SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY, PETITIONER,

vs.

WALLACE BUTTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 25—Article entitled "Georgia Plays for Keeps" beginning at page 28 of the November 4, 1949 issue of The Saturday Evening Post	1397	1061
No. 26—Letter from Wallace Butts to J. D. Bolton, dated October 22, 1962	1403	1067
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Defendant's Exhibits:		
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No. 11—Financial statement of Wallace Butts of July 17, 1961	1411	1075
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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21,491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and McRae, District Judge.

JUDGMENT—Filed May 8, 1964

By the Court:

On Consideration of the motion of appellant to dismiss appellee's cross appeal, and of appellee's withdrawal of his cross appeal, It Is Ordered that appellee be, and he is hereby granted permission to withdraw his cross appeal reserving his amendment filed February 24, 1964 to his notice of cross appeal.

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 30, 1964

1. Plaintiff's Complaint (filed March 25, 1963).
2. Defendant's Answer (filed April 10, 1963).
3. Defendant's Amended Answer (filed July 29, 1963).
4. Defendant's Motion to Compel Plaintiff to Answer Certain Questions Which Plaintiff Declined to Answer on Deposition Taken May 3, 1963; with attached list of questions submitted to plaintiff which he refused to answer (filed May 16, 1963).
5. Order of Judge Lewis R. Morgan Compelling Plaintiff to Answer Questions Listed in Defendant's Motion to Compel dated May 16, 1963 (filed June 5, 1963).
6. Order of Judge Lewis R. Morgan dated August 1, 1963, in regard to the Admissibility of Evidence of Alleged Specific Acts of Misconduct of the Plaintiff.
7. Pre-trial Order (dated August 5, 1963).
8. Transcript of evidence of the following named witnesses for the defendant:

Hugh Fleming:

Line 1, page 100, through line 5, page 113.

[fol. 3] *George Burnett:*

Line 12, page 113, through line 16, page 125.
Line 6, page 128, through line 6, page 169.
Line 12, page 172, through line 12, page 207.

J. D. Bolton:

Line 5, page 208, through line 12, page 242.

Jack C. Gorday:
Line 21, page 246, through line 23, page 252.

Coach Johnny Griffith:
Line 1, page 256, through line 3, page 347.
Line 21, page 369, through line 3, page 374.

Coach Frank Inman:
Line 15, page 374, through line 10, page 397.

Coach Leroy Pearce:
Line 3, page 399, through line 25, page 418.
Line 5, page 420, through line 13, page 445.
Line 11, page 446, through line 16, page 475.

9. Plaintiff's Motion for Directed Verdict:
Line 1, page 476, through page 483.

10. Transcript of evidence of the following named witnesses for the plaintiff:

Frank Graham, Jr.:
Line 3, page 492, through line 3, page 535.

Coach Paul William Bryant:
Line 23, page 537, through line 7, page 577.
Line 12, page 578, through line 13, page 592.
Line 1, page 593, through line 17, page 602.

[fol. 4] *Jimmy Sharp:*
Line 13, page 603, through line 11, page 612.

Charles Pell:
Line 16, page 613, through line 21, page 628.

John Gregory:
Line 19, page 629, through line 17, page 630.
Line 7, page 632, through line 19, page 667.

James Wallace Butts:
Line 4, page 670, through line 14, page 711.
Line 14, page 712, through line 2, page 719.
Line 23, page 724, through line 13, page 736.

Line 16, page 738, through line 13, page 746.
Line 10, page 748, through line 11, page 749.

LeRoy Jordon:
Line 16, page 755, through line 25, page 768.

Charles Louis Trippi:
Line 6, page 770, through line 14, page 780.

Raymond W. Clark:
Line 20, page 781, through line 10, page 786.

Robert Wallace Williamson:
Line 4, page 787, through line 24, page 793.

Mickey Babb:
Line 8, page 795, through line 4, page 809.

Samuel Richwine:
Line 16, page 809, through line 21, page 813.

[fol. 5] *Brigham Everett Woodward:*
Line 3, page 815, through line 6, page 818.

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Line 13, page 819, through line 5, page 821.
Line 1, page 822, through line 19, page 843.
Line 1, page 844, through line 18, page 846.
Line 1, page 847, through line 25, page 849.
Line 14, page 850, through line 21, page 851.
Line 1, page 853, through line 18, page 857.
Line 8, page 858, through line 7, page 877.

Proffer of evidence made by defendant's counsel in regard to specific acts of misconduct of plaintiff:
Line 1, page 892, through line 22, page 907.

John Carmichael:
Line 1, page 878, through line 21, page 890.
Line 5, page 908, through line 14, page 939.
Line 1, page 1000, through line 4, page 1005.

Frank Graham, Jr.:
Line 15, page 939, through line 1, page 961.
Line 1, page 962, through line 6, page 998.
Line 18, page 1007, through line 13, page 1015.

Clay D. Blair, Jr.:
Line 9, page 1020, through line 5, page 1042.

Roger Kahn:
Line 20, page 1042, through line 14, page 1063.
Line 13, page 1064, through line 19, page 1069.

[fol. 6] *William C. Hartman, Jr.:*
Line 14, page 1070, through line 5, page 1090.
Line 3, page 1091, through line 14, page 1104.
Line 19, page 1120, through line 18, page 1133.

Charles Davis Thomas:
Line 5, page 1135, through line 11, page 1147.

Robert Henry Edwards:
Line 21, page 1151, through line 20, page 1152.

Furman Bisher:
Line 12, page 1156, through line 7, page 1161.

John C. Carmichael: (continued)
Line 20, page 1162, through line 15, page 1192.
Line 1, page 1193, through line 11, page 1194.
Line 13, page 1195, through line 11, page 1199.

11. Transcript of evidence of following named rebuttal witnesses of defendant:

Harold Heckman:
Line 10, page 1216, through line 10, page 1219.
Line 7, page 1223, through line 20, page 1223.

William T. Bradshaw:
Line 14, page 1224, through line 9, page 1236.

R. H. Driftmier:
Line 18, page 1236, through line 1, page 1240.

[fol. 7] *Dr. O. C. Aderhold:*

Line 8, page 1241, through line 9, page 1267.
Line 1, page 1269, through line 15, page 1289.
Line 1, page 1292, through line 5, page 1299.
Line 7, page 1300, through line 4, page 1301.

Dr. Hugh Mills:

Line 2, page 1305, through line 20, page 1307.
Line 23, page 1307, through line 11, page 1309.
Line 17, page 1313, through line 11, page 1315.

J. D. Bolton:

Line 1, page 1316, through line 5, page 1319.
Line 3, page 1320, through line 5, page 1331.

Frank Scoby:

Line 1, page 1340, through line 9, page 1354.
Line 4, page 1355, through line 12, page 1358.

Dr. H. M. Davis:

Line 14, page 1359, through line 17, page 1362.

Frank Scoby: (Continued)

Line 8, page 1365, through line 1, page 1384.
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Dr. O. C. Aderhold: (Continued)

Line 19, page 1398, through line 13, page 1406.

12. Transcript of evidence of following named rebuttal witnesses of plaintiff:

[fol. 8] *Dr. Frank Anthony Rose:*

Line 1, page 1409, through line 8, page 1447.
Line 6, page 1448, through line 6, page 1458.
Line 1, page 1459, through line 5, page 1459.

James Wallace Butts (Continued)

Line 13, page 1459, through line 21, page 1461.

13. Plaintiff's Requested Instructions to the Jury Identified as Number 5, 13 and 14.

14. Defendant's Requested Instructions to the Jury Identified as Number 3, 6, 8 and 14.

15. Plaintiff's Counsels' Argument to the Jury:
Line 1, page 1534, through line 20, page 1557.
Line 8, page 1560, through line 2, page 1591.

16. Charge of the Court to the Jury (line 16, page 1616 through line 13, page 1646, of the original record).

17. Transcript of Defendant's Exceptions to the Court's Charge to the Jury (line 11, page 1656, through line 23, page 1660, of the original record).

18. Judgment entered August 20, 1963.

19. Defendant's Motion for New Trial (filed August 29, 1963).

20. Defendant's Motion for Judgment Notwithstanding the Verdict (filed August 29, 1963).

[fol. 9] 21. Order of Judge Lewis R. Morgan, dated January 14, 1964, Denying Defendant's Motion for Judgment Notwithstanding the Verdict.

22. Order of Judge Lewis R. Morgan, dated January 14, 1964, Granting Defendant's Motion for New Trial, Unless Plaintiff Remit All But $460,000.00 of Judgment, Rendered in His Favor on August 20, 1963.

23. Order of Judge Lewis R. Morgan, dated January 15, 1964, Amending His Previous Order of January 14, 1964, on Defendant's Motion for New Trial.

24. Consent of Plaintiff to Remit (dated January 20, 1964).

25. Judgment of January 22, 1964, setting aside previous Judgment Rendered August 20, 1963, and Entering Judgment for Plaintiff in the Amount of $460,000.00 and Overruling Defendant's Motion for New Trial.

26. Defendant's Notice of Appeal (filed January 24, 1964).

27. Plaintiff's Notice of Cross-Appeal (filed January 30, 1964).

28. Rule 10 entitled "Pre-trial and Trials" of the United States District Court for the Northern District of Georgia, as promulgated March 1, 1962, by the three Judges of said Court (including the form of Pre-trial Order prescribed by said rule).

29. Deposition of Wallace Butts taken May 3, 1963:
Line 11, page 58, through line 17, page 58.

[fol. 10]

30. Deposition of Wallace Butts taken July 16, 1963:
Line 6, page 92, through line 7, page 93.

31. Transcript of pretrial conference dated July 8, 1963:
Line 1, page 170, through line 2, page 182.
Line 20, page 184, through line 20, page 187.

32. Transcript of pre-trial conference dated July 29, 1963:

Line 24, page 121, through line 3, page 137.
Line 2, page 147, through line 12, page 147.
Line 18, page 165, through line 1, page 167.
Line 24, page 179, through line 10, page 180.

33. Transcript of proceedings on December 10, 1963, in regard to defendant's Motions for New Trial and Judgment Notwithstanding the Verdict:

Line 2, page 124, through line 17, page 125.
Line 4, page 126, through line 13, page 126.
Line 11, page 155, through line 2, page 157.

34. Documents introduced by defendant and admitted:

Clerk's Number:

4—The Saturday Evening Post—issue of 3/23/63 (only the article entitled "The Story of a College Football Fix.")

11—Butts' financial statement of July 17, 1961.

12—Burnett notes (seven pages).

13—Toll ticket (Butts to Bryant call) (both sides).

14—Toll ticket (Bryant to Butts call) (both sides).

[fol. 11]

19—Letter to Therrell—dated 3/26/63.

20—Letter—Butts to Aderhold—dated 2/23/63.

21—Letter—Rose to Aderhold—dated 3/6/63.

34—NCAA Const. and By-Laws (portion) (only one page).

35. Documents introduced by plaintiff and admitted:

Clerk's Number:

6—Memorandum addressed by Mr. Blair to staff members of The Saturday Evening Post.

16—Communication from Bernie Moore to Southeastern Conference Institution on unnecessary roughness in college football.

22—Financial Statement of Curtis Publishing Company (page 1—being a Consolidated Balance Sheet).

Submitted by: Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, Jackson 2-7420.

[fol. 12] Certificate of Service (omitted in printing).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DESIGNATION BY APPELLEE OF ADDITIONAL MATTERS TO BE INCLUDED IN THE RECORD—Filed April 30, 1964

Appellee, as authorized by Rule 23(a) of the above named court, designates the following additional matters to be printed in the record in this action, in addition to those already designated by Appellant:

1. Motion of plaintiff to exclude all evidence obtained as a result of the alleged intercepted telephone conversation. (Identified in the Index of the Clerk of the United States District Court, Northern District of Georgia in this case as Volume I, Page No. 50).

[fol. 13] 2. Order of Judge Lewis R. Morgan dated 20th day of May 1963 denying plaintiff's motion to exclude evidence obtained as a result of telephone conversation. (Identified in the Index of the Clerk of the United States District Court, Northern District of Georgia in this case as Volume 1, Page No. 102).

3. Notice of amendment of plaintiff's cross appeal filed in Office of the Clerk, United States District Court, Northern District of Georgia, February 24, 1964.

4. Defendant's counsels' argument to the jury:
Line 5, page 1504, through line 5, page 1533 of Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

Line 23, page 1591, through line 25, page 1615 of Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

5. Jury's verdict as returned in open court:
Line 15, page 1662, through line 9, page 1663 from Volume 3 of the Court Reporter's Transcript of proceedings in the trial court.

6. Documents introduced by plaintiff and admitted in evidence:

CLERK'S NUMBER:

8 Check requisition to Milton Flack—$500.00 being voucher issued by Curtis Publishing Company.

[fol. 14]

9 Check requisition to Frank Graham, Jr.—$2,000.00, being voucher issued by Curtis Publishing Company.

10 Check requisition to Furman Bisher—$1,000.00, being voucher issued by Curtis Publishing Company.

11 Check requisition to Pierre Howard—$500.00 being voucher issued by Curtis Publishing Company.

12 Check requisition to Pierre Howard for Burnett, 2-26-63, $2,000.00, voucher issued by Curtis Publishing Company.

13 Check requisition to Pierre Howard for Burnett, $3,000.00, being voucher issued by Curtis Publishing Company.

14 Check requisition to Frank Graham, Jr., for expenses incurred, $512.09, being voucher issued by Curtis Publishing Company.

15 Check requisition to Frank Graham, Jr., $38.59, being voucher issued by Curtis Publishing Company.

17 Communication to Intercollegiate Football Coaches, Commissioners and Officials, entitled "Unwarranted Viciousness and Brutality in our College Game."

21 Copy of a letter from Frank Graham, Jr. to Pierre Howard, 2-22-63.

[fol. 15]

24 The article entitled "Father is a Football Coach" beginning at page 37 in the November 20, 1954 issue of The Saturday Evening Post.

25 The article entitled "Georgia Plays for Keeps" beginning at page 28 of the November 4, 1949 issue of The Saturday Evening Post.

26 Copy of letter to J. D. Bolton from Wallace Butts dated 10-22-62.

27 Copy of letter to J. D. Bolton from Wallace Butts dated 4-27-62.

28 Copy of letter to Coach Johnny Griffith from Wallace Butts dated 10-22-62.

29 Copy of letter to Coach Johnny Griffith from Wallace Butts dated 2-26-63.

7. Transcript of pre-trial conference dated July 8, 1963:
Line 5, page 48, through line 14, page 50.
Line 20, page 62, through line 21, page 62.
Line 15, page 145 through line 1, page 146.

8. Transcript of pre-trial conference dated July 29, 1963:
Line 17, page 107 through line 19, page 108.
Line 11, page 121 through line 23, page 121.

9. Transcript of evidence of the following named witnesses: (From the "Court Reporter's Transcript of Proceedings").

[fol. 16]

GEORGE BURNETT:
Line 6, page 128 through line 9, page 169.

HUGH FLEMMING:
Line 22, page 486 through line 18, page 488.

JAMES WALLACE BUTTS:
Line 23, page 724 through line 23, page 752.

LEROY JORDON:
Line 19, page 755 through line 17, page 769.

SAMUEL RICHWINE:
Line 16, page 809 through line 6, page 814.

JAMES WALLACE BUTTS: (Continued)
Line 1, page 844 through line 25, page 849.

WILLIAM C. HARTMAN, JR.:
Line 14, page 1070 through line 6, page 1090.

HAROLD HECKMAN:
Line 12, page 1216 through line 8, page 1221.

DR. O. C. ADERHOLD:
Line 1, page 1269 through line 24, page 1289.

DR. HUGH MILLS:
Line 12, page 1309 through line 16, page 1313.

J. D. BOLTON:
Line 6, page 1319 through line 2, page 1320.

[fol. 17]

FRANK SCOBY:
Line 10, page 1363 through line 7, page 1365.
Line 14, page 1384 through line 3, page 1385.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, T. M. Smith, Attorneys for Wallace Butts, Appellee.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William Oliver Bldg., Atlanta, Georgia 30303.

Certificate of Service (omitted in printing).

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8311

WALLACE BUTTS, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, Defendant.

COMPLAINT—Filed March 25, 1963

Now comes Wallace Butts, as plaintiff, and names the Curtis Publishing Company as defendant, and for complaint says:

1.

Jurisdiction of this Court is founded on diversity of citizenship and amount. Plaintiff is a resident and citizen of the State of Georgia, residing in the City of Athens, Clark County, Georgia. The defendant is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in the City of Philadelphia. Defendant maintains an office and place of business at 805 Peachtree Street, N. E., Atlanta, Georgia, at which place service of this complaint may be perfected. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

[fol. 20]

2.

Plaintiff claims damages from the defendant in the amount of Ten Million ($10,000,000.00) Dollars, as a result of a certain libelous publication by defendant as hereinafter alleged.

3.

Plaintiff has been engaged in the football coaching profession for approximately 35 years. Plaintiff began his coaching career in Madison, Georgia as head coach of Madison Agricultural and Mechanical School. After spending four years at Madison, plaintiff became football coach at Georgia Military College in Milledgeville, Georgia where, after remaining three years, he went to Louisville, Kentucky where he coached Louisville Male High for a period of three years. In 1938 plaintiff became assistant coach at the University of Georgia under Coach Joel Hunt and in the following year was elevated as head coach of the Georgia Bulldogs, which position he held until 1961 at which time he became Athletic Director of the University of Georgia.

4.

Plaintiff, during his career, has enjoyed a national reputation as a successful and respected member of the coaching profession and has been accorded many honors among which was his election in 1959 as president of the Football Coaches Association, a national organization of football coaches throughout America. Upon invitation he has coached the College All Stars, the Blue-Grey All Star Game and the North-South All Star Game. Plaintiff has during his career been widely sought as a speaker and lec- [fol. 21] turer at clinics, banquets and other such public gatherings throughout the United States. In addition, plaintiff has been approached and offered employment as head football coach by several colleges and professional football teams in the country due entirely to his reputation as a successful member and leader in his profession.

5.

The defendant is engaged in the publishing of several magazines and periodicals, the best known of which is the Saturday Evening Post. The Saturday Evening Post has

in years past been the chief and most valuable asset of the defendant due to its vast and impressive circulation and consequent advertising revenue. However, in the last several years the advertising revenues of the Saturday Evening Post have declined radically and drastically to the point that the magazine lost its status as a valuable income producing asset and showed staggering deficits. In an effort to rescue its foundering publication, the defendant elected new directors who in turn elected a new president who in turn made sweeping changes in the editorial staff and management of the Saturday Evening Post.

6.

In an apparent last ditch effort to bolster its sagging circulation, which in turn would increase advertising revenues, the Saturday Evening Post has resorted recently to the publishing and printing of lurid, defamatory and exposé type matter concerning nationally known personalities. All of this is in keeping with its announced new editorial policy as delivered recently through its Vice [fol. 22] President and Director of Editorial Development, Clay Blair, Jr., of " . . . sophisticated muckraking. . . . We are going to provoke people, make them mad."

7.

Specifically, the defendant did wilfully, maliciously and falsely publish a libelous article concerning the plaintiff in its most recent issue bearing date March 23, 1963 entitled, "The Story of a College Football Fix" with sub-title "How Wally Butts and Bear Bryant Rigged a Game Last Fall."

8.

Plaintiff was informed prior to the actual circulation of said article on or about March 18, 1963, that the defendant had under consideration such an article and plaintiff did,

through his attorney, under date of March 11, 1963, send a telegram to the defendant, followed by a letter of the same date, advising the defendant that the proposed content of said article was false and that in the interest of fair and accurate reporting, said article be not published. A copy of said telegram and letter, marked respectively Exhibits "A" and "B" are incorporated herein by reference.

9.

In addition, and after said article was published and circulated, plaintiff, on March 18, 1963, pursuant to Georgia Code Section 105-720, requested that the defendant retract and correct the defamatory statements concerning the plaintiff in its said article, which to date defendant has refused to so do or even to reply to said request. A copy [fol. 23] of said telegram marked Exhibit "C" is incorporated herein by reference.

10.

Plaintiff alleges that the publication of said libelous article has caused plaintiff extreme mortification and embarrassment in that same is a direct insult and attack on his honor, character, and integrity as a football coach. As stated in said article, "but careers will be ruined, that is true," plaintiff's career as a member of the football coaching profession has been ruined and destroyed by this scurrilous and contemptible defamation.

11.

The statements and insinuations contained in said article have damaged plaintiff as aforesaid in the following particulars:

(a) Plaintiff is charged in large block letters in the very title and sub-title of the article with being a "rigger and fixer."

(b) In an italicized editorial, plaintiff is charged with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial, plaintiff is relegated to a status worse than that of "disreputable gamblers", a corrupt person who, employed to "educate and to guide young men" betrays or sells out his pupils.

(c) Plaintiff is charged with rigging and fixing the Alabama-Georgia football game with Coach Bryan as a gambling device in order to restore his financial resources.

[fol. 24]

(d) Plaintiff is charged with such a degree of corruptness and foulness that his betrayed players, as a result of plaintiff's alleged deception, fixing and rigging, were forced into the game like "rats in a maze", and "took a frightful physical beating."

(e) Defendant, in a final act of malice, contempt and editorial irresponsibility, closes its article with its definition of plaintiff as a fixer as being one who never leaves open a "chance" by stating "when a fixer works against you, that is the way he likes it."

12.

Plaintiff brings this action and seeks a recovery of Five Million ($5,000,000.00) Dollars in general damages to compensate him for the injury to his peace, happiness and feelings, and in addition thereto sues for Five Million ($5,000,000.00) Dollars in the nature of punitive damages to deter the defendant from repeating this trespass on plaintiff's honor, reputation and integrity.

Plaintiff Demands a Jury Trial.

Wherefore, plaintiff prays that process issue in terms of law, that the defendant be required to come into this Honorable Court and make its answer and that the plain-

tiff have judgment against the defendant for actual and [fol. 25] punitive damages in the sum of Ten Million ($10,000,000.00) Dollars and costs.

William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 10, 1963

Now Comes, Curtis Publishing Company, the defendant in the foregoing case, and files this its Answer and shows to the Court:

First Defense

1. Defendant admits the averments of paragraph 1 of the Complaint.

2. Defendant admits that plaintiff claims damages from the defendant as a result of the publication complained of, [fol. 26] but denies each and every other averment contained in paragraph 2 of the Complaint.

3. Defendant admits the averments of paragraph 3 of the Complaint.

4. Defendant admits the averments of paragraph 4 of the Complaint.

5. Defendant admits the averments contained in the first sentence of paragraph 5 of the Complaint. The remaining averments of paragraph 5 of the Complaint require no answer, being subject to a Motion to Strike heretofore filed.

6. The averments of paragraph 6 of the Complaint require no answer, the same being subject to a Motion to Strike heretofore filed.

7. Defendant admits publication of the article referred to in paragraph 7 of the Complaint, but denies each and every other averment contained in said paragraph.

8. Defendant admits that the telegram and letter referred to in paragraph 8 of the Complaint were sent on behalf of the plaintiff and received by the defendant. Defendant is without knowledge or information sufficient to form a belief as to what information plaintiff had in his possession at the time of the sending of said telegram and letter. Defendant denies each and every other averment contained in paragraph 8 of the Complaint.

9. Defendant admits that plaintiff sent, and the defendant received, the telegram referred to in paragraph 9 of the Complaint and identified as Exhibit "C". Defendant [fol. 27] also admits that it has refused, and still refuses, to comply with the request contained in said telegram. Defendant denies each and every other averment contained in paragraph 9 of the Complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 as to the effect of the publication of the article complained of on plaintiff. Defendant denies each and every other averment contained in paragraph 10 of the Complaint.

11. Defendant denies each and every averment contained in paragraph 11 of the Complaint.

12. Defendant avers that paragraph 12 of the Complaint requires no answer.

Second Defense

1. Defendant avers that the statements in the article complained of which are of and concerning the plaintiff, are true.

Third Defense

1. The Complaint fails to state a claim upon which relief can be granted.

Wherefore, having fully answered, defendant prays for judgment in its behalf.

Welborn B. Cody, Attorney for Defendant.

[fol. 28] Of Counsel: Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia, Jackson 2-7420.

In United States District Court

Motion of Plaintiff to Exclude All Evidence Obtained as a Result of the Alleged Intercepted Telephone Conversation—Filed May 3, 1963

This case involves statements made by defendant in an article published under date of March 23, 1963, entitled "The Story of a College Fix," plaintiff asserting said statements to be libelous and defendant asserting them to be true. For the purpose of this motion only, a copy of said article is hereto attached, marked Exhibit "A".

A reading of the article set up as Exhibit "A" states that it is based on an alleged telephone conversation between plaintiff and Paul (Bear) Bryant, intercepted by one George Burnett. If any of said conversation took place as alleged, neither the interception by Burnett nor the use of the information obtained by Burnett or by defendant or anyone was authorized by either party to said conversation, and under the provisions of 47 U.S.C. § 605, no person having received the contents, substance, purport, effect or [fol. 29] meaning thereof, knowing how such information was obtained may divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

If any such conversation took place as alleged by defendant, the use thereof in any manner is prohibited by such statute and, accordingly, plaintiff moves the Court for a ruling that no part of said alleged telephone conversation or any information gained as the result thereof may be used in evidence against plaintiff and that defendant may not on discovery make inquiries concerning the existence of or the contents of said alleged telephone conversation or any facts resulting from the knowledge thereof by defendant.

Plaintiff shows that a ruling at this time will substantially shorten the nature and extent of discovery and the scope of the trial.

W. H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Plaintiff.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William Oliver Building, Atlanta 3, Georgia.

[fol. 30]

IN UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION—Filed May 20, 1963

On May 3, 1963, the plaintiff in the above-styled case filed a motion to exclude all evidence obtained as a result of the alleged intercepted telephone conversation which may be offered in evidence against the plaintiff upon the trial of this case. The plaintiff contends that if any of the said conversation took place as alleged, neither the interception by Burnett nor the use of the information obtained by Burnett or by the defendant or by anyone was authorized by either party to the said conversation, and under the provisions of 47 U.S.C., Section 605, no person having received the contents, substance, purport, effect, or meaning thereof, knowing how such information was obtained, may divulge or publish the existence, contents, substance, pur-

port, effect, or meaning of the same, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. The plaintiff believes that, if any such conversation took place as alleged by the defendant, the use of this conversation in any manner is prohibited by the statute.

The defendant has filed its brief in opposition to the plaintiff's motion to exclude evidence relating to this alleged telephone conversation, and contends therein that a ruling at this time would be premature, since neither the Court nor the parties can accurately foresee the precise circumstances in which evidence relating to this conversation might arise, nor the numerous potential sources from which such evidence might be obtained.

[fol. 31] The Court wishes to make it clear that its opinions contained in this order constitute a *preliminary* ruling for the purposes of facilitating discovery and to serve as an indication of the present thinking of the Court. This is in no way a *final* ruling on the admissibility of evidence relating to evidence relating to the subject telephone conversation, as that determination will be made upon the trial of this case in August.

The principal thrust of the plaintiff's motion is based upon 47 U.S.C., Section 605, which has been set forth above. A violation of this provision is made criminal by 47 U.S.C., Section 501. It seems to this Court that Congress, through the enactment of this statute, sought to prohibit mechanical tampering with telephone communications by deliberate acts of wire tapping. As Judge Holtzoff said, in *United States v. Sullivan*, 116 F. Supp. 480, 481:

> "It is obvious from the phraseology of the statute that it was aimed at actions of two types: First, it sought to prohibit a telephone switchboard operator from divulging any conversation that may be overheard, or telegram or radio operator from disclosing the contents of a telegram or radiogram; and Second, *it sought to preclude any unauthorized person from*

surreptitiously attaching some mechanical apparatus to a telephone wire and thereby listening to or otherwise intercepting communications passing over the wire without the knowledge of the parties to the conversation or message as the case may be." (Emphasis supplied)

In *United States* v. *Guller,* 101 F. Supp. 176, 178, in holding telephone conversations of the defendant which were [fol. 32] overheard by the eavesdropping of federal agents in an adjoining hotel room admissible over an objection based on Section 605, the District Court emphasized the absence of any physical interference with the communications facilities:

"The interception forbidden by Section 605 of the Communications Act of 1934, 47 U.S.C.A., Section 605, must be by some mechanical interpositions in the transmitting apparatus itself, that is, the interjection of an independent receiving device between the lips of the sender and the ear of the receiver."

In *Irvine* v. *People of the State of California,* 347 U.S. 128, 74 S. Ct. 381, 98 L. Ed. 561, the Supreme Court refused to extend the prohibition of Section 605 to electronic interceptions which were not achieved by wiretapping.

In this case, a concealed microphone was installed in the hall of a house, and a hole was bored in the roof of the house, from which wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. Later, the microphone was placed in a closet where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished. Justice Jackson remarked as follows:

"We should note that this is not a conventional instance of 'wire tapping'. Here the apparatus of the officers was not in any way connected with the tele-

phone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone [fol. 33] was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. *We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone.* We cannot sustain the contention that the conduct or reception of the evidence violated the Federal Communications Act. 48 Stat. 1103, 47 U.S.C., Sec. 605. Cf. *Nardone* v. *United States,* 308 U.S. 338; *Goldman* v. *United States,* 316 U. S. 129; *Schwartz* v. *Texas,* 344 U. S. 199." (Emphasis supplied)

In *De Lore* v. *Smith,* 67 Ore. 304, 132 Pac. 521, Judge McNary, of the Supreme Court of Oregon, stated:

"During the progress of the trial, defendant, for the purpose of showing knowledge upon the part of plaintiff of the return of the cattle to Gilcrest, gave testimony to the effect that he overheard a conversation between plaintiff and her daughter wherein the former was told the cows had been re-delivered to Gilcrest. Plaintiff's counsel objected to the testimony for the reason that the witness was an eavesdropper and thereby committed 'an act of gross impropriety and a moral wrong, and a witness testifying to such a conversation could not show any of the elements or conditions which must first be shown in order to admit evidence of such a conversation'. Defendant overheard the conversation, to which objection was made, at a point on the telephone intermediate between the home of plaintiff and her daughter, who is the wife of Gilcrest. In qualifying himself as a witness, defendant stated that *by chance he took down the receiver of the telephone* [fol. 34] when the parties were engaged in conversation and that he heard the declaration and knew the voices of the parties conversing. Since a time prac-

tically concurrent with the use of the telephone as a medium of communication, the Courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized the voice of the party speaking. *While the practice of eavesdropping or 'cutting in' on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker. Under the circumstances, the question whether the conversation did take place, its nature, and whether defendant correctly identified the voices engaged in the conversation was a fact for the jury.*" (Emphasis supplied)

In view of these authorities, it is the preliminary ruling of this Court that evidence relating to the Butts-Bryant telephone conversation is admissible in this civil action. Accordingly, the plaintiff's motion is denied.

The plaintiff has filed with this Court a motion for reconsideration of the Court's order of May 9, 1963, which refused to compel the defendant to answer Interrogatory No. 28 relating to the number of libel suits now pending against the defendant. Inasmuch as the Court has made a thorough study of this point, and has determined that it would be unwise and impractical to bring into this case evidence pertaining to other suits having nothing to do with the issues involved in the case at bar, the plaintiff's motion for reconsideration of the order dated May 9, 1963, is hereby denied.

[fol. 35]

It Is So Ordered.

This the 20th day of May, 1963.

Lewis R. Morgan, United States District Judge.

In United States District Court

Order Concerning Motion to Compel Answers to Certain Questions—Filed June 5, 1963

The defendant having filed with this Court a motion to compel answers to certain questions heretofore propounded to the plaintiff by deposition, and the Court having given consideration to the questions propounded by the attorneys for the defendant, and the plaintiff having refused to answer said questions upon advice of counsel, and it appearing to the Court that the answers to these questions propounded might be relevant and material to the issues involved, it is the order of the Court that the plaintiff be required to give answer to the questions propounded by the attorneys for the defendant at a time and place to be mutually agreed upon by the parties.

Upon motion seasonably made by the attorneys for the plaintiff, let the motion to compel and the answers thereto be placed in a sealed envelope and filed in the Clerk's Office of this Court, and the contents of the motion and the answers thereto not be revealed by the Clerk of the Court [fol. 36] or by the defendant except by permission of the Court, such as at the trial under circumstances as this Court specifies, all in accordance with the authority granted under Rule 30(b) of the Federal Rules of Civil Procedure.

It Is So Ordered.

This the 5th day of June, 1963.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO DEFENDANT'S ANSWER—Filed July 29, 1963

Now Comes the defendant in the foregoing case and files this, its Amendment to the Answer heretofore filed, and for cause thereof shows to the Court:

1.

At the time the original Answer was filed, defendant made no answer to a part of paragraph 5 of the Complaint, and no answer to paragraph 6 of the Complaint, because simultaneously with the filing of said Answer the defendant filed a Motion to Strike part of paragraph 5 and all of paragraph 6 of the Complaint, which Motion to Strike has since been overruled.

[fol. 37] 2.

Defendant therefore answers that part of paragraph 5 of the Complaint which has not been heretofore answered, by alleging as follows:

5. Defendant admits that it is engaged in the publishing of several magazines and periodicals, the best known of which is The Saturday Evening Post; that The Saturday Evening Post has been and continues to be a valuable asset of the defendant; that beginning in 1960 and continuing until the middle of 1962 the advertising revenues of The Saturday Evening Post, as well as other magazines, declined; that in April 1962, the Board of Directors of defendant was increased from eleven to thirteen in number and two new directors were elected to fill the new directorships; that a new President of defendant was elected by the Board of Directors in July, 1962; and that substantial changes in the editorial staff and management of defendant's magazines, including The Saturday Evening Post,

have been made. Defendant denies each and every other averment contained in paragraph 5 of the Complaint.

3.

Answering paragraph 6 of the Complaint which has not been heretofore answered, defendant alleges as follows:

6. Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of "sophisticated muckraking" in the [fol. 38] sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country. Defendant denies each and every other averment contained in paragraph 6 of the Complaint.

Wherefore, having answered, defendant prays that this, its Amendment, be allowed and made a part of the record in said case.

Welborn B. Cody, Thomas E. Joiner, E. J. Boudurant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta, Georgia, 30303. Jackson 2-7420

Certificate of Service (omitted in printing).

[fol. 39]

IN UNITED STATES DISTRICT COURT

ORDER REGARDING ADMISSIBILITY OF EVIDENCE—
Filed August 1, 1963

The defendant in this case contends that it intends to offer evidence at the trial as to specific acts of misconduct on the part of the plaintiff which fall into two categories. The first category includes acts of dishonesty on the part of the plaintiff in his dealings with the University of Georgia and also certain violations by him of standards of ethics to which the plaintiff is subject by reason of his employment with the University of Georgia, the University being a member of the Southeastern Conference and the National Collegiate Athletic Association. The second category concerning the activities of the plaintiff is that tending to show an illicit and adulterous relationship with a particular woman.

The defendant contends that under Rule 43(a) of the Federal Rules of Civil Procedure this evidence is admissible in Federal Courts. Rule 43(a) provides that in determining admissibility of evidence where there is a conflict between the State and the Federal rule, the plaintiff is entitled to the benefit of the more favorable rule. *Hambrice* v. *Woolworth,* 290 F. 2d 557.

However, on the question with which this Court is concerned and without passing upon the question as to whether the matter is substantive or procedural, it appears that there is no conflict between the Georgia rule and the Federal rule as to the admissibility of the specific acts of misconduct on the part of the plaintiff.

[fol. 40] Under the decision of *Cox* v. *Strickland,* 101 Ga. 482, it is held that the filing of a plea of justification in defense to an action of libel puts the plaintiff's character in issue, and the defendant has the right to show that the plaintiff's general character is bad, but cannot, in so doing, go into proof of specific acts or resort to general rumors by hearsay.

Neither under the majority of Federal decisions which this Court has studied would such tests be admissible. See *Tribune Association* v. *Follwell,* 107 F. 646; *Association* v. *Schenck,* 98 F. 925; *Morning Journal Association* v. *Duke,* 128 F. 657.

As was said in the *Schenck* case, supra, "It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."

As further authority sustaining the admissibility of such evidence, see *Wigmore on Evidence,* Third Edition, Section 209, where it is stated that the reputed character of the plaintiff in an action of defamation is admissible in mitigation of damages so long as proof of character is made by *reputation only,* but particular acts of misconduct are irrelevant and such evidence is universally regarded as improper.

However, the defendant, should the plaintiff place his good character in issue, would have the right on cross-examination to go into special facts to ascertain the nature and extent of the knowledge of the witness. *Cox* v. *Strick-*[fol. 41] *land,* 101 Ga. 482; *Smith* v. *State,* 91 Ga. App. 360. But in so doing, it is not permissible to prove specific acts, except on cross-examination for the purpose of testing the knowledge of the defendant's witnesses, and except for the purpose of impeaching knowingly false statements made by the defendant himself to the jury or by his witnesses on cross-examination. *Sikes* v. *State,* 76 Ga. App. 993; *Mimbs* v. *State,* 189 Ga. 189, 192; *Green on Evidence,* Sec. 138.

Counsel will be governed in the trial of this case by this expression of opinion.

It Is So Ordered.

This the 31st day of July, 1963.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

PRE-TRIAL ORDER—Filed August 5, 1963

This Pre-Trial Order supersedes the pleadings and shall govern the trial of the case, but this Order, in the interest of justice, will be amended upon motion timely made.

1. In this action jurisdiction of the court is invoked upon [fol. 42] the ground of diversity of citizenship. The jurisdiction of the court is not disputed.

(a) There are no motions now pending in the case.

(b) No further discovery is desired by the parties in advance of trial, except that the defendant desires to take the deposition of Fred Nichols before or during the trial.

2. The names of the parties in the above caption are correct and complete and there is no question of misjoinder or nonjoinder.

3. The jury shall be qualified as to relationship to the parties to the case and to the following as counsel for plaintiff, to-wit:

Henry B. Troutman
Robert S. Sams
William H. Schroder
Allen E. Lockerman
T. M. Smith
Henry B. Troutman, Jr.
T. M. Smith, Jr.
Tench C. Coxe
Harold C. McKenzie, Jr.
Robert L. Pennington

(a) The procedure to be followed concerning questions to be propounded to the jury has been discussed and agreed upon at a previous pre-trial hearing.

4. A summary by plaintiff's counsel of plaintiff's cause of action is as follows:

[fol. 43] Wallace Butts, head coach of the University of Georgia football team from 1939 to 1961 when he became Athletic Director, is suing Curtis Publishing Company claiming that his reputation as a football coach has been damaged by a false and libelous article published in the March 23rd issue of the Saturday Evening Post charging him with having fixed and rigged the 1962 football game between the University of Georgia and the University of Alabama, as a gambling device, by furnishing Georgia's plays, defensive patterns and all the significant secrets possessed by Georgia's football team to Paul Bryant, head football coach of the University of Alabama prior to the game. The plaintiff alleges that he has been damaged by said libelous article in the respects set forth in his complaint to the extent of $5,000,000.00 general damages and $5,000,000.00 punitive damages.

5. A summary of defendant's contentions, including all special defenses, is as follows:

Defendant admits the publication of the article but contends that the statements therein complained of which are of and concerning the plaintiff are true. Defendant denies the conclusions of the plaintiff as to what charges are made by the article. Defendant contends that the article is not libelous per se and denies that the article libeled the plaintiff, and denies that the plaintiff was in the coaching profession at the time of the publication complained of. Defendant denies that plaintiff is entitled to recover any damages by reason of the publication of the article of which plaintiff complains.

6. No further amendments to the pleading are contemplated by the parties.

[fol. 44] 7. The documents likely to be offered in evidence by the parties or of which they have knowledge have been identified at the pre-trial hearing held on July 29, 1963 or on depositions and assigned tentative numbers. It was agreed that some of the documents will be admitted in evidence without objections. The authenticity of most of the documents was agreed upon. It is not intended for this Order to limit either party in the introduction of other documents.

8. Counsel for the parties have furnished each other a list of the probable witnesses to be used at the trial.

9. Various memoranda of authorities by counsel for each party on unusual questions of law involved in the case have heretofore been supplied to the Court.

10. The Court has ruled over objection by counsel for plaintiff that the second defense, as stated in the Answer of the defendant, is a plea of justification. Therefore, the defendant at the trial of this case will have the burden of proving the truth of the statements in the article which are of and concerning the plaintiff and the defendant will introduce its evidence first and will have the opening and concluding arguments.

11. It is estimated that the trial of the case will require approximately two weeks.

This the 5th day of August, 1963.

Lewis R. Morgan, United States District Judge.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALLACE BUTTS, Plaintiff,

versus Civil Action No. 8311

CURTIS PUBLISHING COMPANY, Defendant.

JUDGMENT—August 20, 1963

This action came on for trial before the Court and a jury, Hon. Lewis R. Morgan, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff, Wallace Butts, recover of the defendant, Curtis Publishing Company, the sum of Sixty Thousand ($60,000.00) Dollars general damages, and Three Million ($3,000,000.00) Dollars punitive damages, with future interest thereon at the rate of seven (7) per cent as provided by law, and his costs of action.

Dated at Atlanta, Ga., this the 20th day of August, 1963.

B. G. Nash, Clerk, Ruth M. Stilwell, Deputy Clerk.

[fol. 46]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR NEW TRIAL—
Filed August 29, 1963

Now Comes the defendant in the foregoing case and moves the Court to set aside the verdict of the jury returned herein on August 20, 1963, and the judgment entered thereon on the same date, and to grant a new trial on the following grounds, to-wit:

1.

Because of the gross excessiveness of the verdict, awarding $3,000,000 in punitive damages is so exorbitant and flagrantly outrageous that it demonstrates beyond doubt that it is the product of bias and prejudice on the part of the jury and is in such an amount as to shock the conscience of the Court.

2.

That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by [fol. 47] the First and Fourteenth Amendments of the United States Constitution because:

(a) The amount of such damages rested in the sole discretion of the jury without regard to any standard or limitation which would safeguard or take cognizance of those Constitutional guarantees;

(b) The stated purpose of such damages under the charge was to deter the defendant from repeating the trespass, and to worn others not to commit a like

[File endorsement omitted]

offense, with the result that the award of punitive damages by the jury especially in the amount of $3,000,000, must constitute an attempt by the jury to effect a prior restraint upon future publication by this defendant or by other publishers or both;

(c) Georgia Code Sec. 105-2002, as construed by the Georgia courts, which defines the purpose of punitive damages in a libel action upon Georgia law and which in part served as the basis for the charge on that subject in this action, on its face permits the jury to attempt suppression of future publication by this defendant by an award of punitive damages;

(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press.

[fol. 48]

3.

That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages violates and abridges and cannot be sustained without violating and abridging defendant's rights to substantive and procedural due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, because:

(a) The amount of such damages rested in the sole discretion of the jury without regard to any standard or limitation;

(b) The amount of such damages in the circumstances of this case was so excessive as to constitute a deprivation of property without due process of law.

4.

Sec. 105-2002 of the Georgia Code as construed by the courts of Georgia violates and abridges defendant's rights under the Fourteenth Amendment of the United States

Constitution because the amount of damages which could be imposed under that Section rests in the sole discretion of the jury without regard to any standard or limitation, which damages are imposed *ex post facto.*

5.

Because evidence indicates that a material witness for the plaintiff testified falsely on a material point, as more fully set forth in affidavits filed with The Honorable Lewis R. Morgan contemporaneously herewith, which affidavits are incorporated herein by reference.

[fol. 49]

6.

Because the Court erred in refusing to permit counsel for the defendant to examine witness J. D. Bolton and to introduce documentary evidence regarding numerous telephone calls made by the plaintiff between October, 1961 and February 1, 1963, which telephone calls were charged to the University of Georgia in the amount of $2,818.10. Said telephone calls were set forth in a 42-page document identified as defendant's Exhibit 17. Defendant contends that said telephone calls were made to individuals of questionable character, including a woman not his wife, to whom some 300 of said calls were made. That all of said telephone calls were charged to the University of Georgia, though none were in connection with the business of the University. The defendant proposed to show by the witness J. D. Bolton that defendant's Exhibit 17 was prepared by the plaintiff with the help of his secretary and with the help of the witness J. D. Bolton, and that after the list was completed, it was approved by the plaintiff as correct and the plaintiff so stated to J. D. Bolton. Defendant further proposed to show by the witness J. D. Bolton that it was not until after the institution of his litigation that the University officials learned of these telephone charges having been charged to the University of Georgia and that upon subsequent demand of the plaintiff for the

payment thereof, the plaintiff agreed that the list was correct and that he would reimburse the University. That thereafter on April 8, 1963, the plaintiff by letter to J. D. Bolton, Comptroller, agreed to make this payment, which letter was identified as defendant's Exhibit 18, and which letter was in the following language:

> "I accept the final figure of $2,818.10 as the correct amount I owe the Athletic Department of the Uni-
> [fol. 50] versity of Georgia for personal telephone calls charged to that account."

That the Court likewise excluded the foregoing letter from the evidence in said case after the same had been tendered by counsel for the defendant.

Defendant alleges and contends that the exclusion of such evidence and the refusal to permit defendant's counsel to examine J. D. Bolton with respect thereto was harmful and prejudicial to the defendant and constitutes grounds for a new trial.

7.

Because the Court erred in refusing to permit counsel for the defendant to introduce the depositions of George P. Anderson and William Baxter to prove the following facts:

(a) That they were employees of the Phoenix Hotel in Lexington, Kentucky in October, 1960.

(b) That plaintiff charged to the University of Georgia $155.70 of alcoholic and other beverages purchased at said Phoenix Hotel in Lexington, Kentucky from October 21 through October 23, 1960.

(c) That on October 21, 1960, a registration at the Phoenix Hotel in Lexington, Kentucky in the name of "Lindsey, E. C. and wife" was made and was noted to be charged to the University of Georgia.

[fol. 51] In connection with these depositions, defendant's counsel offered to prove that none of the items referred to in (b) above were in connection with the business of the University of Georgia and that the registration referred to in (c) above was, in fact, arranged by the plaintiff for the woman referred to in Paragraph 6 hereof and the bill for her room and other hotel charges was, in fact, charged to the University of Georgia though these were not in connection with any business of the University.

That the refusal of the Court to permit the defendant to introduce said evidence was harmful and prejudicial and constitutes grounds for a new trial.

8.

Because the Court erred in refusing to permit counsel for the defendant to introduce the deposition of the woman referred to in paragraph 6 hereof, and because the Court refused to permit counsel for the defendant to introduce into evidence the deposition of James C. Tracy, an employee of Delta Air Lines, Inc., which depositions were to prove the following facts:

(a) That on January 26, 1962, the woman referred to in paragraph 6 hereof traveled from Miami, Florida, to Orlando, Florida, in the company of the plaintiff, her air line ticket having been purchased by the plaintiff through the use of Air Travel Credit Card No. DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(b) That on May 9, 1962, a passenger described as "E. C. Smith" traveled via Delta Air Lines from At-
[fol. 52] lanta, Georgia, to Miami, Florida, on an air line ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 to the University of Georgia Athletic Association.

(c) That on July 10, 1962, said woman, in the company of plaintiff, traveled from Atlanta, Georgia, to

Miami, Florida, via Delta Air Lines tickets which were purchased by plaintiff through the use of Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(d) That on September 19, 1962, a passenger designated as "E. Smith" traveled from Atlanta, Georgia, to Birmingham, Alabama, via Delta Air Lines, Inc., under a ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(e) That on November 7, 1962, a passenger designated as "E. Smith" traveled from Atlanta, Georgia, to Jacksonville, Florida, via Delta Air Lines, Inc., under a ticket purchased by plaintiff and charged on Air Travel Credit Card DLQ 2834 WDL 2 and charged to the University of Georgia Athletic Association.

(f) That on December 27, 1962, plaintiff and a passenger designated as "E. Smith" traveled from Birmingham, Alabama, to Atlanta, Georgia, via Eastern Air Lines, Inc., under tickets purchased by plaintiff and charged to Air Travel Credit Card DLQ 2834 WDL [fol. 53] 2 and charged to the University of Georgia Athletic Association.

(g) That on all of the transportation tickets referred to in subparagraphs (a) through (f) herein the plaintiff signed for the same and authorized them to be charged to the University of Georgia Athletic Association.

(h) That said "E. C. Smith" and "E. Smith", as referred to in subparagraphs (b), (d), (e) and (f) hereof, was in fact the same woman referred to in paragraph 6 of this Motion, and that none of said trips had any connection with business of the University of Georgia Athletic Association.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

9.

Because the Court erred in refusing to permit counsel for the defendant to introduce the deposition of the woman referred to in paragraph 6 hereof, which deposition was taken by defendant's counsel on July 17, 1963, and refusing counsel for the defendant permission to call said woman as a witness for the purpose of questioning her as to the following:

(a) That said woman traveled with the plaintiff on numerous occasions, some of which were to football games participated in by the University of Georgia team, that plaintiff visited her in her hotel room, that [fol. 54] on at least two occasions plaintiff was seen drunk in her presence, that plaintiff paid her expenses on said trips and exhibited her to members of the University of Georgia football team, including the trip to Los Angeles, California, for the game between the University of Georgia and the University of Southern California, in 1960; to Lexington, Kentucky, for the game between the University of Georgia and the University of Kentucky, played on October 22, 1960; and the game between the University of Georgia and the University of Alabama in 1962, at which game plaintiff visited in her room at the Guest House Motel in Birmingham, Alabama; that she attended the football game in Jacksonville, Florida, between the University of Georgia and the University of Florida in November, 1962, her expenses having been paid by the plaintiff.

(b) That the plaintiff on a number of occasions during the time he was Athletic Director of the University of Georgia visited the Domino Lounge and the Copa-Cabana night clubs in Atlanta, Georgia, in the company of said woman, at which places liquor was served and

floor shows, consisting of so-called strip-teast artists, performed.

(c) That said woman visited plaintiff on numerous occasions in hotel and motel rooms in and around the City of Atlanta, Georgia, including the Atlanta Biltmore, Air Host Inn, Dinkler Plaza, Henry Grady and Piedmont Hotels.

(d) That plaintiff purchased and gave to said woman one 1961 Pontiac convertible, the license tag for which was registered in the name of said woman but the [fol. 55] conditional sales contract recorded in the public records in the office of the Clerk of the Superior Court of Clarke County, Georgia, disclosed the name of the plaintiff as the purchaser thereof.

(e) That on one occasion said woman accompanied plaintiff on a trip to Nassau in The Bahama Islands, on which trip no member of plaintiff's family was present.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

10.

Because the Court erred in refusing to permit counsel for the defendant to question witness J. D. Bolton in regard to the embarrassment of some of the University of Georgia officials arising from the recording of a retention title contract for a 1961 Pontiac purchased by the plaintiff and in the name of the plaintiff from Boomershine Motors, Inc., of Atlanta, when said Pontiac was actually purchased for, and the license tag registered in the name of, the woman referred to in paragraph 6 hereof for the year 1962. Defendant's counsel offered to prove by the said J. D. Bolton that he confronted the plaintiff with the fact of this embarrassment and the plaintiff told said Bolton that he had

helped finance said automobile for said woman's brother, when, in fact, it was for her.

Defendant alleges and contends that the exclusion of such evidence as hereinbefore referred to was harmful and prejudicial to it and constitutes grounds for a new trial.

[fol. 56]

11.

Because the Court erred in refusing to permit counsel for the defendant to question witness J. D. Bolton in regard to the embarrassment of some of the officials of the University of Georgia arising from the fact that the plaintiff visited many times with the woman referred to in paragraph 6 hereof in her apartment in Atlanta, Georgia, while he was Coach and Athletic Director of the University of Georgia, making this known to others and causing common gossip to be spread around the community.

Defendant alleges and contends that the exclusion of such evidence as hereinbefore referred to was harmful and prejudicial to it and constitutes grounds for a new trial.

12.

Because the Court erred in refusing to permit counsel for the defendant to examine plaintiff as to the following:

(a) All of the facts and incidents set forth in the paragraphs numbered 6 through 11 of this Motion.

(b) As to the facts that plaintiff testified upon deposition that he did not know any person that goes by the name of "E. C. Lindsey".

(c) That, when confronted by J. D. Bolton, Comptroller of the University of Georgia, with a certain hotel bill described in paragraph 7(c) hereof, the plaintiff directed J. D. Bolton to send that bill to "E. C. Lindsey" at the address known as 50 Biscayne Drive, [fol. 57] N. E., Atlanta, Georgia, Apartment #5, which

was, in truth and in fact, the residence address of the woman referred to in paragraph 6 hereof.

(d) His knowledge as to his general reputation in the community and from that knowledge whether or not that reputation was good or bad.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to it and constitutes grounds for a new trial.

13.

Defendant contends that the evidence referred to in paragraph 6 through 12 of this Motion was relevant, material and admissible for the following reasons, to-wit:

(a) To refute the testimony of the plaintiff that he had never done "anything that would injure the University of Georgia" and to affect the credibility of the plaintiff as a witness.

(b) To refute the allegations in plaintiff's Complaint which pray for punitive damages "to deter the defendant from repeating this trespass on plaintiff's honor, reputation and integrity," it being the contention of the defendant that such evidence tended to show a lack of honor, reputation and integrity on the part of the plaintiff.

(c) To mitigate damages, it being the contention of the defendant that a person guilty of such conduct [fol. 58] would not be a man of such delicate sensitivity who could suffer an injury to his peace, happiness and feelings by the alleged libelous article published by the defendant.

(d) To prove that the plaintiff was a corrupt man as such term was defined by the Court in its charge to mean "depraved, debased or perverted," plaintiff having alleged in his complaint and the plaintiff's counsel having argued to the jury that defendant accused him

in the alleged libelous article of being a corrupt person and said portion of the Complaint of defendant having been read to the jury by the Court in its charge.

(e) When the plaintiff in a libel action voluntarily takes the stand as a witness in his own behalf, he may be examined as to any specific acts of misconduct.

14.

Because the Court erred during the trial of the case by declining to permit counsel for defendant to cross-examine the plaintiff on the subject of his refusal on May 3, 1963 (when his deposition was being taken) to answer the following questions:

(a) "Will you tell the reporter what happened, the events that happened, leading up to that termination and how it was handled?" (meaning the termination of plaintiff's relationship as Athletic Director at the University of Georgia in 1963).

(b) "Do you remember whether or not from that [fol. 59] office on September 13, 1962, you put in a telephone call to Coach 'Bear' Bryant?" (meaning the office of Communications International, Inc. in Atlanta, Georgia).

(c) "Coach Butts I show you what has been identified as defendant's Exhibit 3 which consists of seven pages, and ask you if at this conference the original, of which this purports to be a photostat was exhibited to you?" (the conference referred to was that held in Attorney Cook Barwick's office on February 22, 1963, at which time certain officials of the University of Georgia were present, among them Dr. O. C. Aderhold, President, Mr. J. D. Bolton, Comptroller, William C. Hartment, Dr. Harmon Caldwell, Chancellor, and others. The Exhibit 3 referred to was the notes made by George Burnett concerning the alleged telephone conversation between the plaintiff and Coach Paul Bryant).

(d) "Did you, or not, make the statement at that time in the presence of these gentlemen who attended that conference that in substance, these notes shown on this Exhibit 3 were correct?"

(e) "Were you at that time apprised of the substance of George Burnett's story as he had told it to one of the University officials about this alleged telephone conversation?"

(f) "Did you, or not, state to those present at that conference that Burnett's story was substantially correct except that he had misunderstood or misinterpreted the effect of it?"

[fol. 60] (g) "Did you at that time at that conference admit to those present that you had a telephone conversation with Coach 'Bear' Bryan on September 13, 1962, which lasted 16 minutes and 3 seconds?"

(h) "Did you state to those present that George Burnett probably did hear the conversation that went on between you—the alleged conversation between you and Coach 'Bear' Bryant?"

(i) "Were you, or not, handed the original notes prepared by George Burnett on September 13, 1962, concerning the alleged telephone conversation with Coach 'Bear' Bryant?"

(j) "Do you recall in the alleged telephone conversation Coach 'Bear' Bryant stating to you that he would call you on the following Sunday, and, if so, did he actually call you on the following Sunday?"

(k) "At the time of your resignation in 1960, had you heard of any complaints from any of the alumni concerning your personal conduct?"

On May 3, 1963, the deposition of the plaintiff, having been called as an opposite party for cross-examination,

was taken by the defendant for purpose of discovery and for use as evidence at the trial.

Counsel for the defendant stated to the plaintiff (while he was on the witness stand and under cross-examination) that he wanted to read the foregoing questions that were propounded to the plaintiff at the time of such deposition [fol. 61] and then ask the plaintiff whether he at that time refused to answer all of said questions.

Defendant contends that it was entitled as a matter of right to demonstrate to the jury the plaintiff's reluctance to relate the facts no matter what his reason might be for such refusal, even though such refusal might have been based on the advice of his counsel. In any event, the defendant contends that it was entitled to show the demeanor of the witness and to show any reluctance on his part to testify, his manner of testifying, the nature of facts under inquiry, and the probability or improbability of his testimony, all of which bears materially on the credibility of the witness, particularly in a case in which the witness is the plaintiff seeking to recover damages in the sum of $10,000,000.

Defendant, therefore, contends that such action on the part of the Court in excluding such evidence was prejudicial error for which a new trial should be granted.

15.

Because the Court erred in failing to instruct the jury as to the provisions of Georgia Code Sec. 38-1806 in accordance with a timely written request, as follows:

> "What credit to impeached witness, question for jury.— When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The [fol. 62] credit to be given his testimony where im-

peached for general bad character or for contradictory statements out of court shall be for the jury to determine."

The above Georgia Code section constituted the Defendant's Request to Charge No. 3, which the Court prior to argument of counsel stated that such request would be given substantially as requested.

Defendant contends that said request of said charge was not given as requested, but instead the Court instructed the jury as follows:

"If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars. And you may reject all of the testimony of that witness or give it such credibility as you may think it deserves."

This charge was clear error for the Court eliminated entirely any reference to the mandatory provisions of Georgia Code Sec. 38-1806 which require that the jury shall disregard the entire testimony of a witness whom it finds to have testified wilfully and knowingly falsely, unless it shall also find that such testimony was also corroborated by circumstances or other unimpeached evidence.

[fol. 63] 16.

Because the Court erred in refusing to charge the jury as follows:

"Whenever a party presents himself as a witness and his evidence is contradictory, vague or equivocal, his testimony must be construed most strongly against him."

Counsel for defendant made such request to charge in writing, the same being designated Defendant's Request to Charge No. 6. Defendant contends that such a charge was proper and was adjusted to the evidence in said case for the reason that the plaintiff's testimony in many respects was contradictory, vague and equivocal, and under the circumstances the jury should have been instructed that his testimony should have been construed most strongly against him.

17.

Because the Court erred in refusing to allow counsel for the defendant to question John C. Carmichael, a witness for the plaintiff, concerning a previous conviction on September 19, 1933 for petty larceny in the State of Ohio, said crime involving the stealing of women's purses from theaters. Counsel for defendant had in his possession and presented to the Court a duly authenticated copy of said conviction and record of the said Carmichael.

The Court, in refusing to permit defendant's counsel to examine witness Carmichael in respect to this criminal record, stated that the ground for such refusal was the fact that the offense was committed thirty years ago.

[fol. 64] The failure of the Court to allow counsel for the defendant to question the said Carmichael concerning his previous conviction was prejudicial to the defendant in that it prevented defendant from impeaching said witness of plaintiff by the proof of a crime involving moral turpitude.

18.

Because the Court erred in refusing to allow counsel for the defendant to question John C. Carmichael, a witness for the plaintiff, about, and to introduce into the evidence, the following:

1. An application for a permit for the sale of beer and wine to the City of Atlanta, Georgia, dated July 22, 1940, signed by the said Carmichael, wherein he

stated that he had never been convicted or plead guilty to a crime in any court. In fact, the said Carmichael had been convicted in a court in Ohio in 1933, as is set forth in more detail in the preceding paragraph of this Motion.

2. An application for a permit to sell beer, addressed to The Honorable Mayor and General Counsel of the City of Atlanta, Georgia, dated March 12, 1957, signed by the said Carmichael, wherein he stated as follows:

"Have you ever been convicted or plead guilty to a crime in any court? x -

Yes No

If so state the offense and date—1932—But I Was Not Guilty And Was Released."

[fol. 65] In fact, the said Carmichael had been found guilty of the crime in the State of Ohio set forth in more detail in the preceding paragraph of this Motion, and was convicted in the Criminal Court of Fulton County on March 22, 1950 of possessing illegal distilled spirits and alcohol, which latter conviction was admitted by the said Carmichael on the witness stand in this case.

The Court excluded such evidence or the questioning of the witness with respect thereto, but, in excluding the same, the Court did not assign any reason for such ruling. Defendant alleges and contends that such evidence was relevant, material and admissible for the following reasons:

(a) It tended to impeach the witness.

(b) It affected the credibility of the witness.

Defendant, therefore, alleges and contends that the exclusion of such evidence by the Court was harmful and prejudicial to it and constitutes a ground for a new trial.

19.

Because the Court erred in allowing counsel for the plaintiff to examine, over the objection of counsel for the defendant, J. D. Bolton, Hugh Mills and Harold Heckman, all witnesses for the defendant, with respect to whether they knew of the reputation of the plaintiff's witnesses Hartman, Clark, Baird and Trippi, and as to whether or not such witnesses' reputations were good or bad in the community, and whether or not they would believe them on oath. Defendant contends that such questioning of de- [fol. 66] fendant's witnesses was improper when the character and veracity of such of plaintiff's w itnesses had not been brought into issue.

In allowing such questioning by counsel for the plaintiff, the Court relied upon Georgia Code § 38-1804, which Code section defendant contends is not in point or applicable to such ruling.

Defendant further alleges and contends that allowing counsel to question defendant's witnesses in such regard was harmful and prejudicial to the defendant and constitutes a ground for a new trial.

20.

Because the Court erred in excluding the following testimony of George Burnett:

1. As to what Burnett asked the operator and as to the operator's answer to Burnett in regard to the extension number in Tuscaloosa, Alabama, to which Burnett had been connected, upon the ground that such testimony of Burnett was hearsay. Defendant contends and alleges that anything which Burnett himself said previously would not be hearsay, and further that the conversation between Burnett and the operator was reported in the alleged libelous article, the truth of which the defendant had the bur-

den of proving. Such testimony of Burnett was not offered to prove the truth of what the operator said, but rather to prove that his conversation with the operator did take place substantially as reported by the defendant in the alleged libelous article.

[fol. 67] 2. As to what Burnett said to Milton Flack and what Flack said to Burnett when Burnett called Flack after Burnett overheard the conversation between plaintiff and Paul Bryant. Such conversation between Burnett and Flack was reported in the alleged libelous article by the defendant. The Court excluded such testimony by Burnett on hearsay grounds. The defendant alleges and contends that anything said by Burnett previously would not be hearsay and that the entire conversation between Burnett and Flack was admissible not to prove the truth of what Flack said, but rather to prove that such conversation as reported by defendant in such alleged libelous article actually took place.

3. As to Burnett's testimony as to the conversation between Burnett and Bob Edwards on January 4, 1963. Said conversation was reported by defendant in the alleged libelous article. The Court excluded such testimony on hearsay grounds. The defendant alleges and contends that such testimony was not offered to prove the truth of what Edwards said, but rather to prove that such conversation between Burnett and Edwards as reported by defendant in the alleged libelous article, actually took place.

4. As to Burnett's testimony of what took place at a meeting attended by Burnett and certain officials of the University of Georgia in the office of Cook Barwick, attorney for the University of Georgia. The Court excluded such testimony on hearsay grounds. The defendant alleges and contends that the conversations which took place at such meeting in Cook Bar-

[fol. 68] wick's office were reported by it in the alleged libelous article, and that the testimony of Burnett was introduced to prove that such conversations did take place at such meeting, and not to prove the truth of the matter asserted by the participants in the meeting. In addition, defendant alleges and contends that the defendant was entitled to show the extent to which the officials of the University of Georgia questioned and checked upon George Burnett and his story, all of which illustrated the diligence of the defendant in its investigation of the story prior to its publication.

Defendant alleges and contends that the exclusion of such evidence was harmful and prejudicial to defendant and each exclusion is a ground for a new trial.

21.

Because the Court erred in admitting into evidence, over timely objection by defendant's counsel, plaintiff's Exhibits 16 and 17 which are, respectively, a memorandum on unnecessary roughness in college football and a letter from the President of the Football Coaches Association and the Chairman of the Football Rules Committee relating to unwarranted viciousness and brutality in college football.

The defendant contends that these Exhibits were inadmissible on the grounds that these documents were hearsay and were not relevant to any issue involved in this case and on the further ground that no proper foundation was laid for the admissibility of this evidence.

[fol. 69]

22.

Because of the following errors in plaintiff's counsel's closing arguments to the jury, which, even though not specifically objected to by counsel for the defendant, constitute significant and fundamental errors which the Court

may notice without objection and which it may take into consideration in exercising its discretion upon the motion of defendant for a new trial:

(a) Closing argument of Lockerman—

"... I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth."

Defendant contends that the above argument is objectionable and improper since plaintiff's counsel introduced before the jury his own unsworn testimony as to the credibility of the plaintiff, when the actual evidence in the case was to the effect that plaintiff's reputation was bad and that witnesses would not believe him under oath. In such argument plaintiff's counsel clearly violated the established principle that an attorney in closing argument should not state to the jury his own belief regarding one of the [fol. 70] principal issues in the case, particularly when there was no testimony in the record whatsoever to that effect. This argument was particularly harmful in view of the fact that the Court had previously ruled that character witnesses on behalf of the plaintiff could be cross-examined as to their knowledge of specific instances of misconduct and the plaintiff deliberately failed to call such character witnesses. Thus, the argument of plaintiff's counsel denied defendant the right to an effective cross-examination.

(b) Closing argument of Lockerman—

"... and when that suit was filed the Curtis Publishing Company came into this court and filed its answer to it, and admitted every word in it. Now, since having done that, the Curtis Publishing Company is trying to contradict what it said in its own pleadings in judicio, here in the Court Room."

Defendant contends that the above argument is objectionable and is an improper misstatement of the facts, the same being so crucial that if accepted by the jury a verdict would be demanded for the plaintiff inasmuch as the jury is being told that the defendant admitted that the article is libelous and that the plaintiff was entitled to damages.

(c) Closing argument of Lockerman—

"In this very law suit alone that has been in every paper, every radio station, every television station for months and months and months, and recently hour on the hour, all over the world, they have gotten untold millions of dollars in publicity where the name 'Satur-[fol. 71] day Evening Post' is on the ears and the lips and tongue of all the people in the world.

"These reporters here, all over this Court Room, are sending this out. That is what they want. You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain the Saturday Evening Post ever got. There is no way of telling—they could not have bought the publicity they have gotten in this case probably for fifty or seventy-five or a hundred million dollars, because it is worldwide, and you try to buy space in magazines, daily papers, radio stations, television stations all over the world where your name is mentioned every hour on the hour, such as this has been, you can't do it for any amount of money, and they have used Wally Butts for that purpose.

"If you should return a verdict in this case, say, for five million dollars, they would think that they had won the greatest victory that could possibly be returned in the case."

Closing argument of Schroder—

"Now, listen to this, gentlemen. 'The final yardstick, we have about six lawsuits pending,' and he later identified those lawsuits as libel suits, 'meaning that we are hitting them where it hurts.' Proud of his libel suits, proud of the publicity, the free advertising he gets from his libel suits.

"Mr. Clay Blair, who wouldn't get on the stand and testify so you could see him, had this to say when his [fol. 72] deposition was taken, at page 44, which we read. 'I was not being facetious when I used the phrase "sophisticated muckraking". I meant it then and I mean it now.' Their type of sophisticated muckraking is this article here where they can get a mere germ of an idea that they know will sell and will cause people to get hit where it hurts them, and result in a libel suit with a $100,000,000 worth of free advertising to them, and that is what they want. I will show you why that is what they want.

"Mr. Clay Blair, again, 'I changed the image of the Post. He said that the March 23 issue—that is the one with Butts' story in it— is a step in the right direction. This issue takes up twenty-five percent toward the goal of the magazine that I envision.'

"Gentlemen, if that is just twenty-five percent, that type of story toward the goal he envisions, what can we look for or hope to look for when that is multiplied four times.

"He says, Mr. Clay Blair, 'The Post advertising revenues fell from one hundred six million dollars in 1960 to eighty-six million in 1961, and to about sixty-six million in 1962. I did not like that trend dropping twenty million dollars from a one hundred six in 1960

to eighty-six in 1961 and again to sixty-two million in 1962.'

"That is when they changed the image. They have got to get those advertising revenues up, and I say that is the worse kind of libel that you can have. A [fol. 73] newspaper can print a libel because someone has given it some information that turned out to be inaccurate but when you go out and buy a libel—and they paid over $9,000 for this story, which will show here in the voucher, paid $9,000 for it—and did the reporting job that they did, they knew what they were getting, and they have it. One million dollars of free advertising."

• • •

"I say, gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wally Butts for what they have done to him? Would a fifty percent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them?"

The defendant contends that this line or argument, so heavily emphasized by both of plaintiff's counsel, was clearly improper and prejudicial since it injected into the case assertions wholly unsubstantiated by any evidence whatsoever. For example, it was boldly asserted that the defendant received the benefit of $50,000,000 to $100,000,000 of free advertising solely because of this case; that it suggests a wholly improper measure of damages for consideration by the jury (that they might determine damages on the basis of some percentage of the wholly unsubstantiated assertions to the effect that the defendant had somehow directly profited from the notoriety attributable to the subject proceedings. The manner in which his argument was presented (for example, relatively indirectly by Lockerman on Friday followed by a direct and unqualified assertion by Schroder on Monday), seems almost calculated

[fol. 74] to deceive the jury into thinking that the assertions made were in fact true. The statements by Schroder were calculated to confuse the jury into correlating the alleged free advertising with the admitted substantial decline of advertising revenues, facts of which were introduced into evidence in the case over the objection of the defendant, and instilled in the jury the impression unsupported by any evidence that the defendant had profited in an astronomical amount by the notoriety incident to the trial.

(d) Closing argument of Schroder—

"Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way their lesson can be brought home to them, gentlemen, is to hit them where it hurts them, and the only thing they know is money."

• • •

"I am looking to you for my protection. Heavens knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; or yourself. We have got to stop them now, and you are the only twelve in the world that can stop them."

Defendant contends that the above argument is wholly improper not only as attempting to unduly arouse the prej- [fol. 75] udice and passion of the jury, but also as injecting and suggesting a wholly improper consideration with respect to the measure of damages. The Georgia law does not authorize punitive damages to deter the defendant from repeating the alleged trespass against anyone other than the plaintiff.

(e) Closing argument of Lockerman—

"I am sorry that I may have appeared to have gotten right emotional about this matter. I am emotional about it. I am mad about it. There are just thousands and thousands of people who are mad about it too, and I believe that in your deliberations and in your final verdict that you are going to return the kind of verdict that will help restore Wally Butts as he should be restored in the eyes of the world."

Closing argument of Schroder—

"... They don't care about Butts. They wouldn't care about you or about me. They are just one stp in the direction they are aiming."

• • •

"... They write about human beings; they killed him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it."

• • •

[fol. 76] "... I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now."

Defendant contends that the above arguments are clearly objectionable as improperly appealing to the prejudices and passions of the jurors to the obvious injury and harm of the defendant.

(f) Closing argument of Schroder—

"... I have lived in agony with this man since I got the first notice that this was what was going to happen this Post article was coming out. I have seen him deteriorating ever since it came out, and I have lived in agony along with him, and it may be that the personal first-

hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wally Butts."

Defendant contends that the above argument not only constitutes testimony by plaintiff's counsel, but also involves an improper and prejudicial attempt by argument to inject into the minds of the jurors allegations not specifically covered by the evidence.

(g) Closing argument of Lockerman—

"Mr. Cody is a fine lawyer. I respect him very much, I know that in this case that he is being persuaded by the Curtis Publishing Company, his client in the mat-
[fol. 77] ter, in which he necessarily must avoid discussing the real issues."

* * *

"He [Mr. Cody] has seen fit to talk to you about anything except the truth of those charges."

Closing argument of Schroder—

"I want to begin by taking up where the Saturday Evening Post lawyer ended Friday." . . . Throughout that argument not two minutes were devoted to the merits of the case; not two minutes were devoted to the plea of justification, that is to say, that what is in that article published by the Saturday Evening Post is true."

Defendant contends that the above argument was improper, offensive and irrelevant and immaterial to any of the issues in the case and interjected personalities, thereby appealing to the prejudices and passions of the jurors.

Defendant, therefore, contends that all of the above arguments on the part of plaintiff's counsel were prejudicial

and harmful to the defendant and constitute errors for which a new trial should be granted.

23.

Because of the following errors in the Court's charge, which errors, even though not specifically objected to by counsel for the defendant, constitute significant errors which the Court may notice without objection and which [fol. 78] it may take into consideration in exercising its discretion upon this motion of defendant for a new trial:

(a) In giving the following charge in regard to punitive damages:

"The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award."

The defendant contends that such charge is not a correct statement of the Georgia law of punitive damages in that punitive damages can only be given to deter the wrongdoer from repeating the trespass upon the plaintiff and not as a deterrent to third persons, nor can punitive damages be awarded for the protection of the community in general, but only for the protection of the plaintiff. Such charge was not anticipated by the defendant in that the plaintiff had requested a charge correctly stating the Georgia law of punitive damages and the Court stated that such charge was to be given substantially as requested by plaintiff, nor were such damages prayed for in plaintiff's complaint.

(b) In giving the following charge to the jury:

"Before you would be authorized to find punitive damages under the Georgia law, you must first determine that the plaintiff, Wallace Butts, is entitled to recover general damages. However, if you decide to

award punitive damages, the sum you award need have [fol. 79] no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion."

Defendant contends that the law requires that there must be a relationship between the general damages and the punitive damages which the jury is authorized to award the plaintiff.

(c) In giving the following charge to the jury:

"A defendant may show that it acted without malice and that there was neither actual malice nor any circumstances from which malice may be inferred. In a word, a defendant is permitted to show that, in publishing this article, it in good faith relied upon certain matters which had come to its attention. And if the jury accepts this as credible, this would go in mitigation of punitive damages."

Defendant contends that such charge is erroneous in that the impression was thereby conveyed to the jury that absence of actual malice would merely mitigate punitive damages, whereas the Georgia law is clearly that, in the absence of actual malice, no punitive damages can be awarded.

(d) The often repeated language in the charge to the effect that the defendant had the burden of proving the "statements in the article" to be true (there are seven repetitions of this in the charge) and the inconsistency of such language with the part of the charge dealing with substantial truth and the sting of the libel.

[fol. 80] Defendant contends that such confused the jury as to whether or not the defendant had the burden of prov-

ing the accuracy of all of the statements in the article, particularly since the Court failed to charge the defendant's request #8, which request was to the effect that defendant need not prove the truth of any statements made about anyone other than the plaintiff.

(e) By charging the jury as follows:

"I charge you that the law presumes that the plaintiff has a good reputation, and when a defamatory statement is made against him, the law presumes he has sustained injury to that reputation and to his feelings."

Defendant contends that the above charge was erroneous for the following reasons:

(i) That when evidence of bad character or reputation of the plaintiff is introduced, there is no longer a presumption that the plaintiff has a good reputation.

(ii) That the Court has not in the above quoted portion of the charge, nor in any other portion of the charge, clearly instructed the jury that the presumption of good reputation can be rebutted.

(iii) That the Court has not in the above quoted portion of the charge, nor in any other portion of the charge, clearly instructed the jury that the question of whether or not the plaintiff has a good reputation was for the jury in this case.

[fol. 81] Defendant, therefore, contends that such errors in the Court's charge were prejudicial and harmful to the defendant and constitute errors for which a new trial should be granted.

24.

Because the Court erred in charging the jury, over objection by the defendant, the following:

(a) That the alleged libelous article was libelous per se, as follows:

"Under the law of Georgia, if the publication was libelous per se, and I charge you that this article was libelous per se, and the law will presume that anyone so libeled must have suffered damage. In such case, no measure of damages can be prescribed, except through the enlightened consciences of impartial jurors."

Defendant contends that the article is not libelous per se.

(b) That the article was libelous per se as being a charge made with reference to the profession of the plaintiff and that the plaintiff was engaged in a profession at the time of the publication of the alleged libelous article, as follows:

"I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and [fol. 82] which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the rule follows to such damages as must be presumed to proximately and necessarily result from such a publication.

* * *

"I charge you that the words 'libelous per se' in this case mean words of such character that a presumption of the law arises therefrom that a party has been degraded in his business or professional reputation."

The defendant contends that the plaintiff was not in a profession at the time of the publication of the article.

25.

Because the verdict is contrary to law and to the evidence in this case in that the plaintiff's complaint is clearly an action for alleged damages to his professional reputation and has been so construed by the Court, and by plaintiff's counsel, but the evidence at the trial showed without contradiction that the plaintiff was not engaged in a profession at the time of the publication of said alleged libelous article. Since plaintiff has not shown that he was engaged in a profession at the time of publication, the article was not libelous per se and due to the plaintiff's failure to allege or to prove special damages, a verdict in his favor for any amount whatsoever is not authorized and, therefore, the verdict was contrary to law and to the evidence introduced in the case and a new trial should be granted.

[fol. 83] Defendant reserves the right to amend this Motion with permission of the Court and to add additional grounds thereof after the Official Record is filed by the court reporter.

In addition to the foregoing Motion, the defendant moves the Court to enlarge the time for filing additional affidavits and documents under Rule 59(c), which affidavits and documents may further substantiate the grounds for any part of the foregoing Motion.

Wherefore, defendant prays that a new trial be granted in said case on any one or all of the grounds hereinbefore stated.

Request is hereby made for an oral argument on this Motion.

Welborn B. Cody, Thomas E. Joiner, E. J. Bondurant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta 3, Georgia.

[fol. 84]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—Filed August 29, 1963

[Title omitted]

Defendant moves the Court to set aside the verdict entered in the above-entitled action on August 20, 1963, and the judgment entered thereon on the same date, and to enter judgment in accordance with defendant's motion for directed verdict.

Defendant's motion for directed verdict should have been granted because the plaintiff's action is clearly one for alleged damages to his professional reputation and his complaint has been so construed by the Court and by plaintiff's counsel, but the evidence at the trial showed, without contradiction, that the plaintiff was not engaged in a profession at the time the alleged libelous article was published. Since plaintiff has not shown that he was engaged in a profession at the time of publication, the article was not libelous per se and due to the plaintiff's failure to allege or to prove special damages, a verdict in his favor for any amount is not authorized and, therefore, the defendant's motion for a directed verdict should have been [fol. 85] granted, and this motion for judgment notwithstanding the verdict should be granted.

Welborn B. Cody, Thomas E. Joiner, E. J. Bonderant, Jefferson Davis, Jr., Attorneys for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta 3, Georgia.

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—Filed January 14, 1964

The defendant herein has filed a motion for judgment notwithstanding the verdict, contending in said motion that the plaintiff is not entitled to any recovery since the evidence established without contradiction that he was not, at the time of the publication of the charge complained of, in the profession of a football coach, and because he neither claimed nor offered evidence of any special damage incurred by him as a result of the publication.

It was the ruling of this Court at the time of trial, and the jury was so instructed, that "a written publication [fol. 86] which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se."

There is a strong thread running throughout the trial of this case and the many hearings which preceded the trial that this article was being held by this Court to be libelous per se for the reason that it degraded him in his business or professional reputation. The plaintiff and defendant discuss at length in their respctive briefs whether the article would have been libelous per se even if plaintiff had not been engaged in his profession at the moment of libel. There is overwhelming authority to the effect that this would in fact be the case; *Weatherholt* v. *Howard,* 143 Ga. 41; *Estes* v. *Sterchi Bros. Stores, Inc.,* 50 Ga. App. 619, 179 S. E. 222; numerous other decisions and treatises. However, the Court is prepared to stand squarely on the issue of the article's having hurt him in his profession as the basis for the ruling of libelous per se.

The plaintiff's name was synonymous with University of Georgia football for some 25 years. He had served as

President of the American Football Coaches Association; he was one of the few coaches to be selected to serve on the important Rules Committee; he was admittedly widely known and respected as a successful coach and as an eminent authority in the sport of football. Can it be sincerely argued by the defendant that this man, who is in his mid-fifties, is not injured *legally* in the eyes of the football world, simply because he had not officially occupied a position of employment in this field for a period of six to eight weeks? Future employment quite probably would have [fol. 87] occurred, and in what capacity other than that to which he had given his whole life?

Law is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the rigid technicalities sought to be imposed by the defendant, the plaintiff, caught in a mesh of procedural and technical complexities, is told there is only one way out of them, and that is to have filed his lawsuit a few days earlier, while still listed on the employment rolls of The University of Georgia, *prior to the publication of the subject article.*

Because of that omission, it being of course impossible to do, he is to be left ensnared in the web—the processes of the law, so it is said, being impotent to set him free.

This Court does not believe that paths to justice are so few and narrow. I think we should hesitate quite a long time before committing our procedure to so sterile a conclusion.

Accordingly, the motion for judgment notwithstanding the verdict is denied.

It Is So Ordered.

This the 14th day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 88]

IN UNITED STATES DISTRICT COURT

OPINION AND ORDER GRANTING MOTION FOR NEW TRIAL—
Filed January 14, 1964

The jury in this libel action returned a verdict for general damages against the defendant in the sum of $60,000.00 and for punitive damages in the sum of $3,000,000.00.

The defendant moves, under Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., to set aside the verdict for damages principally upon the ground of excessiveness, as set out in Ground 1 of the defendant's motion. Apart from defendant's contention that the verdict is excessive, the defendant sets out 23 other grounds in its motion for a new trial (Ground 5 of defendant's motion having been abandoned).

The cause of action by plaintiff arose by virtue of an article published by defendant in its March 23, 1963, issue of the *Saturday Evening Post*, said article having been principally written by one Frank Graham, Jr., but with assistance from others employed by the defendant. The article was entitled "The Story of a College Football Fix", with the subtitle "How Wally Butts and Bear Bryant Rigged a Game Last Fall". The article concerned alleged information on Georgia plays given by Butts to Coach Bryant relating to the Alabama-Georgia football game played in Birmingham, Alabama, in September, 1962.

The article charged Butts with being corrupt and with betraying his players, and that the players were forced into the game like "rats in a maze" and "took a frightful physical beating". The article charged, in an italicized [fol. 89] editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of "disreputable gamblers", and a

corrupt person who, employed to "educate and guide young men", betrays or sells out his pupils.

Plaintiff Butts had been Head Football Coach at the University of Georgia from 1939 until 1961, at which time he became Athletic Director. As a member of his profession, he had been president of the Football Coaches Association, and by invitation had coached the College All-Stars, the Blue-Gray All Star Game, and the North-South All Star Game. Butts had been a lecturer and speaker at clinics and banquets throughout the United States. Testimony adduced was that plaintiff had been offered employment by several college and professional football teams in the country and was negotiating with a Texas professional team when the article was published, but thereafter negotiations were discontinued.

Evidence was introduced that on March 18, 1963, Butts, through his atorney, notified the Curtis Publishing Company that the article was false and advised that the article not be published; and that thereafter, pursuant to Georgia law, Butts requested a retraction from Curtis, which was refused. It was admitted on the trial that one of Butts' daughters had telephoned long distance to a *Saturday Evening Post* official with a plea that the article be withheld from publication. The evidence of plaintiff showed that plaintiff was capable of earning a minimum of $12,000.00 per annum from his football activities, but that since the publication, all prior negotiations had been terminated. [fol. 90] The defendant filed its answer of justification and plead that the statements in the article were true. The defendant thus assumed the burden of proving the truth of the article. See *Cox* v. *Strickland,* 101 Ga. 482.

Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overheard between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia Game. By some mechanical de-

fect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the Alabama, lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the *Saturday Evening Post.*

The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the *Saturday Evening Post,* knew that Burnett had been convicted of "bad check writing". No representative of the *Post* looked at the notes before the article was published. According to Coach Griffith of Georgia, defendant's witness, "a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had." No effort was made by the *Post* to view the actual game film, although the Sports Editor of the *Post,* one Roger Kann, considered that necessary.

[fol. 91] Inserted in the article were the following direct quotations, which were subsequently denied under oath by the parties quoted:

(1) Graham wrote that Burnett had told him that Larry Rakestraw, Georgia quarterback, placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. Burnett later testified under oath that he had not told Graham any such thing.

(2) Mickey Babb, another Georgia football player, specifically denied the quotation in the article attributed to him pertaining to knowledge by the Alabama team of the Georgia formations and plays. Babb was quoted in the article as saying the Alabama players knew Georgia's key play (eighty-eight pop) and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. This was confirmed by Coach Johnny Griffith.

(3) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him, which was also to the effect that Alabama knew Georgia's plays.

(4) Coach Johnny Griffith categorically denied three separate and distinct quotations in the article that were attributed to him.

(5) There were many other instances in which the individual, credited by Graham as giving Graham certain information which was included in the article, [fol. 92] categorically denied under oath that any such information had been furnished.

Frank Graham, Jr., author of the article, and Charles Davis Thomas, the Managing Editor of the *Saturday Evening Post,* testified by deposition that they both knew that after the article was published plaintiff Butts' career would be ruined. The author of the article, Frank Graham, Jr., testified by deposition at the trial. Curtis' Editor-in-Chief, Clay Blair, Jr., and its Senior Editor, Davis Thomas, were present in court but testified by deposition. Furman Bisher, of Atlanta, who was paid to assist in the preparation of the article, testified by deposition.

The article was clearly defamatory and extremely so. The *Saturday Evening Post* had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable.

This Court does not feel that the award of $60,000.00 for actual damages was excessive. The evidence showed plain-

tiff to be a man in his fifties, and that his earnings from his profession had been a minimum of $12,000.00 per annum.

The Court must now consider the amount of punitive damages awarded. What is the nature of punitive damages [fol. 93] and for what purpose do we allow their imposition? The law of Georgia provides that in every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages to deter the wrongdoers from repeating the trespass. Sec. 105-2002, Georgia Code Annotated, 1933.

This Court, however, is greatly concerned with the size of the verdict as to punitive damages. An examination has been made of many cases and the awards made throughout the several jurisdictions of the United States, both in the Federal and State Courts. As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds* v. *Pegler,* 123 F. Supp. 36, 223 F. 2d 429. Since the award in the case at hand, the New York Supreme Court, Appellate Division, October Term, in the case of *Faulk* v. *Aware, Inc., and Hartnett,* has reduced the award of punitive damages in the amount of $2,500,000.00 to $150,000.00. The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained. *Reynolds* v. *Pegler,* supra.

True, fixing the amount of damages is primarily in the province of the jury, and it has been said, with respect to libel cases, "the jury is generally considered to be the Supreme arbiter on the question of damages". *Lynch* v. *New York Times Company,* 171 A.D. 399, 401. The Court, if possible, should try to avoid invading that field. However, a Court may not stand by idly when it is apparent that a verdict is excessive. In *Sunray Oil Corporation* v. *Allbritton,* 188 F. 2d 751 (5 Cir. 1951), Judge Hutcheson emphasized that a district judge has a duty to grant a new

[fol. 94] trial, not only when the jury's verdict is excessive as a matter of law, but also where "it is larger in amount than the judge thinks it justly ought to be". Thus, he said:

> "Whether, in the opinion of the district judge, a verdict is excessive as a matter of fact, that is, though not contrary to right reason and, therefore not excessive as a matter of law, it is larger in amount than the judge thinks it justly ought to be, or is excessive as a matter of law, that is, is so monstrous or inordinate in amount as to find no support in right reason, he has the same power, the same duty, in the one case as in the other to relieve against the excessiveness by granting a new trial or requiring a remittitur in lieu."

As was held by the late Judge Parker in the case of *Virginian Railway Company* v. *Armentrout,* 166 F. 2d 400, 408:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. * * *
>
> "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

[fol. 95] In accordance with the cases cited above, this Court feels it is its duty to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights. In observance of such duty, this Court concludes that the award for puni-

tive damages in this case was grossly excessive. It is the Court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00.

Movant's Grounds 2, 3, and 4 assert that the right given by Section 105-2002, Georgia Code Annotated, 1933, to a jury to grant punitive damages violates the rights guaranteed by the Federal Constitution to freedom of speech and press and to substantive and procedural due process. These contentions are without merit. However, these constitutional questions are raised for the first time by this motion. No constitutional question concerning the statute was ever raised by movant's pleadings. The contention that a State statute is unconstitutional is an affirmative defense and must be so pleaded in defendant's answer. *Kewanee Oil & Gas Company* v. *Mosshamer,* 58 F. 2d 711, 712; *White Cleaners and Dyers* v. *Hughes,* 7 F. Supp. 1017 (D.C. La. 1934, 3 judges).

Movant's Ground 5 has been expressly withdrawn by defendant.

Grounds 6 through 13 of defendant's motion contend that error was committed in excluding certain evidence as to specific acts of misconduct by plaintiff, defendant contending that this evidence should have been permitted for the purpose of impeachment and in mitigation of damages. The [fol. 96] first consideration is Section 38-202, Georgia Code Annotated, 1933, which provides as follows:

> "The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct."

The defendant contends that under Rule 43(a) of the Federal Rules of Civil Procedure, this evidence is admissible in Federal Court. Rule 43(a) provides that in de-

termining admissibility of evidence whether there is a conflict between the State and the Federal rule, the plaintiff is entitled to the benefit of the more favorable rule. *Hambrice* v. *F. W. Woolworth Company,* 290 F. 2d 557.

However, on the question with which this Court is concerned and without passing upon the question as to whether the matter is substantive or procedural, it appears that there is no conflict between the Georgia rule and the Federal rule as to the admissibility of the specific acts of misconduct on the part of the plaintiff.

Under the decision of *Cox* v. *Strickland,* 101 Ga. 482, it is held that the filing of a plea of justification in defense to an action of libel put the plaintiff's character in issue, and a defendant has a right to show that the plaintiff's general character is bad, but cannot, in so doing, go into the proof of specific acts or resort to general rumors by hearsay.

Neither under the majority of federal decisions which this Court has studied would such tests be admissible. See [fol. 97] *Tribune Association* v. *Follwell,* 107 F. 646; *Sun Printing & Publishing Association* v. *Schenck,* 98 F. 925; *Morning Journal Association* v. *Duke,* 128 F. 657.

As was said in the *Schenck* case, supra:

> "It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."

As further authority sustaining the inadmissibility of such evidence, see *Wigmore on Evidence,* 3d Edition, Section 209, where it is stated that the reputed character of the plaintiff in an action of defamation is admissible in mitigation of damages so long as proof of character is made

by reputation only; but particular acts of misconduct are irrelevant and such evidence is universally regarded as improper. Pertinent to this issue is the statement of Richards, C. B., in the case of *Jones* v. *Stevens*, 11 Price 235, 265:

> "I cannot . . . allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice and throw on him the difficulty of showing a uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge."

[fol. 98] Movant contends that this Court erred in refusing to charge Section 38-1806 of the 1933 Georgia Code Annotated. There was no showing that any witness wilfully and knowingly testified falsely, and this Court charged generally on the subject of impeachment. See *Smaha* v. *George*, 195 Ga. 412.

Ground 15 of defendant's motion is without merit. Ground 16 of movant's motion is without merit. See *Smaha* v. *George*, supra; and *Branan* v. *LaGrange Truck Lines, Inc.*, 94 Ga. App. 829.

Grounds 17 and 18 of defendant's motion contend error in exeluding evidence tending to impeach witness John Carmichael. Such evidence was offered by defendant to show that witness Carmichael had been convicted in 1933 while witness was a minor in Ohio. The Court, in its discretion, refused to admit such evidence because of the lapse of time. See *Goddard* v. *United States*, 131 F. 2d 220; *Sinclair Refining Company* v. *Southern Coast Corporation*, 195 F. 2d 626.

The alleged false statements for the purpose of obtaining licenses were inadmissible. A witness cannot be impeached by proving contradictory statements previously made by him as to matters not relevant to his testimony and to the case. *Grant* v. *Hart*, 197 Ga. 662; *Haynes* v. *Phillips*, 67 Ga.

App. 574. Both grounds 17 and 18 of the defendant's motion are without merit.

Grounds 19, 20, and 21 do not merit the granting of a motion for a new trial on any of the grounds as set forth. [fol. 99] Ground 22 of defendant's motion for a new trial asserts error because of arguments of plaintiff's counsel in the closing remarks to the jury. No objection nor complaint was ever raised to any portion of plaintiff's counsel's argument to the jury, although separate arguments were made by counsel for both parties on separate days of the trial.

Arguments were begun on Friday by both counsel and completed on Monday. Much of the argument of which complaint is now made was offered on Friday, and yet on the following Monday, no objection was raised on this portion of counsel's summation. Counsel for defendant consisted of numerous counsel, and yet exception was only made on the filing of this motion. It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial. See *Travelers Insurance Company* v. *Bell,* 5 Cir. 1951, 188 F. 2d 725; *Thomson* v. *Boles,* 123 F. 2d 487; *Hobart* v. *O'Brien,* 243 F. 2d 735; *Uhl* v. *Echols Transfer Company,* 5 Cir. 1956, 238 F. 2d 760. For the reasons stated above, Ground 22 of defendant's motion is without merit.

Grounds 23 (a) (b) (c) (d) and (e) of defendant's motion for a new trial complained of errors in the Court's instructions to the jury. The instructions complained of in these grounds of defendant's motion were not objected to at the trial of the case. Rule 51 of the Federal Rules of Civil Procedure provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto

[fol. 100] before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Opportunity was afforded counsel for defendant to make such objections before the jury was permitted to consider its verdict. Under the above-cited rule, the defendant may not now complain. See also *Pruett* v. *Marshall*, 5 Cir. 1960, 283 F. 2d 436; *Williams* v. *National Surety Corporation*, 5 Cir. 1958, 257 F. 2d 771; *Moore* v. *Louisville & Nashville Railroad Company, Inc.*, 5 Cir. 1955, 223 F. 2d 214.

Defendant's contention based on Ground 24 of the defendant's motion for a new trial is without merit for the reasons stated in this Court's ruling on defendant's motion for a judgment notwithstanding the verdict this day filed with the Clerk of the Court.

All the grounds set out in defendant's motion for a new trial, excepting Ground 1, are denied for the reasons stated above.

As to the first ground of the defendant's motion for a new trial, a federal trial court has authority to determine whether a verdict is excessive and to grant either a new trial or to require a remittitur. *State Farm Mutual Automobile Insurance Company* v. *Scott*, 5 Cir. 1962, 198 F. 2d 152.

An order in compliance with this opinion will be filed this date.

[fol. 101] This the 14th day of January, 1964.

Lewis R. Morgan, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER—Filed January 14, 1964

Now, this the 14th day of January, 1964, It Is Ordered that the motion of the defendant, Curtis Publishing Company, for a new trial is granted unless the plaintiff, Wallace Butts, within twenty (20) days after the service of this order, shall, in a writing filed with the Clerk of the United States District Court for the Northern District of Georgia, remit all the punitive damages awarded above the sum of $400,000.00; the award for general damages in the amount of $60,000.00 to remain undisturbed.

Lewis R. Morgan, United States District Judge.

[fol. 102]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ORDER ON MOTION FOR NEW TRIAL—Filed January 15, 1964

The order on the motion for a new trial in the above-named case having been filed on January 14, 1964, this Court hereby amends said order by adding to the third paragraph on Page 14 of said original order the following words: "including Ground 14 of said motion, which ground has no merit", so that said paragraph, when amended, shall read as follows:

> "All of the grounds set out in defendant's motion for a new trial, excepting Ground 1, are denied for the reasons stated above, including Ground 14 of said motion, which ground has no merit."

This the 15th day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 103]

IN UNITED STATES DISTRICT COURT

CONSENT OF WALLACE BUTTS TO REMIT—
Filed January 20, 1964

An order having been entered by this Honorable Court dated January 14, 1964, granting the motion of the defendant, Curtis Publishing Company, for a new trial unless the plaintiff, Wallace Butts, within twenty (20) days from the date thereof, shall, in a writing filed with the Clerk of this Court, remit all the punitive damages awarded above the sum of $400,000.00; the award for general damages in the amount of $60,000.00 to remain undisturbed;

Now comes the plaintiff, Wallace Butts, and after grave deliberation, having neither the financial nor the physical resources available to conduct a second trial of this case, and standing to gain nothing thereby in the present posture of the case, regretfully, but with great respect for this Honorable Court, accedes to the Court's said order and remits all punitive damages awarded above the sum of $400,000.00, leaving a net total recovery in favor of plaintiff in the amount of $460,000.00.

This 20th day of January, 1964.

Wallace Butts, Plaintiff.

[fol. 104] William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia, Attorneys for Plaintiff, Wallace Butts.

Service acknowledged January 20, 1964. EAB.

Jeff Davis, Sr., Attorney for Defendant.

Of Counsel:

Kilpatrick, Cody, Rogers, McClotchey & Regenstein.

[fol. 105]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALLACE BUTTS, Plaintiff,

versus Civil Action No. 8311

CURTIS PUBLISHING COMPANY, Defendant.

JUDGMENT—January 22, 1964

The plaintiff, having filed with the Clerk of this Court a writing remitting all of the punitive damages awarded above the sum of $400,000, which writing was in accordance with the Order of this Court dated January 14, 1964, the defendant's Motion for New Trial is hereby overruled.

The judgment for the plaintiff for $3,060,000 entered on August 20, 1963, is hereby set aside and

It Is Hereby Ordered and Adjudged that the plaintiff, Wallace Butts, recover of the defendant, Curtis Publishing Company, the sum of $460,000, with interest as provided by law.

Dated this 22nd day of January, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

[Title omitted]

NOTICE OF APPEAL—Filed January 24, 1964

Notice is hereby given that Curtis Publishing Company, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on January 22, 1964.

Welborn B. Cody, Attorney for Defendant.

Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, JAckson 2-7420.

[fol. 107]

IN UNITED STATES DISTRICT COURT

NOTICE OF PLAINTIFF'S CROSS APPEAL—
Filed January 30, 1964

The jury's verdict in this case of $3,000,000.00 punitive damages and $60,000.00 general damages for the plaintiff was entered as the judgment of the district court by order dated August 20, 1963. By order entered January 13, 1964 on defendant's motion for new trial the district court ruled that the punitive damages awarded plaintiff by the jury was excessive and that a new trial would be granted defendant unless plaintiff, within 20 days, remitted in writing filed with the Clerk all the punitive damages awarded above the sum of $400,000.00, leaving the $60,000.00 for general damages undisturbed.

Plaintiff, Wallace Butts, having neither the financial nor physical resources to conduct a second trial and faced with either remitting $2,600,000.00 of the punitive damages or having a new trial granted, yielded to the mandate of the district court and remitted in writing, filed with the clerk January 20, 1964 all punitive damages awarded by the jury above the sum of $400,000.00. Thereafter, on January 22, 1964 the district court set aside the judgment for plaintiff for $3,060,000.00 entered on August 20, 1963 and substituted in lieu thereof judgment for the plaintiff against the defendant in the sum of $460,000.00.

From said judgment of the District Court the defendant Curtis Publishing Company filed its notice of appeal in the Clerk's office on January 24, 1964, thereby recording its intention to refuse to accept the District Court's $2,600,000.00 reduction.

[fol. 108] Feeling that the sword should cut both ways, and in order that the action of the District Court in requiring plaintiff to consent to a reduction of the verdict in the amount of $2,600,000.00 as a condition to the denial of defendant's motion for new trial may be reviewed, notice is hereby given that Wallace Butts, plaintiff in the above entitled action, hereby cross-appeals to the United States Court of Appeals for the Fifth Circuit from that part of the order of the District Court entered in this cause on January 22, 1964 which set aside the judgment for plaintiff in the amount of $3,060,000.00 entered August 20, 1963 and substituted in lieu thereof judgment for plaintiff in the amount of $460,000.00, and gives notice of his intention to ask the Circuit Court of Appeals to restore the original award or in the alternative, to fix an amount in excess of that established by the trial court which would be fair and reasonable under the facts of the case.

William H. Schroder, Allen E. Lockerman, T. M. Smith.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta 3, Georgia.

[fol. 109]

In United States District Court

Notice of Amendment of Plaintiff's Cross Appeal— Filed February 24, 1964

Wallace Butts, plaintiff in the above entitled action, heretofore filed in this Court under date of January 30, 1964 his notice of plaintiff's cross appeal to the judgment of the district court dated January 22, 1964 in order that the action of the district court in requiring plaintiff to consent to a reduction of $2,600,000 of the jury's verdict as a condition to the denial of defendant's motion for new trial may be reviewed by the United States Court of Appeals for the Fifth Circuit in connection with the defendant's appeal to said Court from the district court's judgment of January 22, 1964.

Now comes Wallace Butts the said plaintiff in the above entitled action and within thirty (30) days from the date of the district court's judgment of January 22, 1964 gives notice of this his amendment to his said notice of cross appeal, for consideration and review by the United States Court of Appeals for the Fifth Circuit of the pretrial ruling of the district court as made by said court on July 29, 1963 that the second defense of the defendant, Curtis Publishing Company, as set out in its answer to plaintiff's complaint, was a valid plea of justification. A consideration and review of said ruling of the district court regarding the defendant's alleged plea of justification is sought by plaintiff only in the event the decision of the United States Court of Appeals for the Fifth Circuit reverses the judgment of the district court and sends the case back for a new trial; [fol. 110] otherwise, a review and consideration of the district court's said ruling regarding the defendant's alleged plea of justification is not sought.

William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Plaintiff.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William-Oliver Building, Atlanta, Georgia 30303.

In United States District Court

Defendant's Requested Instructions to Jury

Defendant's Request to Charge No. 3

Wallace Butts v. Curtis Publishing Company, Case No. 8311 George Code Section 38-1806, which is as follows:

"38-1806. (5884) What Credit to Impeached Witness; Question for Jury.—When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated [fol. 111] by circumstances or other unimpeached evidence. The credit to be given his testimony where impeached for general bad character or for contradictory statements out of court shall be for the jury to determine. (59 Ga. 63; 93 Ga. 488 (21 S.E. 66); 722 Ga. 254.)"

Defendant's Request to Charge No. 6

Wallace Butts v. Curtis Publishing Company, Case No. 8311

Whenever a party presents himself as a witness and his evidence is contradictory, vague or equivocal, his testimony must be construed most strongly against him.

Defendant's Request to Charge No. 8

Wallace Butts v. Curtis Publishing Company, Case No. 8311

In order to establish the defense of truth the defendant must establish the substantial truth of the charge which is made in the article. However, the defendant need not prove the truth of any statements contained in the article which

are made about someone other than the plaintiff nor need the defendant prove the truth of any statements in the article about him which are not a part of the libelous charge. Therefore, in determining whether or not the defense of truth has been established, you will disregard any inaccurate statements contained in the article which are not about the plaintiff, or which are about the plaintiff but are not a part of the libelous charge.

Ga. Code Ann. §*105-701*

[fol. 112] Defendant's Request to Charge No. 14:

Wallace Butts v. Curtis Publishing Company,
Case No. 8311

You cannot award plaintiff punitive damages unless plaintiff has sustained his burden of persuading you by a fair preponderance of the evidence that defendant acted with actual malice in publishing the charge made of plaintiff in the Post article.

Restatement of Torts, ¶908, comment (b) (1938)

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY—
Filed February 7, 1964

Plaintiff requests the Court to give to the jury the following instruction:

* * * * * * *

5.

I instruct you that when read in its entirety, the court construes the article complained of in the Saturday Evening Post as charging plaintiff as being corrupt and with rigging and fixing the 1962 Alabama-Georgia football game, which statements tend to injure the plaintiff in his trade,

occupation or business. I, therefore, charge you that the article complained of is libelous per se, that is, libelous on its face as a matter of law. I further charge you that, if the defendant does not prove the truth of said charges to your [fol. 113] satisfaction by a legal preponderance of the evidence, you must return a verdict for the plaintiff in the amount of damages to which, under all the circumstances shown by the evidence, you find he is entitled.

* * * * * * *

13.

In addition to seeking general damages, the plaintiff is also seeking to recover $5,000,000 as punitive damages to deter Curtis Publishing Co. from repeating the alleged injury to his honor, reputation and integrity in the future. I charge you that under the law of Georgia, there may be aggravating circumstances in every tort, either in the act or in the intention of the defendant. If you find the defendant has failed to prove the truth of the article and if you also find that there are such aggravating circumstances, then you would be authorized to award to the plaintiff, in addition to such such as you may award for general damages, if any, additional damages to deter the defendant from repeating the trespass to the plaintiff.

Ga. Code Ann. § 105-2002 (1956 Rev.)

14.

On the question of punitive damages, as on the question of general damages, the law prescribes no set way in which such damages shall be computed. You should bear in mind that the purpose of such punitive damages is to deter a defendant from repeating the alleged wrong to the plaintiff. You would be authorized to consider in this connection the wealth of the defendant, if such fact appears from the evi- [fol. 114] dence. You may also consider whether or not the defendant has sustained the burden of proving its claim that the statements made of and concerning the plaintiff

were truthful, and if you find that the defendant has not sustained that burden, then you are authorized to consider this an aggravating circumstance.

I further charge you that actual malice is an aggravating circumstance, and upon proof thereof, punitive damages may be awarded to deter the wrongdoer.

Richardson v. *Roberts,* 23 Ga. 215 (5) (6) (1857); *Atlanta Journal* v. *Doyal,* 82 Ga. App. 321, 331, 60 S.E. 2nd 802 (1950).

IN UNITED STATES DISTRICT COURT

PRE-TRIALS AND TRIALS—RULE 10—Filed February 22, 1962

(a) Preliminary pre-trial orders may be entered from time to time, including the time of hearing of motions. No civil case shall be tried however, until a final pre-trial order has been entered by the Court defining the issues to be tried and embracing (by reference or otherwise) all previous preliminary pre-trial orders.

(b) Plaintiff's counsel shall complete all discovery desired within a period of four months after answer is filed or shall apply to the Court for an extension of such time. When discovery is completed and the case ready for [fol. 115] trial plaintiff's counsel shall so certify to the Court and the case (if not already assigned for pre-trial by the Court) will be set down for pre-trial hearing.

(c) At a time not less than fifteen days prior to the date set for pre-trial hearing, plaintiff's counsel must have a pre-trial conference with opposing counsel, at which all of the terms of a final pre-trial order shall be discussed and, within ten days following said conference, plaintiff's counsel shall file with the Court a proposed pre-trial order covering all matters referred to in this Local Rule of Court, the appendix attached thereto, and as further ordered by the Court. Upon request by either party the Court will cause

such preliminary pre-trial conference between counsel to be held at the court house at a time fixed by the Court, at which time a partial or a complete pre-trial order may then be entered. Stipulations may be made by counsel subject to be withdrawn by a time certain, and any stipulation made by counsel will, upon good cause shown to the Court, be permitted to be withdrawn.

(d) The proposed pre-trial order prepared by counsel and submitted to the Court at the time of pre-trial hearing, or prior thereto, shall include among other things the following:

All motions filed but not disposed of; all questions regarding jurisdiction of the Court; whether the appointment of a special master should be made; qualification of the jury and the number of jurors required; documentary evidence to be introduced by each party and objections thereto; amendments to the pleadings; the matter of witnesses; depositions to be put in evidence and objections thereto; citation of authorities by any party regarding evidence, [fol. 116] procedural or substantive law; estimated length of trial and request for special assignments; efforts by counsel to settle the case; form of the verdict and separation of issues for trial.

(e) In negligence suits such other matters shall be covered as contained in appendix to this Rule and by Orders of Court.

(f) The pretrial hearing shall be attended by attorneys who will actually try the case or, upon approval by the court, by some other attorney of record who is authorized to define the issues and to make stipulations. Non-resident counsel may request of the Court a special assignment for pre-trial hearing.

(g) The final pre-trial order shall be made pursuant to Rule 16 of the Federal Rules of Civil Procedure, to Rule 44½ of the Admiralty Rules, to Orders of the Court, and to Local Rules of the Court and all amendments thereto.

(h) The case shall be tried pursuant to such pre-trial order and unless otherwise directed by the Court, no issues in behalf of the plaintiff or defendant will be considered on the trial unless contained in said pre-trial order, but, upon motion timely made by either party the terms of the pre-trial order will be amended in the interest of justice.

(i) The final pre-trial order shall make reference to the charge of the Court to be given on the trial of the case, in so far as the same may be considered at that stage of the case. Requests to charge however, shall be prepared in triplicate by counsel, each request on a separate sheet of [fol. 117] paper and numbered serially, and one copy shall be delivered to the Court and one copy served on opposing counsel at or before the time of opening of the trial, together with citation of authorities in connection therewith.

Approved effective January 9, 1962:

Frank A. Hooper, United States District Judge, Boyd Sloan, United States District Judge, Lewis R. Morgan, United States District Judge.

A True Certified Copy, February 13, 1964.

B. G. Nash, Clerk, /s/ Sammy Godsey, Deputy Clerk.

(Seal)

[fol. 118]

IN UNITED STATES DISTRICT COURT

DEPOSITION OF WALLACE BUTTS—Taken May 3, 1963

Deposition of Wallace Butts, plaintiff, taken by defendant pursuant to the federal Rules of Civil Procedure, pursuant to agreement of counsel, before Walter M. Pratt, Notary Public, at 1607 William-Oliver Building, Atlanta, Georgia, on Friday, May 3, 1963, commencing at 9:30 o'clock a.m.

• • • • • • •

Q. I asked you in the early part of this deposition if you knew a man by the name of E. C. Lindsey and I believe I recall your answer was that you did not.

A. No. I know no man named E. C. Lindsey.

Q. Do you know any person that goes by the name of E. C. Lindsey?

A. Nobody that goes by that name.

• • • • • • • •

IN UNITED STATES DISTRICT COURT

CONTINUATION OF THE DEPOSITION OF WALLACE BUTTS—Taken July 16, 1963

Continuation of the Deposition of Wallace Butts, plaintiff, taken by defendant pursuant to the Federal Rules of Civil Procedure, pursuant to agreement of counsel, before [fol. 119] Carl F. Potswald, Notary Public, at 1607 William-Oliver Building, Atlanta, Georgia, on Tuesday, July 16, 1963, commencing at 10:00 o'clock a.m.

• • • • • • •

Q. Concerning the Pontiac convertible automobile which you purchased in July 1961 from Boomershine Motors, do you have that car now?

A. No.

Q. What happened to it?

A. The car is owned by another person.

Q. Who is the person that owns it?

A. Evelyn Lindsey.

Q. Did she buy it from you?

A. No.

Q. Did you give it to her?

A. I gave her part of it.

Q. What part of it did you give to her?

A. Mr. Cody, the best way I can answer this is to tell you that she had a Buick which was traded in on the deal.

Q. And did she turn the Buick in and get credit on the purchase price, was that credited on the purchase price when you bought the car from Boomershine?

A. No, sir.

Q. Did she turn the Buick over to you?

A. She gave me the cash from the sale of the Buick.

Q. Do you recall how much cash was involved in the sale of the Buick?

A. I think, sir, it was $900.

Q. Did you pay for the balance of the car you bought from Boomershine?

A. Yes, sir.

• • • • • • •

[fol. 120]

IN UNITED STATES DISTRICT COURT

PRE-TRIAL CONFERENCE—July 8, 1963

Mr. Schroder: Well, Your Honor, the direct—wait a minute, that is going to bring up another thing. We are going to—whether this answer that has been filed is a plea—really a plea of justification or is a joinder of the general issue, that will determine who goes first. If it is a plea of justification, which I don't think it is, but if it is and is so construed by the Court, I think the defendant has admitted a prima facie case; it is up to him to grab the ball and travel from there.

The Court: I thought we had been over that.

Mr. Schroder: We discussed it in your office at one time when it came up, you know; we were there discussing something else, and there was—

The Court: You mean by justification, the truth, of course?

Mr. Schroder: I am talking about a plea of justification as that term is used in Georgia law and in general law.

The Court: Well, that means they are pleading that it was true.

Mr. Schroder: No—well, yes, sir. In order to plea—enter [fol. 121] a plea of justification, they have to, in effect, admit a prima facie case. Now, a plea of truth is entirely different. That joins the issue. But the burden is still on me. A plea of justification, they admit, number one, that they published an article—

The Court: Yes, sir.

Mr. Schroder: —which was—with malice, which defamed my client and which was false. They have admitted in a plea of justification the complaint and everything in the complaint and every innuendo and insinuation that the complaint says was complained of in that article.

The Court: I don't think they admitted everything in your complaint. I think the substance of their answer is that they say that the article which they published is true.

Mr. Schroder: But that is—that is not a plea of justification, though. Now, I am prepared to argue and I am prepared to submit a memorandum on it, because I know I am on sound ground.

There is a real big difference between a plea of justification and a plea of truth.

The Court: His second defense filed is that the Defendant avers that the statements in the article complained of, which are of and concerning the plaintiff, are true.

[fol. 122] Mr. Schroder: Yes, sir; that is a simple plea of truth.

The Court: Yes, sir.

Mr. Schroder: That joins the issue. I say it is false; he says it is true.

The Court: Yes, sir.

Mr. Schroder: The burden is still on me to prove it is false.

The Court: You mean the allegations in the article?

Mr. Schroder: The burden is on me to prove the allegations of my petition.

The Court: Yes, sir.

Mr. Schroder: Now, that is one thing. But, now, if, as we were talking about the other day, if, in effect, this is a

plea of justification, it admits everything I have said in my complaint, and I have got authorities to substantiate it. He admits a prima facie case, and he proceeds then with the burden of proof, so he puts up his case.

Let me give Your Honor the benefit of just a few authorities on this.

[fol. 123] The Court: All right, sir.

* * * * * * *

Mr. Cody: This is as plain a plea of justification as can be filed, and that is that they published this article and they state that the article is true, and—

* * * * * * *

The Court: Mr. Cody, I think this is a plea of justification. If it is not, I will let somebody else correct it, but that is all I can see.

Mr. Smith: Our basic problem is, we think there is a difference between a plea of truth and a plea of justification, and they say it is one and the same.

The Court: I think it is one and the same.

Mr. Smith: Well, that is it; that is it.

The Court: All right, sir. I stand to be corrected.

Mr. Schroder: Well, don't let the record indicate that we have agreed.

[fol. 124] The Court: No; I am not.

* * * * * * *

IN UNITED STATES DISTRICT COURT

PRE-TRIAL CONFERENCE—July 8, 1963

Mr. Cody: There is no limitation on Cross-examination.

Mr. Schroder: I think there is a Code section on that.

The Court: That is the reason I was bringing it up. I am in doubt.

Mr. Schroder: 38-202; "The general character of the parties, and especially their conduct in other transactions, are irrelevant matters, unless the nature of the case involves

such character—" that is not the one I was talking about. 1804, I believe it is.

The Court: Code Section 13-1804? That's right.

Mr. Schroder: That is the one. I don't see where I have gotten it written down.

The Court: "Where witness called by defendant testifies to his good character from general reputation, it is allow-
[fol. 125] able, on cross-examination, for witness to testify to his having heard of specific instances of conduct tending to disprove witness' estimate of defendant's character."

Likewise, you could—

Mr. Cody: That is 1804 you are reading from?

Mr. Schroder: That is 1804?

The Court: Yes, sir; and that is the case—the case is 70 Georgia Appeals 431. "Where witness called by defendant testifies to his good character from general reputation, it is allowable, on cross-examination, for witness to testify to his having heard of specific instances of conduct tending to disprove the witness' estimate of defendant's character." So, likewise, I am assuming—say you put up his bad character, if such. Could Mr. Cody—likewise, would Mr. Schroder be—would it be admissible for Mr. Schroder to question him about acts of good character? I am just guessing.

Mr. Schroder: I would think it would go both ways. Had you known so and so, or have you heard so and so.

Mr. Cody: Oh, yes; you get into hearsay which is inadmissible.

Mr. Schroder: That is what the section says.

[fol. 126] Mr. Cody: Yes; both ways. And by the same token I have that same right of cross-examination when we get into that field if he puts up evidence of good character.

The Court: That is another point that has been bothering me.

Mr. Schroder: We come back to an unfortunate play of words in these decisions, because what we are talking about in a libel suit—

The Court: Is good character.

Mr. Schroder: No; is not the damage to a man's character

but damage to his reputation, and that is entirely different from his character. A character is what he is; and reputation is what other people think he is.

The Court: Well, say reputation. Couldn't you question him in regard, didn't he do so and so? Did you know he contributed so much to the Boys' Club?

Mr. Schroder: Had you known that, would that affect your estimate as to his reputation?

The Court: That's right.

[fol. 127] Mr. Schroder: I think it works both ways, although I admit I am not—I don't have any—

The Court: I have read some of these Georgia cases on that.

Mr. Cody: I think Cox against Strickland in 101 Georgia answers pretty well that problem.

Mr. Schroder: Yes; that is a leading case; no question about it.

The Court: What does it say? I have read Cox vs. Strickland, but not on that.

Mr. Cody: Plaintiff, under the general rule, has the right on cross-examination of going into special facts to ascertain the nature and extent of the knowledge of the witness. Where a plaintiff's character is in issue, he has a right to sustain it by proof of his general character if he can.

The Court: Yes, sir.

Mr. Cody: Now, that covers both sides of it.

The Court: All right. Suppose he puts Coach Butts on the stand. You would not be permitted to ask him any questions in regard to specific acts, would you?

[fol. 128] Mr. Cody: Oh, yes.

Mr. Schroder: I doubt that.

Mr. Cody: You are getting into another field now.

The Court: No, sir.

Mr. Schroder: No, sir; that is the same field.

The Court: That is the same field.

Mr. Cody: On the question of reputation and character, yes; I will answer it as to character; yes.

Mr. Joiner: Your Honor, isn't that Code Section now

confined by the very words of it to cross-examination of witnesses who testify as to the character of other witnesses for the purpose of impeaching the witnesses, and not—

The Court: Here is the first sentence in that Code Section. "A witness may be impeached by evidence as to his general bad character." I assume that Coach Butts will go on the stand.

[fol. 129] Mr. Schroder: (Nods head in affirmative.)

The Court: Can the defendant attempt to impeach Coach Butts by evidence of immoral acts or something?

Mr. Cody: On the subject of impeachment, you are getting into a different field. We were not talking about impeachment of a witness when you first raised this point. You were talking about cross-examination of a witness who testified as to good character.

The Court: Yes, sir.

Mr. Cody: That is a different point.

The Court: Well, both of those points I want to raise.

Mr. Lockerman: Let's do talk about the ones you raised, whether or not he can go into specific acts if Butts is put on the stand.

The Court: Or if any witness is put on the stand.

Mr. Cody: I don't think a party can testify as to his own good reputation.

[fol. 130] Mr. Lockerman: I don't either.

The Court: I didn't mean that. Suppose we have got character witnesses on both sides.

Mr. Cody: Yes, sir.

The Court: You would be permitted to question the witnesses about the good character in regard to certain specific acts: had you known this, would your opinion still be the same?

Mr. Cody: Right, right. He has the same privilege with respect to any witness that I put on the stand that would testify to the bad character.

Mr. Lockerman: You could only ask him the general questions as to reputation, the witnesses you put on.

The Court: Have you known Coach Butts? How long

have you known him? Do you know his general character and reputation in the community in which he lives? Is it good or bad? Right there he stops.

Mr. Schroder: No, no. Would you believe him under oath?

The Court: We are talking about reputation now.

[fol. 131] Mr. Schroder: That is what I am talking about.

Mr. Cody: No; you are behind.

Mr. Lockerman: And he stops right there.

The Court: That's right.

Mr. Lockerman: Now, if they testified that his reputation was bad—

The Court: Bad.

Mr. Lockerman: —he can't go into any specific acts.

The Court: That's right.

Mr. Lockerman: Now, we, on the other hand, in cross-examining him, assuming that we did cross-examine him, we could ask him if he knew about good deeds.

The Court: Philanthropic deeds, and enumerate them.

[fol. 132] Mr. Lockerman: That's right. After he testified to that, assuming that he would, whether he did or did not, whether it would make any difference in his opinion as to his reputation. Of course, Mr. Cody cannot go back into this.

The Court: That ends that.

Mr. Lockerman: That ends that.

The Court: That's right; that is his reputation.

Mr. Lockerman: That's right. Now, if, in the testimony of Butts when he is put on the stand and under cross-examination by Mr. Cody—

The Court: Yes, sir.

Mr. Lockerman: —can Mr. Cody ask Mr. Butts anything about specific acts of conduct on his part?

The Court: Now, that is getting into—

Mr. Schroder: Getting into the guts of it.

[fol. 133] The Court: That is getting into the character of it, as to his veracity as a witness.

Mr. Strubing: That's right.

Mr. Cody: That's right. You are getting away from character now.

Mr. Schroder: After all, the Georgia Code Section says that libel is an injury not to character but a libel is an injury to reputation. There is a difference.

The Court: Yes, sir; but what I am driving at, suppose the defendant, in an effort to impeach his character as to his veracity and so forth, can he be asked specific acts?

Mr. Schroder: No more so than we could other witnesses, I don't think. Somewhere there ought to be some authority.

Mr. Cody: There is plenty of it.

Mr. Schroder: Let's have it.

Mr. Cody: 130 Federal, page 24.

Mr. Schroder: 130 what?

[fol. 134] Mr. Cody: Best against Kessler.

Mr. Schroder: Give me the citation, please.

Mr. Cody: 130 Federal, page 24.

Mr. Schroder: Seventh Circuit?

Mr. Cody: Case in the Seventh Circuit.

Mr. Smith: Is that a Federal 2d or—

The Court: Federal?

Mr. Cody: Just Federal.

Mr. Lockerman: Not Federal 2d? Its so long ago.

Mr. Cody: That is a situation where the plaintiff testified in his own behalf, goes to his credibility as a witness. Bear in mind, we haven't come to the question of impeachment yet, because on the subject of impeachment we have got three Code Sections in Georgia, three specific Code [fol. 135] Sections that deal with impeachment. Only some phases of this case come within the provision of those sections.

The Court: All right; what is it? 38-1804. What is the other?

Mr. Schroder: 1804—38-1804.

Mr. Cody: Let me give you the Code Sections on impeachment. 38-1801, 1802, and 1803.

The Court: 38-1801, 1802, and 1803.

Mr. Cody: Let me read you this last section. "A witness

may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case. Before contradictory statements may be proved against him, (unless they are written statements made under oath in connection with some judicial proceedings) the time, place, person, and circumstances attending the former statement shall be called to his mind with as much certainty as possible; and if in writing, the same shall be shown to him, or read in his hearing, if in existence; and to lay this foundation, he may be recalled at any time. When thus impeached, he may be sustained by proof of general good character, the effect of the evidence to be determined by the jury." Now, I want to state to the court here and now in unmistakable terms that a lot of statements have been made in this case in which I expect to apply the rule of impeachment, and when you do and prove previous contradictory statements or any of the [fol. 136] other impeaching qualities referred to in any one of the three Code Sections, specific acts or conduct, when they become applicable, I intend to take advantage of it.

The Court: I am basing this on some of the questions that have been propounded. Say you ask Coach Butts, had he made a statement or did he make a statement that he did call Coach Bryant and make these certain statements which are set out in the allegations—

Mr. Cody: Yes, sir.

The Court: —and he denies them. Then how could any of those specific acts about which you propounded questions in regard to a night at the Phoenix Motel in Lexington, Kentucky, how could that be admissible?

Mr. Cody: Because the jury may not believe him under oath, because he has testified both ways under oath. It's got a lot to do with the case; as a matter of fact, it gets almost down to the guts of the case.

Mr. Schroder: Say that again, please.

The Court: You want me to ask the question again?

[fol. 137] Mr. Schroder: I didn't get the answer except

he says it gets down to the guts of the case. What is the reasoning of it?

Mr. Cody: Suppose he testifies under oath—well, he has already testified by deposition, which is under oath. Suppose there are a lot of misstatements in there.

The Court: Of course, you can question him about his deposition.

Mr. Cody: Well, that is impeachment.

Mr. Smith: What is relevant about his being in the Phoenix Motel?

Mr. Schroder: Well, that is—I can't—I can't answer that at the moment.

The Court: I am not questioning the—what I am saying is—

Mr. Cody: I am not going to disclose my entire case.

The Court: How could that—have you got any authority for how that could be?

Mr. Cody: I have got the authority of this Code Section, when a man testifies under oath.

[fol. 138] The Court: Oh, yes; I know you can show that he made various, certain contradictory statements before, but how can you show that he might have had a woman at the Phoenix Motel, or whatever it might have been, how would that be relevant?

Mr. Cody: It could become relevant in several different points of view. If he won't tell the truth about it, the jury has got a right to say he might not tell the truth about anything. That is how you impeach a witness. In the final analysis—

The Court: Yes, sir; I can see where your proposition is whether he admitted this telephone call or not, or if he did, but I can't see the relevancy of specific acts with some woman, if that is what eventually comes up, and I am basing it on some of your depositions.

Mr. Joiner: Is Your Honor referring to specific acts, are you limiting it now to impeachment?

Mr. Schroder: No.

Mr. Joiner: Or just generally.

Mr. Schroder: The man is on the stand—

[fol. 139] The Court: The man is on the stand, Coach Butts is on the stand; you are questioning him, and you ask him about statements he made to Griffith or whoever it was that he admitted doing this, or if he did, I am assuming that would be relevant, but what about the fact if he spent a night with a woman before the Georgia-Alabama game, how could that be relevant? I am basing it on the nature of the depositions that were propounded.

Mr. Cody: Well, a witness may be impeached by proving the contrary to the facts to which he has already testified.

Mr. Lockerman: Relevant facts only.

The Court: It has to be relevant facts to the issue.

Mr. Cody: A witness may be impeached by disproving the facts testified to by him.

The Court: That's right. I go with you there. That is in regard to the statement, say, he made to Coach Griffith or some other coach; I don't know. How about whether he spent the night in the Tutwiler Hotel with some woman before the Georgia-Alabama Game?

Mr. Cody: I say it is relevant to his competency as a witness, his credibility as a witness.

[fol. 140] Mr. Schroder: Under what Code Section?

Mr. Cody: 1803.

Mr. Joiner: Your Honor, you have got numerous statements by this plaintiff to the effect that he has never done anything disloyal.

The Court: Well, I don't know that that is disloyal. I am not willing to take judicial—

Mr. Joiner: Well, Your Honor, I think—

Mr. Cody: I can give you an actual illustration of being disloyal to his team, carrying a woman around with him, with the team, of this character. You don't think that that is material?

The Court: I don't think it is a proper thing to do, but I don't know—I can't see—

. . . . . .

Mr. Joiner: Your Honor, on this point of disloyalty, I realize at first it might not seem to be relevant, but it is very definitely relevant to this case for this reason. He had made a number of statements that he has done no act of [fol. 141] disloyalty. Also he has made the statement that he has faithfully carried out the trust that has been given to him in the guidance and education of young men. Now, it is certainly relevant to show in this case, if in fact there is evidence to this effect, that he has betrayed that trust by carrying a woman with him on football trips, that he has been disloyal to the University of Georgia by charging them, without any justification or authorization whatsoever, for the expenses of her room and transportation, and other things. There is no question but that under numerous cases that evidence of similar acts which go to prove motive or intent are admissible. It doesn't make any difference whether they are acts of specific misconduct or acts that are not of specific misconduct. It is a question of motive and intent. They are always admissible.

The Court: How are you going to prove that—say you prove he took a woman to the Georgia-Alabama game and stayed at the Tutwiler Hotel. How is that any evidence of disloyalty?

Mr. Joiner: We can show further it was charged to the University of Georgia, it would be fraud and deceit to the University.

The Court: Well, now, we can't get into trying that case.

Mr. Joiner: It would be an evidence of his intent, and it would refute his statement that he has never done anything disloyal.

[fol. 142] Mr. Schroder: He has got to prove fraud and deceit. As soon as that was brought to his attention, he paid it. That is not fraud. You have got to prove fraud if you are going to do that.

Mr. Joiner: Assuming we are able to prove the fraud.

Mr. Schroder: I still don't think it would be relevant. I might illegally charge parking to the Government or taxi-

fare, when technically I wasn't supposed to do it, and sometimes you have to make refunds. I know, because—

Mr. Joiner: If it is a question of technical error, it should be excluded. If it is shown it was done knowingly and willfully, it is certainly evidence of motive and intent on the part of the plaintiff. He testified his motive and intent on giving this information was nothing disloyal to the University of Georgia, and his motive and intent in this telephone conversation, which presumably they will admit that the telephone conversation took place and that football was discussed, but the motive and intent of the plaintiff in talking to Coach Bryant was not one of the disloyalty.

The Court: We are getting off carrying a woman to the Tutwiler Hotel before the Georgia-Alabama game. I don't know what the rules and regulations are. I imagine they are pretty liberal. I know they are in—what do you call it—proselyting. I know they are there.

Mr. Bondurant: The spelling is a little different, but I think it is close.

[fol. 143] Mr. Strubing: Excuse me.

The Court: I am sorry; I thought it would be well—

Mr. Schroder: You going back to the office?

Mr. Strubing: Going back to Philadelphia.

Mr. Schroder: Good to have seen you.

The Court: I can't—unless you can show me something, I don't believe that those particular acts—I didn't know that was your theory. I thought your theory on that was showing his reputation, and I didn't think that was admissible.

Mr. Cody: There is no question but what it would be admissible on reputation on cross-examination, not on direct examination, of a witness.

Mr. Lockerman: Not cross-examination of Butts.

The Court: If they put his character in evidence, if they do put his character in evidence, then, on what we just discussed, I would be inclined to think they could ask the witness about specific acts.

[fol. 144]

TRANSCRIPT OF PRE-TRIAL CONFERENCE—July 29, 1963

The Court: I will be frank with you, as far as I can see I think it is a plea of justification, but I think it is libelous per se.

Mr. Cody: It might be, but it depends on—it depends on what the evidence is, Judge. If you base it on the man's business at the time the publication took place, I don't know—

The Court: I don't believe, Mr. Cody, I will admit that that case—I don't believe that fact that a man is temporarily out of work, if he has been engaged in something for thirty-five years and he is temporarily out of hazardous occupation for six weeks or two months, I don't think—

Mr. Schroder: I didn't mean it that way. You are absolutely right about that part of it, because you were taking it in its literal sense. What I mean to say was that if the evidence shows he has given up this business, and that is what I claim it will show, and would change the question of whether or not—

Mr. Schroder: There is evidence—

Mr. Cody: —it is libelous per se. A man could spend fifty years in a particular business and get out of it completely, and then somebody comes along and libels him, just because it had something—it had some connection with the business which he was in for fifty years, it doesn't make it [fol. 145] libelous per se. The evidence might be such in this case that it will be libelous per se.

* * * * * * *

The Court: Well, I think in fairness to both parties I should—I stand to be corrected by the Court above, but I think it is a plea of justification, and I will rule to that effect.

Mr. Cody: Now, Judge, the next—

The Court: If you want me to rule in the courtroom—we have got the records here; you make your points now where you can certainly protect your record.

Mr. Schroder: If it will be understood that I do here and now and will hereafter except to that, there is no need for me to make it any other time.

The Court: It will be in the record; that will be the ruling of the Court.

Mr. Cody: I think the next most important point in this case is whether or not, for any reason, specific acts of misconduct of this Plaintiff are admissible in evidence. I am not talking about the question of character witnesses now [fol. 146] and cross-examination. I think everybody pretty well agrees what the law is on that.

Cox Against Strickland is about as clear as it can be, but there are a half dozen reasons why acts of—specific acts of misconduct are admissible in this case, and I am going to ask Mr. Joiner to speak briefly on that point, because, as I view this case, it is one of the most important points in the case. We have been—we are charged in this complaint with having libeled this Plaintiff ten million dollars, and we have got a right under those circumstances and under the—under the circumstances as alleged in this complaint to bring in certain acts. Some of it are in mitigation of damages, doesn't go directly to the question of liability, and I will let Mr. Joiner, he has a brief before him.

I think we ought to give Mr. Schroder a copy.

Mr. Schroder: That would be nice.

The Court: The only case I can find on that question is the case someone cited here before, and I believe it was Kessler versus Best or Best versus Kessler, an old Federal Court decision back in 133 Federal—not Federal 2d—and I shepardized that case, and I can't find anything on the point; I mean, I can't find where it has been cited.

Mr. Cody: Is that the mitigation of damages case?

The Court: Yes, sir.

Mr. Cody: Here is my point—

[fol. 147] The Court: Have we got the 133 up here?

Mr. Joiner: 130, I believe it is, Your Honor.

Mr. Cody: Let me make one point.

The Court: Let me talk to Professor Kirby at Vanderbilt Law School; maybe he can help us.

The Court: This is Professor James Kirby of Vanderbilt Law School.

Mr. Schroder: Kirby?

The Court: Yes. He is the counselor for the Southeastern Conference, and they have requested that he sit in on the hearing, just have a seat inside the bar.

Mr. Schroder: I have no objection.

Mr. Cody: No.

The Court: There is no objection, Professor.

[fol. 148] The Court: He said he is a special counsel for the Southeastern Conference.

Mr. Schroder: Maybe he can help us; maybe he will bring some law with him.

The Court: I don't know whether these professors of law will do you any good.

Mr. Joiner: Judge, Homer said he didn't think you have the 130 Federal here. I have a copy.

The Court: I have read the case. In that case—

Mr. Joiner: I think you will find, Judge, from reading the cases that we have cited in our memorandum in the light of this petition that there are a good many other reasons other than mitigation of damages.

The Court: What would be other reasons?

Mr. Cody: Well, let me give you—pick up the article. We have got four or five different reasons set forth. Give him the substance of it.

Mr. Joiner: I think the first thing to consider is just briefly the Federal rule on evidence. There are four rules [fol. 149] that have been established by recent Fifth Circuit—by recent decisions of the Fifth Circuit. The first is the question of admissibility as procedural and not substantive. Federal Courts are not required to follow State Law.

Second is that in determining the admissibility of evidence the Federal Court is not bound by State Court rule that is less liberal than another rule which the Federal Court might be free to adopt.

The next rule is the Federal Rule concerning evidence, is one of admissibility and not exclusion. Of course, that comes from a plain reading of Rule 43.

And then the last one, and this is very important, although Rule 43(a) specifies three categories of evidence which shall be admitted in Federal Courts, it does not prohibit the receipt of probative evidence outside these three categories. Those cases are Monarch Insurance Company versus Stack(?), Dallas County versus Commercial Union, and Hamby versus Commercial Union, and Hamby versus Woolworth, all recent Fifth Circuit cases.

The first purpose for which this evidence would be admissible would be in cross-examination of the Plaintiff's character witnesses, if the Plaintiff does offer any character witnesses, and we filed a previous brief on that point. I think we pretty well covered it.

The Court: You covered that.

Mr. Joiner: The second is that specific acts of misconduct may be inquired into on the cross-examination of the Plaintiff in order to test the credibility of the Plaintiff, and, in this connection, the case of Best versus Kessler, which Your Honor has referred to, is pertinent.

Now, in that case—

[fol. 150] The Court: I thought that case was on mitigation of damages.

Mr. Joiner: Yes, sir, Your Honor, it is; but it is also on this point in this sense. The evidence, you will recall in Best versus Kessler was admitted and the objection was not excluding the evidence but was on a charge which limited the evidence to this one ground, the credibility of the plaintiff. There was no objection to the admissibility of the evidence for that purpose, and so the case does not rule specifically on that, but the dictum in the case clearly states that it was admissible for the purpose of credibility of the witness, and also, this, of course, indicates a decision by a District Judge to the effect that it is admissible for the purpose of credibility.

The Seventh Circuit went on to say it is admissible in litigation of damages, and the District Court erred in limiting it to strictly credibility and not allowing it on the mitigation of damages.

Also a recent Fifth Circuit case has some pertinence, the case of Delpit versus Nocuba Shipping Company. Although it is not a libel case, it does deal with some of the same types of misconduct that we are concerned with in this case. This was a case in which—

Mr. Lockerman: What is the citation?

Mr. Joiner: It is in the brief; 302 Fed. 2d. 835.

A longshoreman brought an action to recover for injuries received as a result of the alleged unseaworthiness of a vessel. He was allowed, that is the counsel for the [fol. 151] Defendant, in cross-examining the Plaintiff, to go into his former common law wife and children by his former common law wife, and the Court said, although this testimony may perhaps have had a slightly prejudicial influence, it was properly admitted in an attempt to show an inconsistency with a prior declaration by the Plaintiff and thereby impeach his credibility.

Of course, we would have to have some inconsistency, but it is our position there will be some inconsistencies, and this testimony would be relevant to show the inconsistencies in prior statements of the Plaintiff. That covers that category.

The next one gets into mitigation of damages. We have three separate cases of mitigation of damages. The first is different from evidence for the purpose of showing that the Defendant has a bad reputation. That is Best versus Kessler. The first phase is that such evidence is admissible for the purpose of showing that the Plaintiff is not a man of delicate sensitivity.

In this case the Plaintiff has brought his action, and I am quoting now from the complaint, for the injury to his peace, happiness and feelings. Now, that is a different element of his damages from injury to his reputation. Having tendered this issue, then any evidence which tends to show that the man is not delicately sensitive is pertinent because it shows that he was not injured to the same extent, his feelings were not injured to the same extent as would be true with a more sensitive man. In this case citing the case of Wamsley versus Kopczynski—

Mr. Schroder: Who?

[fol. 152] Mr. Joiner: Wamsley versus Kopczynski, it looks like, and they are talking about this same type of evidence.

"This evidence was potent; it means much viewed in the light of other evidence in the case. Such a character as it was intended to portray is not usually delicately sensitive, nor easily injured to any great extent. The jury might have taken that view, and have determined that mere nominal damages would in their judgment suffice."

The Court: That is on the question of mitigation of damages?

Mr. Joiner: Yes, sir; but it is a different phase of mitigation than just the reputation itself.

Mr. Schroder: Is that a Federal case?

Mr. Joiner: No; that is a New York case.

Then, there was a Georgia case in 31 Ga. 309, which does not specifically hold such evidence to be admitted for the purpose of showing the man is of not delicate sensitivity, but I believe that the inference is present in that case.

And there is the case, a Southwestern case, and I believe that is a Texas case; also another New York case, and finally a case from the District Court in Massachusetts dealing with an analogous situation, not specific acts of misconduct but acts of prior abuse, giving and taking abuse. That was Mayor Curley, and Mayor Curley had given on any number of occasions, given the type of abuse he was [fol. 153] suing for, and this also received that type of abuse. The Court held that evidence of this was pertinent as bearing on the sensitivity of the feelings of the Plaintiff in the case.

We come down now to the second phase of the mitigation and that is that this evidence is admissible for the purpose of showing the Plaintiff is not a man of integrity. In paragraph 12 of his complaint the Plaintiff states that his action is for a trespass upon his integrity. Integrity is defined by Webster's New International Dictionary as "Moral soundness; honesty; freedom from corrupting influence or

practice; especially strictness in the fulfillment of contracts, the discharge of agencies, trusts and the like."

In the brief we cite a number of cases that adopt the same definition of integrity.

Now, while the case of Best versus Kessler talks expressly about mitigation of reputation, I think that it has a very definite bearing on this issue of integrity, because the charge there was made with reference to the man's business. He was charged with dishonesty and clandestine activity in connection with the business transactions, and I believe that reading the holding of the case, although the word "Integrity" is not mentioned specifically, would indicate that that case stands for the proposition that such evidence would also be admissible on the question of integrity.

We come now to the question of mitigation in general, showing the man's character or reputation was injured or was not good before the libel. The same thing that you would argue where there was proper damage to an automobile prior to the collision, out of which the case arises. The simple logical argument is that it had previously been damaged, and so the subsequent damage is not as great as it would have been if the—there had been no previous damage.

[fol. 154] The Court: All that is true, but doesn't the Georgia code limit you on character as to the form of questions?

Mr. Lockerman: Yes, sir.

Mr. Joiner: I think the Georgia code is limited strictly to character evidence for the purpose of impeaching a witness. I don't think it goes any further than that, but even if it does, under the Federal rule we are entitled to the more liberal rule, and the fact that Georgia Courts exclude it would not cause it to be excluded in this case.

The Court: When the Circuit Court of Appeals passes on this case—I am sure they will one way or the other—isn't the question going to be on the substantive law of Georgia?

Mr. Joiner: No, sir. Cite Monarch Insurance Company versus Spach, Dallas County versus Commercial Union Assurance Company—well, those two cases are recent Fifth Circuit cases.

The question of admissibility of evidence is procedural and not substantive, and, therefore, Federal Courts are not, under the case of Erie versus Tompkins, bound to follow State law.

Mr. Schroder: That is a different situation; that is a different thing. This is brought under a statute of Georgia, under a libel law of Georgia. Ordinarily, I think, whether it gets to be a question of whether something is hearsay or not hearsay, the rule you just read I think applies.

[fol. 155] The Court: The only difference in this case and the State Court is that the—it is in the Federal Court by virtue of diversity of citizenship. As I understand the law it is incumbent on me to try a case as it would be tried in the State Court, as far as admissibility of evidence and so forth.

Mr. Joiner: These three cases are directly contrary to that view.

Mr. Cody: That is not correct, Judge. You have got a false impression there.

The Court: Well, some statements that I have read are it is correct. Maybe you have got some recent ones.

Mr. Joiner: These are all leading cases and are cited by Moore as being leading cases on this point.

Mr. Cody: On the definition of libel; yes; that would be true but not as to the admissibility of evidence.

The Court: On recovery of damages?

Mr. Cody: Well, I think on damages it would be substantive law.

The Court: Of Georgia?

[fol. 156] Mr. Cody: Yes.

Mr. Joiner: But this Monarch Insurance Company case, I believe, is the first case which was passed on the points, and it specifically holds that admissibility of evidence is

procedural and not substantive, and Federal Courts and diversity cases—

Mr. Cody: Is that that decision rendered by Judge Wisdom?

Mr. Joiner: Yes; I believe it is.

Mr. Cody: They go into a lot of detail in that case, Judge, about the admissibility of evidence. And also the other rule that in determining the admissibility of evidence in Federal Courts, the Federal Court is not bound by a State Court rule that is less liberal than another rule which the Federal Court would be free to adopt.

And then, of course, under 43(a) the plain reading of the rule itself, and its applicability in diversity cases, is that the Federal rule concerning evidence is one of admissibility and not exclusion, and, therefore, where there is a conflict between a State and Federal rule, the Plaintiff is, under Rule 43, entitled to the benefit of the more favorable rule, and these cases that I cite indicate "More favorable" means "More liberal".

The Court: You mean Federal cases?

[fol. 157] Mr. Joiner: Yes, sir. These Fifth Circuit cases are entitled to be admitted. So, no Georgia case has any pertinency in determining this issue, unless the Georgia case bears on admissibility or unless the Georgia case excludes it and the Federal rule also excludes it. But the very fact it is excluded by a Georgia case would not exclude it in a diversity action in the Federal Court.

The Court: Your contention is that the rules here should be the same as it is in the Kessler versus Best or Best versus Kessler?

Mr. Cody: Right.

The Court: In other words, in that case, as I recall it, had some question about the business dealings and somebody suing somebody for libel; they raised the question in that, hadn't he had an affair with a Spanish actress or something like that?

Mr. Cody: That's right.

Mr. Joiner: Yes, sir.

Mr. Cody: Here is—go ahead.

Mr. Joiner: Another category, which, as far as I am able to determine, is unquestioned in any jurisdiction, on the [fol. 158] laws—on the facts, we have got a difference probably on facts. In Paragraph 11(b) Plaintiff complains the article charges him with being a corrupt person, which it does not. Now, from reading the complaint, the only—

The Court: You admit it is libelous per se?

Mr. Joiner: No, sir; no, sir. I admit it charges him with being a corrupt person—

The Court: All right, sir.

Mr. Joiner: —but on that point, from the case of Morris versus Evans in 22 Ga. App., if mere fraud, dishonesty, immorality or vice be imputed, no action lies without proof of special damages, so to charge a person with being corrupt is not in and of itself libelous per se.

The Court: If it affects him in his business it is, though.

Mr. Joiner: Yes, sir; if it is made with reference to his trade or profession.

The Court: This is made—I mean, the whole article is based on his profession as a coach.

[fol. 159] Mr. Joiner: But this Supreme Court case seems to be right in point on that, unless he is engaged in the profession at the time of the libel.

The Court: I mean, in fairness to you, I am not inclined to—I mean, the interim period of six weeks, the fact that he had resigned from the athletic directorship and so forth, I believe as far as the petition alleges—

Mr. Joiner: I agree with you so far as the petition alleges.

The Court: I think it is libelous per se.

Mr. Joiner: I mean, the petition doesn't show he is not any longer in the profession, but this case does not make any distinction as to time.

The Court: We can check the record in the case to see what the distinction was, but it is apparent from the case that we have the same situation, that a person was out of business for a little while and went right back into business.

The Court: That is the case in the 50 Ga.

Mr. Joiner: No, sir. This case right here, 143 Ga.
[fol. 160] Mr. Cody: 143, Ga., isn't it?
Mr. Joiner: Yes, sir.
Mr. Cody: The Weatherholt case.
Mr. Joiner: The 5th Headnote covers this point. The Plaintiff in this case was in business and went out of business, and was libeled, and went apparently right back into business, and they said since he was not in business at the time of the libel he could not recover, in the absence of proof of special damages. If he can show special damages—
Mr. Joiner: He is not pleading special damages.
The Court: He is not pleading special damages.
Mr. Joiner: No, sir; but if he can show special damages, that is another question.

. . . . . .

The Court: I say, if it could be shown that he did that, and that he used it and he did not repay it under such circumstances, he had to be called on for it, wouldn't your circumstances go into, even at that, would it be admissible.
[fol. 161] Mr. Schroder: No, sir. I am saying it would not be admissible. It could not possibly be admissible. We are suing, as you read there a moment ago, for the damage they have done to him in his chosen profession.
The Court: Yes, sir.
Mr. Schroder: And that is what the suit is based on.
The Court: Well, if the suit is brought on the basis as a football coach, Georgia Courts have even held that you can be defamatory to a farmer, that that is included—I know it covers football.
Mr. Joiner: But that the issue—
The Court: That is what he has got in his petition, his reputation as a successful coach and leader of the coaching profession.
Mr. Cody: You are assuming, of course, that the evidence will fully justify all of that. Your judgment now as to what you intend to do would be tempered with what the evidence is on that?

The Court: Yes, sir.

[fol. 162] Mr. Cody: You could—because on this particular point it does turn on what the evidence eventually will be.

The Court: What I am saying is this. The fact that he was out of it six weeks and during this six-week interval this article appeared, between February 28 and March 23, I don't think it should affect him as far as—

Mr. Cody: Okay.

The Court: 143 Ga., nevertheless, to the contra—

Mr. Joiner: There might be a difference if the evidence shows he definitely left the athletic field forever prior to the publication of this article.

The Court: Well, I assume you are not going to show that from what the petition says.

Mr. Schroder: That's right.

Mr. Joiner: I think it would be a question.

The Court: If he says, "I got out of the coaching profession, I never intended to go back, and as far as I am con-

[fol. 163] cerned I was through with the coaching profession," I think your 143 Ga. might apply, but unless it was—

Mr. Cody: We will hold that part of it in abeyance; I understand Your Honor's ruling.

* * * * * * * *

Mr. Schroder: The petition in this case was deliberately drawn so as to confine it to his reputation in his profession. Misconduct, which you are speaking of, hasn't anything to do with the profession.

Mr. Cody: Look at your punitive damages situation.

Mr. Schroder: Sir?

Mr. Cody: Look at your punitive damage situation.

Mr. Schroder: Like I say, if there is any misunderstanding as to what that means, then we will redraw that part of it. We were tracking the punitive damages statute, or trying to; maybe we did embellish it a little bit.

* * * * * * * *

[fol. 164] HUGH FLEMMING, called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. You are Mr. Hugh Fleming?
A. Yes, sir.
Q. I believe you have been sworn as a witness, have you not, Mr. Fleming?
A. I have.
Q. Where do you reside, Mr. Fleming?
A. At the present time I am residing in Athens.
Q. What is your business connection?
A. I am with Southern Bell Telephone Company.
Q. Were you at one time manager of the Athens branch?
A. I was district manager in Athens until July 1st.
Q. And then you moved to Atlanta?
A. Yes, sir.
Q. Although you still maintain your residence at Athens?
A. Yes, sir.
Q. Mr. Fleming, in response to a subpoena, did you bring with you a toll ticket—
A. Yes, sir.
Q. —of your company with reference to a telephone call, long-distance telephone call that took place on September the 13th?
A. Yes, sir.
Q. Will you let me see that, sir?
A. Those are copies attached.

[fol. 165] Mr. Cody: I'd like to have this identified as Defendant's Exhibit No. 13.

The Clerk: 13; yes, sir. Defendant's Exhibit No. 13 is a toll ticket.

Mr. Cody: Yes.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 13.)

By Mr. Cody:

Q. Mr. Fleming, is this long-distance toll ticket on an IBM card?

A. Yes, sir.

Q. Which would be difficult for a layman to interpret; is that a correct statement?

A. Some parts of it; yes, sir.

Q. Would you be kind enough to tell us what that card discloses?

A. Well, this card indicates that on September the 13th a call was placed to Tuscaloosa, Alabama, to telephone number 752-7441. It shows that it was placed by Wallace Butts and indicates that it was placed to Paul B-r-i-n-c-e.

Q. Is that spelling legible, the latter part of it? Are you having difficulty trying to find out who that is?

A. It appears very legible to me; yes, sir.

Q. Now, Mr. Fleming—

[fol. 166] Mr. Schroder: I didn't hear the answer.

The Court: He said it appeared legible to him. But how was the name spelled?

The Witness: B-r-i-n-c-e.

By Mr. Cody:

Q. Mr. Fleming, what time did that call—what time does that toll ticket show the call was made?

A. This indicates this call was made at 10:29 a.m.

Q. On September 13?

A. Yes, sir.

Q. 1962?

A. My ticket has no indication of the year on it, sir. It was billed during October of '62, but the ticket itself here does not carry the year.

Q. You don't maintain your records back of one year, do you?

A. We maintain them for a period of twelve months normally; yes, sir.

Q. Mr. Fleming, on the back of that card or toll ticket, did you have some symbols indicating the time consumed in that particular call?

A. Yes, sir; we have.

Q. Could you interpret for the jury what that first circular symbol means?

A. Well, the first circular symbol on the back indicates the time that the call was established.

Q. What about the second one?

A. The second one indicates the number of minutes that the call lasted.

[fol. 167] Q. And the third one?

A. Indicates the number of seconds that the call lasted.

Q. How many minutes and how many seconds was it?

A. This shows fifteen minutes and two seconds.

Q. Does it—does the toll ticket show who the call was charged to?

A. The call—the ticket indicates the call was billed on a credit card number—card number 543-4531A-K35.

Q. Have you checked your records to see whose credit card that was?

A. No, sir; I haven't.

Q. Do you know that telephone was billed, what telephone number was billed for that call?

A. Yes, sir. This was billed to telephone number 543-4351.

Q. In Athens?

A. Yes, sir.

Q. Do you know whose number that is?

A. Yes, sir.

Q. Whose is it?

A. That is the telephone at the University, the athletic association.

The Court: Did you say the University of Georgia Athletic Association or the University of Georgia?

The Witness: It is the University of Georgia Athletic Association.

[fol. 168] By Mr. Cody:

Q. Mr. Fleming, did you bring with you a toll ticket indicating a call from Tuscaloosa to Athens?

A. Yes, sir.

Q. Will you let me see that a minute?

A. Yes, sir.

Mr. Cody: Will you identify these as No. 14?

The Clerk: Yes, sir. Defendant's Exhibit No. 14 for identification is a toll ticket.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 14.)

By Mr. Cody:

Q. Will you interpret for the jury what this toll ticket discloses? Give us the date of it first.

A. The date shown on this one is September the 16th.

Q. 1962?

A. Again I do not have the year indicated on this ticket.

Q. Yes, sir.

The Court: When was it billed?

The Witness: Frankly, sir, I don't know. This one was billed in Alabama.

[fol. 169] Mr. Cody: That is supplied by another deposition, Your Honor.

The Witness: And I did not have it.

The Court: I was ahead of you.

Mr. Cody: That information is in another deposition.

The Witness: This was a call that was placed to Athens, Georgia, from Tuscaloosa. The telephone Li 6-0262. It shows that it was a personal call to Coach Wallace Butts.

By Mr. Cody:

Q. Does it disclose the length of time that the call consumed?

A. Yes, sir. This one shows the conversation lasted sixty-seven minutes.

Q. And that is September 16?

A. September 16th; yes, sir.

Q. Let me have that just a minute. Would you mind leaving these exhibits with the Court until the completion of this case?

A. Mr. Cody, that would sure be up to the Court. These records should remain in our custody. We have copies of them if they would suffice; I'd like to leave those.

[fol. 170] The Court: Is there any objection to supplant these with photostatic copies?

Mr. Schroder: Of course not.

Mr. Cody: Very well. I have one or two more questions to ask Mr. Fleming.

The Court: All right, sir. They will be substituted with photostatic copies. They will have to remain here and the photostats can be made here.

Mr. Cody: We have photostats. He's made them for us.

The Court: All right, sir, go ahead.

By Mr. Cody:

Q. Mr. Fleming, are these records kept in the ordinary course of business of your company? Is it customary to maintain records of this type in the course of your business?

A. Yes, sir; it is.

Q. Is this the type permanent record that is made in connection with a long-distance call by your company?

A. Yes, sir.

[fol. 171] Mr. Cody: Did I give you a copy of the other one? You have both?

Mr. Schroder: I have two.

Mr. Lockerman: Do you remember what those exhibit numbers are?

Mr. Cody: I think we'd better mark the copies, ma'am. This would be 14.

By Mr. Cody:

Q. On this last exhibit No. 14, Mr. Fleming, what was the—what was the time of that call? When was it established, the connection?

A. This call was just about eight minutes of nine in the evening.

Q. Are the symbols on the back of these toll cards stamped by machine?

A. Yes, sir. They are stamped by a Calculagraph machine.

Q. That is an automatic machine that records the timing?

A. Right.

Q. Did I give you back the first ticket?

Now, let's see if we have the exhibits. This will be No. 13.

The Clerk: There are two of these.

[fol. 172] Mr. Cody: I believe that's all.

Cross examination.

By Mr. Schroder:

Q. Mr. Fleming, of course you have no idea what the content of either one of these telephone conversations consisted of, do you?

A. No, sir; I have not.

Q. Is there any way to find out by the telephone company or from the telephone company?

A. No, sir.

Q. Did you bring with you, Mr. Fleming, records of the following long-distance calls which were charged to the credit card of Coach Wallace Butts? I will read this list off, and you let me know if you brought them in, please, sir. October the 30th to Coach Ray Graves of the University of Florida; December the 14th, Coach 'Rabbit' Smith, Palatka; December 21, John Rauch, who was at

Tulane at the time, or Oakland, I forget; then January the 8th, John Rauch again; January 17th, Bernie Shiverley, coach at Kentucky; January 24, Ray Greaves, coach at the University of Florida, Gainesville; February the 6th—I mean, February the 8th, Coach Shiverley at Lexington, Kentucky; March the 28th, Bowden Wyatt, coach at the University of Tennessee; April 9, Joel Eaves, coach at Auburn University; April 25, Bob Ford, coach at the University of Kentucky; April the 26th, Paul Bryant, coach at Alabama; May 8, Bob Woodruff, coach at the University of Tennessee in Knoxville; May 16, Coach Walker of South Carolina; May 16, Dean Griffin, Denver, Colorado; May 16, Paul Bryant, Tuscaloosa; May 17, Paul Bryant, Tusca- [fol. 173] loosa; June—I mean, August 20, Paul Bryant from Tuscaloosa; August 24, Corbett, head coach at LSU; September the 9th, John White of the New York Giants; September the 13th—you have that one? September the 14th, Coach Michaelson at Pittsburgh in Pittsburgh, Pennsylvania? I said that one has been produced, September 13 Bryant at Tuscaloosa. I believe that is the one he has. September the 14th, Coach Michaelson at Pittsburgh University in Pittsburgh, Pennsylvania; September the 18th, Clyde Earhart in South Carolina; September the 22nd, R. Guepe, coach at Vanderbilt University; September the 26th, Guepe, coach at Vanderbilt University; September 22nd, Guepe at Vanderbilt University; September the 22nd, five days after the Georgia-Alabama game, Bryant in Alabama; October the 4th, Paul Bryant, Tuscaloosa, Alabama; October 4th, Weems Baskin, South Carolina University at Columbia; October 8, Bryant's secretary, Tuscaloosa, Alabama; October the 10th, Coach Howard at Clemson College; October the 15th, Ford, coach at the University of Kentucky; October the 16th, Ray Graves, coach at the University of Florida; October 18, Peterson [illegible]ch at Florida State University; October the 19th, Jordan, coach at Auburn; October the 23rd, Bryant, Tuscaloosa, Alabama; October 25, Paul Bryant, Tuscaloosa, Alabama; October

25, Ray Graves, University of Florida; October 25, Mr. Ford, coach at the University of Kentucky in Lexington; October the 30th, Coach Walker, Charlotte, North Carolina; October 30th, Coach Howard at Clemson College, South Carolina; October 30, Paul Bryant, Tuscaloosa, Alabama; October 31, Howard at Clemson College; November the 8th, Ray Graves, coach at the University of Florida; November the 14th, Paul Bryant, Tuscaloosa, Alabama; No-
[fol. 174] vember 14, Coach Walker, Charlotte, North Carolina coach; November the 15th, Paul Bryant, Tuscaloosa, Alabama; November 19th, Howard at Clemson College, South Carolina; November the 21st, Marvin Bass at the University of South Carolina, November 29, Coach Bobby Dodd, Georgia Tech; November 30, Shiverley, Lexington—I will stop there. Did you bring any of those other records?

A. No, sir; I don't have those.

Q. All right, sir. Your answer is you don't have them with you?

A. I don't have them with me is right.

The Court: Did you subpoena them?

Mr. Schroder: No, sir, I didn't subpoena them.

The Court: All right.

Mr. Schroder: I thought they were going to have all the ones here that were there. I didn't understand what was in the subpoena, what was called for by the subpoena. I have never seen the subpoena.

The Court: Do you want it?

Mr. Schroder: Yes, sir. But—he is going to have three or four days; would it be too much trouble if I give you this list?

[fol. 175] The Witness: I can get them; yes, sir.

Mr. Schroder: I'd appreciate it very much.

The Court: All right, sir.

Mr. Schroder: You are here in Atlanta, are you, Mr. Fleming?

The Witness: I am in Atlanta. These are in Athens, but I can get them.

Mr. Schroder: Would it be all right if I have this reproduced and given to Mr. Fleming to get me these calls that I have listed here?

The Court: Yes, sir.

Mr. Schroder: Thank you, sir. I will do that within tomorrow, Your Honor. That's all.

The Court: Anything further from Mr. Fleming?

Mr. Cody: Nothing further.

[fol. 176] The Court: All right, sir, you may step down. Can Mr. Fleming be excused except insofar as obtaining those other records is concerned?

Mr. Schroder: Yes, Your Honor.

Mr. Lockerman: Wait just a second.

Mr. Schroder: I believe I subpoenaed you to bring some records from another area here.

The Court: That's all right—

Mr. Schroder: Can he give those to me so he would not have to come back tomorrow to identify them?

The Court: I thought you wanted him to come back with these other records.

Mr. Schroder: Not as a witness necessarily, but to deliver them.

The Court: He would have to identify the other records, would he not?

Mr. Schroder: Bring them all back tomorrow; is that right?

[fol. 177] The Court: All right, sir.

Mr. Cody: Let me ask Mr. Fleming one more question.

The Court: All right, sir.

Redirect examination.

By Mr. Cody:

Q. On these toll tickets, Mr. Fleming, the Calculagraph record that appears on the back as to the time element, is that when the parties start talking or when the first effort is made to try to get the call through?

A. The time of the call you are speaking of now?
Q. Yes.
A. It is stamped at the time you start talking.

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GEORGE BURNETT called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. You have been sworn, Mr. Burnett?
A. Yes.
Q. Your name is Mr. George Burnett?
A. Yes, sir.
Q. Where do you live, Mr. Burnett?
[fol. 178] A. 3550 Durden Drive in Atlanta.
Q. How long have you lived in Atlanta?
A. Since December, 1957.
Q. Mr. Burnett, I show you what has been identified in this case as the Defendant's Exhibit No. 12. Will you take a look at that, please, sir, and hold it just a minute. Is that a record which you personally made?
A. Yes, sir.
Q. That your handwriting?
A. Yes, sir.
Q. How many pages are there to that Exhibit?
A. Seven.
Q. Do you remember the circumstances under which that Exhibit was made?
A. Yes, sir.
Q. Will you explain that to the jury?
A. On September the 13th I was in an office on Eleventh Street, in Atlanta of the Institute of Oral Hygiene. I was attempting to call to business associates by contacting them through an office of the Communications International

which is located in the Rhodes-Haverty Building, and as I kept dialing the number, it was busy. Knowing that they had two lines coming into the office, I continued every twenty or thirty seconds to try to get in, and after four or five attempts there was some funny noises and electronic sounds, and the next thing I heard was an operator's voice talking to someone. It was evident it was into an open circuit, because you could hear the background noises. And I heard the operator say, "Coach Bryant is out on the field but is on his way to the phone," and asked a party she identified as Coach Butts, "Do you want to hold or do you [fol. 179] want him to return the call?" Coach Butts said, "I will hold." And within a matter of a minute a man's voice came on the line; the operator identified him. He said, "Hello, Wally." And Coach Butts said, "Hello, 'Bear.'" And they started talking.

I realized very quickly at the outset that this was a football talk, and Coach Butts began giving information to Coach Bryant about plays that Georgia was using, both offensively and defensively.

Mr. Schroder: Just a moment, Your Honor.

The Court: Just a minute.

Mr. Cody: Don't go into that.

The Court: I don't believe there is any objection made, but I will—

Mr. Schroder: Yes, sir; there is an objection made, and I would like for the jury, to be instructed.

The Court: What was the objection?

Mr. Schroder: That there were certain plays given over the phone, I think before he can identify a play, there is a conclusion on his part.

[fol. 180] Mr. Cody: Yes, sir.

The Court: Yes, sir; I think it is a conclusion, and I sustain the objection to it.

Mr. Cody: I stopped him.

The Court: All right.

By Mr. Cody:

Q. How long had they talked before you started taking notes, Mr. Burnett?

A. Probably a minute or a minute and a half.

Q. What was the first statement, if any, that you recall that was made by either party?

A. To each other?

Q. Yes.

A. They said, "Hello."

Q. What's that?

A. They said, "Hello" to each other.

Q. What next?

A. Coach Bryant's first statement was, "Do you have anything for me?" And Coach Butts said, "Yes." And then they started talking.

Q. Look at your notes there, Mr. Burnett; you can refresh your recollection. Will you explain to the jury, if this does refresh your recollection, as to what was said, explain to the jury what you heard, and in doing so you can refer to your notes.

A. Well, as I have said before, I don't remember the exact words of those notes now. I do know the first page [fol. 181] I wrote 'Bear' Bryant's name down and Wally Butts' name down, and the words that Reismueller was the greatest in history. I do know—I do recall that Coach Butts told Coach Bryant that Reismueller was the best they ever had at Georgia in the history of Georgia.

Q. Do you know—did you know at the time whether or not Georgia had any such player as that?

A. No, sir; I did not.

Q. Do you know whether or not the spelling on your memorandum there is correct?

A. I wrote it as it sounded; I don't know.

Q. You wrote it R-e-i-s—

A. Yes, sir.

Q. —m-u-e-l-l-e-r?

A. Yes, sir.

Q. Turn to the next page, Mr. Burnett. Does the reference to Rakestraw mean anything to you or bring back any recollection of what was said about him?

A. He—this was written not actually as it was said. He said, "Rakestraw goes to the right, evidently is a man in motion." I don't remember; I wrote: "Rakestraw to the right."

Q. I am not asking you to explain the method of play; I am just trying to get you to explain to the jury if you remember what was said about Rakestraw.

A. That this one play that Rakestraw went to the right and on an optional left pass, if they can block the man on the corner, if not, they would keep running. If they can block the man on the corner, they keep running; if not, they pass.

Q. You were writing what you heard?

A. I was writing as I could get the words.

[fol. 182] Q. Do you understand what that means?

A. Yes, sir.

Q. Take the next note that you have.

A. Well, he said—I wrote down "Well-disciplined ball club—added two coaches." It was said at this time that this was of no thanks to Johnny Griffith, "we have added two coaches." What that meant I had no way of knowing.

Q. What did it mean to you?

A. It didn't mean anything to me actually. I asked one of my associates—

The Court: That would be hearsay.

Mr. Cody: Don't go into that.

The Witness: Sorry.

By Mr. Cody:

Q. Did you know that Georgia had added two coaches?

A. No, sir.

Q. I believe you said that the order in which these pages are clipped together now are not necessarily the order in which you made these notes?

A. That is right.

Q. You don't remember the words in which they were taken?

A. No; I don't. I know that this was the first page because I wrote the two parties' name on it, and I wrote the last page because this was the end of the conversation [fol. 183] where I wrote the time and the date and the last note.

Q. Turn over to the next page, the first item.

A. You want me to read it?

Q. Is that an abbreviation of what was said? If it is, tell the jury what the entire conversation was on this point or any other one in the notes.

A. I don't remember all of the incidental conversation pertaining—as I said, I was writing these as they were talking, therefore I missed some of the conversation as I was writing. It said, "On side guard pulls on sweep."

Q. Do you remember anything else that was said about that?

A. No, sir.

Q. What about the next item?

A. "Don't overshift." Whether this was in relation to the fact of the on side guard pulling, I don't recall; it came immediately after this.

Q. What about the next item?

A. He made the remark that Woodward—

The Court: Who made the remark?

The Witness: I'm sorry; Coach Butts told Coach Bryant that Woodward commits himself fast on pass defense, and he was the safety man; I wrote this one, "Woodward commits fast—safety man."

By Mr. Cody:

Q. There is a dash after the word "fast"?

A. Yes, sir.

Q. Anything else said about that?

[fol. 184] A. No, sir.

Q. What about the next item?

A. As I wrote it, it says, "Weak defense, anybody except Blackburn." He made the remark the pass defense was weak, pass to anybody and anybody's direction except Blackburn, that he was strong on pass defense.

Q. Did you know that Georgia had a player by the name of Blackburn?

A. No, sir; I do not.

Q. Do you know anything about the Georgia team?

A. No, sir; I had not followed the Georgia team by names, and I didn't know the people involved.

Q. Have you ever seen Georgia play?

A. No, sir.

Q. Do you know very much about football yourself?

A. Yes, sir.

Q. You play in high school?

A. Yes, sir.

Q. Play anywhere else?

A. Freshman year of college, just on the squad my freshman year, and the war broke out.

Q. Did you later learn there was a Blackburn on the Georgia team?

A. No, sir; I don't remember that I ever learned there was anybody named Blackburn on the team. It still doesn't mean anything to me.

Q. Turn over to the next page, Mr. Burnett. What is the next item?

A. It says, "Baer slot right, split right end out."

Q. Does that mean anything to you?

A. I have since been told—

[fol. 185] Mr. Schroder: Your Honor—

Mr. Cody: Don't go into what anybody told you.

The Court: I sustain the objection.

By Mr. Cody:

Q. Did you know at the time what that meant?

A. "Slot right" was a term I wasn't acquainted with.

Q. I notice you spelled "Bear" B-a-e-r?

A. I wrote it as I heard it.
Q. Is that what it sounded like to you?
A. That is what it sounded like to me.
Q. Did you find out later who that referred to?
A. Yes, sir; I was told—

Mr. Schroder: Same objection.
The Court: Sustain the objection. Don't lead him into hearsay, Mr. Cody.

By Mr. Cody:

Q. Let's go to the next item, Mr. Burnett.
A. The next one says "Long count, left half in motion." I wrote this, and I cannot recollect what it was in reference to, whether—I did not draw a line after the first one I read. Evidently this was all part of sequence as I was writing.
Q. Were you trying to write down everything you heard?
[fol. 186] A. I was trying to catch as much of it as I could; yes, sir.
Q. What about that next item?
A. It says, "Best since Trippi," and I wrote the word "Porterfield." He made the remark that Porterfield was the best back since Trippi.
Q. Did you know Porterfield?
A. No, sir; I knew—
Q. Did you know Georgia had a player by that name?
A. No, sir; I did not.
Q. This is still all in your handwriting.
A. Yes, sir; it is.
Q. I say "handwriting"; it is your—
A. It is a combination of printing and writing. I print more than I write.
Q. Turn over to the next page, Mr. Burnett. What is the next item?
A. It says "Baer on a hook on goal line."
Q. Did that mean anything to you?

A. No, sir; it didn't. I wrote it; he said that when they are on the goal line that "Baer" goes on a hook, and I didn't have the slightest idea what he meant on a hook.

Q. What about that next item?

A. "Slot to right ends normal (3 yards)." He made the remark this was the formation they used until they get down to the—close to the goal line, that they play a slot to the right and the ends are normal, split out about three yards.

Q. Did that mean anything to you?

A. Well, the "ends out 3 yards" did. As I say, the "slot" is—was new to me; I didn't understand what a "slot" was.

Q. What about the next item?

[fol. 187] A. It says, "Right halfback on fly," and then it says, "Left halfback, quarterback gives to left half, left guard pulling blocks on corner."

Q. What does all that mean, if you know?

A. Well, to me it meant a—

Mr. Lockerman: Your Honor, I don't think that—

Mr. Cody: I withdraw that.

The Court: I don't think, Mr. Cody, what his interpretation was is admissible. I sustain the objection.

Mr. Cody: I withdraw that.

By Mr. Cody:

Q. Was anything else said on that subject other than what you wrote down on that item?

A. I don't recall specifically.

Q. Now, turn over to the next page; take the first item there.

A. "Slot or wide slot till goal line."

Q. Do you remember anything else that was said on that subject?

A. This is where he said they used this slot or a wide slot until they get down to the goal line.

Q. What about that next item?

A. "Can't quick kick." I wrote there just the three words. This was in response to a question. Coach Bryant asked

him, "How about quick kicks?" And he said, "Don't be worried about—" Coach Butts said, "Don't be worried about [fol. 188] quick kicks; they haven't got anybody that can."

Q. Let's get to this next item.

A. You want me to read it?

Q. Read that.

A. "Slot right, right half on fly, screen to him."

Q. Do you remember anything that was said amplifying that statement?

A. He just made that statement.

Q. What about that next item?

A. I wrote down "29-0 series" and "Baer catches everything they throw." He put this in the form of a statement to Coach Bryant, "You remember my old 29-0 series." They used that. And "Baer catches everything they throw," he referred to it as their 29-0.

Q. Turn over; anything else you heard with reference to that particular item?

A. No, sir.

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Direct examination (Continued).

By Mr. Cody:

Q. Mr. Burnett, I will return these notes to you. Do you recall where we were when we adjourned?

The Court: The Court Reporter can read it back.

Mr. Cody: I remember now.

By Mr. Cody:

Q. Turn over to the next page, Mr. Burnett. Read that item.

[fol. 189] A. It says, "Slot right, left end out 15 yards."

Q. Do you remember anything that was said about that other than what you wrote down?

A. No, sir; I don't remember anything else other than that.

Q. What about the next item?

A. The next item says, "Drop end off, contain with tackle." This was a Georgia defensive play. I wrote down "Georgia (defense)" and drew an arrow from "Georgia," that Georgia drops the end off and contain with a tackle.

Q. What about the next item?

A. You want me to read it as it is?

Q. Read it.

A. It says "Give Wally ring Sunday," and then I wrote "641 Athletic Office, 10:04 a.m., September 13, 1962, Jackson 5-3520."

Q. Let's back up there just a minute. Who was going to ring who Sunday?

A. Coach Bryant asked Coach Butts, "Will you be home, 'Wally?'" And he said, "Yes, I will." And he said, "I will give you a ring Sunday." And he said, "All right." And they hung up.

Q. What is this "641"?

A. The operator stayed—I stayed on the line. I didn't hang the phone up immediately, and the operator came on and asked me—asked—

Mr. Lockerman: Your Honor, please, I don't think that he ought to go into any conversation.

Mr. Cody: Don't go into that.

[fol. 190] The Court: Yes, sir; that would be hearsay; I sustain the objection.

The Witness: I asked the operator to what number—

Mr. Lockerman: I don't think he ought to go into that conversation, Your Honor.

Mr. Cody: Don't go into that.

The Court: I sustain the objection.

By Mr. Cody:

Q. This "10:40 a.m.," that is the time?

A. This was the time the call was completed. I looked at my watch and wrote down the time.

Q. And the date?

A. And the date.

Q. September 13, 1962?

A. Yes, sir.

Q. What is that number at the bottom?

A. This is the number I was trying to get, Jackson 5-3536 was the Communications International Office.

Q. Before we get off of this particular call, Mr. Burnett, who was it doing most of the talking?

A. Coach Butts was.

Q. Do you recall whether or not this information was or this discussion was in question-and-answer form?

A. Some of it was; yes, sir.

[fol. 191] Q. And some not?

A. Some not.

Q. Was it given with some hesitation or reluctance?

Mr. Lockerman: Your Honor, please, I don't think he ought to try to interpret—

The Court: Yes, sir; that is a conclusion; I sustain the objection.

By Mr. Cody:

Q. What did you do with the notes, Mr. Burnett? What happened after this conversation took place as far as you were concerned?

A. I hung up the phone and sat there for about twenty or thirty seconds, and then I picked the phone up and called the Communications International Office, and it was answered by Mr. Milton Flack.

Q. What did he say?

A. And I asked Milton—

The Court: That is hearsay; I will let him state he called Milton Flack, but anything he might have asked him would be hearsay.

By Mr. Cody:

Q. What number did you call him at?

A. JAckson 5-3536.

Q. That is the one you had been trying to get?

A. Yes, sir.

Q. How long had you known Wallace Butts?

A. I didn't really know Coach Butts. I had met him on [fol. 192] one occasion. I had never actually—I didn't actually know him.

Q. Did he have some connection with the same company for which you work?

A. He was on the Board of Directors.

Q. When did you have occasion to contact Bob Edwards, if you did?

A. This wasn't until January the 4th that I talked to him about this.

Q. Who is Bob Edwards?

A. He is a division manager for our company.

Q. Where does he live?

A. In St. Simons, Georgia.

Q. Did he go to the University of Georgia, if you know?

A. Yes; he did.

Q. Was he a football player?

A. He played football; I don't know how much football he played with Georgia.

Q. Did you contact him about these notes? Did you tell him about this conversation, and, if so, tell me—tell the jury what you told Bob Edwards.

A. On the 4th of January we had just had a two-day—

Mr. Schroder: If it please the Court, I think any conversation between this witness and some third party would be pure hearsay.

The Court: Yes, sir; I sustain the objection.

[fol. 193] By Mr. Cody:

Q. Did you later meet with Bob Edwards and Coach Griffith?

A. Yes, sir.

Q. Where?

A. At the Biltmore Hotel.

Q. When was that?

A. On Thursday, January the 7th, during the week of the Coaches' conference.

Q. Did you—what did you do with the notes on that day?

A. Gave them to Coach Griffith.

Q. Have you had the notes since that day?

A. No, sir; not until right now.

Q. You know what he did with them?

A. Turned them over to the Athletic Association.

Q. You have had—you have had no control, no possession over those notes since?

A. No, sir.

Q. Up until today?

A. That's right.

Q. Mr. Burnett, did you—did you later have a meeting with the University officials?

A. Yes, sir.

Q. About what date was that?

A. It was about—not quite—about a week after I met with Johnny Griffith. This was one, as I remember right, Thursday, the following week, about the twenty-fourth of January.

Q. I am not trying to pin you down to the exact date, but I want to get it as close as I can. About the 24th of January?

A. About the 24th of January.

Q. That would be 1963?

A. Yes, sir; this year.

[fol. 194] Q. Do you know if they had the notes with them at that meeting?

A. Yes; they did. I was shown the notes at that time.

Q. Who was at that meeting?

A. It was in the office of Mr. Cook Barwick, and present with Mr. Barwick was Dr. Aderhold and—who is president of the University, and a Mr. Bolton, who is on the athletic committee and Bob Edwards and myself.

Q. Mr. Barwick, the gentleman sitting at this table?

A. Yes, sir.

Q. Was that the only meeting you had with the University officials?

A. No, sir; I had subsequent meetings after this, two or three, if I remember right.

Q. Do you know the purpose of that meeting?

A. Do I know—

Q. Yes.

A. —or did I know?

Q. Did you know the purpose of it?

Mr. Schroder: If the Court please, if he knew the purpose it would have to be told to him by some other party.

The Court: Yes, sir; I think that would be a conclusion also; I sustain the objection.

By Mr. Cody:

Q. When was the second meeting that you had with the University officials?

[fol. 195] A. About a week later in Mr. Barwick's office, approximately a week or ten days later.

Q. At that first meeting did you or not sign an affidavit?

A. No; I did not on the first meeting.

Q. Did you give them permission to take a lie detector test?

A. Yes.

Q. When were you first asked to take—to make an affidavit?

A. At that same meeting.

Q. And that was given subsequent to the meeting?

A. Yes, sir.

Q. Where were you—did you sign it in Mr. Barwick's office?

A. Yes, sir.

Q. What did you say the date of the second meeting was with the University officials?

A. About a week or ten days, as I remember, after the first time I met them.

Q. Were you requested at that meeting—
A. Yes, sir.
Q. —to take a lie detector test?
A. I was.

Mr. Lockerman: Your Honor, please, I don't think he ought to go into the conversation at that meeting.

The Court: You can ask him whether he made an affidavit at that meeting; I sustain the objection.

[fol. 196] By Mr. Cody:

Q. Did you take a lie detector test at that meeting?
A. Not at that meeting.
Q. When was that?
A. I took the lie detector test during the first week of February about 4:30 in the afternoon.
Q. Who gave you that test?
A. A Mr. McManus or McMain.
Q. Did you go to him in response to the request that had been made of you?
A. Yes, sir.

Mr. Schroder: That request would be hearsay.
The Court: Yes, sir; I sustain the objection.

By Mr. Cody:

Q. After the affidavit was signed, Mr. Burnett, who did you give it to?
A. Mr. Barwick.
Q. Getting back to this telephone conversation for the moment of September the 13th, did you hear any mention made of any ticket sales?
A. No, sir.
Q. What about rule changes?
A. No, sir.

Mr. Schroder: What was that last question?
Mr. Cody: Rule changes.
[fol. 197] Mr. Schroder: Oh.

By Mr. Cody:

Q. Did you hear any mention made of any financial investments?

A. No, sir.

Q. Did you hear any mention made of a concern called Commercial Enterprises Incorporated?

A. No, sir.

Mr. Cody: I believe that is all for the moment, Your Honor.

The Court: All right, sir. Go ahead, Mr. Schroder.

Mr. Schroder: Please the Court, would it be out of order for me to inquire as to your idea of adjournment—for adjournment today?

The Court: If it is all right with counsel and the jury, I think we can run to 4:30 unless you—I am here, I can conduct it as long as you wish. We'll go ahead; we will run for twenty-five or thirty more minutes.

Mr. Schroder: Whenever it will be, I will not finish today.

The Court: I presume Mr. Cody will have some further questions on direct. If we don't finish with him, that is all right. We will go ahead right now.

[fol. 198] Cross examination.

By Mr. Schroder:

Q. Mr. Burnett, on September 13, 1962, it is your testimony, is it not, that you were in the office there on Eleventh Street of a concern known as Oral Hygiene, Inc.?

A. No, sir; Institute of Oral Hygiene.

Q. Institute of Oral Hygiene, Inc.?

A. No, sir; it was not a corporation.

Q. Who was your—was anyone associated with you in that business?

A. John Carmichael and Mr. Milton Flack.

Q. To what extent was John Carmichael an associate of yours in that business?

A. He was—he had an exclusive sales contract with a company called Sterilray, Incorporated, to merchandise a toothbrush sterilizer, an electronic toothbrush sterilizer.

Q. Was he the one that put the money into the business there known as the Institute of Oral Hygiene?

A. Yes; he was. Yes; he was.

Q. At the time he made his investment in that business, is it or not true that you and he were employees or associated with Foundation Life?

A. Yes.

Q. And the two of you took a leave of absence from Foundation Life to go into this sales agency handling the sterile toothbrush?

A. Yes.

Q. How long had you all been in that business after you left Foundation Life before September 13, 1962?

A. About two months at the most.

[fol. 199] Q. You have referred to the fact that a man named Milton Flack also had an interest in the Oral Hygiene—Institute of Oral Hygiene?

A. His interest was because he was the president of the Sterilray Corporation with which we had a sales contract.

Q. Did he have an office there in the space on Eleventh Street?

A. No; he did not.

Q. Did anyone—any gentleman or any man have any office space there other than you and John Carmichael?

A. No.

Q. On September 13, 1962, you say that you arrived at that office in the morning?

A. Yes.

Q. Was Mr. Carmichael at the office that morning?

A. No; he was not.

Q. Was he customarily at that office before you arrived?

A. Most of the time, yes.

Q. And when you got there on this particular morning you missed him and you tried to reach him over the telephone?

A. Yes; I did.

Q. You tried him at his home?

A. I recall I did.

Q. And you then tried him at this downtown International Communications office space in the building across the street here?

A. Yes.

Q. You did not know at that time that Milton Flack was in that office?

[fol. 200] A. No; I did not.

Q. Did you know where Milton Flack was at that time?

A. No; I did not.

Q. It was your idea, though, that you were calling only John Carmichael?

A. Either John or Milton. We check in with each other at that phone.

Q. You had no intention, then, of calling Carmichael only when you called the office of Communications International?

A. I was trying to locate either Mr. Carmichael or Mr. Flack to find out where Mr. Carmichael was.

Q. It was Mr. Carmichael you were looking for?

A. This was my intent; yes, sir.

Q. And your testimony is that in your efforts to dial the Communications International office you became connected in with this telephone conversation that you have talked about on direct examination.

A. Yes.

Q. Was there anyone in the office there at the time that you dialed the number?

A. No, sir; there wasn't.

Q. John Carmichael came in later?

A. Yes; he did.

Q. Did you ever get in touch with John Carmichael over any telephone, or did he just come into the office there where you were?

A. He just came into the office.

Q. After the telephone conversation was over and the parties had hung up, the parties hung up that you were listening to?

[fol. 201] A. Yes.

Q. And you said the line stayed open?

A. Yes.

Q. And you did have a conversation with the telephone operator?

A. Yes.

Q. You later, shortly after you hung up, I believe, the testimony is that you telephoned Communications International again?

A. Yes.

Q. Now, the notes that you were discussing with Mr. Cody that you say you took at the time this telephone conversation was being listened in on by you, you discussed the contents of those notes later with Mr. John Carmichael?

A. Yes; I did.

Q. And after your discussion of those notes and with what you had heard between the two parties on the phone with Carmichael, you then later on in the afternoon discussed those with Mr. Flack?

A. Yes, sir.

Q. You discussed them first with Carmichael alone?

A. Yes.

Q. And then later in the afternoon you ran into or Mr. Flack came by; is that correct?

A. He came by the office.

Q. And you at that time talked about them in the office of both Mr. Flack and Mr. Carmichael?

A. Yes, sir.

Q. All right, sir. After talking with Mr. Flack and Mr. Carmichael, the three of you decided to just forget the whole thing?

[fol. 202] A. This is right. It was Mr. Carmichael's advice, that we forget about it.

Q. Did Mr. Flack advise you also to just forget about the whole thing?

A. Yes; he agreed with Mr. Carmichael.

Q. All right, sir. And you did proceed to forget about the whole thing?

A. I tried to; yes.

Q. You took the notes, as you called them, to your home and hid them away?

A. I just put them in a box in a dresser drawer.

Q. And you did not, or did you, discuss anything about this with anybody from September the 13th until—with some other party until, I think you said, January the 4th?

A. I don't recall discussing it with anyone or mentioning it to anyone.

Q. Don't you think you would have recalled it if you did?

A. I think I would have.

Q. There is nothing magic about January the 4th; you are recalling you discussed it at that time?

A. What do you mean "magic"? I don't understand.

Q. There is nothing about January the 4th that would make you remember discussing it on that day—

A. That fact that we—

Q. —and yet not before that?

A. The fact that we had a meeting at the office, Mr. Schroder, and at the end of the meeting I was sitting in the office with Mr. Edwards, and we got into general conversation with each other, being close friends; I distinctly remember that day.

Q. All right, sir.

[fol. 203] A. I don't recall discussing this with anyone else in between.

Q. All right, sir. Now, you have indicated that in this conversation that you were listening to some reference being made to a telephone call that was to be placed by the two parties, or shall we say by one of the parties to the other party on a following Sunday—

A. Yes, sir.

Q. —September the 16th?

A. Right.

Q. That is all that you remember? Certainly your notes don't show anything about what was to be said at that conversation, do they?

A. No. Mr. Schroder, several times in the conversation Coach Bryant would ask questions, and Coach Butts said "I don't know." And a couple of times Coach Bryant said "Can you find out?" And he said, "I will try." And they ended up the conversation with—by him saying, "Will you be home Sunday, Wally?" And he said, "Yes." He said, "I will give you a call then."

Q. Do you remember having made the statement that you did not hear Coach Bryant tell Coach Butts that Coach Bryant wanted to wait until after Coach Butts had seen the last week scrimmage before renewing the conversation next Sunday?

A. That wasn't mentioned.

The Court: What are you reading from, Mr. Schroder?

Mr. Schroder: A statement that was made.

[fol. 204] The Court: In the deposition?

Mr. Schroder: It was a statement that was made by—a statement made by the witness before Gene Cook. He said the statement was not made, so I don't have any problem. It would have been a previous contradictory statement if he said no, he didn't say it.

The Court: We don't want to get into Mr. Cook.

Mr. Schroder: Mr. Cook's report has nothing to do with this case; I understand that.

The Court: Go ahead.

Mr. Schroder: That report has nothing to do with this trial, even mentioning it. That is the reason I didn't identify it.

The Court: All right, sir.

By Mr. Schroder:

Q. It is your testimony today, Mr. Burnett, that there was nothing said in the telephone conversation to which you were listening that would even intimate that Coach

Butts was to be called by Coach Bryant after Coach Butts had had an opportunity to observe the last week of scrimmage?

[fol. 205] A. Well, all I know, Coach Bryant asked him would he be home on Sunday, and Coach Butts said he would, and he said, "Fine, I will give you a call then." And that is all I heard him say about the telephone call.

Q. Your answer to my question, then, would be there was no intimation of that?

A. Of a scrimmage, no.

Q. Thank you, sir. In the conversation that you say you overheard between Coach Butts and Coach Bryant, was there any mention made of gambling?

A. No.

Q. Was there any mention made of either party betting on the outcome of the game?

A. None at all.

Q. Was there any mention made about how many points one team might be favored over the other to win by?

A. No, sir.

Q. Was there any mention made about betting on odds?

A. No, sir.

Q. As a matter of fact, did either Coach Bryant or Coach Butts say anything in that conversation that you say you overheard to indicate that what they were discussing was to be done or not done in the Georgia-Alabama game coming up the following Saturday?

A. You will have to say that again; I don't understand what you are saying.

Q. In this conversation that you were listening in on, I want you to state to the jury and to the Court whether or not either Coach Butts or Coach Bryant, in relation to anything they might have been talking about, said that this [fol. 206] was to be done or used or that this was not to be done or not used in the forthcoming game between the University of Georgia and Alabama?

A. Well, Mr. Schroder, Coach Bryant asked the question at the onset, "Do you have anything for me, Wally?" and Coach Butts proceeded to give plays of the team—

Mr. Schroder: If the Court please—

A. (By the witness) —of the plays that would be used.

Mr. Schroder: Just a moment. The answer is not responsive, and it is a conclusion when he says he gave plays. Plays definitely are a conclusion by the witness as to what—

Mr. Cody: He hasn't finished.

The Court: Aren't you asking for an interpretation yourself, Mr. Schroder, which I have previously ruled out?

Mr. Cody: I think he ought to let him answer the question, Your Honor, and not stop him in the middle of an answer.

Mr. Schroder: I have no objection to him answering the question.

The Witness: Coach Butts proceeded to give the plays that I was—that I wrote down at the time, and at no time in the conversation did Coach Bryant ever mention any- [fol. 207] thing about Alabama plays, and the two teams were playing each other a week later.

By Mr. Schroder:

Q. The question, Mr. Burnett, is simply this—well, let me ask you this. Do you remember when your deposition was taken in the office of your lawyer, Mr. Howard?

A. Yes, sir.

Q. On June 3, 1963?

A. Yes, sir.

Q. Being present were myself and Mr. Lockerman and Mr. Smith for Coach Butts, and Mr. Bondurant for the Post?

A. Yes, sir.

Q. You remember at that time this question being asked you?

A. I don't remember the particular question.

Q. I haven't asked it.

The Court: He is going to relate the question to you.

By Mr. Schroder:

Q. Question: "Was there anything said by either party directly that what they were talking about was to be done or not done in the Alabama-Georgia game, or did you just conclude that?" Do you remember giving this answer—

A. I imagine I probably concluded it. They didn't—he didn't say they were going to do this Saturday in the Alabama game, no.

Q. In other words, what you have stated is a conclusion on your part?

[fol. 208] A. I imagine so; yes, sir.

Q. Was there anything at all in the conversation that you say you overheard which does not appear in your notes that you attach any significance to, or do your notes contain—when you say "plays"—

A. There were things—

Mr. Cody: Your Honor, that calls for a conclusion. He has testified to the facts as he knows them.

The Court: I believe Mr. Schroder asked him in his question, was there anything that he remembered that wasn't in his notes that he could testify to.

Mr. Schroder: That's right.

Mr. Cody: He has already testified the thing—

The Witness: There are a lot of things I can't testify because I can't remember them in detail.

The Court: Just a moment.

The Witness: I'm sorry.

The Court: I think he is entitled to go further and ask him is there anything further in his notes—not in his notes [fol. 209] to which he can testify. I think that is proper cross-examination.

Mr. Cody: Anything else besides what he has testified to; yes. I didn't direct my objection towards that.

The Court: What did you direct your objection to?

Mr. Cody: He said, was there anything in the notes—in the conversation that he heard other than what is in those notes. That is the substance of his question. He has al-

ready testified to things that have taken place in the conversation.

The Court: Yes, sir; but I don't know whether he has testified to everything.

Mr. Cody: He hasn't. Now, if he will ask him—if his question is directed towards what else—

The Court: I think that is what his question was. Ask your question again, Mr. Schroder.

By Mr. Schroder:

Q. Mr. Burnett, you say that you made certain notes of what you consider to be significant that was discussed in the telephone conversation that you were listening in to; is that correct?

[fol. 210] A. No, sir; not exactly. I was taking notes, Mr. Schroder, as they were talking. What was significant and what was insignificant at the time I had no way of knowing. I was writing the notes as fast as I could, but not taking shorthand, abbreviating when I could. There were things that were said as I was writing that I didn't catch all of it and didn't write down.

Q. Will you now, please, sir, state to the Court and jury what you remember being discussed between the two parties that is not included in your notes?

A. Other than what I have already testified to I can't remember.

Q. You have testified today to everything you remember?

A. That I can possibly remember.

Q. That you remember hearing in that telephone conversation?

A. That I can remember; yes, sir.

Q. When you were discussing this on January the 4th, over three months after September 13, 1962, did you at that time have in your possession the notes which you have in your hand there now?

A. No; I did not.

Q. You did not then when you were talking to Bob Edwards about them have the notes with you?

A. No.

Q. Have you ever shown those notes to Bob Edwards?

A. Yes; I did.

Q. When did you show them to Bob Edwards?

A. Just prior to going down to see Mr. Griffith, Coach Griffith.

[fol. 211] Q. You went down to see Coach Griffith at the request of Bob Edwards?

A. Yes.

Q. You went down to see Coach Griffith on January the 14th, 1963.

A. No, sir; it was—I think it was around the 14th. It was during the week of the Coaches' Conference, 17th or 18th; it was during that week; it was in the second week after I had talked to Bob.

Q. Well, if I stated the meeting took place on January 4, 1963, at the Biltmore, according to the information of others, you would not say I was wrong, would you?

A. No, sir; as I say, I don't remember the exact dates. They were during the week of the Coaches' Conference, the second to the last day.

Q. My point is really not as closely connected with the date of January 24th as it is with this. You did not show those notes which you have in your hands now, or any copy of those notes to Bob Edwards until within—until a matter of two weeks after you first talked to him about it on January the 4th?

A. This is right.

Q. In the Saturday Evening Post article—before I—let me withdraw that question, please. When Frank Graham, Jr. was in Atlanta, you met him, did you not?

A. Yes; I did.

Q. Did he hold himself out as being a representative of the Saturday Evening Post when you were talking with him?

A. I was introduced to him as a writer representing the Post; yes, sir.

[fol. 212] Q. Well, you knew when you were talking to him who you were talking to?

A. Yes, sir.

Q. When you were talking to Frank Graham, did you have your notes with you?

A. No; I did not.

Q. You were talking to him purely from recollection?

A. Memory; yes.

Q. Memory. Now, he was here in February, 1963?

A. Yes, sir.

Q. About February the 21st?

A. Right.

Q. Did you tell him you didn't have your notes?

A. Yes.

Q. Did you make it plain to him you were speaking solely from your memory?

A. Yes, sir.

Q. When he was here, was there an agreement reached as to what you were selling your story to the Post for?

A. No, sir; I wasn't selling my story to the Post.

Q. Well, did you receive money for it, sir?

A. Later I did.

Q. Was it understood when he left here that he was to pay money for it?

A. Not to me; no, sir.

Q. Did you receive money for it?

A. Later; yes, sir.

Q. How much money did you receive for it?

A. Five thousand dollars.

[fol. 213] Q. To your knowledge did you ever send to Frank Graham the notes that you are holding in your hand there before he wrote his article and the Saturday Evening Post published that article?

A. No; I did not.

Q. The article, therefore, was published without the benefit of your notes?

A. That is true, as far as I know.

Q. The first sentence in the article, relying upon your memory, I believe, is an error in that it starts out with even the wrong date for this alleged interception of the telephone conversation, does it not?

A. I don't know, Mr. Schroder; you will have to read the first sentence.

Q. The first sentence is: "On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up the telephone and dialed the number." That is not true?

A. No; it was Thursday, January the 13th.

Q. Yes, sir. You mean September?

A. I mean, September the 13th.

Q. At the—do you know whether Mr. Graham asked to look at any film of the game while he was here?

A. No; I don't.

Q. Did you, in a discussion did you hear any discussion between him and anyone else in your presence about his sports editor wanting him to check the film?

A. No, sir.

The Court: Aren't we getting into hearsay here? Now, I excluded hearsay over here. If you are going into the con- [fol. 214] versation with others I am going to let Mr. Cody get back into it.

Mr. Schroder: Your Honor, this is Mr. Graham of the Saturday Evening Post.

The Court: Yes, sir; I know it is Mr. Graham, but any conversation with Mr. Graham—

Mr. Schroder: Would be inadmissible against the Post? That is their man talking.

The Court: You can question Mr. Graham, but this is hearsay insofar as Mr. Burnett is concerned. Go ahead. There is no objection.

Mr. Schroder: Burnett is not a party. This is the Post's agent making the—

The Court: Go ahead; there is no objection.

Mr. Schroder: All right.

By Mr. Schroder:

Q. At the time that Mr. Graham was in Atlanta, on how many occasions did you see him?

A. Three times.

[fol. 215] Q. That would have been some—about February the 21st?

A. 22nd.

Q. 22nd? Have you seen Mr. Graham since February 21st or 22nd?

A. I saw him on February 23rd also.

Q. That was the same trip, though, that he was here?

A. Yes, sir.

Q. Have you seen Mr. Graham since he left Atlanta—

A. No, sir.

Q. —on that trip?

A. No.

Q. Have you talked with Mr. Graham at all since he was here on that trip?

A. No, sir; I have not.

Q. Did Mr. Graham submit to you or did anyone in connection with the Saturday Evening Post submit for you to correct this article that they published in March, March the 23rd?

Mr. Cody: Your Honor—

The Court: Yes, sir.

Mr. Cody: —he is getting into a subject that is not covered in direct examination, and I think the rule of this Court, the Rules of Civil Procedure provide that cross-examination is limited to the subject matter of direct examination.

[fol. 216] The Court: I am assuming he is going into this for the purpose of punitive damages.

Mr. Schroder: Yes, sir; it is.

The Court: And I think it is a question of whether or not there would be any negligence or disregard in checking the article. I will let him ask that question. Overrule the objection.

By Mr. Schroder:

Q. Did you hear the last question? Do you remember what it was?

A. Was I asked about the article prior to it being published? Is that it?

Q. Did anyone connected with the Saturday Evening Post send to you a copy of the article before it was finally published by the Saturday Evening Post?

A. No.

Q. Did anyone connected with the Post talk with you about the accuracy of the statements appearing in the article that were attributed to you?

A. No.

Q. The Post article has been read previously today. Now, I want to ask you about this which appears right in the first column which has been attributed to you, and I want to ask you if you told Mr. Frank Graham that this was so, and to put it in the article. This is quoting you; I am in the first column, quote: "Butts also said"—now, [fol. 217] this is relating what you told Graham you overheard on September the 13th, 1962. "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant that he would drop back to pass. If they were together it meant he was setting himself to spin and hand off." Did you tell Mr. Graham that you heard Coach Butts make that statement to Coach Bryant?

A. No, sir; I didn't.

Q. That is an inaccurate quotation, a misquotation on his part that he has attributed to you?

Mr. Cody: Your Honor, he is arguing this case now, and I want to—

The Court: I think you can ask him did you tell him that.

Mr. Cody: And I want to, again, insist on my objection that he is getting into a subject matter that was not covered by the direct examination, and I think the Rules provide he is limited.

The Court: I think he can cover that.

Mr. Cody: I understand Your Honor's ruling, but I want to make my objection.

[fol. 218] Mr. Schroder: To make the record perfectly clear on this, Your Honor, I intend to prove by this witness and others that the article is replete with misquotations and inaccuracies, and I am doing that for the sole purpose of showing how reckless the Saturday Evening Post was in publishing this article.

The Court: What he is objecting to is arguing the case, Mr. Schroder. I think you can ask him did he tell him that, and I think his answer was no. But your other question, I think, was properly objectionable. Go ahead, sir. I will permit the line of questioning. I think it is proper.

Mr. Schroder: As I understand, then, the record does show that Mr. Burnett did not say to Graham the quotation that Graham put in the article that related to the position of the quarterback's feet.

The Court: Rakestraw.

Mr. Schroder: Rakestraw.

The Court: All right. Was there any mention of Rakestraw in the conversation as you purportedly heard it?

The Witness: Nothing about the feet; no, sir. This I [fol. 219] didn't know anything about. I didn't say anything to Mr. Graham about Mr. Rakestraw's feet.

By Mr. Schroder:

Q. Now, in the article published on March 23, in the second column on page 81, the following appears: "Burnett knew—" I am quoting from the article— "Burnett knew, too, that Butts recently had been involved in a disastrous speculation in Florida orange groves." Did you say that to Mr. Graham?

A. Mr. Schroder, I don't recall using those words, "it was a disastrous speculation." I made the remark that I knew Coach Butts had been in an orange grove speculation in Florida that didn't prove too successful. Now, I don't know I used the word "disastrous" or not.

Q. The word you used was "had not been too successful"?

A. Right.

Q. But you did not tell him that it was "a disastrous speculation?"

A. I may have; I don't remember using the word "disastrous."

Q. On page 82, column 2, at the bottom, the following I will quote from the article. "Griffith—" meaning Johnny Griffith "—went to University officials, told them what he knew, and said that he would resign if Butts was permitted to remain in his job." Did you give that information to Frank Graham?

A. No. I told Mr. Graham that at the time Coach Griffith was given the information in the hotel and shown the notes, that he made the remark that "we knew something had happened," that somebody had given away their plays; "sold them out" is the words.

[fol. 220] Mr. Schroder: Your Honor, that is not responsive to the question.

The Witness: I am getting to it. You asked me about what Coach Griffith said, Mr. Schroder. Coach Griffith made the remark to Bob Edwards and I, said if something like this was allowed to happen in football he wanted out of it and he would resign, and that he was going to take this to the athletic officials, and if it wasn't straightened out he would resign.

By Mr. Schroder:

Q. Let me ask you if you remember this question being asked you when your deposition was taken and you were under oath at that time too, weren't you?

A. Yes; I was.

Q. All right. Question: "The same article in the Post states this on page 82: 'Griffith went to University officials, told them what he knew, and said that he would resign if Butts was permitted to remain in his job.' Do you know where the writer of the article, Frank Graham, got

that piece of information?" Your answer: "No, sir; I don't."

A. The answer is I don't; I don't know where he got it as far as going to the officials was concerned, Mr. Schroder.

Q. Is that your explanation of the answer you gave a moment ago?

A. Is what?

Q. Is what I just read, is that a true answer?

A. I said I don't know that Mr. Griffith told the officials this; no. He made the remark—

Q. The question—

A. He made the remark to Mr. Edwards and I if this [fol. 221] were allowed to continue in football he was going to get out of it.

Q. Was Mr. Graham present when he said that?

A. When Mr. Griffith said it?

Q. Was Mr. Graham, the author of the article, present?

A. I told him this.

Q. That Griffith was going to resign?

A. No, sir; Mr. Griffith had stated if this could happen in football he wouldn't have any part of it.

Q. Did you hear Mr.—did you tell Mr. Graham Mr. Griffith went to University officials and told them what he knew and said he would resign if Butts was permitted to stay on?

A. No, sir.

Q. That is the simple question I asked you to start with.

A. All right, sir.

Q. All right, sir. It was your information—do you know of anyone else supposed to have overheard this conversation?

A. Which conversation, the telephone or the one with Johnny Griffith?

Q. The telephone conversation?

A. No, sir; I don't.

Q. Did you say anything to the Saturday Evening Post about this being the story of a college—I mean, a fixed football game?

A. No, sir.

Q. Did you say anything to the Saturday Evening Post that this was a rigged football game?

A. No, sir.

Q. Did you say anything to the Saturday Evening Post about this game having been thrown?

A. No, sir.

[fol. 222] Q. Did you say anything to the Saturday Evening Post about this having been a sell-out?

A. No, sir.

Q. Did you say anything to the Saturday Evening Post about Coach Bryant and Coach Butts being corrupt men?

A. No, sir.

Q. When you met with Mr. Cook Barwick seated here the first time, the statement which you made in his presence and in the presence of those others that you have identified here, that statement was recorded, was it not?

A. Yes; it was.

Q. That is the first time you had met Mr. Cook Barwick, was it?

A. Yes, sir.

Q. That was the first time you had met Mr. Aderhold?

A. Yes, sir.

Q. And the other gentleman named Mr. Bolton?

A. Yes, sir.

Q. That was the first time you had indicated any knowledge at all of the matters that you have testified here to today to any one of those three?

A. Yes; it is.

Q. Mr. Barwick asked you some questions, numerous questions at that time, didn't he?

A. Yes, sir.

Q. One of those questions was: Did you have any sort of record, wasn't it?

A. Yes; he did.

Q. And you answered him that you did not, didn't you?

A. That's right.

Q. But you told him to go ahead and investigate?

[fol. 223] A. Yes, sir.

Q. And later it turned up that there was a record, wasn't it?

A. Yes, sir.

Q. And that is when you testified a moment ago or at some time during the proceedings that they begin questioning you about that or what was in the article, excuse me, started questioning you about that, and you became alarmed or became frightened, and said, "Am I on trial?"

A. That is what is in the Post article.

Q. Yes, sir.

A. Yes, sir.

Q. That is all true, isn't it?

A. Yes, sir.

Q. Was there any reason for your denying that you had any record when you first talked to the University of Georgia people and Mr. Barwick about this matter?

A. Other than I didn't want to get involved in it if I didn't have to. I wasn't under oath; I was just answering direct questions.

Q. You don't mean by that you are free with the truth when you are not under oath?

A. I am not indicating anything of the kind.

Q. The reason you said you didn't have a record, you didn't want to get involved and weren't under oath?

A. I didn't say "involved". I didn't want to get—start public announcement about some problems that I had had that I have since paid my debt on.

Q. Your friend, Milton Flack, did he get paid anything in connection with this story by the Saturday Evening Post?

A. I don't know.

[fol. 224] Mr. Cody: Your Honor, I think that that—that would come from someone else.

The Court: He can state if he doesn't know; that is a proper answer.

Mr. Schroder: If the Court please, I have the voucher issued by the Saturday Evening Post, if there is any doubt about it.

Mr. Cody: Go ahead.

The Court: He can ask Mr. Flack or whoever.

By Mr. Schroder:

Q. You don't know?

A. I don't know the particulars involved in any payment to Mr. Flack; no; something about him getting some money to not talk about the story.

Q. All right, sir. The lawyer who was representing you and probably—is Mr. Pierre Howard still representing you?

A. Yes, sir.

Q. He was paid a fee by you?

A. Yes; he was.

Q. A thousand dollars?

A. That's right.

Q. Do you know what that was for? What did you pay him a thousand dollars for?

A. For legal advice and legal fees.

[fol. 225] Q. In connection with this story?

A. In connection with the work he was doing for me.

Q. In connection with this story?

A. Representing me in the things I knew were going to come from this; not from the story, no; not for any part in the story. This was legal fees.

Q. Did you owe him any fees for any services that he had rendered you before you got involved with him in this so-called story?

The Court: How could that be admissible here?

Mr. Cody: I think he knows, Your Honor.

Mr. Schroder: I have him on cross-examination.

The Court: You have him on cross-examination; I don't think that is admissible unless you can show me a reason why it should be. I don't think it should be. I mean, something that might have taken place before, some contract he might have in some other case, I don't think that would be admissible.

Mr. Schroder: The contention is and can be proved that the thousand dollar payment was for services rendered in this story and this story alone which I indicated at the outset, if it please the Court, and I am so contending, this was sort of what we lawyers call on a contingent basis. "I will pay you a thousand dollars now and if your story, [fol. 226] after I get to talking to you, is reproduced, I will then pay you three thousand dollars."

The Court: I thought we were on Mr. Pierre Howard's fee.

Mr. Schroder: We are. He was in the middle of this representing both parties.

The Court: He can testify as to what he paid Mr. Howard.

Mr. Schroder: That is all I was asking.

The Court: He testified five thousand dollars. Anything else?

Mr. Schroder: About payments, no, sir; nothing further with him on payment.

The Court: All right, sir.

By Mr. Schroder:

Q. The Saturday Evening Post article makes the statement that you did record all that you heard in connection with the telephone conversation that you were listening in on; that is inaccurate, is it not? On page 81, the bottom, column 1, "Some of the jargon stranger still, but he recorded all that he heard."

A. No, sir; I have already testified that I didn't—couldn't get it all written down. There were some other [fol. 227] things, and I was abbreviating and making sentences short as I was copying it down.

* * * * * * * *

By Mr. Schroder:

Q. During the examination yesterday, Mr. Burnett, we were referring, I believe, to the fact that the office there

on Eleventh Street of the business known as the Institute of Oral Hygiene was—the business owned by John Carmichael?

A. Yes; it was.

Q. And you had known John Carmichael for how many years before you went to work for him?

A. Approximately two years.

Q. About two years?

A. Yes.

Q. And during the time that you knew Mr. Carmichael and before you left and went with him to the Institute of Oral Hygiene he was with you at the Foundation Life?

A. Yes, sir.

Q. Was he your boss at the Foundation Life?

A. He was my district manager.

Q. That is what I meant; he was your superior?

A. I reported to him.

Q. You and John Carmichael were fairly friendly or good friends?

A. Yes, sir.

Q. The office there on Eleventh Street had—did it have a private office in it?

A. Yes; it had one—one private office which was Mr. Carmichael's office.

Q. Now, it was in Mr. Carmichael's office, was it not, that you were listening in on this telephone conversation?

[fol. 228] A. Yes, sir.

Q. You were seated at Mr. Carmichael's desk?

A. Yes, sir.

Q. Now, during the course of this listening in by you on this telephone conversation, did Mr. Carmichael come in?

A. No; he did not.

Q. You are sure that he did not come in before you were through?

A. Yes, sir.

Q. Could you see the—you were in the private office, you say?

A. Yes; I was.

Q. Did you see into and through the agency room which was immediately adjacent to that office?

A. No; I could not.

Q. Would it be your testimony, then, that Mr. Carmichael could not have been in the agency room, being a place that you could not see?

A. I didn't hear anyone come in. He did not come in the private office, and I would have heard him, I am sure, come in the front door. He did come in subsequently with a paper sack with two cups of coffee in it.

Q. You and Carmichael—this was how long after you say that you finished?

A. Some, approximately an hour to an hour and a half.

Q. You and he have talked about this incident on many occasions?

A. Not on many occasions.

Q. On several occasions?

A. Several; yes.

Q. And you do know that he has since told you that he was in the office when you were?

[fol. 229] A. No; he has not told me this.

Q. But you know he has told this?

A. Yes, sir.

Q. But your testimony is that he was not there?

A. That is right.

Q. And you say now that it was an hour or an hour and a half after that?

A. Approximately.

Q. It could not have been thirty minutes?

A. It could have been anywhere from thirty minutes to an hour and a half.

Q. All right, sir. When you were on the telephone and heard these two voices, you knew at that time that you were listening to two people talk on their telephones and that you were not intended to be listening, didn't you?

A. I realized that.

Q. But you did continue to listen in anyway, didn't you?

A. That's right; that's right.

Q. The testimony, I believe, yesterday by you indicated that the party being called was not at that time near the phone but was out on the field?

A. That is what I heard a female voice say.

Q. That Coach Bryant was out on the field?

A. This was the words that she used.

Q. Well, don't—this was in the morning that you were listening in on this call?

A. Yes; it was.

Q. Well, don't you know, as a matter of fact, that there was no practice in the morning, football practice?

A. I don't know as a matter of fact when they practiced, Mr. Schröder.

Q. Well, this was the coach that you were talking about, [fol. 230] that you have just referred to, wasn't it?

A. Yes, sir.

Q. And the field was the practice field, was it not?

A. I have no idea.

Q. Didn't you at one time say it was the practice field?

A. I don't recall. I said the practice field; I may have used the word "practice field"; I don't remember.

Q. Well, you are a former football player; you know what the word "practice field" means, don't you?

A. Yes.

Q. That is where football players, during football season, practice, isn't it?

A. This is true.

Q. When Carmichael and you had your discussion about what you say you overheard, the remark was made, was it not, that, "well, if there's anything wrong about this, let's bet on the outcome?"

A. No; this remark was not made.

Q. When was the remark made about betting on the game?

A. The only remark about betting was made, said, "If you are going to bet, which way would you bet?"

Q. All right, sir, I will buy that. Who made the remark, "If we want to bet on the game, which team would we bet on?"

A. I don't recall. As I remember, Mr. Carmichael said to me, "How would you know if they were going to go for

a high score or a low score with this intimation if you were going to bet on it?" There was never any serious discussion by any of the three of us about betting on the football game.

[fol. 231] Q. And that was because you told them that you wouldn't know yourself which way the teams were going?

A. No, sir; I didn't say this.

Q. What did you say, sir?

A. The three of us agreed on this; I don't know which one prefaced it first, but the three of us agreed who would know.

Q. Who would know? And that was based upon what you say that you heard one coach tell the other on the telephone?

A. That's right.

Q. All right, sir. And insofar as the three of you were concerned, you were the only one that heard—overheard anything that was said on that telephone?

A. That's right.

Q. The first time that you discussed this incident with your lawyer, Mr. Howard, was when?

A. On the 21st of February.

Q. On the 21st of February, 1963?

A. '63.

Q. That was in the morning or in the afternoon?

A. In the late afternoon.

Q. The Saturday Evening Post representatives were in Atlanta on that very day, were they not?

A. Yes; they were.

Q. As a matter of fact, they had come in on the—on February the 20th, hadn't they?

A. I have no idea when they came in.

Q. But Mr. Howard told you they were here?

A. Yes; he did.

Q. You knew they were here?

A. Late that afternoon when I went to his office and told him what had happened.

[fol. 232] Q. They were already here when you first—when you say you first told him—

A. Yes.

Q. About the incident?

A. Yes.

Q. Do you know what they were here for?

A. Haven't the slightest idea.

Q. They didn't discuss it with you while they were here?

A. No; they did not.

Q. Did you talk to them at all?

A. With whom?

Q. The Saturday Evening Post people.

A. Yes; I did.

Q. What did you all talk about?

A. About the story and what I had overhead, and the fact that I was a little disturbed at my last meeting in Mr. Barwick's office, and that I decided I wanted this story told and told in the way it happened, and my story about my bad checks, as is in the Post article, to be told before I was maligned.

Q. Then they were here to get your story?

A. I have no idea why they were here, Mr. Schroder.

Q. Did you discuss anything with them other than your so-called story? Did you discuss business with them of oral hygiene?

A. Mr. Schroder, when I went to Mr. Howard's office and told Mr. Howard what had happened—

Mr. Schroder: If the Court please, may he answer my question?

[fol. 233] The Court: I think we can clarify it a little bit. He is talking one thing and you are talking another. Why don't you ask him when he first told him?

Mr. Schroder: All right, sir.

By Mr. Schroder:

Q. When did you first talk to the people from the Saturday Evening Post?

A. Friday evening, about 7:00 or 7:—about 7:00 o'clock Thursday evening on the 21st, about 7:00 o'clock, at their motel is the first time I met the Post people and told them the story.

Q. And their motel was here in Atlanta?

A. Yes, sir; it was.

Q. And did you discuss with them business in general, or did you discuss with them just this so-called story?

A. I discussed with them just this story.

Q. All right, sir.

Examination.

By the Court:

Q. How did they know you knew about the story? How did they know about the story?

A. Mr. Howard told me that Mr. Beddow and the Saturday Evening Post people were in town and this would be some people to talk to who would be willing to listen to a story if I wanted to give them one. I decided, Judge, on his advice that it was time for me to get this story out before people were trying to malign me totally in a different way, and he said he knew they were in town [fol. 234] and would be willing to listen, and he called them and made an appointment for me, and we went to the motel.

Q. May I clarify something? Had you talked to Mr. Howard before?

A. No, sir.

Q. How did he know what you knew about this story?

A. He didn't until I walked into his office.

Q. That afternoon?

A. Yes, sir. He had heard the story from Mr. Carmichael before, but I didn't know he had heard the story.

The Court: I didn't connect it up. I didn't mean to interrupt your line of questioning.

Mr. Schroder: I thank you for the help.

Cross examination (continued).

By Mr. Schroder:

Q. The people that you talked to at the motel were Frank Graham, Jr.?

A. Yes; that was one of them.

Q. Who subsequently wrote the story?

A. Yes, sir.

Q. Supposedly based on information that you gave him?

A. Yes, sir.

Q. Also present in Atlanta that time with Mr. Graham was the Saturday Evening Post lawyer in Birmingham representing the Post in the libel suit that Coach Bryant [fol. 235] had filed against them maybe a month before this?

A. That's right.

Q. His name was Mr. Beddow? He was over here?

A. Yes, sir.

Q. With Mr. Graham?

A. Yes, sir.

Q. There was also from Birmingham a private investigator who was working on the Byrant against the Post lawsuit in Birmingham that had been filed some months before all this came up, a Mr. Bodecker?

A. I met a Mr. Bodecker; I didn't know who he was or his connection.

Q. He was with Mr.—

A. He was with Mr. Beddow.

Q. He was with Mr. Beddow, the Birmingham lawyer?

A. Right.

Q. And you stayed there in the room at the, I believe you said, the Heart of Atlanta Motel?

A. Yes; it was the Heart of Atlanta.

Q. And that was Mr. Frank Graham's room?

A. I don't know whose room it was.

Q. Well, you stayed there with these gentlemen for some minutes or some period of time that evening?

A. About an hour to an hour and a half, as I recall.

Q. And you then met with Mr. Graham again the following day?

A. Yes; the following morning at Mr. Howard's office.

Q. And how long did you meet with them on that occasion?

A. We were together about another hour or two in Mr. Howard's office.

[fol. 236] Q. Did you see Mr. Graham later that afternoon?

A. No, sir; I don't recall seeing him at all that afternoon.

Q. Did you see anyone else hired or working for the Post that afternoon?

A. No; I did not.

Q. That would have been the 22nd?

A. Right.

Q. Then the next day did you see Mr. Graham?

A. I saw Mr. Graham the next morning very briefly again in Mr. Howard's office.

Q. In Mr. Howard's office?

A. Right.

Q. That was the 23rd?

A. That was the 23rd.

Q. And I believe your testimony yesterday was that you have not, since the 23rd, seen Mr. Graham?

A. Well, this is true, but the afternoon of the 23rd I drove him to the airport and spent some three and a half hours at the airport waiting for his plane and talking with him.

Q. All right, sir. He had not written any story then to your knowledge, had he?

A. No.

Q. Since you last saw him on February 23rd at the Atlanta Airport, have you seen him or talked with him in any—with respect to anything?

A. I have not seen him and I don't recall that I have talked with him. I have received a letter from him, but I have not talked with him or seen him.

Q. Did your letter pertain to this story before or something he was putting in the story before he published it?

A. No, sir; he was forwarding to me a letter from a [fol. 237] television station in Indiana regarding an article; this was after the article was published.

Q. Your testimony is, then, that you have had no communication with Frank Graham other than the letter that you have just told us about since he left here February the 23rd?

A. That is true.

Q. I don't know whether I asked you this yesterday or not, but have you had any communication of any sort with anyone else employed by the Saturday Evening Post after February the 23rd and before this magazine was published in this issue of March 23?

A. No, sir.

Mr. Schroder: If it please the Court, the article has been tendered and, I believe, admitted in evidence.

The Court: Yes, sir.

Mr. Schroder: This witness has already testified yesterday about a quotation that he did not give the author which the author indicated in the article that he did give to him, and in order to make it photographic, so to speak, for the jury, I have had that article, the entire article blown up, and I would like the permission of the Court to have it unraveled and placed here where they can—

The Court: You mean you are—

[fol. 238] Mr. Schroder: I will state in my place it is authentic.

The Court: You are just going to blow it up?

Mr. Schroder: I had it blown up by the Atlanta Blueprint Company.

Mr. Cody: I don't think it is proper, Your Honor; the article itself is in evidence; I don't know.

The Court: Would you object to it being demonstrative?

Mr. Cody: I don't know what he is apt to do with it.

Mr. Schroder: This is the article forming the basis of this libel suit. There are inaccuracies in it, and I think it ought to be here where the jury can see it when the witnesses testify on the stand about the manner in which they

have been misquoted, where the jury can see right here in front of them what the misquotations are, what the inaccuracies are, and have it vividly clear here before it or rather than have them memorize it or pass out copies to them.

Mr. Cody: I think that is entirely improper, Your Honor, what he is undertaking to do.

[fol. 239] The Court: I don't know whether it is or not.

Mr. Cody: He is undertaking to re-emphasize some errors they made in the article.

The Court: Of course, the whole gist of the whole case is whether or not the facts, statements contained in the article are true.

Mr. Cody: That's true. Well, he has pointed out—he has pointed out and has a right to point out any error in the article, but not to emphasize it or re-emphasize it. He has already pointed out certain errors. It is already in evidence.

The Court: I will let him do it. Let me see it. I don't know what you have got there, but—

Mr. Schroder: That is the last of it. I will hand Your Honor the first one.

The Court: Sir?

Mr. Schroder: Please hand His Honor that.

The Court: I brought my copy this morning.

[fol. 240] Mr. Schroder: In the first column—this is the first column, and each column is on separate cardboard.

The Court: Where are you going to put those, Mr. Schroder?

Mr. Schroder: Well, insofar as this one is concerned I would show this to the witness and have him mark this entire paragraph here where it reads—where it reads, "Butts also said Rakestraw tipped off what he was going to do," and on down to the bottom.

The Court: Of course, that can't go out with the jury.

Mr. Schroder: I understand that; the article itself will be out with the jury.

The Court: Yes, sir.

Mr. Cody: It's already in evidence. I don't know what—

The Court: Well, he wants it where the jury can see it instead of passing it around. I will let it in. I will let you demonstrate with it, but it is not going out with the jury.

Mr. Schroder: I understand that, sir.

[fol. 241] The Court: All right, sir. Are you through with this witness?

Mr. Schroder: I was going to ask him to step down here, if he will.

By Mr. Schroder:

Q. Yesterday you testified—can you see this all right, sir?

A. Uh-huh (affirmative).

Q. That this quotation which I shall now read to you, "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off." Is that what I have just read, was that—that is a quotation that the author said you said to him. Did you tell the author that?

A. No; I didn't.

Q. I see. Will you mark that with a pencil, please?

A. Mark it in what way?

Q. With a parenthesis and put your initials there.

A. What am I signing to?

Q. You don't have to sign it.

A. Initialling it means what?

The Court: You just go ahead and initial it, Mr. Burnett.

The Witness: All right, sir.

By Mr. Schroder:

Q. Just what I read, make it kind of heavy, will you.

[fol. 242] In the article there is a quotation appearing on

the second page near the bottom of the second column on that page which reads, quote, and this purports to be something that you told the author that Johnny Griffith in turn had told you at the meeting you attended with Johnny Griffith at the Biltmore, the quote that is attributed to you reads, "'We knew somebody had given our plays to Alabama,' Griffith told him,"—"him" being you—"and maybe a couple of other teams we played to, but we had no idea it was Wally Butts."

The Court: Didn't you go over that yesterday?

Mr. Schroder: Not what I am going to ask him now.

Mr. Cody: It is purely repetitious, Your Honor.

Mr. Schroder: Not what I am going to ask him now.

Mr. Cody: It is repetitious, Your Honor.

The Court: Let me ask—let him ask his question, and don't you answer until after I rule on it.

The Witness: All right, sir.

[fol. 243] By Mr. Schroder:

Q. You know, do you not, as a matter of fact that Johnny Griffith has denied telling you that?

The Court: That is not a proper question anyway, Mr. Schroder. I don't think Mr. Griffith's testimony is in evidence yet, and I don't think—

Mr. Schroder: I will wait until—

Mr. Cody: He is going to testify.

The Court: My recollection yesterday was that he went into an explanation as to what he said; well, you heard the testimony; I don't want to repeat it.

Mr. Cody: I want to make one other point, Your Honor, for the record.

The Court: All right, sir.

Mr. Cody: I think I know the purpose for which he is undertaking to emphasize this evidence. We have been over this question at pre-trial procedure. There's been no such documents as any—enlargement of a portion of this article, but to—

[fol. 244] Mr. Schroder: Well, that is the article, Your Honor, that he himself has introduced.

The Court: I am going to let you put that in, Mr. Schroder; I have already ruled on that. What I was concerned with was the question you were repeating.

Mr. Schroder: All right, sir.

By Mr. Schroder:

Q. Let me ask you this, Mr. Burnett. These notes that—

Mr. Schroder: Have they been introduced in evidence yet? Are they up here?

Mr. Cody: Your Honor, I'd like to get these notes introduced. I've been carrying some of them around and I am afraid I will lose them.

The Court: All right, sir.

Mr. Cody: Those two telephone calls that were identified yesterday—let me have those right there.

The Court: What is the number?

[fol. 245] The Clerk: No. 12.

Mr. Cody: 12, 13, and 14.

The Court: All right, sir, any objections to the notes which have been tendered?

Mr. Schroder: I do not want to give the Court the impression if I say that I have no objection that I am admitting that they are authentic.

The Court: You are not admitting what is contained in the evidence, but you have got no objection to the notes—

Mr. Schroder: That is, they have been identified.

The Court: All right, sir.

Mr. Cody: I'd like, while we are on the subject, I'd like to introduce in evidence the notes; they have already been identified by exhibits number, the two toll tickets that were identified yesterday by Mr. Fleming.

Mr. Schroder: I have no objection.

[fol. 246] The Court: All right, sir, what are their numbers?

The Clerk: 13 and 14.
The Court: All right, let 12, 13 and 14 be admitted.

(Whereupon Defendant's Exhibits Nos. 12, 13 and 14 were admitted into evidence.)

The Court: Is that over objection?
Mr. Schroder: No, sir.
The Court: All right, sir.
Mr. Schroder: No, sir.
The Court: All right, without objection.

By Mr. Schroder:

Q. In connection with these notes that have been identified and admitted in evidence as Defendant's Exhibit 12, your testimony yesterday was that every time that you heard the man that you described as Coach Butts talk to the other party, Coach Bryant, he always referred to him [fol. 247] or called him "Bear" throughout the conversation?

A. One time at the beginning he said "Coach" and most of the time he called him "Bear".

Q. Did he ever call him "Paul"?

A. I don't recall; he may have, Mr. Schroder.

Q. But your recollection today, and as you have indicated on your notes there, was that he was calling him "Bear" certainly a greater majority of the time?

A. Most of the time; yes.

Q. When he wasn't calling him "Coach"?

A. Yes.

Q. You testified yesterday, I believe, that the second notation on Page 1, reading "Reismueller, greatest in history," that that was said by Coach Butts in this form, he is the greatest in the history of the University of Georgia?

A. He said he was the greatest lineman they have had in the history of the University; yes, sir.

Q. And the lad was what, a sophomore?

A. I don't know.

Q. You didn't know then that he had never even played in a varsity game?

A. No, sir.

Q. You being a former football player—turn to Page 2, looking at the last note, reading, "well-disciplined ball club"; what in your experience as a football player does that mean, "well-disciplined ball club"?

A. Well, Mr. Schroder, it means exactly what it says. It was a well-disciplined ball club.

Q. I don't understand it myself; would you amplify it a little bit, clarify what it means to you.

A. Well, Mr. Schroder, a well-disciplined ball club means one that responds well, I imagine, to instruction, and listens and doesn't fool around with horseplay, and attends to [fol. 248] business. I imagine this is what being disciplined means.

Q. I see. And the statement was made that the Georgia team in September, 1962, was, as described here, a well-disciplined ball club?

A. Yes, sir. But you are taking it out of context. It was part of a statement. He said, "They have a well-disciplined ball club, but this is no thanks to Johnny Griffith, because they had added two coaches." This is one entire statement.

Q. Yes, sir. But I was referring to the discipline part without regard to who was responsible for it being disciplined or who might be responsible for it not being disciplined.

A. I appreciate that.

The Court: Let's don't argue between witness and counsel. Let's go ahead with the evidence.

By Mr. Schroder:

Q. The notation on the top of Page 3, "On side guard pulls on sweep"; what position did you play when you were in football?

A. I played guard.

Q. What, to you, is a sweep?

A. An end run.

Q. That is around the end?

A. Yes.

Q. A sweep around the end?

A. Yes, sir.

Q. Now, what was the "on side guard pulls" mean?

A. That means that the guard on the side on which you are running pulls out to lead interference. If you are going to run to the right, the right guard pulls; if you are [fol. 249] going to run to the left, the left guard pulls.

Q. When you say "leading interference", leading the way for the ball carrier to go around the end?

A. Yes, sir.

Q. The next note reading "don't overshift". I recall you saying that that had to do with some defensive maneuver.

A. No, sir; I didn't say that.

Q. Well, I'm sorry; I didn't mean to misquote you. What was it you said?

A. I said I wrote this down by itself. I don't recall whether it had anything to do with the play above or not. The statement was made by Coach Butts to Coach Bryant, "Don't overshift," telling him not to overshift.

Q. Not to overshift what; offensively or defensively?

A. His defense.

Q. His defense?

A. His defense.

Q. Of course, you don't know that overshifting is a principal part of every defense of every team?

A. I don't know what?

Q. Overshifting is a principal part of every defense of every team that plays football?

A. Overshifting?

Q. Yes.

A. No; I don't know that overshifting—

Q. You don't—

A. —is a principal part of defense. I'm sorry.

Q. And you are a football fan?

A. Yes; I am a football fan. If you overshift you are in trouble, Mr. Schroder.

Q. Explain that to me, please, sir.

A. You shift yourself out of position, I imagine.

[fol. 250] Q. Well, not what you imagine; I mean, just tell me about this overshifting and how it gets you into trouble.

A. Well, you can overshift on a spread formation and they will go the other way on you, and you are in trouble.

Q. What is a spread formation?

A. When the teams are all spread out, the offense is all spread out.

Q. You mean great distances are between the offensive players?

A. That's right.

Q. And your description of overshifting is that if you overshifted in that sort of a situation and they went the other way, you would be in trouble?

A. Yes, sir.

Q. You don't know that the basic defense of Georgia is overshifting, an overshift, as is Alabama's?

A. No; I don't.

Q. You don't?

A. I don't know that.

Q. Page 4 of your notes, you have "Best since Trippi, Porterfield." Who is Trippi?

A. Charlie Trippi is a former Georgia great football player who was one of the coaches last year.

Q. Are you familiar with his playing days at the University of Georgia?

A. Yes; I am. I remember reading about Charlie Trippi.

Q. Was he considered to be a right fair country ball player?

A. A pretty good country football player.

Q. He was an all around player playing both offense and defense?

[fol. 251] A. Yes; he played in the days when they played football.

Q. There is a note here which you discussed briefly yesterday reading, "Can quick kick", and if I recall correctly, and you correct me if I misquote you, that was in connection with a question asked by Coach Bryant, that is to say, you say you heard the question asked by Coach Bryant of Coach Butts, "Well, what about the quick kicking?" And Coach Butts says, "You don't have to worry about that, because they don't have anybody that can quick kick."

A. That's right.

Q. That is a fair representation—repetition of what you said?

A. Yes, sir.

Q. Well, don't you know that Georgia has a quick kicker?

A. No; I don't.

Q. You don't know that they do quick kick?

A. No, sir; I don't.

Q. The opening part of this article by the editors up here in the top side, referring to the Chicago White Sox scandal, did you discuss anything with Mr. Graham about how—what you said you heard reminded you of any such thing as the Chicago White Sox scandal in 19—when they threw the 1919 World Series?

A. No; I did not.

Q. Did you all discuss that topic at all?

A. No, sir; did not.

Q. The first time you testified—the first time you talked to your friend Bob Edwards, you testified yesterday it was January the 4th?

A. That's right.

[fol. 252] Q. You testified yesterday that you did not find your notes until two days before you had the meeting at the Atlanta Biltmore?

A. That's right; the day before, as a matter of fact.

Q. Then—

A. A day or two before.

Q. Then you did not at any time show your notes to Bob Edwards before you found them on the day before

you met at the Biltmore, the day that you met being January 24?

A. I couldn't have shown them to anybody, Mr. Schroder, until I found them.

Q. That's right.

A. And I found them about two days before we met at the Biltmore, and I met Mr. Bob Edwards that morning and showed him the notes.

Q. You met on January 24; that would have been January the 22nd?

A. No, sir; that was about January the 17th. The 24th is when I met with Mr. Cook Barwick in his office.

Q. No, sir; I don't want you to be in error.

A. I don't want to be in error.

Q. All right, sir.

A. We—we met on the 14th—on the 4th and about two weeks later is when I met with Johnny Griffith. I don't remember the exact dates.

Q. It was January the 25th. I am not supposed to testify, but I don't want you to get in error.

A. I don't want to be in error.

The Court: I thought the Coaches' Convention was the 17th of January; am I in error?

[fol. 253] Mr. Schroder: If that is what the testimony is.

The Court: That is what the testimony was, is my recollection.

Mr. Schroder: It is in error. All I can say, Your Honor, is that there were a lot of depositions in this case.

The Court: They would know. It was my impression there was a convention out here at the Biltmore Hotel on January the 17th. I could be in error.

Mr. Schroder: I think that is a week earlier.

The Witness: It was during the week of the Coaches' Convention, Your Honor; it was on a Thursday, the last part of the week of the Coaches' Convention.

Mr. Schroder: I will bring it out by some other witness. I will state for the record that it was January the 24th, Thursday.

By Mr. Schroder:

Q. If it was January 24 that you met with Coach Griffith, it would have to have been January 22 or 23 that you first got hold of your notes?

A. Right.

Q. And you could not, therefore, have shown them to [fol. 254] your friend Bob Edwards before that time?

A. This is true.

Q. All right, sir. Now, the—

Mr. Schroder: Your Honor, just a minute, please. The deposition, please, Mr. Smith. I didn't bring it up here with me; 25.

Mr. Smith: Page 25?

By Mr. Schroder:

Q. Mr. Burnett, your associate, Mr. Flack, had made several efforts to sell or peddle this story, had he not?

A. I don't know of several efforts; I know of one, Mr. Schroder.

Q. You know of one, and that was the only one you know of is the one involved with Phil Rizzuto in New York?

A. That's right. That was approximately two weeks before—

Mr. Cody: Your Honor, I don't think it is proper—

The Court: I didn't hear that, the first.

Mr. Cody: I don't think it is proper for this witness to testify about what somebody else did. You get into that with another witness.

[fol. 255] Mr. Schroder: All right, sir; will you hold this witness subject to recall, Your Honor?

The Court: What was the testimony?

Mr. Schroder: It had to do with an associate of his—

The Court: Mr. Flack; I got that part of it, but sell it to who?

Mr. Schroder: Phil Rizzuto was one, and others. Mr. Cody properly pointed out I can bring it out by Mr. Flack, but I want this witness held to put back on the stand.

The Court: This witness will be here all during court.

Mr. Cody: You needn't worry about that part. I think it would be better to bring it out and you can bring Mr. Burnett back to the stand.

The Court: Yes, sir.

By Mr. Schroder:

Q. At any rate, you did, did you not, Mr. Burnett, promised Mr. Barwick and the group in his office that you would not sell the story, didn't you, Mr. Barwick sitting right here?

A. You are referring again to the Phil Rizzuto—

[fol. 256] Q. Yes.

A. Yes, sir; I did, when I reported it to him.

Q. You promised him you would not sell the story, didn't you?

A. Well, yes, sir.

Q. Did you ever go to him and tell him that you were going to sell it or had sold it?

A. I didn't sell the story, Mr. Schroder.

Q. You got paid for it, didn't you?

A. Subsequently, but I did not give the story in the beginning with the intention of doing it for selling it.

Q. Did you ever ask Mr. Barwick to relieve you of the promise you made to him that you would not give the story for money or sell it or whatever else you did?

A. No; I did not.

Mr. Schroder: That's all, Your Honor.

Examination.

By the Court:

Q. Mr. Burnett—

A. Yes, sir.

Q. During the entire conversation which you allegedly overheard over the telephone, did you ever hear the word "Rakestraw" used?

A. Yes, sir; he used it as I have it here in the notes, Your Honor, when he said Rakestraw was—went to the right in describing a play; he used the name of Rakestraw.

Q. That was the only time?

A. The only time, and he said when Rakestraw goes to the left, an optional left pass, if they can block the man on [fol. 257] the corner he keeps running; if they can't they pass. That is the only time in my notes or that I recall hearing the name Rakestraw used.

The Court: I just wanted to clarify that.

Mr. Schroder: All right, sir.

The Court: Anything further from this witness, Mr. Cody?

Mr. Cody: Is he through? You through with him?

Mr. Schroder: Yes; yes, sir.

The Court: Yes, sir.

Mr. Cody: I have a few questions, Your Honor.

Redirect examination.

By Mr. Cody:

Q. Mr. Burnett, yesterday Mr. Schroder asked you if you had the notes, meaning the notes you have in your hands now, if you had those notes before you when you had this discussion with Mr. Graham who was then representing Saturday Evening Post.

A. Yes, sir.

[fol. 258] Q. And you said that you did not have them before you?

A. No; I did not.

Q. Where were those notes at the time?

A. In Mr. Barwick's office, Mr. Cook Barwick's possession with the athletic board. I say "in his possession"; to my knowledge he had them.

Q. You had previously turned them over to the University officials?

A. Yes, sir; I had.

Q. Then you—in your discussion—

Mr. Schroder: Don't lead him.

By Mr. Cody:

Q. In your discussion with Mr. Graham, you were speaking from memory?

A. Yes, I was.

Q. Who was—who was present, Mr. Burnett, at this first meeting that you had in Mr. Barwick's office?

A. Mr. Barwick—

Mr. Schroder: Your Honor, we have been all over this, I believe. I have got notes about this.

The Court: Didn't we go over this yesterday, Mr. Cody?

Mr. Cody: We touched on this meeting, but I didn't get the personnel of those present.

[fol. 259] The Court: Go ahead. If you've covered it, we'll stop you.

By Mr. Cody:

Q. Go ahead; state briefly.

A. Mr. Barwick, Dr. Aderhold, Mr. Bolton, Bob Edwards and myself.

Q. Did Mr. Bolton and Dr. Aderhold at that time make known who they were?

A. Yes, sir.

Q. Did you at that time know that a tape recording was made of that conference?

A. Yes, sir. They asked my permission, and I gave it.

Q. Was that the meeting at which they asked you to make an affidavit?

A. Yes, sir.

Q. And to—

Mr. Schroder: We have been all over this, Your Honor.

The Court: Yes, sir.

By Mr. Cody:

Q. Mr. Schroder asked you a few minutes ago about some of your conversation with Mr. Carmichael. Did I

understand you to say in response to one of his questions that Mr. Carmichael is the one that told Mr. Pierre Howard about this story?

A. Yes, sir.

Mr. Schroder: Wait a minute; whoa, whoa! That would [fol. 260] be pure hearsay. That was not answered; anyway, if it was, it would be pure hearsay.

Mr. Cody: He didn't object to it.

The Court: I believe I asked it; I believe that's correct. I didn't know how he knew about it. I don't want to go into any hearsay on it. I didn't know I was eliciting hearsay.

Mr. Schroder: May I move it be removed?

The Court: I think it is a minor detail.

By Mr. Cody:

Q. Mr. Barnett, what did Carmichael tell you, if anything, about keeping his name out of this?

Mr. Schroder: If the Court please, that would be hearsay.

The Court: Yes, sir. I sustain the objection. Mr. Carmichael will be here, won't he?

Mr. Cody: I didn't subpoena him, Your Honor. They didn't have his name on the list of witnesses they gave me. Maybe he does. That's all we have of this witness.

* * * * * * *

[fol. 261] J. D. Bolton called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Your name is Mr. J. D. Bolton?

A. Yes, sir; that is correct.

Q. What is your position with the University of Georgia, Mr. Bolton?

A. I am comptroller and treasurer of the University of Georgia, and also treasurer of the Athletic Association.

Q. How long have you been connected with the University?

A. Since July 1, 1933.

Q. What part of that time have you known Coach Butts?

A. Since Coach Butts came there, I believe, in 1938.

Q. During that time have you been closely associated with him?

A. Yes, sir.

Q. How often would you see him and talk to him?

A. Quite—quite frequently.

Q. Almost daily?

A. Yes, sir; and sometimes—some instances, sometimes it would be maybe a week or more.

Q. How long have you been on the Athletic Board?

A. I think it was about 1935 or—6.

Q. Have you continuously been on it since?

A. Yes, sir.

Q. On it now?

A. Yes, sir.

[fol. 262] Q. What is the function of the Athletic Board, Mr. Bolton?

A. The Athletic Board—the University of Georgia Athletic Association is incorporated, and it has full responsibility for the athletic program, subject, of course, to the control of the Chancellor of the University system and the Board of Regents.

Q. How many members constitute that Board?

A. I believe it is fifteen.

Q. Composed in part by faculty?

A. Yes, sir; I believe there are eight faculty members and seven non-faculty members, alumni.

Q. When did you—when this so-called Butts-Bryant affair first come to your attention?

A. I believe it was on January the 24th.

Q. Do you haye your notes there?

A. Yes, sir. Yes, sir; that's correct; is was on January 24, 1963.

Q. What brought it to your attention?

A. I was registered at the Biltmore Hotel to attend the Southeastern Athletic Conference, and we registered there, it was Thursday afternoon on January the 24th, and I was in my room looking at television. Coach Griffith called me and asked me if I—

Mr. Schroder: If the Court please, that would be hearsay, the telephone and any other conversation he had.

The Court: I will let him go into what was said, but not—when he first had knowledge of it. I won't let him go into any knowledge of any conversation.

[fol. 263] By Mr. Cody:

Q. Did you thereafter go to Mr.—Coach Griffith's room?

A. Yes, sir.

Q. Was that the first time he called it to your attention?

A. Yes, sir.

Q. What did you do after that?

A. I told him we would have to—

The Court: We can't go into any conversation, Mr. Bolton.

Mr. Cody: All right.

By Mr. Cody:

Q. Did he—Mr. Bolton, I show you what has been identified as the Defendant's Exhibit No. 12, and I'd like to ask you if those papers were shown to you at that time?

A. Yes, sir; they were.

Q. By whom?

A. Coach Johnny Griffith.

Q. Did you take charge of them from then on?

A. No, sir.

Q. What happened to them from that point?

A. He kept them until the following Saturday morning, about 9:30.

Q. Who got them then, if you know?

A. He turned them over to President Aderhold that morning on Saturday morning.

Q. I see.

A. And President Aderhold turned them over to me and asked me to lock them up in the vault.

[fol. 264] Mr. Lockerman: If Your Honor please, we object to that.

The Court: Sustain the objection.

The Witness: I'm sorry.

The Court: You did lock them up after that?

The Witness: Yes, sir.

By Mr. Cody:

Q. Did you later turn them over to Mr. Barwick?

A. Yes, sir.

Q. When?

A. It was that Saturday night, Saturday night on June 26th.

Q. Was Mr. Barwick the attorney for the Athletic Board and the University?

A. Mr. Barwick is a member of the Athletic Board. The Athletic Board at that time had no attorney, I don't believe.

Q. Now, you referred to meeting him on a Saturday. Where did you meet him?

A. At his home here in Atlanta.

Q. Don't go into any conversation that took place there. I am just trying to establish some dates. Now, thereafter did you—did you call a meeting in Mr. Barwick's office and have Mr. Burnett present?

A. I didn't call the meeting.

Q. Who did?

[fol. 265] A. President Aderhold.

Q. Did you attend the meeting?

A. Yes, sir.

Q. Do you have the date of that?

A. Yes, sir; it was on January 29, Tuesday.

Q. Now, following that meeting did you thereafter have a meeting at which Coach Butts attended?

A. Yes, sir.

Q. When was that?

A. That meeting was on February the 22nd, on Friday.

Q. Where?

A. In Mr. Cook Barwick's office.

Q. Now, at that time was Coach Butts made acquainted with this—with those notes?

A. Yes, sir.

Q. Do you remember whether or not he had those notes and took a look at them?

A. Yes, sir.

Q. Do you know whether or not Coach Butts was acquainted with the nature of the affidavit that Mr. Burnett had signed?

A. No, sir; I wouldn't know. I don't think he was.

Q. Was he told the purpose of this meeting after he got there?

A. Yes, sir; yes, sir.

Q. What was the purpose of it?

A. The purpose of the meeting was to inform Coach Butts of everything that we knew about at that particular time.

Q. That is, the Butts-Bryant affair?

A. Yes, sir.

The Court: Mr. Cody, I am not quite clear, and I don't [fol. 266] know whether the jury is, who was present at this meeting on February the 23rd, where it was held, and so forth.

Mr. Cody: I am just about to get there.

The Court: I am jumping ahead of you. I didn't quite know.

Mr. Cody: That is my next question, Your Honor.

By Mr. Cody:

Q. That meeting, I believe, was in Mr. Cook Barwick's office?

A. That is correct.

Q. At what time? Do you have a note of that?

A. I believe it was 10:00 a. m. I have a note here to that effect.

Q. As a matter of fact, Mr. Bolton, didn't—didn't you personally drive Coach Butts from Athens to that meeting?

A. Yes, sir.

Q. You invited him to ride with you?

A. Yes, sir; he rode with me and President Aderhold.

Q. Who was it contacted him to tell him that he was wanted at that meeting? Was it you?

A. No, sir.

Q. Now, tell us—tell us who all was at this meeting, if you know.

A. It was Chancellor Colwell, Mr. James Dunlap.

Q. That is Harmon Colwell?

A. Chancellor Colwell, Chancellor of the University Sys-
[fol. 267] tem of Georgia. Mr. James Dunlap—

Q. Wait a minute, wait a minute. Who is he?

A. He is the Chairman of the Board of Regents of the University System of Georgia.

Q. Go ahead.

A. Mr. Bernie Moore, Commissioner of the Southeastern Conference.

Q. Who else?

A. Mr. William Hartman of Athens, Georgia, Coach Butts, Mr. Cook Barwick, Dr. Aderhold, and I.

Q. When you gave Coach Butts those notes, did he make any comment about them?

A. Yes, sir.

Q. Could you recall for the jury what comments he did make?

A. The best that I remember, Coach Butts looked at the notes and said, "No doubt the guy heard what he said he heard. I don't blame him for placing the interpretation

that he did on this conversation. If I had been in his place, I probably would have thought the same thing, but he is mistaken. It's just conversation, ordinary football talk among coaches, and that you know I would not give old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia. If I did give any information to hurt Georgia it was not intentional."

Q. When was it that Coach Butts resigned as athletic director?

A. The following day, on February 23, which was Saturday following this meeting that you just referred to on February the 22nd.

Q. Has he had any connection with the University since that time?

A. Well, he resigned on that day effective February the [fol. 268] 28th, and there's been no connection since that time.

Q. Mr. Bolton, I assume by your testimony that you were on the Athletic Board in 1960 and '61; I believe you said your service was continuous?

A. Yes, sir; that is correct.

Q. When did Coach Butts resign as football coach at the University?

A. I believe that was effective January 1st, 1960. I expect I'd have to refer to some notes.

Q. See if it wouldn't be '61.

A. I believe it was '61.

Q. Did you have any understanding with him at the time of that resignation that he was to have nothing to do with football?

A. President Aderhold made a statement to him at the Board meeting—

Mr. Lockerman: Your Honor please—

The Court: Yes, sir; that would be hearsay.

Mr. Lockerman: Pure hearsay.

The Court: Unless Coach Butts was present.

The Witness: Yes, sir.

The Court: Were you present when Coach Butts—was

[fol. 269] Coach Butts present when Dr. Aderhold made the statement?

The Witness: Yes, sir.

The Court: I will let it in.

By Mr. Cody:

Q. Go ahead and tell us what he said.

A. He told Coach Butts he could contribute a lot to the public relations of the University and the Athletic Association, but he wanted—and the over-all athletic program, but he wanted it clearly understood that he would have no responsibility for coaching.

Q. Was that a voluntary resignation he made, Mr. Bolton?

A. So far as I know.

The Court: What resignation are you referring to?

Mr. Cody: 1961, the first, as coach.

By Mr. Cody:

Q. From that time, Mr. Bolton, has he had anything to do with the football team?

A. Not to my knowledge; no, sir.

Q. Thereafter and before—before this resignation of February 23 that you mentioned effective February 28, 1963, was there any previous resignation that you know of as athletic director?

[fol. 270] A. I'm sorry; I didn't quite catch the last date. Prior to February 23?

Q. Prior to that, did he tender his resignation as athletic director previous to that?

A. Yes, sir.

Q. What reason did he give?

A. He gave as a reason that he had realized that he had devoted a great deal of his time to personal business.

Q. Was anything said about that interfering with his duties as athletic director?

A. Yes, sir.

Q. Did you go into any detail about that? Don't mention the details; I just want to know if there were any.

A. Some of the details on it; yes, sir.

Q. Did he mention anything at that time about his physical condition?

A. I didn't—not to me; no, sir.

Q. Do you know, Mr. Bolton, whether or not these outside activities of Coach Butts had hurt the University?

Mr. Schroder: Had what? I didn't hear.

The Court: Just a moment, Mr. Bolton, don't answer that question. What is the nature—

Mr. Cody: These business activities that he referred to, his outside business interests. Let me re-form the question. [fol. 271] The Court: All right, sir. Don't answer the question, Mr. Bolton.

By Mr. Cody:

Q. Do you know whether or not these outside business interests that Coach Butts had did interfere with his responsibilities as athletic director?

Mr. Schroder: If the Court please, I think that would call for a conclusion of the witness.

The Court: Well, if he was one of the officers of the Athletic Board, I will let him answer that, but—

Mr. Schroder: I don't think it is—I will withdraw the objection.

The Court: All right, sir, go ahead.

By Mr. Cody:

Q. Can you answer that question?

A. Yes, sir.

Q. What is your answer?

A. I think it did.

Q. It did?

A. Yes, sir.

Mr. Cody: I believe that's all.

[fol. 272] The Court: We are going to take a recess for fifteen minutes.

Members of the jury, I must admonish you as previously —you may step down, Mr. Bolton.

(Whereupon the witness was excused from the stand.)

The Court: I am not going to send you to your jury room, but let you refresh yourselves on the outside. As I admonished you yesterday not to discuss the case among yourselves or let anyone discuss it in your presence. Simply dismiss it from your mind until we return at 11:25. Let the jury pass out; everyone else remain seated.

(Whereupon the jury retired from the courtroom at 11:12 a. m.)

The Court: Mr. Marshal, we will recess until 11:25.

(Whereupon Court recessed at 11:12 a. m., reconvening at 11:25 a. m.)

After Recess

The Court: Do you have any further questions, Mr. Cody?

Mr. Cody: Yes, I did, Your Honor.

[fol. 273] The Court: All right, sir, you may continue.

Mr. Cody: I have three more questions I'd like to ask Mr. Bolton which I neglected to ask a few moments ago.

J. D. Bolton having resumed the stand, testified further as follows:

Direct examination (Continued).

By Mr. Cody:

Q. Mr. Bolton, at this meeting in Mr. Barwick's office February 22 when the other representatives of the University were present, was Coach Butts asked to sign an affidavit?

A. Yes, sir.
Q. What did he say?
A. He said, no, he would not.
Q. Was he asked to take a lie detector test?
A. Yes, sir.
Q. What did he say about that?

Mr. Schroder: If the Court please, they know that is strictly inadmissible.

The Court: Yes, sir; I don't believe that is admissible.

Mr. Schroder: Cody knows that.

[fol. 274] Mr. Cody: I think it is admissible to ask if he was requested to take one. I am not going into the results of it.

The Court: If he didn't take one there wouldn't be any results. I think the only purpose, and I thought I stated yesterday to the jury and I will instruct the jury again on the admissibility of the polygraph or lie detector test, would be to show in mitigation of damages, if any, on behalf of the Post, and I don't think that is a proper question, and I sustain the objection.

By Mr. Cody:

Q. Now, Mr. Bolton, I have one more question I'd like to ask you. What was the date of this resignation of Coach Butts as athletic director, the one previous to the February 23 resignation?
A. January 28, 1963.

Mr. Cody: Thank you, sir; that's all we have.

The Court: All right, Mr. Schroder.

Cross examination.

By Mr. Lockerman:

Q. I believe you testified, Mr. Bolton, that you and Wally Butts, that you had been at the University of Georgia since 1933, and he had been there since 1938?

A. Yes, sir.

Q. Is that right?

A. That's correct.

[fol. 275] Q. The two of you together?

A. Yes, sir.

Q. I believe that Mr. Cody asked you about those notes—

Mr. Lockerman: May I have them?

By Mr. Lockerman:

Q. —and about the first time you saw them, and I think you have some memorandum as to the first time that you said that you saw these notes—

A. That's right, sir.

Q. The Defendant's Exhibit No. 12. Now, you don't know anything about these notes yourself, do you?

A. I know nothing of the technical aspects of football; no, sir.

Q. You don't know anything about these notes themselves, do you?

A. I don't believe I understand the question, Mr. Lockerman.

Q. You don't know yourself who made the notes or when they were made, do you?

A. Oh, no, sir.

Q. They were merely handed to you by Coach Griffith; is that correct?

A. That is correct.

Q. As a matter of fact, these notes don't mean anything to you either, do they?

A. Not too much.

Q. Yes, sir. You don't know anything about football, do you?

A. No, sir; not the technical aspects of it.

Q. Mr. Cody asked you about the day that you came over to the meeting in Cook Barwick's office, and I believe [fol. 276] he asked you about—didn't he ask you if Wally Butts rode over here with you?

A. Yes, sir.

Q. As a matter of fact, Wally Butts called you that morning and asked you if he could ride here with you, didn't he?

A. I don't think that is right.

Q. Well, in any event he did ride in your car with you, didn't he?

A. Yes, sir; that's correct.

Q. And you at that time knew everything about, or rather you knew what the purpose of that meeting was, didn't you?

A. That is correct; yes, sir.

Q. And I believe you testified on direct-examination that so far as you knew Wally Butts didn't know anything about the purpose of that meeting, did he?

A. I don't remember that question was asked, but I don't believe he did.

Q. Yes, sir. And it took you about, say, an hour or an hour and a half to ride over here from Athens for the meeting, didn't it?

A. That's correct.

Q. Did you say anything to Wally Butts, this man you had been working with for, say, twenty-five years, about what the purpose of that meeting was?

A. No, sir; nothing was said whatever.

Q. You just kept perfectly quiet, didn't you?

A. Oh, no, sir; we talked.

Q. I mean about the purpose of the meeting.

A. Oh, yes, sir.

Q. You didn't mention why you were—you didn't mention why you were bringing him over here for the meeting, did you?

[fol. 277] A. No, sir; Dr. Aderhold was in the car also.

Q. And neither did Dr. Aderhold?

A. No, sir.

Q. Neither one of you?

A. That's correct.

Q. I believe you testified that when you finally got into the meeting in Cook Barwick's office, and the purpose of the meeting was brought out to Wallace Butts and he was shown these notes, he immediately said, did he not, that possibly the man heard some conversation between himself and Bryant; is that about what he said?

A. No, sir. He said that he didn't doubt that the guy heard what he said he heard. You want me to repeat the whole thing again?

Q. I think I remember quite well what you said, and I suppose the jury does too. The next thing he said was that he misinterpreted or didn't understand the conversation; isn't that right?

A. Yes, sir; that's correct.

Q. And that he had not given any information to Bryant in the telephone conversation, if he had one, that would help him, didn't he?

A. Well, the way I understood it was, he said that, "You know I wouldn't give old 'Bear' anything to help him".

Q. That is what I was getting to next.

A. Yes, sir.

Q. He told you immediately, and the others who were gathered there, that you knew, speaking to all of you, that he would not give old "Bear" anything that would help him?

A. Yes, sir.

Q. He said that, didn't he?

A. Yes, sir; he said that.

[fol. 278] Q. And he said that immediately, didn't he? I mean, in the conversation?

A. In the conversation; yes, sir.

Q. Yes, sir. I believe you referred also to some testimony about—I mean, in your testimony you said something about the fact that Wally Butts had some outside activities other than his connection with the Athletic Department.

A. Yes, sir.

Q. Is that correct?

A. That's correct.

Q. Is Wally Butts or was Wally Butts the only man that had any activities other than—that is, at the University of Georgia, other than his activities with the University?

A. Oh, I shouldn't think so.

Q. There were others, weren't there?

A. Oh, sure.

Q. Yes, sir.

Mr. Lockerman: Will you mark these two papers for identification, please, Plaintiff's Exhibit whichever number is next?

The Court: Are you familiar with these exhibits that are being marked, Mr. Cody?

Mr. Cody: I never have seen them. I'd like to take a look at them.

The Court: All right, sir.

[fol. 279] The Clerk: Plaintiff's Exhibit No. 26 for identification is a copy of a letter dated October 22, 1962 to J. D. Bolton from Wallace Butts.

(Whereupon above document was marked for identification only as Plaintiff's Exhibit No. 26.)

The Clerk: 27 is a copy of a letter dated April 27, 1962 to J. D. Bolton from Wallace Butts.

(Whereupon above document was marked for identification only as Plaintiff's Exhibit No. 27.)

Mr. Cody: He hasn't offered them in evidence yet.

Mr. Lockerman: I just wanted to get him to identify them; that's all.

By Mr. Lockerman:

Q. Mr. Bolton, will you look at these two documents marked for identification as Plaintiff's Exhibits Nos. 26 and 27, which are copies of letters addressed to you dated October 22, 1962, and the other dated April 27, 1962, and I ask you to state whether or not they are copies of letters you received from Wallace Butts.

A. Yes, sir; I can identify them.

[fol. 280] Mr. Lockerman: All right, sir, thank you. That's all.

The Court: Do you have any further questions?

Mr. Cody: I do; I do, Your Honor.

Redirect examination.

By Mr. Cody:

Q. Mr. Bolton, while we are on the subject of letters, do you have a letter there you received from Mr. Schroder?

A. Yes, sir; I think so.

Q. Will you let me see that just a minute?

Mr. Schroder: Can I identify it?

The Court: I presume you are familiar with that letter?

The Witness: All right, sir.

Mr. Cody: Will you identify this as Mr. Schroder's letter; that would be Defendant's Exhibit No. 16, wouldn't it?

The Clerk: 15.

[fol. 281] Mr. Cody: 15, and the reply is 16?

The Clerk: Yes, sir.

(Whereupon above documents were marked for identification only as Defendant's Exhibits Nos. 15 and 16 respectively.)

By Mr. Cody:

Q. Mr. Bolton, I show you the Defendant's Exhibit No.—

Mr. Schroder: You haven't shown it to me.

The Court: Sir?

Mr. Cody: I thought you knew what was in there.

Mr. Schroder: Well, I don't know.

The Marshal: Let's have order, please.

By Mr. Cody:

Q. Mr. Bolton, I ask you to take a look at this Defendant's Exhibit No. 15, and state if you received that during the course of the mail.

A. Yes, sir; I did.

[fol. 282] Q. Is the other exhibit, Defendant's Exhibit No. 16, your reply?

A. Yes, sir.

Q. You, of course, don't know whether that is Mr. Schroder's signature or not?

A. No, sir.

Q. But you did address your letter to him?

A. Yes, sir.

Q. Mr. Bolton, in connection with these outside business activities of Coach Butts, I show you what has been identified—

Mr. Cody: I don't believe it has been identified. Mark this as Defendant's Exhibit No. 17, which is a 42-page document listing some telephone calls.

The Clerk: Defendant's Exhibit No. 17.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 17.)

By Mr. Cody:

Q. I hand you the Defendant's Exhibit No. 17, and ask you to take a look at it, and then state to the Court and jury whether or not that is an instrument Coach Butts asked you to prepare.

A. I have got to do a little comparing here myself.

Q. That is all right. Take your time. Would you like to come over here to the table?

A. I think I can work it right here.

[fol. 283] The Court: The alternate juror on the rear, sir, can you see and hear everything?

Juror: Yes, sir.

The Witness: This looks like a part of it. I am not sure it is all.

By Mr. Cody:

Q. Well, such of it as is there, answer the question with reference to that.

A. All right, sir. I know this is a part of it.

Q. Did Coach Butts render any assistance in the preparation of that document?

A. Yes, sir.

Mr. Schroder: I haven't seen the document they are talking about, Your Honor.

The Court: I haven't either. I just don't know what the relevancy is.

Mr. Schroder: May I look at it, Mr. Counselor?

Mr. Cody: Sure, but I haven't finished with the witness, though.

[fol. 284] The Court: I think he is entitled to look at it, and see whether or not he might want to make an objection to it.

By Mr. Cody:

Q. Did you talk to Coach Butts after that document was completed or the one that you have there that has been identified?

A. Yes, sir.

Q. What did he say about it as to its correctness or as to any error?

A. Well, I have a letter from him.

Q. Will you let me see that?

A. I have two letters, one letter on February 26, one letter on April the 5th, one on April the 8th, one on April the 15th.

The Court: May I make this inquiry. What is the relevancy—

Mr. Schroder: That is what I would like to know, Your Honor.

The Court: —of all of this testimony insofar as the telephone call was concerned which was allegedly made to—

Mr. Cody: I'd like to discuss that with Your Honor, but I think it would be improper in the presence of the jury.

The Court: Well, let the jury be taken to the jury room. We will go ahead and work this out.

[fol. 285] (Whereupon the jury retired from the courtroom at 11:46 a. m.)

The Court: The line of questioning, as I recall, is based on outside activities.

Mr. Cody: Yes, sir.

The Court: And I assume that—and I certainly don't know; effort is being shown that phone calls were made on other activities, but what has that got to do with the issues in this case?

Mr. Cody: Two.

The Court: Sir?

Mr. Cody: Two, Your Honor. It has two.

The Court: What issue?

Mr. Cody: Number one, and the principal one, these is the information disclosed by this 42-page document which discloses—

[fol. 286] The Court: You said a 42-page document. That is a list of phone calls?

Mr. Cody: That's right. First, it discloses twenty-eight hundred eighteen dollars and ten cents in telephone calls that Coach Butts made on these personal and business transactions which he charged to the University.

Mr. Schroder: They have been paid. I think that's—that's all been paid.

The Court: Let's take number one. What's that got to do with this case?

Mr. Cody: I want to prove by this witness that this list of telephone calls was approved by Coach Butts and the parties to whom these calls were made are relevant in this case.

The Court: In proving what part of the case?

Mr. Cody: One, if Mr. Schroder, while he did not mention in his opening statement that any gambling was involved or had any relevancy to this case, nevertheless if he does see fit to inject it into this case, this document is very important in that respect because it discloses a tremendous number of calls to several different parties whom

[fol. 287] I expect to show and can show were gamblers. I am glad to make that statement in the absence of the jury, because I don't care to make any statement to prejudice Coach Butts' case, but I think that on that subject that this document is highly important and is relevant, and I intend to offer it for that purpose.

Mr. Schroder: Let me be—

Mr. Cody: It connects up a sequence of events which I think are highly relevant in this case. Now, I am—

The Court: Well, is it your contention in your plea of justification that there was gambling involved in the football fix; I mean, that is a loose term.

Mr. Cody: We haven't charged Coach Butts with gambling, and it is my contention that we have not. Mr. Schroder has said that by—and set forth in his pleadings by inference he reaches that conclusion.

The Court: Do you contend—

Mr. Cody: I am not offering this document at the present time, Your Honor. What I want this witness to do while he is here and available is identify it. I am not offering it in evidence yet, but I want to, while this witness is here, I want him to identify it.

[fol. 288] The Court: Mr. Schroder, is it your contention that the article does charge gambling?

Mr. Schroder: Let me, if I—

The Court: Can you answer that question?

Mr. Schroder: I can't answer it right now.

The Court: I think that deals with the admissibility of this answer.

Mr. Cody: I think he ought to answer it.

Mr. Schroder: I'd like to direct some remarks to that exhibit and what I have to say in connection with it.

The Court: All right, sir, go ahead.

Mr. Schroder: I know Mr. Cody real well, but I don't think it is fair what he has just said in the presence of the press, because he knows that is not the purpose for which he has that document there. He knows there is not but one man on there that is even mentioned in any respect with

relation to gambling. I don't think it is proper for him to [fol. 289] stand here in the presence of the press and say things that will really hurt the plaintiff.

The Court: Let's—let's eliminate the personalities. What I am trying to determine is the real issue. I will ask you the question, Mr. Schroder: Is it your contention that the article does, by the use of the word—I believe the use of the words "corrupt" and "fixing" and "rigging," is it your contention and will it be your contention that they did charge gambling?

Mr. Schroder: It does, Your Honor; I think it does charge that there was gambling in connection with the outcome of this game by both of mine—not both of mine, but both parties.

Mr. Cody: I believe it is admissible.

The Court: Yes, sir.

Mr. Schroder: What is?

Mr. Cody: Your Honor, let me make one statement.

Mr. Schroder: Just a moment, just a moment, whoa, whoa. He said he thinks it is admissible, and what did Your Honor say?

[fol. 290] The Court: I think if your argument or contention to the jury is that it does charge gambling by innuendo or whatever it might be, I think he would be entitled at the proper time, if you do put it in, put forth such evidence, I think it would be admissible for him to show telephone calls to gamblers, if that is charged.

Mr. Schroder: No, sir. Let me straighten this out, Your Honor; that is not what this document shows that he is talking about he wants to introduce to prove—to disprove it.

The Court: Well, I don't—

Mr. Schroder: Let him take the ones off here he says he can prove are known gamblers, and maybe he has got something, but that is not what he wants to introduce this document for, and he knows it. There is not one single person on there that is a known gambler at the time of this transaction, and I challenge him to prove it.

The Court: Of course, Mr. Schroder—

Mr. Cody: We have got depositions here—

The Court: Just a moment; just a moment. I have never seen the document. I don't know what is contained in it.

[fol. 291] Mr. Schroder: He says what it shows. I want Your Honor to see it.

The Court: Well, as I understand—

Mr. Cody: I say it's got to be connected up.

The Court: Let's get the procedure straight. As I understand you, you do not intend to offer the document at this time?

Mr. Cody: No, sir.

The Court: And all you want to do is have the document identified by Mr. Bolton—

Mr. Cody: Yes, sir.

The Court: And go no further?

Mr. Cody: Except—

The Court: All right, sir.

[fol. 292] Mr. Cody: Except to this extent. I want to offer these letters with it. I want to prove by this witness before he gets away—

The Court: You are not offering the letters at this time; you are just identifying the letters?

Mr. Cody: Just identifying them before this witness gets out of pocket. I want to get the record straight.

Mr. Schroder: I have never seen—

The Court: You have identified it.

Mr. Schroder: Well, I have never seen them.

Mr. Cody: Well, you will have an opportunity to see them.

Mr. Schroder: Well, thanks.

Mr. Cody: I want to make one other statement in response to what Mr. Schroder has said. While we are talking about the discreetness with the press, I have never made any statement in this case to the press or anybody else with any intention of causing any prejudice or harm [fol. 293] to Coach Butts. There's been a good deal of—there's been a good deal of conferences, a good deal of

quotations from Mr. Schroder to the press, and I want to say that I resent any comment on his part that I am making this—trying to identify these documents for the benefit of the press. I can't help them being there, but, at the same time, I am not going to prejudice my client's case by excluding them from the evidence.

The Court: Well, we will cross that bridge when we get to it. I will let him identify the documents such as—and then we will, at such time as the evidence develops, we will determine whether or not they are admissible. I don't know what is in the documents. I can't rule on them without reading them.

Mr. Schroder: I don't know what is in the letter. May I have a look at the letters? I have never had them shown to me during any pre-trial hearing.

Mr. Cody: I have been presented with documents I have never seen before, and I can't help that.

The Court: Well, of course, that is where—I thought we had had enough pre-trial, but apparently we didn't. All right, sir.

Mr. Cody: I don't think we had room for all this, Judge.

[fol. 294] The Court: Let the jury be brought back in.

(Whereupon the jury returned to the courtroom at 11:55 a.m.)

Mr. Cody: Will you identify that as a Defendant's Exhibit? What will that be, 17?

The Clerk: It will be Defendant's Exhibit No. 18. It is a letter dated April 8, 1963 to J. D. Bolton from Wallace Butts.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 18.)

By Mr. Cody:

Q. Mr. Bolton, I believe you have identified this Defendant's Exhibit 15 and 16 as—I believe you have already identified that. I show you now the Defendant's Exhibit

18, and ask you if that is a letter that you received from Coach Butts?

A. Yes, sir; it is.

Q. Do you know his signature?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. Did this Exhibit 18 have reference to the Defendant's Exhibit No. 17, the one—

Mr. Lockerman: Your Honor please, the exhibits will speak for themselves.

[fol. 295] The Court: I will let him testify to it, if he connects it up. I haven't let the exhibits in yet.

A. (By the Witness) Yes, sir; that is correct.

Mr. Cody: I believe that's all.

The Court: Did you have any further questions, Mr. Lockerman?

Mr. Lockerman: No, sir.

Mr. Cody: You can have these back.

The Court: Did I understand you to say you didn't?

Mr. Lockerman: No further questions.

The Court: All right, sir, let Mr. Bolton step down.

(Whereupon the witness was excused from the stand.)

The Court: Call your next witness.

Mr. Cody: You may be excused, Mr. Bolton.

[fol. 296] The Court: Let me ask this question, Mr. Schroder, Mr. Lockerman. Can Mr. Bolton be excused?

Mr. Schroder: Yes, Your Honor.

The Court: You have no further use for him in the trial?

Mr. Schroder: I want to accommodate Mr. Bolton. Let me confer.

The Court: I mean, if you—

Mr. Schroder: I don't have any, but let me check it out.

The Court: I presume he will be in Athens and can be available in a couple of hours.

Mr. Bolton: Yes, sir.

Mr. Lockerman: I believe he said he would be in Athens available?

* * * * * * *

JACK C. GORDAY called as a witness on behalf of the defendant, after having first been duly sworn, testified by deposition as follows:

[fol. 297] Direct examination.

By Mr. Davis:

Q. Would you state your name, please?
A. Jack C. Gorday.
Q. Where do you live, Mr. Gorday?
A. Tuscaloosa, Alabama.
Q. Are you an employee of the Southern Bell Telephone Company?
A. Yes, sir.
Q. What is your position with the company?
A. Group manager.
Q. Where?
A. Tuscaloosa.
Q. Any particular district or division?
A. The Tuscaloosa group, which comprises Tuscaloosa, Utah, Livingston, York.
Q. By subpoena we requested the toll ticket representing an alleged long distance telephone call made by Paul Bryant to Wallace Butts on Sunday, September 16, 1962, from the University of Alabama switchboard, number 752-7441 to either LI3-4351 or LI6-0262 in Athens, Georgia. Do you have a toll ticket representing such a call?
A. Yes.

Mr. Schroder: If it please the Court—
The Court: Yes.
Mr. Schroder: —may I ask a question? I believe that is toll ticket that is already in evidence. I don't see any sense [fol. 298] in going back over the testimony. Isn't that the toll ticket that is in evidence?

Mr. Joiner: May it please the Court—

The Court: My—go ahead.

Mr. Joiner: The toll ticket is in evidence, but the purpose of reading this testimony is to tie in the credit card number of Coach Bryant to the document which has already been admitted.

The Court: Yes, sir. I remember asking that question yesterday, and they said the evidence would tie it in. Yes, sir; go ahead. You don't insist, do you?

Mr. Schroder: No, sir.

The Court: All right.

By Mr. Davis:

Q. Do you have a toll ticket representing such a call?

A. Yes.

Q. May I see it, please? Is this a record that is kept in the ordinary course of business? That is, you have such a record on all telephone calls that are made on all long distance telephone calls that are made?

[fol. 299] A. Yes, sir.

Mr. Joiner: Mr. Davis states: "I will ask the Court Reporter to identify, as Defendant's Exhibit 1, the photostatic copy of the front and back of this toll ticket that you have handed me." Your Honor, I'd like to state that we do not intend to offer that exhibit since it is the one that we have previously offered. It's already been admitted in evidence.

The Court: All right, sir.

Mr. Schroder: That was admitted without objection.

The Court: Yes, sir.

By Mr. Davis:

Q. Mr. Gorday, I would like, while we both look at Defendant's Exhibit 1, for you to indicate what information is on this toll ticket designating, as clearly as possible, the position on this copy that you are reading from? Do you follow me? In other words, I want to know what informa-

tion is on this card as you interpret it, and I want you to tell me what place on the card you are looking at, whether it is the front, side or back side, lefthand corner or right-hand corner?

A. I understand.

Q. All right.

A. I am looking at the front side of the card.

Q. Which is the front side?

[fol. 300] A. This is the side that gives the information as to the city called and the city from which the call was placed.

Q. Well, on the photostatic copy identified as Defendant's Exhibit 1, it would be the—

A. The top portion is the front side of the card.

Q. All right.

A. This is a record of a call placed to Athens, Georgia, to telephone number LI 6-0262. The call was placed from Tuscaloosa, Alabama, and was billed to a credit card, the credit card is No. 752-7441B1-K54.

Q. You said the call was made to a certain number in Athens, Georgia. How do you determine what number it was made to?

A. Across the face of the card there at the very top is one, two, three, four, five, six, seven items over, it says to C. O. That is to Central Office. And then L I 6 and the next little block says to No. 0262. So, the complete number is LI 6-0262.

Q. I see. Does this card indicate here who placed the telephone call?

A. No, sir; it does not.

Q. The credit card you referred to, to whom does that belong?

A. Our records indicate that card was issued to—let me give it to you exactly; Paul W. Bryant.

Q. Does the card indicate the person that the call was made to?

A. Yes, sir. Written in on the card is Coach Wallace Butts.

Q. Who would make that notation in the ordinary course of business?

A. Our operator would if the information was volun-
[fol. 301] teered. She would not necessarily make any notation.

Mr. Joiner: If it please the Court, I'd like to read now from Page 14 of the deposition, a stipulation as to certain telephone calls which are summarized in the deposition, and then I would like to read the information pursuant to that stipulation as to one call.

The Court: All right, sir. Where is your stipulation?

Mr. Joiner: It is on Page 14, Your Honor.

The Court: All right.

Mr. Joiner: This is stated by Mr. Davis: "And it has been agreed by the attorneys for the parties to this action that the witness and his assistant or assistants may read from the toll tickets produced pursuant to this subpoena certain information, the same to be transcribed by the Court Reporter and made a part of this deposition without counsel for either party being present; it is further agreed that the information to be read from the toll tickets shall be transcribed in column style and consist of the following facts: A column indicating the date of the call, a column indicating the city and phone number where the call originated and also the person making the call, if any or all of that information is available; a column indicating the city and phone number called and the person called, if any [fol. 302] or all of that information is available; and a column indicating the time the connection was made and the duration of the call. Counsel further agree that the list of all calls compiled as above stated shall be an accurate account of the records produced and admissible in evidence as such if otherwise admissible."

Then I should like to read from Page 17, Your Honor.

The Court: All right, sir.

Mr. Schroder: 17?

Mr. Joiner: It is the last call on that page. "Date: Sep-

tember 9, 1962, from 959-5327, Tuscaloosa, Alabama, to Athens, Georgia, LIberty 6-0262, Wallace Butts, residence; time: 2:20 p.m.; duration of call: 28 minutes."

* * * * * * *

JOHNNY GRIFFITH called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Your name is Coach Johnny Griffith?
A. Yes, sir.
Q. Where did you attend college, Coach?
A. University of Georgia and South Georgia College.
[fol. 303] Q. When did you finish?
A. Finished in the summer of 1949.
Q. Did you play football when you were at the University?
A. I played my freshman year there; yes, sir.
Q. Did you subsequently play at South Georgia College?
A. Yes, sir; I did.
Q. How long have you been in the coaching profession?
A. Since 1949.
Q. What year?
A. Since 1949.
Q. Will you state to the jury what your experience has been in coaching?
A. I began coaching at South Georgia College as backfield coach in 1949; became head coach at South Georgia College in 1950 through 1953; came to the University of Georgia in 1954 as assistant freshman coach; in 1955 at Furman University as backfield coach; I returned to the University of Georgia in 1956 as assistant coach; I was named head freshman coach in 1959 and '60; head coach of the University of Georgia in 1961.

Q. Are you the head football coach there now?
A. Yes, sir.

Mr. Cody: Can you hear all right?
Juror: Yes, sir.
[fol. 304] The Court: Can all of you jurors hear Coach Griffith? All right, sir.

By Mr. Cody:

Q. Coach Griffith, I show you what has been identified as the Defendant's Exhibit No. 12. Will you state to the jury whether or not you remember seeing those notes before?
A. Yes, sir; I did.
Q. When and where?
A. I don't recall the date. It was the weekend of the Southeastern Conference meeting in Atlanta at the Biltmore Hotel on a Thursday afternoon approximately around 5:30.
Q. Who turned those notes over to you?
A. Mr. George Burnett.
Q. What did you do with them thereafter?
A. I showed them to Mr. J. D. Bolton the same night, and turned them over to President Aderhold on Saturday morning of the same week.
Q. Coach Griffith, was the 1962 game with the University of Alabama the first game of the season?
A. Yes, sir.
Q. And that was to be played on September the 27th?
A. I recall it was the 22nd; yes, sir.
Q. In Birmingham?
A. Yes, sir.
Q. What—prior to the beginning of that season, what preliminary practice would your team normally go through, I mean, so far as the weekly period is concerned? You would have spring practice; I am trying to get at that first.
[fol. 305] A. Yes, sir; we had spring practice that year which consists of four weeks of spring practice. The squad reported on the 30th. We had picture day on the 31st, and—

The Court: The 30th of August?
The Witness: The 31st of August.
The Court: 31st of August.

A. (By the witness) We began practicing on the 1st of September, and we played the game on the 22nd.

Q. Then you had how many weeks of spring training, spring practice?

A. Four weeks.

Q. And then in the fall that would give you about three weeks?

A. Yes, sir.

Q. Did you have many new men on your team for the '62 season?

A. Yes, sir; we had approximately fifteen or sixteen sophomores that we counted on out of the twenty-five or twenty-six boys that we would play during the season.

Q. How many—Coach Griffith, how many formations, basic formations does a football team use during a seasons, approximately how many?

A. Approximately seven or eight or nine, somewhere along there. That is what we use.

Q. With some variations in each formation?

A. Yes, sir.

[fol. 306] Q. How many did—how many formations did you train your team for for the Alabama game, this upcoming Alabama game?

A. Two formations.

Q. Why do you limit it to two?

A. Well, we feel that two is satisfactory, possibly sometimes three, and we don't think we can handle any more offense plans than three formations.

Q. Is that by reason of the fact that boys themselves can't take in more than that?

A. Well, in our case last year; yes, sir; that would be true because of the sophomore people we had on the football team.

Q. Take a look at that Exhibit 1 showed you, Coach Griffith, and try to refresh your recollection now as to—

let's take it back to this meeting that you had at the Biltmore Hotel. Will you point out to the jury whether or not there is any reference on those—on that exhibit to either one or both of the formations that you had trained that team for?

A. Yes, sir; there are two notes that indicate the two formations that we used in the ball game.

The Court: That you used or planned to use?

The Witness: Planned to use and did use in the ball game.

By Mr. Cody:

Q. Did you—could you state to the Court what those formations are?

A. We used a three-yard slot in the ball game and the note reads "slot to right, ends normal (3 yards.)" We use what we call—

[fol. 307] Q. What page are you on?

A. These are not numbered.

Q. Mine is in the same order as yours.

A. I will have to count them. I am on Page 5.

Q. State to the Court the other formation that you referred to.

A. I am on the last page which is Page 8, "slot right, left end out. 15 yards."

Q. Is that last item what you coaches sometimes refer to as a pro-set?

A. Yes, sir.

The Court: As what?

The Witness: A pro-set.

The Court: Pro-set?

The Witness: Yes, sir.

By Mr. Cody:

Q. P-r-o, hyphen, s-e-t?

A. Yes, sir.

The Court: What is that, professional-set?

The Witness: Yes, sir; it is a terminology we use to describe an offensive formation. Other schools call it maybe something different; I don't know.

[fol. 308] By Mr. Cody:

Q. What reactions did you have to these notes when you saw those two items that you have mentioned to the Court?

Mr. Schroder: If the Court please, I don't think the reaction of the witness, what reaction he might have would be admissible.

The Court: Yes, sir; I don't think that is proper.

Mr. Cody: I withdraw the objection—I withdraw the question.

The Court: All right, sir.

By Mr. Cody:

Q. Coach Griffith, will you look on Page 1? Do you see the name "Reismueller" mentioned?

A. I don't understand you.

Q. Do you see the name "Reismueller" or "Rissmiller" mentioned?

A. Yes, sir.

Q. What is his correct name?

A. Rissmiller.

Q. Rissmiller?

A. Yes, sir.

Q. Was he a sophomore?

A. He was—he was starting his sophomore season; yes, sir.

[fol. 309] Q. You don't—freshmen are not permitted to play on the varsity team; is that right?

A. That is correct.

Q. So this would have been his first year on the team?

A. Yes, sir.

Q. What sort of a player was he?

A. Well, he is potentially a real fine football player, and we think he will be a real fine football player.

Q. Do you see anything in these notes other than the two formations that you have referred to which you particularly noticed?

A. I am not sure I understand your question.

Q. Turn to Page 2, the second item. Will you read that to the jury?

A. "Optional left pass if can block man on corner, keeps running."

Q. What does that mean to you?

A. Well, optional left pass is a terminology that I was familiar with.

Q. Was that terminology used by you in the 1962 season?

A. No, sir.

Q. Who used that terminology? Was it used before at Georgia?

A. Yes, sir.

Q. When?

A. It possibly could have been used in 1961; I don't recall. It had been used before that time, I don't know how long.

Q. Whose terminology was that?

A. Well, it was used by Coach Butts.

Q. Have you ever used that terminology yourself in the training of these boys?

[fol. 310] A. Not to my knowledge, in '61; definitely no in '62.

Q. On Page 2, that third item, "Well disciplined ball club": does that mean anything to you?

A. No, sir.

Mr. Schroder: I didn't understand the answer.

The Court: He said "No, sir."

Mr. Schroder: Thank you.

By Mr. Cody:

Q. Take the next. What about the next item at the top of Page 3?

A. "On side guard pulls on sweep"?

Q. Yes.

A. We pulled the on side guard on sweeps in the second half of the ball game against Alabama.

Q. Was that a part of the training you had given your team?

A. Yes, sir.

Q. Does that next item mean anything to you?

A. No, sir; it does not.

Q. Do you have a young man on your team or did you have one last year named Woodward?

A. We have a boy named Woodward; yes, sir.

Q. Turn to the third item there on Page 3, "Woodward commits fast—safety man"; did he play safety, the safety man position on your team?

A. Yes, sir.

Q. What does the term—in football terminology, what [fol. 311] does it mean by "commits fast"?

A. Well, it means that the halfback or safety man whoever is in the secondary, in this case refers to the safety man, that he comes up fast on running plays, commits hisself from his original position to come up and make the tackle.

The Court: What would that do, leave safety open?

The Witness: Possibly so if they were throwing the ball; yes, sir.

By Mr. Cody:

Q. Was that a habit of Woodward?

A. Yes, sir; it was.

Q. Did you try to correct it?

A. Yes, sir; we have been trying to correct it since he came to the University. He is an aggressive type boy that likes contacts, and it is rather hard to try to discourage him from trying to do that; yet, it is definitely a disadvantage in playing secondary.

Q. When you say "contact," you mean to make a tackle?

A. Yes, sir.

Q. That last item on Page 3, "Weak defense, anybody except Blackburn"; did you have—did you have a man on your team named Blackburn?

A. Yes, sir.

Q. Is that the way you pronounce his name?

A. Yes, sir.

Q. What position did he play?

A. He played left halfback normally. However, we did swing him from left and right halfback so he played both halfbacks.

[fol. 312] Q. Does that item mean anything to you?

A. Well, we had counted on him being our best defensive back from his previous experience over the 1961 season.

Q. This was his second year then?

A. He was a senior; it was his third year.

Q. Was he the best defensve back that you had?

A. We thought that he possibly would be, but he was sick off and on before the Alabama game, and didn't get the work he needed actually to be ready to play against Alabama.

Q. On Page 4, "Baer slots right, splits right end out"; does that mean anything to you?

A. No, sir.

Q. You have a man on your team named Baer?

A. We have a man named Babb, B-a-b-b.

Q. What position did he play?

A. He played both ends, left and right ends.

Q. This next item, Coach Griffith, on Page 4, "Long count, left half in motion"; does that mean anything to you?

A. We have a halfback in long motion count, what we call a four motion count, with both halfbacks, left and right halfbacks, and we throw an eighteen and nineteen overpass off of it.

Q. What is the purpose—difference between a long and a short count?

A. Well, the ball is snapped at different positions where the halfback is as he goes in motion; on a short motion he is normally about three or four yards from his original position, and in long motion he is normally about ten to twelve yards beyond the original position that he lined up in.

Q. Would that have any purpose in trying to draw your opponent off side?

[fol. 313] A. It will cause him to be off adjustment in the secondary to a certain extent, not to draw them off sides; no, sir.

Q. You see on Page 4 reference to Porterfield?

A. Yes, sir.

Q. Was he a new man?

A. He was an upcoming sophomore; yes, sir.

Q. Was he one of your best players?

A. He was our best back; yes, sir.

Q. Was he what you would call a running back?

A. He was our best running back; yes, sir.

Q. Turning over to the next page, Coach Griffith, you heretofore referred to that second item as one of your formations, "slot to right, ends normal (3 yards)"; what is the significance, if any, as to the distance that the ends spread, whether it is three, five or seven yards; what is the significance?

A. Well, it makes a difference in regard to the defensive end as to where he will line up, whether he will line up on his inside head up or outside shoulder, and it would depend on the width of the slot or the split of the end as to where he would line up. Some teams have certain rules; we have our own rules in regard to that.

Q. That is one of the formations that you referred to?

A. Yes, sir.

Q. Turning back to Page 4 just a moment, the item in the middle of the page, "Long count, left half in motion"; was that one of Georgia's plays for 1962?

A. Yes, sir.

Q. Had you trained your team for the Alabama game to use that play?

A. Yes, sir.

[fol. 314] Q. At the bottom of Page 5, Coach Griffith, does that last item there—can't tell whether it is one or several items—does it mean anything to you?

A. Not the way it is written; no, sir.

Q. Did you ever know Mr. Burnett prior to meeting him at the Biltmore Hotel when you were shown these notes for the first time? Did you ever know him?

A. No, sir; I did not.

Q. You don't know whether he knows much about football or not?

A. I couldn't answer that; no, sir.

Q. Turn to Page 6 just a minute. Do you see a reference there to a notation, "Can't quick kick"?

A. Yes, sir.

Q. Who did the kicking for the Georgia team principally?

A. Jake Saye.

Q. S-a-y-e?

A. Yes, sir.

Q. Was he what you coaches would describe as a quick kicker?

A. Not from his position; no, sir. We had to use a different formation to quick kick from because he was a quarterback.

Q. You mean by that quarterback is too close to the line to quick kick?

A. Yes, sir.

Q. Am I correct, then, in assuming that from his quarterback position he could not quick kick?

A. No, sir; we had to pull him into a type of quick kick formation that we used, and it is a double wing with a quarterback lining up about eight yards deep directly behind the center.

[fol. 315] Q. Now, when you do that, doesn't that tip off your opponent to the fact that you are kicking?

A. It could tip them off that we could quick kick from that, but when Saye lined up in that formation, we could

do one of three things off of it, that is, quick kick and throw and run off of it.

Q. Then, is it true that you did during the '62 season use some quick kicks?

A. Not from the quick kick formation that most teams use; no, sir; we went to this formation to do our quick kicking.

Q. Did you not have anybody that could do any quick kicking from a normal formation?

A. No, sir; we did not.

Q. Does that next item after the "quick kick" make any sense to you?

A. "Slot right, right half on fly, screen to him," it is a formation we used; however, we did not screen to the right halfback as the note reads, "To him," and I assume the note—

Mr. Schroder: If the Court please, it is not up to this witness to assume what the notes say, and he should construe what is in the notes as they are and not assume—

The Court: I will let him interpret the notes. I mean, he is an expert.

The Witness: "Slot right, right half fly, screen to him," we had a slot with a right halfback flying; however, we screened to the left halfback and not to the right halfback.

[fol. 316] By Mr. Cody:

Q. This "29-0 series," does that mean anything to you?

A. No, sir; we have an 029 series, not a 29-0.

Q. What's that? What is an 029?

A. It is what we call our outside belly series with the quarterback reverse pivoting, faking to the fullback, and either pitching off to the opposite halfback or keeping the ball and running.

Q. It is a short pass?

A. I beg your pardon?

Q. If it is a pass, if it develops into a pass is it a short pass?

A. We didn't throw off of this formation.

Q. I see.

A. It is a running series.

Q. At the bottom of Page 6 do you see that reference, "Babb catches everything"?

A. Yes, sir.

Q. What does that mean to you?

A. We had built our passing attack around Babb and had used him also as a split end in this particular ball game from a pro-set. In other words, he would line up if it was a slot, and he—the right end, he would stay in that slot if it was a slot formation. If we called a pro formation, he would always be the end that went out anywhere from ten to fifteen yards and split, regardless of which side of the field it was called on, right or left. We planned—we built our passing attack around him.

Q. Was that because he was the best receiver you had?

A. Yes, sir.

Q. I believe you have already mentioned, Coach Griffith, [fol. 317] this first item on Page 7; that is one of your formations?

A. Yes, sir.

Q. Does that next item make any sense to you?

A. "Georgia" with an arrow pointing to "drop end off, contain with tackle (defense)"; we drop our ends off and contain with a six loose defense.

Q. Is that part of the training that you gave this team for the Alabama game?

A. Yes, sir.

Q. Coach Griffith, you have been in the, according to your testimony, you have been in the coaching business quite some time. Will you state to the jury whether or not in your opinion the information which you have mentioned and which has been taken from these notes would be helpful to an opponent of your team?

A. If the information like this were given, the two most important things to me in the notes are the two formations that we planned to use in the ball game. Our preparation

during the summer and during the fall is based on defensively trying to determine the types of offensive sets that the opposing team will use and try to set the defenses for the possibility of the number of offensive formations that they have shown over the years or particularly in the last season.

Q. Would the information alone with respect to these formations that you mentioned, would that, to some extent, limit the preparation that was necessary on the part of Alabama?

A. Yes, sir; it would. It would eliminate them making preparation and spending time on the practice field to prepare against any of the possibilities of formations that we had shown to try to stop.

[fol. 318] Q. Coach Griffith, if I took a blackboard over here where you could draw a diagram of it, could you explain to the jury what these two formations are?

A. Yes, sir.

The Court: Would the black one be larger? Would it be more convenient?

Mr. Cody: Which one would you prefer?

The Witness: It is immaterial to me.

Mr. Cody: That is all right. Where is that chalk?

The Crier: On the board.

Mr. Cody: Let's get up here where we can see it a little bit better. Can you see that all right?

Juror: Yes, sir.

By Mr. Cody:

Q. Which formation are you referring to first?

A. This is the slot formation with the right halfback between the offensive right end and the right tackle.

Q. Did I understand you to say that it is important to know how far this end gets out from the tackle?

[fol. 319] A. Yes, sir.

Q. Why is that important?

A. Well, from a defensive standpoint it is the distance

he splits as to whether the ends go out with him and still help in the off tackle hold or whether it is right enough where he can play his inside and not be hooked on a sweep that the fullback might try to back him out or the end might hook him in.

Q. Any other comments you want to make descriptive of that particular formation?

A. No, sir.

Q. Let's pass on to your pro-set, as you coaches call it.

A. This is pro formation with the same slot on this side and the only difference is, the left end in this particular formation, because this is to the left, is split out to ten or fifteen yards, depending on the position of the field. In other words, if this were a half marker over here, he normally would not be able to go fifteen yards because he would go out of bounds. This formation is the same as this with the exception of this end who would normally line up here as he is lined up here, will split out approximately ten or fifteen yards.

Q. You can have a seat now, Coach Griffith. Did Wallace Butts have anything to do with the football team in 1962?

A. No, sir.

Q. How many coaches did you have there, assistant coaches?

A. We had ten.

Q. How many men did you have on the squad?

A. On our varsity squad we carried normally around forty-two or -three players.

[fol. 320] The Court: Some of your coaches would be team and freshmen; you didn't have ten varsity coaches, did you?

The Witness: No, sir.

By Mr. Cody:

Q. How many freshmen coaches did you have?

A. We had one full-time and normally we have two or three student assistants.

Q. Gives you about six varsity coaches?

A. Seven; I believe I am correct on that.

Q. Is Coach Frank Inman one of your assistant coaches?

A. Yes, sir.

Q. What part of your system does he teach?

A. He is now the offensive backfield coach, and he is in charge of the recruiting program.

Q. Is Coach Leroy Pearce one of your assistant coaches?

A. Yes, sir.

Q. What part of the team does he handle?

A. Now, he handles the defensive linebackers and the defensive ends. Last year, 1962 season, he coached the ends both ways, offensively and defensively.

Q. How long has Frank Inman been with you?

A. He came to the University of Georgia in July of 1962.

Q. How about Pearce?

A. Pearce came in the spring, I believe, in March; I am not sure; March of 1962.

Q. Coach Griffith, is it true that as early as the first game of the season the coaches themselves don't know very much about the players?

[fol. 321] A. It depends on how many sophomores you have on your football team. We should have a pretty good picture after spring practice is over in regard to the juniors and seniors. Your sophomores are untested, and you normally do not know how they are going to react to competition in the Southeastern Conference.

Q. Did you have an abnormal number of sophomores in '62?

A. I would say we did; yes, sir.

Q. Is it customary for one coach to talk to the coach of the opposing team a week or ten days before a game?

A. I would depend upon what they were talking about.

Q. Would it be customary to talk about players?

A. Well, that is difficult to answer; in general it is whose players and—

Q. What about the characteristic of players?

A. No, sir; I would say it would not be normal.

Q. What about formations?

A. In my opinion it would not be; no, sir.

Q. What about plays?

A. No, sir.

Q. When I use the term "play", does that mean to you a part of a formation or a variance of a formation?

A. Well, I assume you are talking about offensive plays?

Q. Yes.

The Court: Offensive plays run off of a certain formation?

The Witness: Well, offensive plays are run off of dif-
[fol. 322] ferent types of formations. You can run a lot of plays off of—same type plays off of those formations.

The Court: You would have a number of plays run off of those two formations you say you prepared for the Georgia-Alabama game?

The Witness: Yes, sir.

The Court: And all of your plays would be run off of those two separate formations?

The Witness: Yes, sir.

By Mr. Cody:

Q. If these—if these notes that I have shown you and which have been identified, if they are genuine, does that disclose just general football talk?

A. I would not say so; no, sir.

Q. Did Coach Butts ever tell you that he, in September of 1962, that he was calling Coach Bryant about anything?

A. Not to my knowledge; no, sir.

Q. Did he ever tell you that Coach Bryant had called him any?

A. No, sir.

Q. Coach Griffith, it is customary, I believe, for coaches to scout an opposing team and try to get as much information as they can about their potential; is that correct?

A. Yes, sir.

[fol. 323] Q. Sometimes you coaches exchange pictures of

a previous game so as to minimize the difficulties; is that correct?

A. Yes, sir.

Q. Would the movies of a game normally show the action of a secondary defense?

A. Ours would show some of it at times and some of it would not. It would depend on the school taking the film and the type of equipment they were using. If they are using wide angles, it would consistently show the secondary. We do not use the wide angle.

Q. What do you mean by "wide angle", take it from down near the goal post, that direction?

A. No, sir. It shows the width of the field, and it will cover the offensive team in an offensive set and a defensive team entirely in its defensive set which will carry the lens or coverage approximately twelve or thirteen yards deep. I am not too familiar with it, but I have seen it and it shows the reaction of the secondary.

Q. Would it have—would it be able to show the tendencies of a particular player?

A. Yes, sir.

Q. Being the first game of the season, your opponent would have very little scouting information about your team; is that true?

A. In regard to the preparation for the coming game he would have—should have no information. He would have only the information he compiled from films of our games in the last season.

Q. Well, isn't it true that even if you had a picture of the previous season's game, you might have corrected defects that appeared in that game?

A. Yes, sir.

[fol. 324] Q. Does a movie of a game show pass patterns, Coach Griffith?

A. Well, I go back to the original answer. It depends on the type of lens you are using, and it is possible that it definitely would. In ours, sometimes we get the pass pattern, the entire pattern; sometimes we don't.

Q. You would have to show large portions of the field to do that, wouldn't you?

A. Yes, sir.

Q. Would the movies of a game show the distance of these splits?

A. It would show it, but it is rather difficult to look at a film and actually know the exact split of a line or a back or a split end or anything along those lines.

Q. Is that—is that because the cameras are at a bad angle?

A. No, sir; it is—in my opinion, it is because of the distance the camera is from the field in trying to cover the offensive and defensive team. It is just difficult to determine.

Q. Would the film of—would the picture of a game indicate the particular speed of a runner in comparison with other players?

A. Yes, sir; it could; yes, sir. It will—I will say it would.

Q. Do you have secret practice?

A. Yes, sir.

Q. How long before the first game of the season do you start that secret practice?

A. Beginning of the practice.

Q. September the 1st?

A. Yes, sir.

Q. In your opinion, Coach Griffith, would it be helpful [fol. 325] to an opposing team to know something that would keep them from being penalized, receiving penalties?

A. Yes, sir.

Q. Doesn't a game sometimes turn, that is, whether you win or lose, sometimes on as small an event as one penalty?

A. I have seen such games; yes, sir.

Mr. Schroder: I didn't hear that last answer; I'm sorry.

The Court: He said he had seen such games—

The Witness: I have seen such games.

The Court: —where it turned on one penalty. All right, sir, Mr. Cody.

Mr. Cody: Just about through, Your Honor.

By Mr. Cody:

Q. Coach Griffith, if Rissmiller, being a sophomore, was a top flight runner and you had no previous experience with him on account of his being a sophomore, would it be helpful, in your opinion, to an opponent—

The Court: Rissmiller was a tackle, wasn't he?

[fol. 326] By Mr. Cody:

Q. I mean any player—well, we will put it "any player" —to know his potential?

A. Well, I will say this about Rissmiller. I don't think that it was any particular secret that he was predicted to be a real fine football player, because he had been selected, as I recall, as possibly the lineman-of-the-year in the Conference as a sophomore.

Mr. Cody: I believe that's all.

The Court: All right, sir, Mr. Schroder; you want to remove that blackboard?

Mr. Schroder: A couple of questions I would like to direct to the witness about these formations a little later, so I will move it, but bring it back.

Cross examination.

By Mr. Schroder:

Q. Coach Griffith, who gave you your first job at the University of Georgia?

A. Coach Wallace Butts.

Q. That was in 1954?

A. Yes, sir.

Q. Did Wallace Butts also assist you in getting a position at Furman University?

A. To my knowledge he did; yes, sir.

Q. He did?

A. Yes, sir.

Q. When you returned to Athens in 1956 you returned to [fol. 327] work for Wallace Butts?

A. Yes, sir.

Q. In 1954, for a moment we will return to that year, when Wallace Butts gave you your first job at the University of Georgia, you at that time asked him if there was any way that Wallace Butts could give you financial aid, didn't you?

A. Yes, sir.

Q. And he arranged financial aid for you, didn't he?

A. As an assistant to the freshman team; yes, sir.

Q. Has he ever given you any other sort of financial aid?

A. In the form of loans which have been repaid.

Q. I didn't understand you, sir.

A. In the form of loans which have been repaid, with the exception of around three hundred fifty dollars.

Q. You mean Wally Butts has made you loans of money?

A. Yes, sir.

Q. When you needed it?

A. Yes, sir.

Q. And you still owe him some money?

A. Yes, sir.

Q. Did that quite willingly, did he not?

A. Yes, sir.

Q. He was anxious to help, was he not?

A. Yes, sir.

Q. Has Wallace Butts ever gone with you to the bank and endorsed a note so you could get a loan from the bank?

A. I don't recall his going to the bank. He has endorsed some notes for me; yes, sir.

Q. Whether he went to the bank or not with you, he did [fol. 328] endorse the loan for you to get—endorsed a note in order for you to get the loan, didn't he?

A. Yes, sir.

Q. Has Wallace Butts ever made payments to the bank on those loans when they were in arrears?

A. Yes, sir.

Q. In your behalf?

A. Yes, sir.

Q. Taking your testimony item-by-item, you testified

on direct-examination in response to a question put to you that the optional left pass pattern was something Wallace Butts used to use when he was head coach at the University, but which you did not use after you became head coach; is that right?

A. I said that we possibly did use it in 1961; I don't remember using it, but I definitely said we did not use the terminology in 1962.

Q. Did you use the terminology in 1961?

A. I said not to my knowledge we did not. We possibly could have.

Q. Let me refresh your recollection. Let me hand you a document here and ask you if you can identify that document, and, if so, let me know what it is?

A. It is the offensive plan for the Miami game in 1961.

Q. The offensive game plan for the Georgia team to employ in the Miami University game in 1961?

A. Yes, sir.

Q. Look at that game plan—who prepares the game plan?

A. The offensive backfield coach, Charlie Trippi, along with myself.

Q. Along with you?

A. That's right, sir.

Q. All right. Look in that game plan for the Miami game [fol. 329] of 1961, and see if you do not have in that game plan a pass pattern described by you and Charlie Trippi as optional left?

A. Yes, sir; we do.

Q. All right, sir, is there any doubt in your mind now that the term "optional left" was used by the University of Georgia in its football plans for 1961?

A. No, sir; there wasn't.

Q. All right. The previous question or my last question was this, and there may have been some misunderstanding as to what the answer was. Is there any doubt in your mind now, after seeing the Miami game plan for 1961, is there any doubt in your mind now that the term "optional left pass" was used by the University of Georgia during the year 1961?

A. I said that we possibly could have used that. I did not say that we didn't or we did. I don't know if that is an accurate game plan or not. I couldn't answer that. It appears to be; yes, sir; I would accept it as just looking at the front page.

Q. Well, there is a reference to an optional left pass in this game plan, is there not?

A. Yes, sir; there is.

Q. Well, is there now some doubt in your mind?

A. No, sir.

Q. All right, sir. These two diagrams which you have placed on the board here which you have described the top one as a slot formation—

A. Slot right; yes, sir.

Q. Slot right?

A. Yes, sir.

Q. And the bottom one is the pro-set?

A. Yes, sir.

Q. This slot right, was that something new for the [fol. 330] Georgia—that Georgia was planning for the Alabama game?

A. I am not sure I understand your question in regard to that formation.

Q. Was the slot right formation something new that Georgia was preparing to use for the first time in the Georgia-Alabama game of 1962?

A. Well, I still don't understand your question. You mean by "the first time", had we ever used the formation? It was something new as far as preparing for the Alabama game; yes, sir.

Q. You did not use that in 1961?

A. Yes, sir; we used it in 1961.

Q. Well, it wasn't something new, then, was it?

A. Not in the sense of the word being a new formation; no, sir.

Q. Did you use this slot formation that you have described here in 1960?

A. I was not the head coach then.

Q. No, sir; but you were on the coaching staff, weren't you?

A. I was the head freshman coach, and we used it at the University of Georgia; to my knowledge we did use it; yes, sir. I don't know whether it was a three-yard slot or a five-yard slot; I couldn't answer that.

Q. You used it in 1961 in every game you played, didn't you?

A. I couldn't say that we used it in every game. We used it some; yes, sir.

Q. Name me a game you didn't use it in? You were head coach in 1961.

A. Well, I couldn't—I couldn't recall.

Q. It was used very often in 1961, wasn't it? That is a fair statement, isn't it?

[fol. 331] A. Yes, sir.

Q. The lower formation that you have diagrammed here known as the pro-set, was the Alabama game in 1962 the first time the University of Georgia had used that formation?

A. No, sir.

Q. It had used that formation during the season of 1961 also, had it not?

A. Yes, sir.

Q. You have already testified at some length about scouting being done by the opposing teams. You will assume that Coach Bryant would scout your team during '61 just as you were scouting his team in 1961, wouldn't you?

A. Yes, sir.

Q. And if Coach Bryant scouted your team in 1961 they would have seen those same two formations, wouldn't they?

A. Yes, sir.

Q. As a matter of fact, those same formations are used by Alabama, aren't they?

A. Yes, sir.

Q. Exactly, aren't they?

A. No, sir; they use what they term as the two-yard slot rather than a three-yard slot.

Q. That much difference?

A. Yes, sir.

Q. How about the pro-set?

A. The same.

Q. They used that repeatedly in the year '61 and also through the year '62, didn't they?

A. Yes, sir.

Q. Wasn't anything secret about those formations, was there?

A. No, sir.

[fol. 332] Q. Practically every team in the Southeastern Conference uses those same formations?

A. I couldn't tell you about every team.

Q. Do you know of one that doesn't use it?

A. I couldn't tell you of one that doesn't use it.

Q. You play most of them, don't you?

A. We play six of them.

Q. Do you know any of those six that don't use those two formations?

A. Not offhand; no, sir.

Q. Was there any formation that you coached the university of Georgia football players to use against Alabama in 1962 that the Georgia team did not use in 1961?

A. No, sir.

Q. When you refer to the slot end out three yards, that doesn't mean that that end is going to play exactly three yards out from the tackle on every occasion that the formation is used, does it?

A. That is what we strive to get, three yards; yes, sir.

Q. Then it would be inaccurate to say that the end moves from three yards on one occasion to two, and from three yards on another occasion to five, in order to accommodate his own play against the defensive tackle; would that be an inaccurate statement?

A. I would like for you to repeat that again; I didn't get it.

Q. All right, sir. The split end—strike that. On the normal slot where the right end is away from the right tackle and there is a back between the end and the tackle—

A. Yes, sir.

Q. —the end in this position has a tackle on the other [fol. 333] team playing opposite him whom he has to block on occasions, doesn't he?

A. Not from a slot formation; no, sir.

Q. What does he do?

A. The tackle won't come out and line up on the end there.

Q. It will be the end that will line up.

A. Yes, sir; yes, sir.

Q. All right, sir. He has got a blocking assignment, this end has—

A. Yes, sir.

Q. —against the man playing opposite him, doesn't he?

Q. And if the man is where he can't get a good block at him, he will move his own position to accommodate him, won't he?

A. No, sir; because on a slot formation the end will block in, and in our plan the full back will block on the man lined up head on or inside or outside on the offensive end.

Q. All right. Let's put it simply. You know Mickey Babb?

A. Yes, sir.

Q. He is your best end, I believe you said a while ago?

A. Yes, sir.

Q. And Mickey Babb played all through the Alabama game, didn't he?

A. Yes, sir.

Q. He played approximately fifty, five-0 minutes?

A. Yes, sir.

Q. Both offensive and defense?

A. Yes, sir.

Q. Mickey Babb, when he was playing in the end position on slot right, was he or was he not, throughout the [fol. 334] Alabama game, three yards from the tackle?

A. Well, I couldn't answer that.

Q. Well, you were there, weren't you?

A. Yes; but I can't see from the sideline whether he is lined up two and a half or three, but we strive to get three.

Q. Yes, sir. Mickey Babb is going to testify in this case. You know he is under subpoena, don't you?

A. I did not know that; no, sir.

Q. Now, if Mickey Babb is out five yards on many occasions, four yards on other occasions, two yards on other occasions, and three yards on other occasions, those occasions where he is not three yards out, he is not playing the way you coached him; is that right?

A. I would say so; yes, sir.

Q. All right, sir. But you wouldn't say he wasn't playing that way through 1961 and 1962, would you, because you said you couldn't see from the sidelines?

A. Well, I can't see from the sidelines whether he is lined up two and a half or three or four, but we strive for the three-yard slot.

Mr. Cody: I didn't hear that last answer, sir.

Mr. Schroder: I'm sorry.

The Witness: I said I can't tell from the sidelines on every offensive play in a slot formation whether the end is lined up two and a half or three or three and a half, but we strive for a three-yard slot, and that is what we try to coach them.

[fol. 335] By Mr. Schroder:

Q. When a guard pulls on a sweep—what is a "sweep"?

A. Well, in our terminology it is the quarterback reversed pivoting, pitching to the left half or right half, depending on which way it is going, and the halfback tries to run wide, taking the block of the actual back either on the inside or outside.

Q. Well, in simple terminology, a sweep is a run around the end, isn't it?

A. If he can get around it; yes, sir.

Q. That's right; that is what a sweep means, to sweep out?

A. That's right.

Q. Sweep out around the end if he can get there?

A. That's right.

Q. Now, you have testified on direct-examination about pulling a guard on a sweep. When a guard is pulled, he is supposed to be out leading the interference, is he not?

A. On a sweep; yes, sir.

Q. All right, sir. Now, you say that Georgia pulled an on side guard out in front of the ball carrier to lead the play in the Alabama 1962 game?

A. Yes, sir.

Q. Have you seen the film?

A. Yes, sir.

Mr. Schroder: Before I forget it, may I address—

The Court: Sir?

[fol. 336] Mr. Schroder: Before I forget it, may I address a request to the Coach. When the film is shown in Court, may I request Coach Griffith to be here? I don't have him under subpoena.

The Court: Yes, sir. Well, he is under subpoena, though, isn't he? Well, regardless of who he is under subpoena by, he is supposed to stay here, regardless of who subpoenaed him.

Mr. Cody: Your Honor, we expect to show the films ourselves. We have asked to get them back. Mr. Schroder asked us to let him have them.

Mr. Schroder: Let's get going with them.

Mr. Cody: I have been trying to get them back.

Mr. Schroder: Let's get going with them this afternoon.

The Court: Let me say this. How much longer will you have this witness? I presume before he leaves, why can't you have the films this afternoon?

Mr. Schroder: I would be perfectly delighted if we can have them.

[fol. 337] The Court: Don't you have them?

Mr. Schroder: One of the assistant coaches—

The Court: One of who?

Mr. Schroder: One of the assistant coaches has it.

The Court: Where is he?

Mr. Schroder: He is at the Tech Clinic; isn't that where Mr. Gregory is?

The Witness: Yes, sir.

Mr. Schroder: We won't be able to show the film this afternoon. I am not through with my cross-examination of this witness.

The Court: Well, I wanted to clarify that.

Mr. Schroder: I also want this witness to be present when the film is shown.

[fol. 338] The Court: Well, he will be present unless he is excused.

Mr. Schroder: I mean, present in the courtroom.

The Court: Yes, sir.

Mr. Cody: I'd like to have him here.

The Court: I don't know. If he is not—do you want him to testify?

Mr. Schroder: Yes, sir. I want him where he can point out some of these things.

The Court: No witness is excused, regardless of who subpoenas him, once he is here, until the court is terminated.

By Mr. Schroder:

Q. When preparing a team for a football game to be played, and particularly Paul Bryant in preparing his team to defend against Georgia, you would assume that he would plan a defense against everything that he had seen during 1961, wouldn't you?

A. Yes, sir.

Q. Including your two formations over here?

A. Yes, sir.

Q. Your slot and the pro-set?

[fol. 339] A. Yes, sir.

Q. Now, you have referred to certain things that are—two formations that are in Burnett's notes. Is there anything in those notes that would indicate in any way that those were the only two formations that Georgia would use in its game against them in 1962 against Alabama?

A. No, sir.

Q. Nothing in the notes to indicate that, was there?
A. No, sir.
Q. Did Burnett ever say to you that in this conversation he is supposed to have overheard that Coach Butts said to Coach Bryant, "Now, these are the only two formations Georgia is going to use against Alabama?"
A. No, sir.
Q. The document I showed you a moment ago is known as a game plan, isn't it, in football terminology?
A. It is part of a game plan.
Q. It is part of a game plan?
A. Yes, sir.
Q. The final game plan that any team will—I won't say any game; put it to Georgia; Georgia gets up its final game plan when?
A. After the season starts; it is completed usually by Monday night; parts of it are completed by Sunday night, other parts of it completed during the day on Monday, and Tuesday the final game plan is made.
Q. Monday preceding the Saturday on which the game is to be played?
A. Yes, sir.
Q. That is when your final game plan is formulated?
[fol. 340] A. After the season has started.
Q. It is gotten up?
A. Yes, sir; after the season has started.
Q. On the Alabama game in 1962 your final game plan was not formulated until Monday before the game, was it?
A. Well, our game plan was formulated all through the summer in breaking down films and in meetings ten days before practice session started. The basic game plan was formulated at that time.
Q. I am asking you about the final game plan.
A. The final game plan was formulated on Monday.
Q. Monday preceding the Saturday on which the game was to be played; is that true?
A. Yes, sir.
Q. I believe you testified that you have seen the film of

the Georgia-Alabama game in 1962. On how many occasions would you estimate you have you already seen that film?

A. Approximately four or five times.

Q. Describe briefly how the first touchdown for Alabama was scored and what it resulted from?

A. Well, I believe that in the first quarter they intercepted a pass and hit Wilson, their split end, for a touchdown, and I believe that the next point—

Q. Just one moment, please, sir. The end's name was not Wilson; it was Williamson, wasn't it?

A. Williamson.

Q. And he was known by Georgia to be a very capable end, pass receiver and fast, wasn't he?

A. Yes, sir.

Q. Now, as a matter of fact, Coach Butts, after he had returned from a trip to New York with Coach Bryant and Coach Graves, told you and your coaching staff that [fol. 341] Bryant had told him that "We are going to throw what is known as the bomb, the home run against Georgia the first chance we get to."

A. Not to my knowledge he didn't tell me that.

Q. You don't know that he told that to John Gregory, your defensive coach?

A. No, sir; I do not.

Q. Would you say he didn't?

A. I wouldn't say; I don't know.

Q. The first time Alabama got the ball, what did it do? Threw the bomb, didn't they, the home run?

A. Not the first time; no, sir.

Q. All right, sir, what was their first play?

A. I don't recall the play. They kicked to us after a series of downs.

Q. All right, sir. Well, I meant—Georgia threw a pass which you say was intercepted?

A. Yes, sir.

Q. That pass was thrown by Rakestraw?

A. Yes, sir.

Q. It was from the—it was thrown—he was running out to his right to throw to the left end, Babb, wasn't he?

A. Yes, sir.

Q. And Babb was jostled or held up by LeRoy Jordan, the All-American center of Alabama, wasn't he?

A. I don't recall who held him up.

Q. He was held up?

A. That's right.

Q. And he didn't get where he was supposed to, not on his account, but he didn't get to where he was supposed to get, did he?

A. That's right.

Q. And Rakestraw threw the pass, and Alabama made a fine interception right down to the man's shoetops, didn't [fol. 342] he?

A. Yes, sir.

Q. First play they ran after they intercepted that pass was the home run, wasn't it?

A. That's correct.

Q. All right, sir. They ran it from the same formation you have got over there called the pro-set, didn't they?

A. That's right.

Q. Williamson was a split end, and he was a swinging end; he would play left end when he was split on the left and right end when he was split on the right, wouldn't he?

A. That's right.

Q. The fellow that was supposed to cover Williamson was not a defensive ball player, was he?

A. No, sir; he was not.

Q. He wasn't trained to play defense, was he?

A. No, sir.

Q. And Williamson had no trouble at all giving him a wrinkle and going on by and catching the ball for a touchdown, did he?

A. That's right.

Q. You know that boy that was playing that position who was supposed to cover Williamson on the home run was not a defensive ball player, didn't you?

A. Yes, sir.

Q. You were supposed to have someone else in there for him?

A. Well, the reason that he was in the ball game, we got Rakestraw out first because Rakestraw had a bad ankle.

Q. Yes, sir.

A. And we had to put in another substitute, and under the rules we could only put in two in at a time, and we [fol. 343] took a chance on leaving Porterfield to get Rakestraw and another boy out.

Q. Porterfield was the one that was playing the position that was supposed to guard—defend against Williamson?

A. Yes, sir.

Q. These notes say that Porterfield is the best since Trippi; do you agree with that?

A. Well, that is a matter of opinion.

Q. Have you ever seen Charlie Trippi play?

A. Yes, sir.

Q. You know about him, don't you?

A. Yes, sir.

Q. One of the all-time greats of the University, isn't he?

A. Yes, sir.

Q. Porterfield cannot play defense, can he?

A. We haven't trained him to play defense.

Q. Charlie Trippi played defense, didn't he?

A. Yes, sir.

Q. Very good one, wasn't he?

A. Yes, sir.

Q. Charlie Trippi threw passes—

A. Yes, sir.

Q. —did he not?

A. Yes, sir.

Q. Did he kick it?

A. Yes, sir.

Q. Entirely different sort of ballplayer than Porterfield, isn't he?

A. Yes, sir; I would say so.

Q. All right, sir. That is the first touchdown. That re-

sulted from the home run with the offensive man in there on Georgia's defensive team. Now, the second score was a safety, wasn't it?

[fol. 344] A. Yes, sir.

Q. Would you please describe how that safety came about?

A. As I recall, it was a bad snap over the kicker's head and went in the end zone.

Q. That is just one of those things that will happen, isn't it?

A. Yes, sir; they happen.

Q. Just hard luck; the center threw it over the man's head that was supposed to be kicking it, right?

A. Yes, sir.

Q. And the ball went back into the end zone, and all he could do was fall on it for two points for Alabama; right?

A. Yes, sir.

Q. All right, sir. Now, tell me how the—how Alabama scored its second touchdown?

A. I am not sure I recall.

Q. This formation referred to or that you have already described about dropping the end off, containing with the tackle—

A. Yes, sir.

Q. —that is a normal defense employed by every college that you know about in the Southeastern Conference, isn't it?

A. Depends on the defense.

Q. That is what I mean.

A. Yes, sir.

Q. When you are against a pro-set passing situation, you drop your defensive ends off, don't you?

A. Normally.

Q. Normally?

A. Under passing conditions.

Q. All right, sir. Now, isn't it true—let me put it this way. You had a new man playing left end for Georgia in

[fol. 345] the Alabama game, didn't you, named Barry Wilson?

A. Yes, sir.

Q. Never had played in any varsity game before?

A. No, sir.

Q. Your team captain, his name was Ray Clark, wasn't it?

A. That's correct; yes, sir.

Q. And Ray Clark ordinarily would have been playing that position, wouldn't he?

A. Yes, sir.

Q. Ray Clark was injured two nights before the Alabama game in a scrimmage, wasn't he?

A. That's correct; yes, sir.

Q. Why were you scrimmaging your boys two nights before a big game like Alabama?

A. I felt like we weren't getting the concentration in a scrimmage that we planned with no contact, and we were not getting response from the players, and we scrimmaged them for about ten minutes.

Q. You felt just forty-eight hours before the game was to be played that you were not getting the concentration from your players that you thought you were entitled to?

A. Wasn't getting the concentration I felt it was going to take to play a good ball game and beat Alabama.

Q. And what other reason did you give for scrimmaging them just forty-eight hours before the game?

A. Wasn't no other reason.

Q. All right, sir. They weren't too happy about that, were they?

A. Well, I couldn't answer that; I don't know.

Q. What is your thought about it?

A. Well, I don't know; I don't imagine they wanted to [fol. 346] scrimmage. That is something normal in football.

Q. It is abnormal in football to scrimmage any team just forty-eight hours before the game, isn't it?

A. Well, that would depend on the situation.

Q. Well, is it normal at Georgia to scrimmage Georgia's team just forty-eight hours before a game?

A. It is the only time I have ever done it.

Q. Yes, sir. And it was in that scrimmage that you lost the captain of your team?

The Court: What is the nature of this, Mr. Schroder? I mean, I want you to have an opportunity; I can't see where going into what individual players did in the scrimmage, what relevance it has. If it is relevant, I am going to let you put it in.

Mr. Schroder: I will go into detail and explain to Your Honor what I am doing.

The Court: All right, sir.

Mr. Schroder: The impact of this witness' deposition, I mean, this witness' testimony, at least the way it occurred to me, I may be too close to the case, I don't know, was that certain information was transmitted which assisted the coach of the opposing team in his preparations for the coming game.

The Court: Yes, sir.

[fol. 347] Mr. Schroder: I can show not only that that didn't happen and couldn't have happened based on what we have got here already, but, as a matter of fact, the Georgia team itself wasn't ready to play that game. They lost the score, yes, 30 to 0, but it could not be attributed to what the Post says it was; could not be. Now, I am going into reasons to show why it was 35 to 0, or any other score.

The Court: All right, sir. If you have got the solution, go ahead.

Mr. Schroder: I have got the solution.

The Court: All right, sir.

By Mr. Schroder:

Q. I have talked about the first touchdown. I have talked about the safety. Now, the second touchdown, your left end, as I said, was a new man, sir?

A. Correct.

Q. And he committed an error, didn't he?

A. That's correct.

Q. He committed quite an error; he did not cover the area where he was supposed to cover?

A. That's right.

Q. And the man he was supposed to cover caught the ball for a touchdown, didn't he?

A. I believe that's correct, yes, sir.

Q. Yes, sir. Now, that is nine, that is fifteen points. The third touchdown happened in just the same way to the same unfortunate end who was out of position again [fol. 348] and didn't cover his man, didn't it?

A. Yes, sir.

Q. Same thing, wasn't it?

A. Yes, sir.

Q. Therefore, we now have the score about three touchdowns and two safetys; we have got 21 to 0, all of which occurred as a result of an individual unfortunately not doing what he was coached to do; right?

A. Well, there are things that lead up to that situation where they scored. There were other things that led up to it, too.

Mr. Cody: Speak up a little louder; I can't quite hear you.

The Witness: There are situations that put Alabama in position to score in the ball game, and those drives that the Alabama team made and the mistakes the Georgia team made.

By Mr. Schroder:

Q. None of those touchdowns were within the ten-yard line, were they?

A. That's correct.

Q. They were from out in the middle of the field?

A. Well, I believe that the first one was around the thirty-five or forty-yard line.

Q. Yes, sir.

A. Yes, sir.

Q. Do you know how the next two touchdowns were scored?

A. I don't recall; no, sir.

Q. But you do know that Georgia—your Georgia players—I hate to have to say this, being a Georgia man, but [fol. 349] Georgia did not play a good football game that night, did they?

A. I didn't think we played well; no, sir.

Q. The Georgia players made quite a few serious errors on their part in not doing what you had coached them to do?

A. Due to lack of experience; yes, sir.

Q. Well, I am certainly not being critical; I am stating a fact. That is a fact, isn't it?

A. Yes, sir.

Q. You have referred, in response to a question to you put by Mr. Cody about Rissmiller, and as you said, he was already voted by the sports writers of some organization as being, in their opinion, would be the sophomore-of-the-year, tackle?

A. Yes, sir.

Q. It was known, everybody knew he was potentially a great tackle at Georgia?

A. Yes, sir.

Q. Wasn't anything new about that, was there?

A. No, sir; I would say not.

Q. As a matter of fact, Coach Bryant himself had tried to recruit Rissmiller to come to Alabama, hadn't he?

A. I think that's correct.

Q. You know that is so, don't you?

A. I am not positive; no; I didn't recruit him myself.

Q. Where is he from?

A. He is from Eastern Pennsylvania.

Q. How many colleges to your knowledge were after him?

A. I couldn't say; probably five or six.

Q. You know there were more than that now, Coach Griffith?

[fol. 350] A. I really don't; I didn't recruit the boy individually.

Q. You didn't have a report from your recruiter that did go up there and get him?

A. Yes, sir; but we recruit some sixty boys. I can't remember that far back how many schools were after him.

Q. Georgia felt they had a real scoop when they got Rissmiller?

A. We still think so.

Q. And Bryant wanted him to come to Alabama, didn't he?

A. Probably did.

Q. Be that as it may, in your opinion, is Rissmiller the best tackle in the history of the University of Georgia to come to Georgia?

A. Well, he's got two more years left, and, as I say, I think potentially he is a real great football player.

Q. Well, what is your answer to my question? Is he the best tackle that—in the history of Georgia football?

A. I couldn't answer that.

Q. It is a matter of opinion, isn't it?

A. It is a matter of opinion. From what I know back through the years of Georgia football, he would be maybe not the greatest, and I would have to say probably he was not the greatest now, but he has two more years.

Q. As a matter of fact, he had a little bit of difficulty himself in the Alabama game, didn't he?

A. He was knocked out in the Alabama game; yes, sir.

Q. He made how many tackles?

A. I couldn't tell you.

Q. Have you talked to Coach Pearce about it?

[fol. 351] A. Not to the number of tackles Rissmiller made. We know, but I don't have those records with me.

Q. He played a fine game; I will say that for him; he played up to his capabilities. The next note here—pardon me—that was a note I was reading from, "Rissmiller great-

est in history." Next one said, "Rakestraw to right." I believe you said that means nothing to you?

A. No, sir.

Q. The next one is "Optional left pass" and you corrected your testimony now to say that was used in Georgia's plans in 1961?

A. That's correct.

Q. Nothing new about that, is it?

A. In 1961; yes, sir.

Q. Nothing new about that?

A. No, sir.

Q. "If can block man on corner, keeps running"; is that connected up in anything that you know of that Georgia has got?

A. Well, I—I would say it is a piece of information that could mean several things in football in general.

Q. Is that anything peculiar to the University of Georgia's football game?

A. No, sir.

Q. Is there any secret there in that?

A. I would say not.

Q. Next entry is a—

The Court: Mr. Schroder, before you go into that next entry, we have been sitting for an hour and a half. I am going to let the jury refresh themselves. You may step down, Coach Griffith.

[fol. 352] (Whereupon the witness was excused from the stand.)

The Court: Members of the jury, I am going to permit you to refresh yourselves from now until 3:30, at which time you will return to the jury box, but I must admonish you as previously not to discuss the case among yourselves or permit anyone to discuss it in your presence. Simply dismiss it from your mind until you return to the jury box at 3:30.

Let the jury pass out; everyone else remain seated.

(Whereupon the jury retired from the courtroom at 3:15 p.m.)

The Court: Court is recessed until 3:30.

(Whereupon Court recessed at 3:15 p.m., reconvening at 3:30 p.m.)

After Recess

The Court: All right, Mr. Schroder; you may proceed.

JOHNNY GRIFFITH having resumed the stand, testified further as follows:

Cross examination (continued).

By Mr. Schroder:

Q. Coach, the next entry in what has been described as [fol. 353] Burnett's notes reads, "Well disciplined ball club"; that would be on the second page, I believe, sir.

A. Yes, sir.

Q. What does a "well disciplined ball club" mean to you?

A. Well, it is a matter of opinion. It's been my opinion it means the team that is consistent in the operation and techniques of offense and defense, fundamentally strong, don't break down offensively or defensively as individuals. They are physically tough, strong, and basically that is my opinion of it.

Q. Doesn't that also—what you are saying, doesn't that add up to this, that a football player, or in this instance, the football club will be trained and trained and trained again in the particular techniques that the individual members of the club are supposed to carry out, that when the situation occurs in a game they will react instinctively?

A. That's correct; yes, sir; I would say so.

Q. Well, now, was the Georgia football team in the Alabama game of 1962, would it come within that definition?

A. In due respect to the football team, I would say no, because of the number of young people that we had to play in the game and after a certain amount of time there is a certain element of self-discipline that an individual develops through four years of college football.

Q. Yes, sir. On the next page you have already discussed the first note there, so I will pass on to the second one which reads, "Don't overshift". Georgia's basic fundamental defense could be described as "the loose six"?

A. Yes, sir.

[fol. 354] Q. Does Georgia or did Georgia in the game against Alabama in 1962 overshift?

A. Yes, sir.

Q. Did the Alabama team in the game against Georgia in 1962 overshift its defense?

A. Yes, sir.

Q. The next entry reads, and I believe you have discussed this, but I am going to ask you a couple of questions about it, reads, quote, "Woodward commits fast, safety man", unquote. Woodward is one of the best, if not the best, tackler in the secondary Georgia defense?

A. Yes, sir; I would say so.

Q. You have seen the film of the Georgia-Alabama game?

A. Yes, sir.

Q. You testified on direct-examination that it would be helpful for a defensive coach or a coach preparing his defenses against Georgia to know that Georgia had an individual who committed himself fast?

A. Yes, sir.

Q. Woodward was not a sophomore, was he?

A. No, sir; he was not.

Q. Woodward had played an entire season as safety man for Georgia in 1961, hadn't he?

A. Yes, sir.

Q. Georgia was scouted by Alabama in 1961, weren't they?

A. Yes, sir.

Q. Alabama had films of the Georgia games in 1961, didn't they?

A. Yes, sir.

Q. Well, it would be no news to anybody coaching Ala-
[fol. 355] bama that Woodward committed himself fast, would it?

A. No, sir.

Q. Now, as a matter of fact, having seen the film, don't you know that Alabama never did throw a pass in the season that was to be protected by Woodward?

A. Yes, sir.

Q. You know they didn't do that?

A. They did not.

Q. The next entry has to do with Don Blackburn?

A. Yes, sir.

Q. And Don Blackburn, unfortunately, was sick, wasn't he?

A. Yes, sir.

Q. And he only played about, what, four or five minutes in the Alabama game?

A. I would say approximately five minutes.

Q. Five minutes?

A. Yes, sir.

Q. The top entry on the page—on Page 4 reads, "Baer", and I am assuming we are changing that to read "Babb" for the purpose of our discussion—

A. Yes, sir.

Q. —"slot right, split right end out"; is that the way—doesn't "slot right" mean all those words?

A. As I say, I am not sure what it means actually.

Q. Wouldn't mean anything to you if you were getting ready to play Georgia, would it?

A. Well, no, sir; I would say not.

Q. All right, sir. Your next one, "Long count, left half in motion"; that is, what, a description of a half of a play?

A. It is the action of the left halfback. It doesn't mention a play.

[fol. 356] Q. Not a play; it is just an action of the left halfback?

A. That's right.

Q. That is nothing new, is it?

A. Long motion is not.

Q. "Long count, left half in motion," there is nothing new in that, is there?

A. No, sir.

Q. That's been used by Georgia for years, hasn't it?

A. Yes, sir.

Q. In fact, that is commonly used throughout the Conference, isn't it?

A. Yes, sir.

Q. Now, we have discussed the next one about "Best since Trippi". On top of Page 5, there is the entry again where we will use or substitute the name, "Babb on a hook on goal line." Now, is there anything new about that?

A. No, sir; we usually hook Babb on the goal line. We normally had two or three goal line passes. We would be —that would be one of them.

Q. That is one of the few things that an end can do that is left for him to do on the goal line is hook, isn't it?

A. That is one of the things he can do; yes, sir.

Q. Well, is there anything new about throwing an end on a hook on the goal line?

A. In football; no, sir.

Q. That is what we are talking about, football?

A. Yes, sir.

Q. We have discussed the next one. The third one on Page 5, reads, "Right halfback on fly, left halfback, quarterback gives to left half, left guard pulling blocks on corner"; now, "right halfback on fly" means one thing and that is [fol. 357] simply this, isn't it, that when you have a slot formation to the right with the end out from the tackle about three or four or five yards with a halfback, the right halfback is right here behind him, isn't he?

A. Yes, sir.

Q. And when he goes on what they call the fly, he reverses and heads back toward the quarterback before the ball is snapped, doesn't he?

A. That's correct.

Q. Now, is there anything else in that note that would mean anything at all to you?

A. You mean in all the notes or that one note?

Q. That one note I just read, that third entry on Page 5?

A. No, sir.

Q. That is no play that Georgia has, is it?

A. We put the right halfback on fly; yes, sir.

Q. But that doesn't tell anybody anything, does it?

A. No; it tells the action of one individual.

Q. That is done by everybody, isn't it?

A. Well, I have seen it; it is done in football.

Q. In college football everybody puts the slot man on a fly some times, don't they?

A. Yes, sir.

Q. Nothing new about that?

A. No, sir.

Q. Does the rest of the entry mean anything to you? Is it descriptive of anything the University of Georgia does?

A. No, sir; I couldn't tie that in with anything.

Q. The top of Page 6, I believe this one has been discussed. It reads, "Slot or wide slot till goal line"; now, isn't it true that every football team that you know anything about usually does pull in the offensive location of [fol. 358] the players, lining up of the players when they get to the goal line?

A. Yes, sir.

Q. Nothing new about that entry, is there?

A. No, sir.

Q. That is used by every team in the Conference, isn't it?

A. Yes, sir.

Q. The next one you discussed somewhat at length on direct examination, as I want to ask you a few questions about it. The entry reads, "Can't quick kick", well, now,

as I understood your testimony, Saye can quick kick, can't he?

A. Yes, sir.

Q. So that is not a true statement, is it?

A. Well, in the sense of the word, we can't quick kick from the normal quick kick formation.

Q. Is that what the note says?

A. No, I was explaining what a quick kick means to me.

Q. What does the note say?

A. "Can't quick kick."

Q. Georgia can't quick kick?

A. Yes, sir.

Q. And Georgia does quick kick, doesn't it?

A. Yes, sir.

Q. And so to that extent the entry is inaccurate, isn't it?

A. Yes, sir; I would say it was.

Q. All right, sir. The next one, "Slot right, right half on fly, screen to him;" so, again, I am the end, the tackle is there, and the halfback is right behind me in the slot; he goes on the fly back towards the quarterback before the center hands the ball to the quarterback. "Screen to him," [fol. 359] now where would he be if the quarterback was going to screen to him with relation to the field?

A. You are speaking of the right halfback?

Q. Yes, sir, screening to the man on the fly?

A. He would be beyond the left halfback three or four yards.

Q. And isn't it true that when this halfback moves on the fly, as we have described, the defensive team adjusts itself to that direction to protect against him doing something in that direction; is that right?

A. Well, not particularly on a fly. A long motion causes an adjustment in the secondary more than the fly.

Q. Well, why wouldn't you screen to the right half on the fly? You say you don't have that play, but this says you do have it. I want to ask why you don't have it?

A. Well, we don't think it is a good play. It is something we just don't do.

Q. So, certainly that is not an accurate picture of what Georgia does?

A. No, sir; it is not.

Q. All right, sir. The next note you have also discussed at some length. Anyway, "29-0 series, Babb catches everything they throw"; now, 29-0 series, that is not even a pass series, is it?

A. No, sir.

Q. I believe you described that on direct-examination as being what is known in football jargon as the outside belly play?

A. Our 029 is; not 29-0.

Q. You don't have a 29-0, do you?

A. No, sir.

Q. You have no idea what 29-0 means, do you?

A. No, sir; I am not familiar with it.

[fol. 360] The Court: You do have an 029?

The Witness: Yes, sir.

By Mr. Schroder:

Q. And the 029 is the outside belly play?

A. Yes, sir.

Q. Where the quarterback can either kick or pitch to the man running out towards the sideline, the man in motion?

A. Yes, sir; that's correct.

Q. But there is no pass off of that?

A. No, sir.

Q. No way Babb could catch anything in that play; is there?

A. Not in this ball game here; no, sir.

Q. I believe we have already discussed the final page there and the entries on that. The basic formations used by the University of Georgia when it is on defense really are the same as those used by Alabama, aren't they?

A. In that ball game; yes, sir.

Q. In the ball game in 1962 they were using the same formations?

A. Basically the same thing.

Q. In 1961 after you became head coach, didn't you hire someone from Coach Bryant's coaching staff?

A. Yes, sir; I did.

Q. And he came over to coach the University of Georgia along with you?

A. Yes sir.

Q. For the 1961 season?

[fol. 361] A. Yes, sir.

Q. And his name was Bob Ford?

A. Yes, sir.

Q. And Bob Ford brought with him, when he came there to join your staff, all of the formations that Alabama was using?

A. Basically the defensive formations.

Q. Yes, sir. And you took those defense formations and put them into Georgia's formations, didn't you?

A. We took part of it, correlated it with ours; yes, sir.

Q. And he—when I say "he", Coach Bryant is recognized as the outstanding defense coach in the country, isn't he?

A. Yes, sir.

Q. And one of the reasons you employed Coach Ford to come over and join your staff was to bring some of the information and help he had gotten under Coach Bryant when he was coaching at Alabama?

A. I thought he was a well-trained football coach and had a knowledge of defensive football.

Q. Which he had obtained from Coach Bryant at Alabama?

A. That's right.

Q. That is right, isn't it?

A. That's right.

Q. During the 1962 season you, as head coach, assign to one of your assistants the responsibility of preparing your team for offense, don't you?

A. Yes, sir.

Q. And your offense head coach, the coach in charge of your offense under you—

A. Yes, sir.

[fol. 362] Q. —in 1962 was Charlie Trippi?

A. Right.

Q. And Charlie Trippi has been a coach there at the University since he retired from professional football?

A. Yes, sir.

Q. And he left the professional ranks in what, about 19—

A. I don't recall; I think he came to the University as a coach in 1957; I am not sure.

Q. He had been there, anyway, five years through 1962?

A. Yes, sir.

Q. Now, you also have an assistant coach to whom you assign the over-all responsibility of preparing the Georgia team for defense or on defense, don't you?

A. Yes, sir.

Q. And what was the name of the assistant coach that had that responsibility during 1962?

A. John Gregory.

Q. John Gregory?

A. Yes, sir.

Q. During the game in Birmingham, 1962, Coach Charlie Trippi was up in the press box, wasn't he?

A. Yes, sir.

Q. And what was his function? What were his duties up in the press box?

A. To observe the Alabama defenses and make suggested plans as to what we could do to compete against them.

Q. He was up there to assist, be an offensive coach, to assist Georgia in its offense against Alabama?

A. Yes, sir.

Q. And he had a telephone that he would communicate [fol. 363] with someone down there on Georgia's bench?

A. Yes, sir.

Q. And he would tell that someone on Georgia's bench what play he thought Georgia ought to use?

A. That's correct.

Q. On the next series—on the next play?

A. Yes, sir.

Q. And you would send in a substitute to tell whoever was playing quarterback on that occasion—I think it was Rakestraw—to tell quarterback Rakestraw what play Coach Trippi wanted him to run?

A. Yes, sir.

Q. And that is the way most of the plays were run that evening, were't they?

A. About eighty per cent of them; yes, sir.

Q. Eighty per cent were called by Charlie Trippi up in the press box?

A. Yes, sir.

Q. All right, sir. Now, on defense, of course, when Georgia is on defense it has to adjust whenever its particular defense pattern is at the time according to, number one, what down it is, with Alabama having the ball; with the location on the field, that is to say, on what yard line or what area of the field; number three, what the—whether it is, as I said, the down and yardage, that is whether it would be first and ten, or second and eight; all of that goes into the person's mind who is setting the Georgia defense at any particular time; is that right?

A. Yes, sir.

Q. Now, who was—during the Alabama game of 1962, was Coach John Gregory on the sideline as the head defensive coach?

A. Yes, sir.

Q. Was Coach Gregory signalling to the Georgia team [fol. 364] on the field what defense to go into on any particular occasion?

A. Most of the time; yes, sir.

Q. Eighty per cent of the time?

A. I couldn't answer that.

Q. But you do know that the defenses that Georgia was in at any particular time, most of the time was called by your head defensive coach from the sideline?

A. Correct.

Q. Sir?

A. Correct.

Q. Going back to formations for just a moment before I go into the Post story or the Post article. Any variety of plays can be run from any given formation, can it?

A. Yes, sir; you can run a series of plays from possibly three to four different formations; yes, sir.

Q. All right, sir. Let's take the two formations on the board there, the slot formation at the top. From that formation how many different varieties of plays can a team use that is employing that formation?

A. Well, I can call them out the way we run them.

Q. Can you see that?

Mr. Cody: Speak a little louder so we can hear you.

A. (By the witness) Running to the slot formation you can run the sweep; you can run—would you like for me to draw them? I can call the name of the play. I don't know whether it will mean anything to you.

Q. I will bring this over there for you. Coach, it won't be necessary for you to draw it with crayon; you can use your finger.

A. Run this one here, and here with this man, go in the [fol. 365] trap here, come back with a pop on this side over here, and run a slant, pull back in here, and put this man in motion, and come back with a sweep, the same as you would run in this direction here, and you run a nineteen roll-out in this direction here, and run a—run a trap play back with him, and so on.

Q. And you can also run pass patterns off of that formation, can't you?

A. Yes, sir.

Q. Now, can the same thing be said for the pro-set?

A. Well, you limit yourself in this direction here in this hole right here; other than that you have got the same setback to this direction, you see.

Q. My point simply is this; you can run a—any number of—any number of running plays off of either formation, can't you?

A. Yes, sir; that's correct.

Q. And you can run any number of passing formations off of any formation?

A. Yes, sir; that's correct.

Q. Coach Griffith, have you read the article appearing in the March 23rd issue of the Saturday Evening Post bearing the caption "The Story of a College Football Fix"?

A. Yes, sir; I have read it.

Q. I now have before you here, Coach Griffith, the first column of that article on Page 81, Column 1. Where I am pointing my hand reads as follows: "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off." I want to ask you a couple of questions about that entry, please, sir. That would be [fol. 366] right vital information for a coach planning his defense to have, wouldn't it?

A. Yes, sir.

Q. Did you tell the Saturday Evening Post that that was true insofar as Larry Rakestraw is concerned?

Q. Have you ever told anyone that that is true insofar as Larry Rakestraw is concerned?

A. No, sir.

Q. Well, is it true insofar as Larry Rakestraw is concerned?

A. Not to my knowledge.

Q. Thank you, sir. Will you step down here just a moment. Put a—put sort of a parenthesis and then initial it.

A. Right here?

Q. Yes, sir. Draw a line right there. Thank you. I am now going to show you, Coach, the same page, Column 2. There is an entry on Page 2, in referring to Wallace Butts, reading: "Butts, filed away in the position of Georgia's athletic director, which he had held along with his coaching job for some years, was outspokenly bitter about his removal from the field." Did you tell that to the Saturday Evening Post?

A. No, sir.

Q. Do you know where they got that information?

A. No, sir; I do not, sir.

Q. Would you mark that, please, sir?

A. All right.

Q. Thank you, sir. Let's have Column 3, same page. The paragraph I am now referring to and pointing is on Page 81, and this is the last column. "The game itself would have been enjoyed most by a man who gets kicks from attending executions." It comes on down here, [fol. 367] "The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating." And, of course, you were there as head coach, weren't you?

A. Yes, sir.

Q. Did you ever say anything like that to the Saturday Evening Post?

A. No, sir.

Q. Do you know where they could have gotten that information?

A. No, sir; I do not.

Q. Will you please repeat with this, those places?

A. All right.

Q. Will you please just—well, do it right here, save you some running up and down. On this same page, being 81, in the third column where I am pointing now, it reads, and I quote, "It was a bitter defeat for Georgia's promising young team. The twenty-eight-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned." Did you ever say that to anybody connected with the Saturday Evening Post?

A. No, sir.

Q. Do you know where they got that information?

A. No, sir.

Q. Would you do that, please, sir?

The Court: That is not attributed to Coach Griffith as having said that.

Mr. Schroder: He said he was stunned, it was a bitter defeat for him.

[fol. 368] The Court: He didn't say he wasn't stunned. You asked him did he tell the Saturday Evening Post that.

Mr. Schroder: The Saturday Evening Post attributes—

The Court: They didn't attribute that, from reading the article they didn't attribute that to Coach Griffith.

Mr. Schroder: I don't believe, with all due respect, Your Honor, I don't know whether anybody could know whether he was or wasn't, and whether he told the Post if he was.

The Court: He testified he didn't tell the Post that, but he didn't—

By Mr. Schroder:

Q. Did you tell anyone that?

A. No, sir.

Q. Let's have Page 82, Column 2. This is a quote directly attributed to the coach. Coach, at the bottom of the column there you are quoted as saying this, and I will read: "'We knew somebody had given our plays to Alabama,' Griffith told him." Did you say that?

A. No, sir.

Q. Do you know where the Post got that information?

A. Possibly so. I said this, that I figured somebody—

[fol. 369] The Court: Let him come back to the stand where we can hear his testimony.

Mr. Cody: Speak so we can hear you, will you, Coach Griffith?

The Court: Talk out a little louder.

The Witness: I made the statement I figured somebody had been giving information to Alabama, period.

By Mr. Schroder:

Q. Did you say what they have you quoted there as saying, giving your plays to Alabama?

A. I did not say "plays"; no, sir.

Q. Did you say right after that, "'We knew somebody had given our plays to Alabama,' Griffith told him, 'and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts.'" Did you say that?

A. No, sir; I did not.

Q. Here at the bottom, Coach Griffith, it says, "Griffith went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain on his job." Did you say that?

A. No, sir; I did not.

Q. Will you mark that one and initial it?

A. Yes, sir.

Q. Thank you, sir. Let me turn to Page 83, column 2.

[fol. 370] The Court: Mr. Schroder, before you take that down, did Coach Griffith mark there something he hasn't testified about or am I mistaken?

Mr. Schroder: No, sir; he went down too low the first time, and he—

The Witness: I put an arrow in there.

The Court: I thought it was something about calling the plays before the signals. That is where he marked it. He marked it incorrectly?

Mr. Schroder: No, sir; he marked it right; you have got it correct, now, have you not, Coach?

The Witness: Let me see; I think I have.

The Court: What I wanted clear was that about the players coming—that has never been gone over.

Mr. Schroder: Well, while he is down here, may I ask him about that?

The Court: Yes, sir; I thought that this would be the time to clarify it.

[fol. 371] Mr. Schroder: Yes, sir; I overlooked it.

By Mr. Schroder:

Q. "'You Know'"—and I am reading or quoting from the article. "'You know, during the first half of the Alabama game my players keep coming to the sideline and saying, 'Coach, we been sold out.'" Is that an accurate statement?

A. No, sir.

Q. "'Their linebackers are hollering out our plays while we're still calling the signals.'"

A. Some of them came out of the game and said, "They knew what we were going to do," or something along those lines. I don't recall it word-for-word, and I don't know who said it.

Q. Just one player?

A. I am not sure; just one or two.

Q. Just one or two?

A. Yes, sir.

Q. But they didn't say it like they have got it there that you said?

A. No, sir.

Q. And to that extent it is an inaccurate statement?

A. That's correct.

Q. Did anyone ever come off the field and say anything to you about, "Coach, we have been sold out"?

A. Not to my knowledge.

Q. Well, you would remember it, wouldn't you?

A. I don't know whether I would, but I don't remember it.

Q. Well, you don't know where the Post got that information?

A. No, sir; I do not.

[fol. 372] Q. Thank you, sir. In block letters at the top of this, this being page 83, column 2, I think that is going to refer to what is down here at the bottom; if not, you correct me. I am reading here at the bottom, "'I never had a chance, did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.'" Now, is that a correct quotation?

A. No, sir.

Q. Did you ever say that to anybody?

A. No, sir.

Q. The Post put it in large block letters on its own sheet "I never had a chance". That is what you say you never told anyone?

A. No, sir.

Q. You have not said that to anyone?

A. No, sir.

Q. The way that reads—only have half of it up there, but the article itself will show, "Head Coach Johnny Griffith of Georgia's beaten Bulldogs: 'I never had a chance.'"; your testimony is that is absolutely inaccurate?

A. That's correct; it is not a quote by me.

Q. All right, sir. After the—would you mark that one? I hate to give you all this exercise. Coach Griffith, after the Post issue of March 23rd hit the streets, did anybody come by to see you from the Post?

A. Yes, sir.

Q. Let me back up for just a moment and ask you this. Before the Saturday Evening Post published this article that we are talking about; did it ever consult with you as to the accuracy of the quotations that they were putting in that article as having been said by you?

A. No, sir.

[fol. 373] Q. Now, you said you were visited by a representative of the Saturday Evening Post after the issue hit the streets?

A. Yes, sir.

Q. Did you point out to the man who visited you from the Post that you had not been quoted accurately in that article?

A. Not the man that delivered the magazine to me; no, sir; because I did not read the magazine while he was there.

Q. Well, you have had some discussion with somebody from the Post since?

A. Perhaps a week or two weeks later.

Q. That is what I am referring to. What did you tell him about the manner in which they had used your name and your quotations in their article?

A. I simply told him—point out the misquotes that were directed to me.

Q. And what did you say about him having—should consult you before they quoted you in that way?

A. I said that I felt that I should have been contacted.

Q. And you went further than that, didn't you? Didn't

you write a letter or send a copy of a letter to the editor of the Post pointing out that you had been misquoted?

A. I wrote the letter to Dr. Aderhold and a copy was sent to the editor of the Saturday Evening Post.

Q. Has the Saturday Evening Post done anything about retracting the quotations which it has put in its article as being attributable to you?

A. Not directly to me.

Q. Have you seen any—not directly to you?

A. They have not contacted me directly; no, sir.

Q. I see.

[fol. 374] Mr. Schroder: May I ask the Court approximately what time—

The Court: 4:30.

By Mr. Schroder:

Q. The sophomore group that you have there at the University of Georgia, and I say "the sophomore group," I mean the group in 1962, they will be juniors this fall?

A. Yes, sir.

Q. They have quite a bit of potential, don't they?

A. I think so; yes, sir.

Q. And they showed that by beating Auburn, which has a right strong team, right?

A. Yes, sir.

Q. Won from Clemson also?

A. Yes, sir.

Q. With many of those sophomores coming back this fall we can certainly hope for a still better fall this season, can't we?

A. Yes, sir; I think so.

Mr. Schroder: Thank you.

Redirect examination.

By Mr. Cody:

Q. Coach Griffith, I have just a few more questions.

Mr. Schroder: Cody, you going to use this?

[fol. 375] Mr. Cody: No.

By Mr. Cody:

Q. And the first one being a little bit personal, you can decline to answer it if you wish, and I won't insist upon it. Was it true that Coach Butts was outspokenly bitter against Georgia's coaching staff?

Mr. Schroder: If the Court please, I think that would certainly be hearsay.

The Court: Well, I believe that you asked—

Mr. Cody: He went into it.

Mr. Schroder: That was in the article, and he denied he said that.

The Court: I think it is admissible.

Mr. Schroder: All right.

The Court: You asked him had he ever heard him say anything about him, and he asked him—I think it is admissible; I overrule the objection.

Mr. Schroder: All right, sir.

[fol. 376] By Mr. Cody:

Q. You want to make any comment about that?

A. I don't have any comment to make about it, because I don't know anything about it.

Q. Was it true that Georgia took a frightful beating in this Alabama game?

A. Not a physical beating; no, sir.

Q. So far as the score was concerned, they took a frightful beating?

A. Yes, sir.

Q. Was it true that that more or less shocked you, stunned you?

A. Yes, sir; to a certain extent.

Q. Was it true that in the 1962 season that you did think that somebody had given the Georgia plays or formations to other teams?

A. Yes, sir.

Q. Is it true—

Mr. Schroder: If the Court please, I haven't objected for two days as to leading questions, but I think he is leading the witness.

The Court: Don't lead your witness.

Mr. Cody: It is in rebuttal to something he asked about, Your Honor, and I—

The Court: You are still not privileged to lead him.

[fol. 377] By Mr. Cody:

Q. Coach Griffith, tell us just a little bit more about these boys coming off the field during the game, and by that I mean, you point out what part of the game or who those players were, if you remember, whether offensive or defensive players, and tell us a little bit more about that, if you can remember.

A. As I remember, one or two came out with a statement along these lines, that "they know what we are running; they are even calling out our plays. What are we going to do?" or something along those lines. I don't recall a great deal about it, because in the heat of a ball game you are not concentrating on something like that, but I do remember something of that nature.

Q. You are busy trying to make substitutions and look at the plays yourself, aren't you?

A. That's correct; yes, sir.

The Court: You are leading him, Mr. Cody.

Mr. Cody: I will quit that.

The Court: It's awfully easy to do that.

Mr. Cody: I know.

By Mr. Cody:

Q. Now, there's a lot been said here about the fact that a lot of other teams use this pro-set and use this slot formation that you describe; are there variances from that [fol. 378] formation by different teams?

A. Are there what?

Q. Variances.

A. In—yes, sir; in, for example, the slot formation there is; some teams will use a six-yard slot; some a ten; some a five; and some a two.

Q. Of what importance is that?

A. Well, as I said before—

Mr. Schroder: Cody, I believe we have been all over this.

By Mr. Cody:

Q. Have you answered that before?

A. Yes, sir; along those lines in regard to the defensive and play as to where he will line up.

Q. There is a time when you use a particular play; is that of importance?

A. In a game plan you have game situations, first and ten, second and long, second and short, second and third, and the offensive plan or your running attack and your passing attack are broken down to those categories; yes, sir.

Q. Now, to reduce football really to its most common denominator, what you try to do when you get the ball—see if this is correct—you have four downs to make ten yards; is that right?

A. Yes, sir.

Q. You—

Mr. Cody: You mind if I lead him to that extent?

The Court: No, sir; you can't lead him.

[fol. 379] By Mr. Cody:

Q. If you don't make the ten yards in four downs, what happens?

A. Well, you don't get to that fourth down as far as running the game goes. You kick the ball normally on the fourth down.

Q. And the opponent has the ball?

A. That's correct; yes, sir.

Q. Is that when the—is that when the opponent has a better opportunity to make a touchdown, when they have the ball?

A. Yes, sir.

Q. If they don't make a touchdown when they have the ball, it is when they intercept a pass or something of that sort, isn't it?

A. That's correct.

Q. Fumble, pick up a fumble? Now, what was your—what was your complaint or what was your opinion, Coach Griffith, as to the effect that it had on your team when it got the ball by your opponent having some information about your plays or formations? Now, tell us about that.

Mr. Schroder: Now, wait a minute, whoa. Let me see here.

Mr. Cody: I think that is—

The Court: Just a moment; just a moment.

Mr. Cody: I think that is a proper question.

[fol. 380] The Court: Well, I don't know.

Mr. Schroder: No, sir; he is putting words into the witness' mouth not only by leading him but also is putting words in the witness' mouth that the witness hasn't said.

By Mr. Cody:

Q. I will correct that by adding the words "if they had information about your plays and formations."

Mr. Schroder: If the Court please, I think that would call for a conclusion.

Mr. Cody: I think it is a hypothetical question based upon facts that have been testified to.

The Court: Well, I don't know. I don't think you prop-

erly worded your question, and as it is now I think it is objectionable. I will sustain the objection to it.

Mr. Cody: Very well then.

By Mr. Cody:

Q. Coach Griffith, have you ever expressed any opinion as to how much better team Alabama had than Georgia before the game?

A. Yes, sir; I am sure that I have. I could not give you a definite date or who I expressed it to, but it was general information before the ball game—I felt that Alabama had [fol. 381] better personnel than we had, and more experienced football team.

Q. How much better?

A. Well, in my opinion I felt that if the Georgia team scored once and Alabama scored three, that we would have done possibly the best we could have done with the material that we had at the University of Georgia.

Q. You got another game coming up in September, haven't you?

A. Yes, sir.

Q. You hope you do better?

A. We plan to do better; yes, sir.

The Court: Any further questions of Coach Griffith?

Mr. Cody: Just a moment, Your Honor.

By Mr. Cody:

Q. Coach Griffith, roughly do you know how many yards Georgia gained in its offensive plays against Alabama during that game?

A. No, sir. I don't know the exact number. I think it would probably be less than a hundred, in the 80's, 90's; I am not sure.

Q. Is that good or bad?

A. That is bad.

Q. You know how many passes they completed?

A. Georgia?

Q. Georgia.

A. Not the exact number; no, sir. I would say probably around eleven; I am not sure.

Q. Do you know how many they tried?

A. No, sir; I don't know the exact number; probably [fol. 382] eighteen or nineteen.

Q. Do you know how close you got to the goal line at any one time or the closest you got?

A. I believe that we got to their 40-yard line; that was the closest we got.

Q. And you said the score was 35 to nothing, I believe?

A. Yes, sir.

Mr. Cody: I believe that's all.

Recross examination.

By Mr. Schroder:

Q. Mr.—Coach Griffith, the last quarter of the game Alabama was using its third and four stringers, wasn't it?

A. I believe they were in the last.

Q. They were trying not to run up the score; they were using their third and fourth stringers, weren't they?

A. I think they were in the last quarter; yes, sir.

Q. How many passes—Mr. Cody asked you how many passes they completed. How many passes did Mickey Babb drop that night?

A. I don't recall.

Q. Quite a few, wasn't it?

A. I don't recall.

Q. Do you know of any he dropped?

A. Yes, sir. I know of one or two he dropped definitely.

Q. Without bringing the blown-up portion of the article back here, Mr. Cody was asking you about some remarks made by Georgia players, Georgia personnel coming off of [fol. 383] the field. I want to refer you, please, sir, to the Saturday Evening Post article which reads—and I am reading from Page 81, column 3—

Mr. Cody: Are you quoting him now?

Mr. Schroder: Quoting him? I am quoting—

Mr. Cody: If he is not quoting Coach Griffith, I object to it.

Mr. Schroder: I am quoting the Saturday Evening Post article.

The Court: All right, sir; go ahead.

By Mr. Schroder:

Q. Quoting, "'The Alabama players taunted us,' end Mickey Babb told him. 'You can't run eighty-eight pop, (a key Georgia play) on us,' they'd yell. They knew just what we were going to run, and just what we called it.'" What is that play "eighty-eight pop"?

A. We don't have an "eighty-eight pop". We have the "thirty-three" and "thirty-two pop".

Q. You mean you don't have an "eighty-eight pop" in Georgia's offensive plans?

A. No, sir.

Q. Well, then, there couldn't be a key Georgia play such as that as the Post refers to it?

A. We don't have the "eighty-eight pop."

Q. That is what I say; it couldn't be a key Georgia play [fol. 384] as the Post calls it?

A. That's correct.

Q. No play for Georgia, is it?

A. No, sir.

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JOHN GRIFFITH having resumed the stand, testified further as follows:

Recross examination (continued).

By Mr. Schroder:

Q. One question, Coach Griffith. You know Bob Edwards?
A. Yes, sir.
Q. Bob Edwards first called you about this matter saying that Burnett had furnished it to him; is that right?
A. Yes, sir.
Q. Now, the first time that Bob Edwards called you was before Christmas in 1962?
A. As I recall; yes, sir.

The Clerk: Plaintiff's Exhibit No. 28 for identification is a copy of a letter dated October 22, 1962, to Coach Johnny Griffith from Wally Butts.

(Whereupon above document was marked for identification only as Plaintiff's Exhibit No. 28.)

[fol. 385] The Clerk: Plaintiff's Exhibit No. 29 for identification is a copy of a letter dated February 26, 1963 to Coach Johnny Griffith from Wally Butts.

(Whereupon above document was marked for identification only as Plaintiff's Exhibit No. 29.)

By Mr. Schroder:

Q. Mr. Griffith, I hand you Plaintiff's Exhibits 28 and 29, and ask you did you receive the originals of those letters?
A. Yes, sir.

Mr. Schroder: That's all, Your Honor.
The Court: Any further questions?
Mr. Cody: I'd like to ask him a couple of questions, Your Honor.
The Court: All right, sir.

Redirect examination.

By Mr. Cody:

Q. Coach Griffith, this information, after examining the notes made by Mr. Burnett, in your opinion could that information affect the result of this Georgia-Alabama game? [fol. 386] A. Yes, sir.

Q. If you had been the Alabama coach and had received that type of information—

Mr. Schroder: If the Court please, we are going into all this all over again. I am going to have to go through all this.

The Court: Let's see what the question is.

Mr. Cody: I haven't asked him this before.

By Mr. Cody:

Q. Would it have been helpful to you in the preparation of your defense against Georgia had you been the Alabama coach?

A. Yes, sir.

Mr. Cody: That's all.

Mr. Schroder: All right, sir.

Recross examination.

By Mr. Schroder:

Q. Coach Griffith, referring back to the so-called Burnett notes which we reviewed in court here yesterday—

A. Yes, sir.

Q. —I believe you testified that a good number of those notes were inaccurate and didn't even apply to anything [fol. 387] that the University of Georgia had; is that correct?

A. Yes, sir.

Q. The only two things that you saw in those notes that, in your opinion, as you testified, might have affected or might be of any benefit to an opposing coach—

A. Yes, sir.

Q. —were the two formations we spent some time discussing yesterday?

A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. Those two formations were the two formations that were also used by Alabama in its offense, weren't they?

A. Yes, sir.

Q. In the Vanderbilt game, which was the following game played by the University of Georgia in Nashville, Georgia used those same two formations, didn't it?

A. I am not positive; I think so.

Q. You think so?

A. Yes, sir.

Q. How did that game come out?

A. Georgia won 10 to nothing.

Q. Using the same formations that Vanderbilt had seen the week before when they were scouting Georgia in its game against Alabama?

A. I couldn't answer that positively; no, sir; I couldn't answer that.

Q. Well, do you remember varying your offense against Vanderbilt?

A. Well, I am sure that we did, because they used a different defense.

[fol. 388] Q. I mean, your formations?

A. I can't recall; no, sir.

Q. Those are really your two basic formations, aren't they?

A. Well, we used other formations during the season. Yes, sir.

Q. Yes, sir. Those are your two basic formations that you did use throughout the season, weren't they?

A. Yes, sir.

Q. Throughout the season '62?

A. Yes, sir.

Q. And as you said yesterday, you had been using those same two formations in 1961 also?

A. Yes, sir.

Mr. Schroder: Excuse me. That's all.

Examination.

By the Court:

Q. Coach Griffith, if I recall correctly you said you felt that two other games—information had been given on two other games; is that correct?

A. No, sir; I did not say that.

Q. I misunderstood you.

A. Yes, sir.

* * * * * * *

FRANK INMAN called as a witness on behalf of the Defendant, after having first been duly sworn, testified as follows:

[fol. 389] Direct examination.

By Mr. Cody:

Q. Your name is Coach Frank Inman?

A. Yes, sir.

Q. Where did you attend college, Coach?

A. Presbyterian College.

Q. Where is that?

A. Clinton, South Carolina.

Q. Did you play football there?

A. Yes, sir.

Q. What coaching experience have you had?

A. I got my Master's Degree at Duke in 1947, and in the spring—end of the year I went to Richmond Academy in Augusta as Assistant Coach, and stayed at the Richmond Academy until last year when I went to Georgia. In 1956 I became Head Coach.

Q. What part of the team do you coach now?

A. At the University?

Q. Yes.

A. I am the offensive backfield coach.

Q. What year was it you went to the University as a coach?

A. Last year; my first year was last year, the season of 1962.

Q. Were you an assistant coach then during the—at the time that Georgia played Alabama?

A. Yes, sir.

Q. Coach Inman, have you seen these notes that Mr. Burnett turned over to the Athletic Department, have you ever seen those notes?

A. No, sir; I have seen a copy of them.

Mr. Cody: Let me see those notes.

[fol. 390] By Mr. Cody:

Q. Hold these notes a minute. I want to ask you a few questions about them. Did you attend all the staff meetings of coaches during the spring training of 1962?

A. No, sir; I did not. I was not employed until July 1, '62.

Q. Then did your work begin on or about September 1st in the coaching of the players of 1962?

A. My first practice session was September the 1st.

Q. Will you state to the Court whether or not you helped train the team with respect to a formation that you coaches refer to as a slot formation?

A. Yes, sir.

Q. Did you train—help train the team with respect to a formation known as the pro-set?

A. Yes, sir.

Q. What is that pro-set, Coach Inman?

A. Pro-set is a set at Georgia where we use a slot on one side with an end and halfback and on the opposite side the off end is split; with the Alabama game, about fifteen yards.

Q. How many basic formations are there in football, just approximately?

A. That would be difficult to answer. There are a large number. I could name a few and you can count them.

Q. Suppose you name a few.

A. Well, there is the pro-set we use, which I suppose other people do too. We use the wing, the wing back without any end split; sometimes we use a wing back with an off end split which we call a flex. It is also a normal T-back, full house backfield. There are many variations of spread [fol. 391] formation such as the one that Tech used this past year against us.

Q. Was that a pro-set?

A. We called it a spread.

Q. I see. Go ahead.

A. And then you can take any one of those sets that I have mentioned and just by changing the spacing of the line men or the position that the back lines up, whether he is in a close position, three yards, or in the middle position, three to five yards, or out eight or more yards, and I think that would change the formation completely.

Q. When you refer to a slot formation, are there different variations in there, so far as the distance in the spread is concerned?

A. There is a lot of—a large amount of discussion, I think, about the width of a slot, and at Georgia we have used different ones since I have been there. We started with a three-yards, and at other times we had it wider than that.

Q. Is the difference in that width of the slot important in football?

A. Yes, sir.

Q. Would it be important to an opposing team to know the width of that slot?

Mr. Schroder: If the Court please, he is leading the witness.

Mr. Cody: I think he has a right to express an opinion about it, Your Honor.

The Court: He said you were leading the witness.
[fol. 392] Mr. Cody: Yes, sir.
The Court: And I agree with him.

By Mr. Cody:

Q. What is your opinion, Coach Inman, as to whether or not the width of a slot is important?

A. I think it is important to determine where the defensive people are going to be placed, whether or not they would put more than one defensive man in the position in the area between the slot, whether or not they would declare the strength of the defense like a monster man or rover line-backer toward that direction. We think it makes a lot of difference in how you set your defense. Of course, there are a lot of things involved, the field position, and so on. But generally the formation is a basic thing that you determine your defense from, one of the basic things.

Q. Look on those notes, Coach Inman, and turn to Page 5. Do you see anything on that page that indicates a Georgia formation?

A. Is this the one that says "Slot or Wide Slot"? Am I looking at the right page?

Q. On Page 5. Your pages are not numbered, but in the order in the order in which they appear, I think—

Mr. Schroder: Mr. Cody, I think you are referring to the second note on Page 5.

By Mr. Cody:

Q. The second note on Page 5.
[fol. 393] A. "Slot to right, ends normal (three yards)"?
Q. Yes.
A. That is the question, please?
Q. Is that a formation, a Georgia formation?
A. In our slot right formation we did set the end three yards, and put the on side halfback in that area, a yard behind the yard of scrimmage.

Q. Turn to the last page, Coach Inman. The first item on that page you see where it says "Slot right, left end out fifteen yards"?

A. Yes, sir.

Q. Was that a Georgia formation?

A. That is what we call our pro-set, which is the slot right with a split end on the off side, and we tried to put him out wide, fifteen yards.

Q. Did you help train the Georgia team to use that formation for the 1962 season?

A. Yes, sir. I was the assistant offensive backfield coach, and I worked primarily with the halfbacks. I helped Charlie, and I worked particularly, I would say, in this formation where the backs lined up.

Q. How many formations—back up there just a minute. The Alabama game for the season of 1962 was the first game of the season; is that right?

A. Yes, sir.

Q. Did you have a good many sophomores on your team?

A. Yes, sir.

Q. How many formations did you help train that team to use in the Alabama game?

A. We had two basic formations, but, of course, we worked them both ways, and I guess you would call that four formations; we had a slot right and slot left and a pro right and a pro left.

[fol. 394] Q. Did you use those formations during the game?

A. Yes, sir.

The Court: Did you use any other formations except those two formations during the game, those basic formations?

The Witness: During the Alabama game?

The Court: Yes, sir.

The Witness: No, sir. To my recollection we used that. Of course, we used a punt formation. As I recall we ran one time from a punt formation, which I don't think—but that is the formation, so we ran those two.

By Mr. Cody:

Q. Coach Inman, do you have any opinion as to whether or not this information could have been helpful to Alabama? Do you have an opinion about it?

A. These notes?

Q. Well, I mean—yes, the notes?

A. I think that any information in football from a reliable source would be valuable to any coach, and the value of it, I think, would—I assume would be, at least in my case, would be determined by whom—where it came from. If an expert told me—

Mr. Schroder: Wait a minute; whoa, whoa.

[fol. 395] The Court: Just a minute. That is hearsay. You can go back and ask him the question, what some expert told him would be hearsay.

Mr. Cody: Let's don't get into some comment an expert told you.

By Mr. Cody:

Q. I am asking you as an expert whether or not, in your opinion, this information contained on those notes or any information on those notes could have been helpful to Alabama?

A. Yes, sir; I think it could.

Q. If you had been the Alabama coach would it have helped you prepare your defense against Georgia?

A. Well, I would have to say what I said before. You say if I had been?

Q. Yes.

A. Any information I got in football would have—I'd have to decide on how valuable it was, depending on where I got it from. If one of my coaches gave me this information, I would take it without any question, and that is what I meant by—when I said "expert". I should have said "coach", a qualified coach. Does that answer your question?

Q. I think it does. Coach Inman, do you know—do you know who the head of the Southeastern Conference is or was in 1962?

A. The Commissioner?

Q. Yes.

A. Yes, sir; I know him.

Q. Who is he?

A. Mr. Gardner.

[fol. 396] Q. Who is Mr. Gardner?

A. He is head of the officials' association.

Q. If you wanted to obtain an interpretation of a rule, who would you—who would you turn to?

A. Other than my coaching staff?

Q. Yes.

A. If the staff couldn't decide, I assume I would go to the man in charge of it who would be, in this case, Mr. Gardner.

Q. Did Coach Butts have anything to do with the football team during the 1962 season so far as coaching was concerned?

A. Not to my knowledge, no, sir.

Cross examination.

By Mr. Schroder:

Q. The note you read a moment ago in Page 5 reads: "Slot right—" you read it. I forget what page it's on.

A. The last page?

The Court: I think he is referring to the second note on the 5th Page.

By Mr. Schroder:

Q. Page 5, the second note.

A. "Slot to right ends normal (three yards)."

Q. As that note is written, it is incorrect, isn't it?

A. I am not sure I understand you.

Q. Do you put your ends out three yards on the slot right?

A. The right end is split three yards on slot right.

Q. This doesn't say that. It says both ends.

[fol. 397] A. It says "ends normal".

Q. "Ends normal (three yards)"; isn't that what it says?

A. In parentheses it says "three yards"; yes, sir.

Q. Do you put both ends out three yards?

A. On the side of the slot the end is three yards, as near as we can get it, which is, as I understand—

Q. You have two ends on your team, don't you?

A. The off end, if I could finish, the off end in our set-up would be anywhere from three feet to whatever it takes him to run the play.

Q. What is an off end?

A. The one away from the slot.

Q. All right, sir.

A. It would be the left end in a slot right.

Q. Then to the extent that this says your ends are three yards out or split, that is erroneous, isn't it?

A. Not to my thinking; no, sir.

Q. You used—you do split both ends three yards out on a slot right?

A. On slot right the right end splits three yards. The left end splits to do the job, whatever the call is.

Q. Does he go three yards out?

A. He could go three yards; yes, sir.

Q. Is that a slot right formation there on top?

The Court: I don't believe he can hardly see it.

A. (By the witness) Yes, sir; that is a slot right.

Q. I want you to show me this. The witness was not here yesterday, and I might state for his information this was drawn by Coach Griffith as Georgia's right slot formation.

A. Yes, sir.

Q. Now, your note there reads, "slot to right, ends nor-[fol. 398] mal (three yards)"; now, in order for that note to be put on this board, you would have to move this end out here to the same distance that would be, wouldn't you?

A. I suppose if you are going to say this (three yards) means both ends, you are right.

Q. How many ends does it say? Does it say singular or plural? Read it.

A. It says "ends".

Q. E-n-d-s?

A. Yes, sir.

Q. How many ends does a team have?

A. Two.

Q. One here and one there, right?

A. Usually one on the right and one on the left.

Q. That's right, sir. That is here and there?

A. Yes, sir.

Q. And when that said "ends normal (three yards)", your slot right, it would be a different diagram than this one, wouldn't it?

A. I don't see any marking up there about the split of that end.

Q. I didn't draw this. This was drawn by someone else. Can you see it all right?

A. Yes, sir.

Q. Well, the note that you have there in your hand is different from this, isn't it?

A. I think the right end in a slot is three yards and a left end is split anywhere from three feet to any position it takes to get the job done, and if you are saying this note says that both ends are three yards, then I would say that the slot right at Georgia could be that way.

Q. I am not saying—

A. But it would not be that way every time.

[fol. 399] Q. I am saying what the note says.

A. I thought you asked me—

Q. The note speaks for itself, doesn't it? I mean, just read it.

A. Mr. Schroder, you asked me what the note said.

Q. Read it.

A. "Slot to right, ends normal (three yards)."

Q. "Ends normal (three yards)"; now, that is not my language. The language there says that your ends are split

three yards; in effect, isn't that what it says "ends normal (three yards)"?

A. Yes, sir.

Q. All right, sir. Under that note this end would line up three yards away from the tackle just as that end is lined up three yards away from this tackle?

A. Under—if they were going to draw this, sir, I thought you said that was Georgia's slot?

Q. I am talking about—if you are going to draw that formation up, you would move this end out here, wouldn't you, three yards?

A. I suppose you would; yes, sir.

Q. All right, sir. No, oftentimes it is true, speaking of information and the reliability of information that comes into coaches' hands, it's been known often for one coach to plant information where another coach can get it, hoping he will rely on it; you know of instances like that, don't you?

A. No, sir; I don't.

Q. You weren't at Georgia in 1961 before the Vanderbilt game; you weren't at Georgia then?

A. No, sir.

Q. You never heard of that being done, a plant?

A. I have never done anything like that.

Q. I am just asking have you ever heard of anything like that?

[fol. 400] A. Have I ever heard of information being planted?

Q. Hoping that other coaches would rely on it?

A. I have heard of things like that. I don't know of any reliable coach that might use planted information.

A. We have what we call a spread; yes, sir.

Q. Did you use it last year?

A. No, sir—last year?

Q. Did you use it in the Vanderbilt game—I mean, the Alabama game?

A. No, sir.

Q. Is this similar to the one that Alabama uses and similar to the one Georgia Tech uses?

A. No, sir.

Q. Well, I don't know what the formation is, but you did not have any spread formation that you used against Alabama in '62?

A. No, sir.

Q. Is that correct?

A. Yes, sir.

Q. How—I have forgotten the score; what was the score of the Georgia Tech-University of Georgia game?

A. I would like to forget it; it is something in the 30's.

Q. Sir?

A. Was it 30?

Q. 30-something 6, wasn't it?

A. Yes, sir.

Q. And Georgia Tech and Alabama, you rate them even?

A. Georgia Tech won the game; yes, sir.

Q. Won the game how much?

A. I don't recall; they won the game.

Q. About two points?

[fol. 401] A. They used some kind of a spread formation and were able to win.

Q. Alabama used the same formation against Tech that Tech used against Alabama, didn't it?

A. I don't know, sir.

Q. Alabama beat Tech by two points, didn't it?

A. No, sir.

Q. Excuse me. I had it backwards. Georgia Tech defeated Alabama by two points, didn't it?

A. I am really not sure. I think that's correct. They won the game.

Q. And Georgia Tech and Alabama played Georgia about the same way, didn't they?

A. Different times of the year.

Q. Yes, sir. But about the same results?

A. I would say Alabama beat us a little worse on the scoreboard.

Q. That was the first game your sophomores had ever played in?

A. The Alabama game; yes, sir.

Q. Now, is there anything particular about these two plays as Coach Griffith drew yesterday, or wasn't Georgia using those same formations in 1961?

A. I can't—I really can't say exactly what Georgia used in '61.

Q. You did—you weren't at Georgia in '61, were you?

A. No, sir; I went there a little late, and so I didn't have an opportunity to study as much as I should have.

Q. All right.

A. But these formations we have used since I have been at Georgia, and I assume we have used some of those prior to that time.

[fol. 402] Q. Well, they are right basic formations for any Southeastern Conference Football Team, aren't they?

A. They are basic formations for any team that uses a slot with those splits and a pro-set with those splits.

Q. Do you know of any team in the Southeastern Conference that doesn't use either one of those two formations?

A. You just talked about the Tech game in which they had to go to what they figured was a surprise move and a spread that was not either one of those; no, sir.

Q. I say, do you know of any team in Southeastern Conference that does not use these two formations as part of their basic plan?

A. I don't know of any, but I couldn't say that they all do or do not, because I do not know that much about some teams. Like Tulane, for example, that I have not seen play.

Q. Well, it is a fairly common—both of them are fairly common basic fundamental formations, aren't they?

A. Along with a number of others; yes, sir.

Q. Yes, sir. Mr. Cody asked you about some rule interpretations, or who you would go to for an interpretation of the rules as they apply to football players and teams. In 1962—let me ask you this—I withdraw that for the moment. What organization establishes or promulgates rules to be followed by the teams all over the country, as well as those in the Southeastern Conference?

A. The Rules Committee. I don't know the exact name.

Q. I don't mean the members; the name of it.

A. I believe it is the American Football Coaches Associa-
[fol. 403] tion Rule Committee. I am not sure about that, about the name.

Q. They promulgate and seek enforcement of all rules as they pertain to the various colleges which belong to that association throughout the country, don't they?

A. You understand, I don't have a very large background in college football. My understanding, they make the rules, and Mr. Gardner and other groups have to enforce them.

Q. Enforce them?

A. That means they have to interpret them, I think.

Q. Don't you know, as a matter of fact, that that association has local representatives in each area like the Southeastern area and the Southwestern area and the Pacific Coast area, and Midwest?

A. Which? You talking about the rules committee?

Q. Yes, sir.

A. I understood that is right.

Q. Who, in 1962, was the southeastern representative of that rule-making body?

A. I understand Coach Butts.

Q. Coach Wally Butts?

A. Yes, sir.

Mr. Schroder: I believe that's all, Your Honor.

The Court: All right, sir; any further questions from Coach Inman?

Mr. Cody: Just a second, Your Honor.

[fol. 404] Mr. Schroder: I may have one or two more.

Mr. Cody: Well, I have—

The Court: He said he might have another question.

Mr. Schroder: There was one question I missed.

The Court: All right, sir, go ahead.

By Mr. Schroder:

Q. I forgot to ask; you said you were—during 1962 you were the assistant offensive backfield coach?

A. I believe that is the way they—what they call it. I worked with the backs. Coach Trippi was the offensive backfield coach and I was called, I think, the assistant backfield coach, and worked in recruiting.

Q. You were Coach Charlie Trippi's assistant?

A. No, sir; I was Coach Johnny Griffith's assistant.

Q. I thought you said Coach Charlie Trippi was in charge of the offense?

A. He was in charge of the offense.

Q. And you were under him?

A. Everybody that worked with the offense was under the offensive coach; yes, sir; but I think I was considered an assistant at the University of Georgia, not another member of the staff.

Q. I understand that.

A. Yes, sir.

[fol. 405] Q. But Charlie Trippi was in charge of the offense, wasn't he?

A. Yes, sir.

Q. And you were—you were assisting him?

A. Yes, sir.

Mr. Schroder: That's all.

Redirect examination.

By Mr. Cody:

Q. Coach Inman, during the early part of your 1962 season, did you have secret practice?

A. You mean prior to the '62 season?

Q. Yes.

A. Yes, sir; at Georgia we have a fence around our practice field, and, as I recall, a manager was stationed at the gate and allowed only authorized personnel on the practice field.

Q. Is that a—is that a walled field? Do you have a wall around it?

A. Yes, sir.

Q. Was Coach Butts permitted to attend those secret practices?

A. Yes, sir; Coach Butts was our athletic director.

Q. Did—why is it, Coach Inman, that you—that you don't prepare or train your team for the first game of the season to use all of the basic formations?

A. Well, that is a decision, I think, that the staff has to make, and in our case I think the feeling was that we had a large number of inexperienced players and that by concentrating on these maneuvers and using these formations, using our best people in certain positions, that we could [fol. 406] move the football and do a better job. I assume that that is the reason everybody decides on certain formations.

Q. And you limited yourself to two?

A. Well, I would call it four, slot right, slot left, pro right and pro left.

Mr. Cody: That's all I have.

Recross examination.

By Mr. Schroder:

Q. I believe you said you ran from another formation, a punt formation you ran in the Alabama game?

A. Yes, sir.

The Court: Sometimes that is a necessity, isn't it?

Mr. Schroder: It wasn't this time.

The Witness: No, sir.

By Mr. Schroder:

Q. This was a planned play, wasn't it?

A. Called play.

Q. Called play. This Alabama end who caught the first touchdown pass—did you see the game?

A. Yes, sir.

Q. His name is Williamson?

A. I believe that's correct.

Q. Plays right end?

A. Yes, sir.

[fol. 407] Q. And he would play left end if they were going to swing him over that way?

A. Yes, sir.

Q. Did you hear Coach Buts tell the offensive coach or Charlie Trippi that—or John Gregory, when he came back from New York with Paul Bryant and with Ray Graves, coach at the University of Florida, to watch out for Williamson on the first opportunity that Alabama got, that they would throw the bomb, as they call it, to Williamson?

A. I don't recall being in on that conversation; no, sir.

Q. That is what they did too, wasn't it? They threw the homerun to him as soon as they got Georgia's interception, that was the first touchdown for Alabama, wasn't it?

A. Yes, sir.

Q. Don't you all—

A. It wasn't the first time they had the football, as I recall it.

Q. It was the first time they had the ball, I mean, when they intercepted Georgia's pass?

A. Yes, sir.

Q. And they were in position for the homerun, weren't they?

A. Were they in position for a homerun on 50, approximately? I would say anything that far out would be considered in football a homerun.

Q. And they did it?

A. Yes, sir; a fine executed play.

Q. Unfortunately, we at that time had an offensive man trained to play offense in the backfield, supposed to cover Williamson, didn't we?

A. Mr. Schroder, who do you mean "we"?

[fol. 408] Q. The University of Georgia.

A. Yes, sir; the University of Georgia.

The Court: Any further questions?

Mr. Schroder: Just one moment.

By Mr. Schroder:

Q. What is the name of the large—a student community —what is that, the Student Educational Center?

A. The Georgia Center for Continuing Education.

Q. Yes, sir. That is sort of in the shape of a hotel, isn't it?

A. Yes, sir.

Q. Has rooms upstairs?

A. Yes, sir.

Q. How close is that to your practice field?

A. It's—it's not exactly adjacent, but it is well within sight.

Q. No problem at all for someone up there to see if they wanted to see what Georgia was doing out there, was there?

A. I can't answer you positively. I have wondered about it, because it is a very pretty place and it is real tall.

Q. It is real tall, and Georgia practices out there behind. If they wanted to get in there and spy, there wouldn't be any problem, would there?

A. It's not behind it; it is this side of it.

Q. This side of it?

A. Yes, sir.

[fol. 409] Mr. Schroder: That's all.

Redirect examination.

By Mr. Cody:

Q. How far is that building away from the practice field?

A. Well, I have been having a tough time with three yards. I think—I would guess the hotel part of the building is two hundred yards, I suppose. This would be real—

Q. I just want your estimate of it.

A. I would think that's right.

Q. Two hundred yards?

A. There is a building there and some open space in the center, so, whatever that is.

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LEROY PEARCE called as a witness on behalf of the Defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Joiner:

Q. Would you state your name, please?
A. Leroy Pearce.
Q. What is your present employment?
A. I am assistant football coach at the University of Georgia.
Q. How long have you been employed in that capacity?
A. Since February 8, 1962.
[fol. 410] Q. Did you play college football?
A. Yes, sir.
Q. Where did you play college football?
A. University of Wyoming.
Q. Coach Pearce, I wonder if you would tell these gentlemen of the Jury the experience that you have had in the field of coaching football?
A. I coached football for Coach Badden in Wyoming in in 1950-51 and 51-52. I coached for Arkansas in 1953 and 1954.

Mr. Cody: Speak a little louder, Coach Pearce, if you can.

A. I coached at Tennessee for Coach Wyatt in '55 and '56. I coached at Iowa State for Jim Myers in 1957. I coached for Bill Jennings in Nebraska from 1958 through 1961.
Q. What time of the year did you come to the University of Georgia?
A. February 8, 1962.
Q. And what was your position at that time?
A. I was to coach the offensive ends and the defensive ends.

Q. And would you state whether or not you occupied that same position during the 1962 football season?

A. Yes, sir.

Q. Coach Pearce, would you state your opinion as to whether or not football coaches, in the course of preparing for a game, seek to obtain information about their opponent?

A. Would you—do you mean scouting?

Q. Yes.

A. Yes, sir. Scouting is a common practice, and in most conferences now they have the film exchange where you can [fol. 411] exchange films with your opponents, and, of course, you have people on your staff that scout. Most of the assistant coaches scout, and that is going to the game and watching the game to pick up anything that you can do, and those are common practices in football.

Q. Would you go into a little bit more detail about what is involved in scouting, what information you are able to obtain and what your purpose in scouting a football game is?

A. Well, in your football scouting you try to get an analysis of the team's offensive and defensive tendencies, get the plays they run, the formations they are in, and get all their defenses and stunts. These are things you can get in a film, because you can study a film and run it backwards and forwards. At a game when you are scouting it is real hard to get a lot of things like that, because it is hard to keep up with the game because you are trying to keep tendencies on downs, distances, situations, and trying to get a feel of the game and study their personnel actually by being there and not from the film.

Q. Would you state whether or not it is normal for coaches in the Southeastern Conference to try to attend the spring practice game of teams that they expect to play the next year?

A. Yes, sir.

Q. Are they able to obtain any information that will give some indication of what the team could be expected to do during the next year?

A. I believe that the most valuable information you could get from that would be the—It is the first time you get a chance to see boys that will be sophomores play the next year. Now, you—usually the teams are regulated on their offense and their defense so that coaches that are [fol. 412] there, if they bring enough people, they get a chance to pick up your stunts and things on defense or your offensive things.

Q. When you play that spring practice game, you know there are going to be opposing coaches watching, do you not?

A. Yes, sir.

Q. Now, would you summarize to the Jury the shortcomings in the procedures that coaches use to obtain information; in other words, what information would you like to have that you are not able to obtain through normal procedures?

A. Well—

Q. Maybe you'd like to break it down to detail the scouting first and then the films, and I believe you have covered the spring practice.

A. I wish you would restate that question, please.

Q. What are the shortcomings of scouting as far as getting complete information about a team that you are about to play?

A. Well, if you have the films you can take the films and break them down. I would say the only shortcomings as far as films are concerned is it doesn't show all pass patterns unless somebody has a wideangle film, and usually —now, we don't take them at Georgia, and I don't know whether anybody would let you have their wideangle film, but you can get pass patterns if you have the wideangle film. If not, you can't get those and you would have to rely wholly on your scouting or your scout at the game to pick up pass patterns. I think that would be the main weakness of films, but from films you can get their offensive and defensive patterns, and if they don't change it you can be in real good shape on it.

[fol. 413] Q. Now, what opportunity have you had to scout the team that you are going to play on the opening day of the season?

A. Well, you have, during the summertime you can get all of their last year's films which we did, and I am sure that everybody does, and I'd say that the only shortcoming about this is if there is a lot of change in personnel, you don't get to see the new personnel.

Q. And would you state whether or not there were a lot of changes in personnel on the 1962 Georgia football team?

A. Yes, sir. We played a lot of sophomores in 1962.

Q. Would you summarize for the Jury the procedures that football teams in general, and Georgia in particular, utilize to prevent other teams from obtaining information?

A. Well, at the University of Georgia we have what we call closed practices, and we have a wall around our practice field to keep people from getting in, and anybody at the practice is supposed to be admitted—we have a manager on the door and he is supposed to only admit people that have been—well, members of the Board of Trustees and things like that, and in most cases the press and—state the rest of the question.

The Court: He said—

By Mr. Joiner:

Q. What is the—

[fol. 414] The Court: He said state the rest of the question; he didn't understand the question.

Mr. Joiner: I believe he covered it, Your Honor.

The Court: All right, sir.

By Mr. Joiner:

Q. In particular during the 1962 season, what precautionary measures did you exercise with reference to your play groups?

A. Well, in 1962 I—we broke our team into three groups, the backs and the ends and the lineman, and had our foot-

ball players in group meetings and gave them the offensive and defensive assignments in those meetings, and I would say that our quarterbacks probably had a real good picture —well, I hope they had a real good picture of the overall offensive part of the game, but other players just had what they were supposed to do.

Q. In other words, the left guard wouldn't know what the halfback was going to do on the play, and the right end wouldn't know what, maybe, the quarterback would do?

A. I don't think it would be that bad. He would know in the numbering system because we number our backs. But if he were a blocker, the halfback were a blocker, the guard might not know that.

Q. If someone should try to obtain a copy of these plays, would you state whether or not they would have to have the plays for each individual position before they would [fol. 415] have a complete analysis of each offensive play?

A. I believe that they'd have to have the linemen, ends and backs.

Q. Coach Pearce, who was favored to win the 1962 Georgia-Alabama game?

A. Alabama.

Q. How much was Alabama favored to win that game by?

A. Well, as nearly as I can remember it was 14 to 17 points.

Q. I believe you previously testified you were not at Georgia during the 1961 season; is that correct?

A. Yes, sir.

Q. Have you had an opportunity to review the films for the 1961 season?

A. I reviewed all the films when I came to Georgia, and I studied mostly the end personnel, because I knew I would be coaching the ends for the 1962 season.

Q. To the best of your recollection, how many different formations were used by Georgia during the 1961 season?

A. I can't give you an answer to that because I don't know. I mean, there are—

Q. Could you give us an estimate, an approximate number?

A. Well, I'd just say several, because I really don't know.

Q. Now, Coach Pearce, what formations were used by Georgia in the 1962 Georgia-Alabama game?

A. Well—

Q. Basic formations?

A. The names that we gave them is a slot and a pro-set, [fol. 416] and I am sure that you have been over that.

Q. And would it be correct to state that you could say that there are variations of those two separate formations, or you could say it is four different formations? I mean, assuming you go both ways?

A. Assuming that you go both ways, if you count right and left, it is two different formations; it could be four formations.

Q. Would you state your opinion as to whether it could also be considered two formations with those variations; in other words, could it have been—state your opinion—state your opinion as to whether or not it could have been considered the pro-set formation going left and right and the slot formations going left and right?

A. I believe the best answer I could give is that if you put a play in, say, slot right, and put a play in, that you have the same play going the opposite way with it turned over. Now, I really don't understand your question if that is not the answer.

Q. Well, my question is whether or not the two basic formations—let me rephrase it. State your opinion as to whether or not the two basic formations used by Georgia in the 1962 Alabama game were the pro-set and the slot?

A. Yes. Our basic formations were pro and slot.

Q. Assuming that both of these formations were used by the 1961 Georgia team, along with other formations, would it be of any help to an opposing coach to know that these were the two particular formations that you were going to use in that game if he knew the formations you had used the previous year?

[fol. 417] A. If he was sure that those were the formations he could cut his practice time, mainly on those formations, and later in the week practice the other formations, the best plays you could use from the other formations. Did you ask me a question and did I answer it?

Q. My question was, assuming that the opposing coach knew all of the formations that had been used during the previous season and that these two formations were used during the previous season, if he knew that these two particular formations were going to be used in the game and no others, would that be helpful?

A. Yes.

Q. Now, how many formations did Georgia generally use in a game during the '62 season?

A. We didn't use very many formations, because we—

Q. I mean, in one particular game, how many formations would you usually prepare to use in any one particular game?

A. Well, we picked out two or three formations for each game, depending on what we thought we could do best against the football team that we were going to play.

Q. Now, assuming that the opposing coach knew from the films of the 1961 season the plays that Georgia had used during that season and assuming that Georgia used the same plays in the 1962 season, would it be helpful to a coach to know the particular plays that a team intended to use in a particular game?

A. If you knew the exact plays it would be helpful, because you could practice against them and get recognition from them.

[fol. 418] The Court: You mean plays for formations?

Mr. Joiner: Plays. I believe I covered the formations previously, Your Honor.

By Mr. Joiner:

Q. Coach Pearce, during the course of preparation for a game, do you normally have the first team defense work against the firm team offense?

A. Well, we, at the University of Georgia we have the first team defense work against the scout team, and we have the first team offense work against the different scout team so that they actually never work against each other.

Q. What would the scout team that was working along with the defensive team be running?

A. The scout team that worked with our defensive team would run the opponent's offensive plays.

Q. To the best of your knowledge at that time, from scouting the offensive team?

A. Yes, sir.

Q. Coach Pearce, if information were given that would relate to the formations and plays of a particular game, would it be any more help in the opening game than in games later in the season?

A. Well, as I previously stated, I think it would—it would help you early because you would—if you knew of anything new, if you knew anything about players that had not played the previous year.

Q. Would you state your opinion as to whether or not it would be more helpful in the opening game than it would later on in the season?

[fol. 419] A. It would be more helpful in the opening game because as a team starts to play during the year, from one week to the next, you can't make a major change in your football team. So, anything that you have in the first game you will stick with that basically for the next game. You can change for each game a little bit, but not a major change.

Q. Would you state your opinion as to whether or not in college football it is quite frequently done for a coach to change in some respects his offense from one year to another?

The Court: You mean from one year, one game—

By Mr. Joiner:

Q. One year?

A. I would say a lot of coaches change from one year

to the next, because mainly if you are losing, you are trying to find something that is better than what you are doing, and you will—for instance, we have spent a lot of money going to coaching clinics, talking to other coaches and trying to find out what we are doing, and in our staff meetings if we decide somebody else is doing something that is better than what we are doing, I am sure we will change to it.

Q. Would you state your opinion as to whether or not the opponent of Georgia for the opening game of 1962 could have told, from reviewing the 1961 films, whether or not Georgia was going to continue to use the same offenses that they used in 1961?

A. I would say that they could have taken all the films of last year and broke them down, and the things that we did best from 1961, assuming that we would have used [fol. 420] those, they would have no assurance what we would have used.

Q. Would they have—what, if any, assurance would they have had that you were not putting in one or two completely new formations?

A. None.

Mr. Schroder: What's all this got to do with the case? We are just talking about two formations.

Mr. Joiner: Well, Your Honor, Mr. Schroder has made the point—

The Court: I think it is relevant.

Mr. Schroder: I withdraw the objection.

The Court: I overrule the objection. I think it is relevant.

By Mr. Joiner:

Q. Coach Pearce, I show you these notes which have been admitted in evidence, and ask if you recognize them?

A. I have seen a photostatic copy of these notes right here.

Q. Will you state whether or not you have seen them on more than one occasion?

A. Yes, sir; I have.

Q. And are you fairly well familiar with the contents of these notes?

[fol. 421] A. Yes, sir.

Q. Directing your attention to Page 6 of the notes, the third entry on that page, it is next to the last page, "slot right, right half on fly, screen to him"; do you see that entry?

A. Yes, sir.

Q. Would you state whether or not that comes close to describing a play that Georgia used in the 1962 Alabama game?

Mr. Schroder: We are coming close—I think that ought to be explained, if it is coming close and how close.

Mr. Joiner: Your Honor, I would like an opportunity to explain it. Mr. Schroder—

The Court: Go ahead and explain it.

Mr. Joiner: Mr. Schroder has tried to restrict this to the technical language on the notes, but the witness Burnett has testified that he was unable to get down the exact language and that some of this is sketchy information, and if some of it comes close to describing a Georgia play, I think it is important to have that information because it could very well have been that writing as quickly as he did Burnett was unable to get the whole play written down, and I think it is a proper question.

[fol. 422] The Court: I will let him testify as an expert if he could determine from those notes what it meant.

Mr. Schroder: Yes, sir. But seems to me what counsel has stated, he is seeking to impeach these notes he is relying on. If they don't speak the truth, he is trying to get it explained.

The Court: I don't think so. I will let him ask it. I will hold him within bounds.

By the Witness:

A. I think the best way I can answer your question is to tell you how we did screen for this game. We would—

assuming we had a slot right, we'd put our right half in long fly, we called it, and our quarterback would go on a drop back pass, and we would screen to our left halfback who had gone across. We did not screen to the man that was on the fly; we screened to the other halfback.

Mr. Schroder: Well, now, if the Court please, it is not a question what Georgia would do or did do. The question is whether or not Georgia has this play, and I think that the question that was asked a moment ago and the answer would be objectionable. The note speaks for itself. The Post has charged us with—charged Butts with giving detailed information as to plays.

The Court: As an expert, Mr. Pearce, could you tell from [fol. 423] those notes what that play meant in relation to what you knew of the Georgia offense?

The Witness: Well, this is not our screen pass. It is close to our screen pass. We screen to the other halfback, screen to him, and I think you have to—I don't know whether you can assume who "screen to him" is; if that is the plan on the fly, we didn't screen to him.

By Mr. Joiner:

Q. What if it is the left halfback?

The Court: I will let him explain it. I think the Jury will understand it.

By Mr. Joiner:

Q. If "him" is a left halfback, would that be an adequate description of a screen pass which you intended to use in the 1962 Georgia-Alabama game?

A. If "him" is the left halfback, yes.

Q. Directing your attention to Page 1 of the notes, would you give the Jury your opinion of the tackle on the '62 team named Rissmiller?

A. I have been asked about Rissmiller before.

Q. Let me point this out. I am asking your opinion as of the week before the 1962 Georgia-Alabama game and

not as of the present time, because I don't think that would be pertinent.

A. Rissmiller was a starter for us, and he is the best we have, but if you say "greatest in history," as this is, and I really don't know what "greatest in history" means, but he did not start for us; he was the best we had.

[fol. 424] Q. Would you state your opinion as to whether or not it would be helpful to an opposing coach to know who your best lineman was?

Mr. Schroder: I don't think that is the way the note reads, Your Honor. The note reads "Reismueller greatest in history," and again he is putting something else in the notes that is not in the notes.

Mr. Joiner: I think that—

Mr. Schroder: It doesn't say he is the best lineman.

The Court: He is going into a question of adjectives. I will let him ask him. I don't know what your last question was.

Mr. Joiner: Let me restate that, Coach Pearce.

By Mr. Joiner:

Q. Would you state your opinion as to whether or not it would be helpful to an opposing coach to know who your best lineman was?

A. I would say that; I would say that it would be helpful. You might want to run at him. During the game he might not be as good as he was supposed to be.

Q. Now, turning to Page 2 of the notes, third entry on that page, what was your opinion as of the week before the 1962 Georgia-Alabama game as to the state of the discipline [fol. 425] of the Georgia team? I realize it is hard to remember back that far, but if you would, just to the best of your recollection.

A. As I have stated before—as I have stated before on this question, I think there is a real wide meaning in discipline of a football team, what some people think discipline is and what other people think it is. Now, I stated before

that as far as the ends were concerned, and I was concerned mainly with the ends, that before we played Alabama I thought our ends were well disciplined. In the Alabama game I thought they did some things they shouldn't have done, and I didn't think they were well disciplined during the football game.

Q. Had Georgia added two coaches just prior to the '62 season?

A. Yes, sir.

Q. And who were those coaches?

A. Coach Inman and myself.

Q. Directing your attention to the third page of the notes, the first entry on that page, "on side guard pulls on sweep," what does that mean to you, Coach Pearce?

A. Well, this note—excuse me, I am—what does this mean to the Georgia football team or what does this mean?

Q. What does it mean to you? I mean, what do we mean by saying this on side guard pulls—

A. Okay.

Q. I am trying to get across to the Jury what you mean by that, because they as well as I are not quite as familiar with football as you coaches are.

A. Well, assuming a—a sweep is a play that is designed to run inside of an end or outside of an end, depending on how he plays. If he goes out, you try to kick outside; if [fol. 426] he plays tight, you try to run around him. On a sweep, assuming you are running it to the right, if the on side guard pulls on a sweep, it would be the right guard pulling, and that—I think I explained a pull, when they step back and turn up the field in the hole open, the first place there is daylight to block any one of the opposing players that they come to first.

Q. Would you state your opinion as to whether or not it would be helpful to an opposing coach in preparing to defend against a sweep to know whether or not the on side guard might pull on the sweep?

A. It is an unusual thing. A lot of coaches would never pull an on side guard because of the danger of somebody

shooting through that area and stopping the play, and we would only do it against certain defenses. Now, have I answered your question?

Q. I am not sure that you have. My question is whether or not in preparing a defense against a sweep it would be helpful to a coach to know that the on side guard might pull, but let me withdraw that and rephrase it in another way. Would it be helpful for a linebacker to be coached to be on the alert for an on side guard to pull on a sweep so that he would be able to shoot the slot or be watching for an opportunity to do so?

A. It would be helpful if the linebacker keyed on the guard; yes.

Q. Would you explain to the Jury what you mean by this phrase "shooting the slot"?

A. In football, in shooting the gap, if—we have the gap rule and I am sure that everybody has a gap rule, and if on our gap rule, if a guard takes too big a split and our guard feels like he can make it through the gap and get in the opposing team's backfield without being blocked by that [fol. 427] guard, we tell him to go ahead and shoot the gap. Now, that is—that is up to each guard each time. Now, was your question in reference to linemen or linebackers?

Q. A linebacker.

A. Linebackers, if they key the linemen they are playing against hard, in some cases are given the option to run through when a guard pulls or works down the line of scrimmage in the direction that he is pulled, because the guard is usually pretty good key on the direction he is going, and by "key" I mean what he does the defensive man reacts to that action.

Q. In other words, what you are saying is when the guard pulls out, there is a hole left there that the linebacker can run through and make a tackle; isn't that in essence what you are talking about?

Mr. Schroder: That isn't what he said, if it please the Court.

The Court: Mr. Schroder—

Mr. Schroder: If he is going to quote him, he ought to quote him. The witness says the linebacker follows the direction in which the guard is going, as I understood.

The Court: Just a moment.

The Witness: The linebacker—

[fol. 428] The Court: Go ahead. I think Coach Pearce can explain it.

The Witness: The linebacker in many cases will have an option of either running through the direction that the guard pulls from or working down the line the direction he pulls from. By working down the line I mean staying on his side of the line, and by running through I mean running through into the other team's backfield in the direction that the guard pulls.

By Mr. Joiner:

Q. Would you state whether or not when you say "running through" you are referring to running through the hole that was left by the guard when he pulled out?

A. Yes, sir.

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By Mr. Joiner:

Q. Coach Pearce, I believe we were on the top entry, note 3, with reference to the on side guard. Would you state whether or not during the course of the 1962 Georgia-Alabama game a play was run by Georgia in which the on side guard did pull on a sweep?

A. Yes, sir. We pulled our guards twice in the game.

Q. Would you state whether or not to the best of your recollection that would be reflected in the film?

A. Yes, sir; it would have been.

Q. Now, directing your attention to the middle of that page, "Woodward commits fast, safety men"; who was your first string safety man for the Georgia-Alabama [fol. 429] game of '62?

A. Brigham Woodward.

Q. And would you give your opinion as to whether or not he did commit himself fast in—I am talking now about previous to the Alabama game and in the Alabama game?

A. Woodward was a sophomore in 1961, and sophomores have a tendency to commit fast. Let me say, first of all, he is a real good tackler. He does like to tackle. Woodward, we felt that Woodward committed maybe a little bit fast, but we were working on it; we were trying to correct it.

Q. Would you state to the Jury what you mean by a safety man committing fast?

A. Well, a safety man is supposed to prevent touchdowns and supposed to be the last man in your defense, and if he goes up to make a tackle and the runner would happen to get by him, it might be a touchdown, or if they faked a run into the line and threw a pass in his territory it might result in a touchdown or a long gain.

Q. Would you state whether or not to the best of your recollection there were instances in the 1962 Georgia-Alabama game in which Woodward did commit fast?

A. He made several tackles on the line of scrimmage; yes.

Q. And would you state whether or not to the best of your recollection that would be reflected by the films of the game?

A. Yes, sir.

Q. Now, directing your attention to the next entry on that page, "weak defense, anybody except Blackburn"; how long did Blackburn play in the game?

[fol. 430] A. I can't answer that as to time. He didn't play very much.

Q. Would you state the reason for that?

A. Well, Blackburn, in practice before the Alabama game, was—kept getting pains in his stomach and did not practice very much, and so he just hadn't practiced enough to play very much.

Q. Would you state to the best of your recollection the date on which the coaching staff decided that Blackburn would not be used extensively in the game?

A. I can't answer that question at all, I don't believe, because I don't remember it.

Q. You don't remember the date on that?

A. No, sir.

Q. Assuming that this entry is with reference to pass defense, state your opinion as to whether or not this information would be helpful to Georgia's opponent in the opening game if Blackburn did not play very much during the game?

A. I'd say if Blackburn didn't play much during the game you could throw to anybody, to answer your question.

Q. Would you explain what you mean by that, what this entry means to you, and why you say you could throw to anybody?

A. Well, if—excuse me. If I answer your question, it says if Blackburn is not in the game and you say, "weak on pass defense, anybody except Blackburn," and Blackburn is not in the game, I would assume that would mean, and this is an assumption only, that everybody else is weak.

Q. And if it did mean that, would it be helpful to an opposing coach to know that in order to prepare his pass offense for the game?

[fol. 431] A. Well, if you thought the other team was real weak on pass defense you would plan to pass a lot.

Q. Now, directing your attention to the entry on the middle of Page 4, "long count, left half in motion"; would you state whether or not that has any significance with reference to any play which Georgia intended to use in the 1962 Georgia-Alabama game?

A. We used a long fly or long motion which put our halfback away from the formation before the ball was snapped. We practiced on it and we did use it on the Alabama game.

Q. Would that be reflected in the film?

A. Yes, sir.

Q. Now, directing your attention to the entry on the top of Page 5, "Bear on hook to goal line"; assuming that that is made with reference to end Mickey Babb, would you state whether or not to the best of your recollection you

had any such play in mind to use in the Alabama game, if the opportunity was present?

A. I have looked for our game plan and I haven't been able to find it on that, and we—Mickey Babb is six-four, and a real good target. I can't tell you "yes, that was definitely in our game plan"; I just can't answer that.

Q. Assuming that it was in your game plan, did you have an opportunity to use a play of this nature in the 1962 Georgia-Alabama game?

A. No, sir; we were never close to the goal line.

Q. Now, that next entry "slot to right, ends normal three yards"; assuming that to be a brief statement of slot to right, end is normally three yards, what would that mean? [fol. 432] A. Well, to me that would mean that if—if we are in a slot right, that our end would be split three yards, and that—if that meant that that was our slot—let me say that last part over. Our slot was a three-yard slot, and I—I don't know whether this means our formation or what it means right here.

Q. Would you state whether or not it comes close to describing one of the formations that was used by Georgia in this game?

A. That is exactly—if it is slot right, ends normal three yards, that is exactly our slot right formation; yes.

Q. No, Coach Pearce, does it make any difference in preparing to defend against a slot formation whether or not the end is split two, three, four, five or six yards?

A. Yes, sir; it makes a tremendous difference to the people playing in the wide positions, which are the ends, and the people that I coach for the Georgia team. We thought it was real important to have a three-yard slot. In fact, we stopped our practice several times and measured off, just walked three yards. When you say three yards, until you get out there and pace it off to the boys they don't really understand what a three-yard slot is, and if I—if I knew that a team was—would be in a three-yard slot, I could—I think could do a better job preparing my defensive ends for that slot formation.

Q. Would you state whether or not to the best of your recollection you had any difficulty in getting the ends to line up prior to the 1962 Georgia-Alabama game exactly in a three-yard split?

A. Yes; I stated that. Our offensive ends?

Q. Yes.

[fol. 433] A. Yes. I have already stated that. We had a hard time. Like I said, several instances in practice we stopped practice and we would walk off three yards from the outside foot of the tackle to the inside foot of the end so they could have another look at what three yards really was.

Q. Now, directing your attention to Page 6 of the notes, the second entry on that page, "can't quick kick"; would you state your opinion as to whether or not Georgia did have an authentic quick kick for the Alabama game?

A. Would you tell me what you mean by an authentic quick kick?

Q. Yes. Perhaps it would be better if you just describe the quick kick that they did have and tell the Jury how that differs from a quick kick that might be used in the normal formation.

A. We had a quick kick formation, and we quick kicked from that formation, and in that formation we had our line regular, we had wingbacks, two backs at each end, a fullback, and our kicker or—and in our case it was Jake Saye who was our kicker, and a quarterback lined up deep. He could quick kick from that formation, and he could—could throw a pass or we could run the ball, and when we —we call it a quick kick formation, and then we call it quick kick if we quick kicked.

Q. Would you state your opinion as to whether or not lining up in that formation would tip off the other team to the possibility of a quick kick or a kick of some type?

A. Well, Georgia and Tech are the only two teams I know that quick kick from that formation. There may be more; I just know of those two.

[fol. 434] Q. State your opinion as to whether or not the surprise element of quick kick is greater from a normal formation that it is from this formation that you have just related to the Jury?

A. I would say any time that you could come out in a regular formation and quick kick that it would be more of a surprise element; yes.

Q. Now, would you state whether or not Georgia was able, in the beginning of the 1962 season, to quick kick from the normal formation?

A. No, sir; we could not.

Q. Now, directing your attention to the last entry on that page, "Baer catches everything they throw"; assuming that to mean end Mickey Babb, would you state your opinion as to whether or not Mickey Babb was the best receiver on the team, and you understand now that I have reference to the period of time immediately prior to the Alabama game?

A. Mickey Babb is an excellent target, and I am sure that Rakestraw wanted to throw to him more than any other end.

Q. Would you state your opinion as to whether or not he was the primary target in the Georgia-Alabama game?

A. We threw to Babb more in that game than anybody else; yes.

Q. Now, directing your attention to Page 7, the entry which appears on the top of that page, "slot right, left ends out fifteen yards"; what does that mean to you, Coach Pearce?

A. Well, that means that you are in a slot on the right and your left end is split fifteen yards, and this is your pro formation.

Q. Now, Coach Pearce, would you state your opinion as [fol. 435] to whether most of this information contained in these notes relates to the offense to be used by Georgia or to the defense to be used by Georgia in the game?

A. I wish you—

Q. Let me withdraw that and rephrase it. Would you state your opinion as to whether or not most of the information on these notes relates to offense or defense? Maybe you'd like to briefly go over them.

A. No; no, I kind of understand what you are talking about; I understand what you are talking about. These notes, as far as I am concerned, concern the offense of the team that is being talked about.

Q. Now—

A. Mostly; I will add that.

Q. Coach Pearce, to the best of your recollection, how many yards did Georgia gain in the 1962 Georgia-Alabama game running?

A. I couldn't even come close to answering that. We didn't make very many.

Q. Could you give us a close approximation as to the total yards?

The Court: He said he couldn't come close to it.

Mr. Joiner: I was asking about passing and running.

The Witness: No, sir.

By Mr. Joiner:

Q. Would you state whether or not Alabama had the ball—well, let me withdraw that and rephrase it. Would [fol. 436] you state your opinion as to whether or not Alabama was on offense in the 1962 Georgia-Alabama game more than the Georgia team was on offense?

A. We were on offense forty-six plays. I don't know how many plays they were on offense. There is usually about eighty plays, eighty-five. Seemed like—during the game seemed like they were on offense all the time, but that is not right. We were on offense forty-six times. I do not know how many times they were on offense.

Q. Coach Pearce, have you had an opportunity to review the films of the Georgia-Alabama—the Alabama Georgia Tech game for the 1962 season?

A. We studied the films before we played Georgia Tech, and I have seen them once since the season, but—and that's all.

Q. Who won that game?

A. Georgia Tech.

Q. Would you state to the jury to the best of your recollection how the game was won, what you remember of the closing minutes of the game?

Mr. Schroder: We have got into another game.

The Court: What's that got to do with this?

Mr. Joiner: Your Honor, I am not sure it's got any relevancy, but Mr. Schroder went into this game on the examination of Coach Inman on one or two points; I think it might throw some light on this case.

[fol. 437] Mr. Schroder: I don't remember Mr. Inman—

Mr. Joiner: I will withdraw the question.

By Mr. Joiner:

Q. Coach Pearce, you have testified with reference to the various things revealed by this note. Would you give us your opinion as to whether or not some of the things reflected in this note are also reflected in the film of the 1962 Georgia-Alabama game?

A. We are in two formations, and I think we have answered this as we went through.

Q. We did on one or two particular ones, but I am not sure we covered it all. I wanted a general "yes" or "no" answer—

A. Yes; yes.

Q. —before we go into the film. Coach Pearce, I wonder if you would be good enough to show the film to the Jury, and during the course of the film, if you run across some particular play, formation or anything else that is referred to in these notes, if you would run that part again and point it out to the jury?

A. Yes, sir.

Mr. Schroder: Don't I get a little cross-examination here?

The Court: Sir?

Mr. Schroder: Don't I get some cross-examination here?

[fol. 438] The Court: Yes, sir; I will let you cross-examine him when he gets through with him.

Mr. Joiner: I believe the film is a part of our direct.

The Court: Yes, sir. I will let you cross-examine him and let you run the film back and question him about the film.

Mr. Schroder: Fine.

The Court: All right, sir. Let Coach Pearce—wherever is convenient for you, sir, to describe the plays to which you—

Mr. Joiner: I wonder if the Jury would be able to see.

The Witness: I will get a chair.

The Court: We have got to have the Court Reporter where he can get down what you say. When the screen is put up, I want to see whether you can see it.

Juror: So far, it looks fine.

[fol. 439] The Court: How about you?

Juror: This stand may be in the way, this podium.

The Court: Remove this podium, temporarily.

All right, we can turn off some lights when you get it adjusted. Are you ready?

The Witness: Yes, sir.

The Court: Will the marshal turn off—keep everyone out. Don't let anyone leave or anyone come in the court room.

The Marshal: Everyone remain seated, please.

The Court: All right, sir.

The Witness: The Georgia team will be in white; the Alabama in the dark jerseys. Georgia will kick off to Alabama.

This is Georgia kicking off, covering the kick. Alabama is on offense; Georgia is on defense.

Now, to establish things right now, this is what we call a slot left. Now, our left halfback is between the left end

and the left tackle, and the distance between the left end and the left tackle is supposed to be three yards. Our [fol. 440] regular fullback is in his regular spot behind the quarterback and our right halfback is right.

This is our slot left formation in this picture, and in this motion, if we talked about fly or anything, when the left halfback leaves early like this, this is a fly motion.

Now, just to show you right here again, this is a slot right formation. The distance between the right end and the right tackle is supposed to be three yards. That is our right halfback over there, fullback is in his regular position, and now the left halfback is behind the left tackle in the backfield.

This is a slot right. Rakestraw throwing, and it was intercepted; Alabama's ball.

Alabama is on offense. They throw a touchdown pass to Williamson, first play. They had us 7 to 0.

Our first formation is a slot right. This is slot right. There is throw to Mickey Babb.

This is slot right.

This is another slot right. It is hard to see.

Now, for the first time in the game, is what we call our pro-formation. This is a pro left, and a situation in the backfield and the left end, the left tackle is the same as slot left. The only difference is that our right end is split.

And Mr. Joiner asked me to point out anything that was relative to the notes. This left halfback, number 35 is going in what we call long fly or long motion right now. He gets passed the other halfback by the time the ball is snapped right there. We had a penalty on this play; it was called back.

This is a punt formation. We tried to run the ball.

Next is a punt formation and we kicked the ball. Some real good kicking.

[fol. 441] Now, I think just to point out whether it is reaction but to point out, Woodward is coming into the picture right now on the right. He is our safety man. He comes up and gets on the pile, and I think that that is what people would call "commits fast".

Judge, do you want anything pointed out more than once?

The Court: No, sir.

Mr. Joiner: I think once is enough, if you feel like the Jury understands that the one time.

The Court: Is it necessary for you to show all the film to bring out your testimony or just certain portions?

The Witness: I'd like to show the fourth quarter to show the guards pulling on sweeps.

The Court: You show it the way you feel like.

The Witnesses: This is a slot right. Another slot right. The third is a slot right, and then we punt. This resulted in two points for them. Our center snapped the ball over the head of the kicker, Jake Saye, and he is tackled in the end zone. Gave them two points.

This is Georgia kicking off, a free kick.

That is the end of the quarter, and we will have to change reels now.

[fol. 442] The Court: All right, sir, turn back on the lights. Coach, do you have to illustrate—to illustrate your point, can you show the—I want you to show anything you might feel important, but is there anything pertinent to your testimony in the second quarter?

The Witness: They have seen the formations. That is up to Mr. Cody. I think one thing in the fourth quarter it shows the guards pulling on the sweep, and I believe that we can show our formation, show the guards pulling. You have seen Woodward already. I would think you could see everything with the fourth quarter.

Mr. Joiner: That would be acceptable, Your Honor.

The Court: I wanted to cut down on the time.

Mr. Joiner: Yes, sir. I believe it would be all right to go into the fourth quarter. That would be fine.

The Court: All right. Mr. Marshal, just shut the door and don't let anybody out or anybody in.

The Marshal: Everybody have seats, please; remain seated.

The Court: You ready?

[fol. 443] The Witness: Ready.

The Court: All right, sir, turn off the lights.

The Witness: Georgia again on defense.

Georgia receives, and our first formation will be pro right, and this is the first time in the—we have run it in the film before, but this is the first time it has been shown here.

This our pro formation to the right with our left end split, and in the Alabama game we moved our right end—not our right end; we moved Mickey Babb when he was in the game, was going to be our split end all the time.

Now, we have not established who "him" was in our screen pass, but this is our screen pass coming up here, our right halfback is on the long fly, and you can see it is a drop-back pass. I don't know who "him" is. We screened to our left halfback.

I will show you once more. This is our screened pass in the Alabama game, right half, long fly.

That is pro right ninety-nine.

Here is pro right ninety-nine, and on this play—now, on your right guard—well, we have an end; the right guard is pulling and leading up the hole. Right there he blocks on whoever this is, fifty-something. I don't know what his number is. That is our right guard and that is a pull on a sweep.

This is another one right next to this. And the number has an 8 on him, whoever it is that pulled. It is pro right ninety-nine again.

[fol. 444] This is pro left and this is a pass, a throw to Babb.

I think we have touched on everything right now, Your Honor.

The Court: All right, sir.

The Witness: If you want to—

The Court: All right, sir, cut back on the lights.

The Witness: You want me to run this back now or later?

The Court: No, sir; I imagine you have some more questions.

Mr. Joiner: I have one more question to ask him, please, Your Honor.

The Court: All right, sir.

By Mr. Joiner:

Q. Coach Pearce, would you state whether or not to the best of your recollection Coach Wallace Butts attended any of the practice sessions prior to the 1962 Georgia-Alabama game?

A. I know that he was there sometimes; I don't know how many times. I know he was there.

[fol. 445] Mr. Joiner: No further questions, Your Honor.

The Court: All right, sir; go ahead, Mr. Schroder.

Cross-examination.

By Mr. Schroder:

Q. Mr. Pearce, when you were showing the film a moment ago you described the formations that Georgia was going into on each occasion. How did the formation Alabama was in differ from those Georgia was in?

A. Alabama used a slot and a pro formation also.

Q. Each time that they were on offense they were using the same formation Georgia was using when Georgia had the ball?

A. Yes, sir.

Q. All right. If I remember correctly, the film showed the first time Georgia used the pro-set, they threw and completed a pass, didn't they?

A. Yes, sir.

Q. And as I saw it from the screen, from the film, when Georgia used its screen pass they completed it and made a gain?

A. Yes, sir.

Q. Didn't look like anybody was too well defending those in the film that we saw, did it; they weren't expecting it or not.

A. I don't know whether they were expecting it or not.

Q. Well, I mean—

A. We made five yards on it.

Q. You made your play successfully, anyway, on each of [fol. 446] those two occasions I described?

A. Yes, sir.

Q. That is the pro-set and also the screen?

A. Yes, sir.

Q. In the fourth quarter you showed us a scene there where you say the guard, the on side guard pulled and blocked the Alabama linebacker, I believe you said?

A. He blocked the linebacker on one occasion, and the next time he didn't block anybody.

Q. And missed his block the next time?

A. It didn't look like to me he even tried to block him.

Q. Anyway, the first time we used—when I say "We", I mean Georgia—the first time, as you related, the right side guard pulling on sweep, they gained yardage, didn't they?

A. Yes, sir.

Q. Evidently Alabama wasn't expecting that gain?

A. Well, from the yardage he had made it was hard to gain on Alabama.

Q. The three instances I have described here we did gain on them, didn't we?

A. Yes, sir.

The Court: Would you talk out just a little bit louder, Mr. Schroder, I can't hardly hear you.

Mr. Schroder: Who, me?

The Court: Yes, sir. I can hear Coach Pearce all right. [fol. 447] Mr. Schroder: Excuse me, Your Honor. I apologize.

The Court: That's all right; I am kind of deaf.

By Mr. Schroder:

Q. Before I go into the details of these notes, only some of which Mr. Joiner discussed with you on direct-examination, there are one or two questions that I wish to put to you, Coach. Before I do that—and the first one is this. One of the notes, I believe it is the one on Page 5, we have been talking about slot formations here a moment ago, and I think the other formation that you have been talking about is known as the pro-set which Georgia used against Alabama and which Alabama used against Georgia. Is there anything in these notes that you have there which states that those are the two formations to be used against anybody?

A. No, sir; it describes the two formations.

Q. Is there anything in those notes that even indicates that those are the only two formations that one team was to use against the other?

A. It is only two formations that I know that are mentioned.

Q. I see. Is there anything in the notes that says, in effect, that these are the only two formations that will be used?

A. Mr. Schroder, I don't think it says that they are or are not going to be used.

Q. That's right, sir. You remember—you said that when your deposition was taken—let me get your deposition. Have you read your deposition since it was written up?

[fol. 448] A. Yes, sir; yes, sir.

Q. You remember this question being asked you then: "Was there anything in those notes to indicate that the party who was getting that information to rely upon that; was there anything stated that those were the only two formations Georgia was going to use?". And the answer was: "Not in the notes, no, sir." That is what your testimony is today, isn't it?

A. Yes, sir.

Q. Now, from those films you indicated also an instance in which Woodward committed himself fast, you said, because he made the tackle?

A. I don't believe he made the tackle; he came up—

Q. Came up?

A. —and piled on the tackle.

Q. And that is what he is supposed to do, isn't it, on a running play?

A. A safety man is primarily responsible to prevent touchdowns. If he pops loose, he is supposed to tackle him; yes, sir.

Q. But Mr. Woodward, on that occasion that you showed us on the film, kept himself between the ball carrier and the goal line?

A. Yes, sir.

Q. And that is what his job is, isn't it?

A. Yes, sir.

Q. So there wasn't anything indicative about that scene because he was doing what he was supposed to do, wasn't he?

A. Lot of people in coaching never want their safety man to tackle a ball carrier within five yards of the line of scrimmage. I can't say what we do, because I do not coach the safety man.

Q. Well, are—did you mean to indicate by that film [fol. 449] there was something wrong with what Woodward was doing?

Mr. Cody: Speak a little louder, Coach.

Mr. Schroder: Me?

Mr. Cody: No.

The Witness: Were you talking to me, Mr. Cody?

The Court: Mr. Cody asked that you speak a little louder, if you could.

The Witness: Okay; yes, sir. In a press box you try to find people that are getting out of position. Whether he was out of position or whether he wasn't, he was up on the line of scrimmage and he is our last line of defense.

The Court: In other words, the point you are making, he shouldn't have been making the tackle on the line of scrimmage or piling on the line of scrimmage, being the safety man; is that correct?

The Witness: Unless the ball carrier broke aloose. If there is nobody there to tackle him, we would hope he would tackle him. We would—

The Court: He wouldn't make the tackle on the line of scrimmage if the ball carrier broke aloose, would he?

[fol. 450] The Witness: No, sir; he would not.

By Mr. Schroder:

Q. The point, Coach, is that if the safety man keeps the ball carrier between himself and the Georgia goal line, he is performing his job, isn't he?

A. If the man is a ball carrier, if it is not a fake to a man, if the man is a ball carrier; yes.

Q. Let me be more specific and refer to the play—the specific play that you pointed out when the film was being shown. The quarterback on that instance, or the safety man on that instance was doing what he was supposed to do, was he not, or do you feel qualified to answer, since you said you weren't coaching the backfield?

A. That's right. On that very play I'd feel—I'd say I am not qualified to answer that question.

Q. Let me ask you, if you had information for example, that the Alabama safety man committed fast and you were preparing the University of Georgia to play Alabama on the following Saturday, and you relied on that information, what would you be inclined to do insofar as preparing your offense, the passing offense is concerned?

A. I think you'd try to take advantage of that.

Q. You would try to take advantage of that weakness, wouldn't you?

A. Yes, sir.

Q. Now, you have seen these films, some—how many times, eighteen or nineteen times?

A. Yes, sir.

Q. All right, sir. When you—when you say, for example, that Babb is your best target and he is therefore thrown [fol. 451] more passes than the others, he was thrown quite a few passes in the Alabama game—

A. Yes, sir.

Q. —and in many instances he was in position to catch them, was he not, and he just dropped them? Make sure, I am not being critical of Babb; I am just stating a fact.

A. He had, I will say, several; that doesn't mean any certain number.

Q. Speak up, please, sir.

A. He had several chances to catch the ball and did not catch it; yes, sir.

Q. The reason he did not catch it, however, was not because somebody had him well defended, but because he dropped it; isn't that right?

A. Yes, sir.

Q. If someone called you or someone gave you information which you thought you could rely upon preparing Georgia to play Georgia Tech, and they told you that Georgia Tech had in its line the greatest tackle in the history of Georgia Tech, and you relied upon that information, how would you prepare your running game that you were going to use against Georgia Tech in your next week's game?

A. Mr. Schroder, we—I think we established this before that that didn't mean Rissmiller was the greatest lineman. I mean, I would just like to check back and see what's established.

The Court: He wasn't asking you that question. He was asking you—

By Mr. Schroder:

Q. I am asking you, from the notes here, sir, this is in- [fol. 452] formation that was supposed to have been in the notes, "Reismueller, greatest in history;" all right, sir, you are the coach of the University of Georgia, and I know

something about Georgia Tech, information has reached me that you don't know, and I tell you that Georgia Tech has the greatest tackle in the history of the school by the name of Mr. Jones, plays left tackle. How would you react if you felt you could rely upon that information in preparing your offense for the forthcoming Georgia Tech game?

A. I—now, we are assuming the same position as Alabama and Georgia, that there were no films to look at?

Q. Name any school.

A. No; I just wanted—no films to look at, just from what somebody tells you?

Q. Yes, sir.

A. Well, I am sure I wouldn't set my basic offense to run at this person. I—I might instruct—I think I would instruct my quarterback that in situations where we needed yardage not to run at this person.

Q. Now, you have reviewed these films on any number of times, I think fifteen or seventeen, a number of times?

A. Yes, sir.

Q. Did Alabama direct its running plays away from Rissmiller?

A. I don't believe that they—I think they ran them wherever they wanted to.

Q. Rissmiller unfortunately was the target on several occasions and unfortunately he didn't make too many tackles, did he, again being sure for the record I am not being critical?

[fol. 453] A. I understand that. I will answer that "yes", and then I will qualify it by saying this, that Rissmiller, along with several other boys in that football game, were sophomores, and it is a tough job for a sophomore to open against Alabama.

Q. There is no question about that, sir; we are in a hundred per cent accord on that, but my point is really this. If this information that is listed in this note was given about Rissmiller being the greatest in history, and Alabama taking this information, they did not indicate by the way they had their running plays going that they were relying on this information, did they?

A. No, sir. They just ran every place.
Q. Just ran right at him like they did anybody else?
A. Yes, sir.

* * * * * * *

LEROY PEARCE having resumed the stand, testified further as follows:

Cross-examination (continued).

By Mr. Schroder:

Q. Coach Pearce, during the first half of the Alabama-Georgia game, do you know how many times Georgia did use the pro-set?
A. No, sir; but I can check it, if you'd like me to.
Q. Do you have anything to check it by?
A. Yes, sir. Five times.
Q. Five times?
A. Yes, sir.
Q. On four out of those five times it was used successfully, wasn't it?
A. Yes, sir.
Q. During the half Alabama changed its defense to be [fol. 454] used against the pro-set in the second half, didn't they?
A. No, sir; they never changed their defense until we started running into the sidelines late in the fourth quarter.
Q. Well, during the first half, do you know whether—what player Alabama had out guarding the split end?
A. They had their rover man, that is, Williamson; he was an end.
Q. Do you know during the first half they had Jordon out there on occasion also?
A. No, sir.
Q. You don't know that, sir?
A. No, sir.
Q. But you do know—

The Court: You mean you don't know it or they didn't have him out there?

The Witness: Well, what I—I—I would—I would have to see it right now to believe it.

Mr. Schroder: Sure.

The Court: I didn't understand your answer.

By Mr. Schroder:

Q. Who is Jordan?

A. Sir?

Q. Who is Jordan? Is it Leroy Jordan?

A. Yes, sir; Alabama center.

Q. Center?

[fol. 455] A. Linebacker; yes, sir.

Q. Is he a fairly good ball player?

A. Yes, sir.

Q. He is the one, I think, that made All American?

A. Yes, sir.

Q. As I said, you did testify, though, after you have examined your notes, that on four out of the five times that Georgia used the pro-set in the first half it was done successfully?

A. Yes, sir. And we say we made ground, that is successful.

Q. That is really the object, to gain ground?

A. Yes, sir.

Q. When the film was being shown here before we had the luncheon recess you referred every time that Georgia was on offense what formation they were in as slot right or slot left?

A. Yes, sir.

Q. Now, during that same quarter you did not, of course, say anything about what formations Alabama was in when it was on offense, but do you recall what formations they were in?

A. They were in the exact same formation.

Q. So, if you were looking at the film and describing what formations Alabama was in, you would be saying slot right, slot left, or pro-set?

A. Pro right or pro left.

Q. Pro right or pro left?

A. Yes, sir.

Q. During the running of the film, I don't recall that you described any particular play that Georgia was running off of the formation that it happened it be in, but let me ask you this. You did see both Georgia on offense, as we did, and Alabama on offense during the first quarter and the [fol. 456] last quarter. Now, did you see any plays that Alabama used that Georgia does not also have in its repertoire, or would you have to look at it again?

A. Well, I can say this, that Alabama ran a hand-off and we didn't.

Q. A Hand-off?

A. And that is just one play.

Q. Yes, sir.

A. But I—I—I wouldn't want to say.

Q. Without looking at them again?

A. Yes, sir.

Q. What, please, Coach, is the difference in pulling a guard on a sweep and a switch block?

A. Well, now—

Q. Do you know the definition of switch block; you know what that means?

A. Well, now, we did not use a switch block. We used a swing block, and I think that is probably what you are referring to.

Q. All right, sir. What is a swing block?

A. A swing block—you are going to change assignments—

Q. Yes, sir.

A. —and the tackle is going to block down and the guard is going to pull around the tackle and block in that area.

Q. Block in the tackle's area?

A. Tackle's area.

Q. The tackle's zone, really?

A. I—I would say that that is probably correct.

Q. What is happening, then, on a swing block, for example, the man on the other team that the guard is sup-

posed to block is on his outside shoulder, and with the play going that way, the guard can't block him, so he and the [fol. 457] tackle switch assignments with the tackle out here; he blocks the man that the guard was supposed to block but couldn't, and the guard blocks the man the tackle was supposed to block when he takes—when they switch the assignments; is that correct?

A. Yes, sir. He will pull around the tackle and—he will pull around the tackle and block the first he sees.

Q. What is the difference between that which you describe as swing block and pulling a guard on a sweep?

A. If you pull a guard on a sweep, you tell him to pull up the first place there is daylight, and if you swing a man, he would actually have—if there is a man on the tackle, he would block the first man he came to.

Q. All right, sir. If Coach Griffith testified yesterday pulling a guard on a sweep meant that that guard was supposed to pull out on a sweep meant that that guard was supposed to pull out and lead interference for the ball carrier, is that your understanding of what pulling a guard on a sweep is?

A. Yes, sir. I would say that in addition to that that the guard—most guards are taught to pull up the first place they get a chance to pull up through the line.

Q. But they are—they are really, when they are pulling on a sweep, running interference for the ball carrier, aren't they?

A. Yes, sir.

Q. And that is different than the procedure we have just described as a swing block?

A. Well, ask me the question again, please.

Q. Swing blocks are used not only on sweep plays but on [illegible]y play that might—well, off tackle play, they use a swing [fol. 458] block, do they not; they switch assignments when the guard is on the outside of my shoulder and I can't block him in?

A. Any play that is outside; yes, sir.

Q. On a sweep play, that is when, as you have described it a moment ago and as Coach Griffith described it yesterday, when you pull a guard on a sweep, you are pulling him out to lead interference for the ball carrier?

A. Yes, sir.

Q. All right, sir. Now, are you sure that Georgia has now or had—well, "has now" would be unimportant. Are you sure that Georgia had, in 1962, a play such as a sweep where they pulled their on side guard to lead the interference for the ball carrier?

A. Mr. Schroder, I think you are real technical there. I would think at any time a guard pulls around a tackle it would be a pull.

Q. Well, you are using it—you are using it to describe a swing block?

A. Yes, sir.

Q. To you "pulling the guard" means to swing?

A. If you had—if—he would tell the tackle to block down and tell the guard to pull on around the tackle and block.

Q. It is a switching of assignments. You mean pulling him to lead interference; they are the same thing?

A. Well, I think it is a real technical point in the fact that a guard on a sweep may turn up way inside if he sees daylight.

Q. All right, sir. Before we go back to the film here, I want to ask you a question with reference to your description of the slot right or slot left with the split end three yards out, and you said that you had some difficulty getting [fol. 459] the Georgia ends to understand what three yards was, amounted to?

A. Yes, sir. We in practice several times—a lot of times or several times, any amount, we would stop the play because the end would be too wide or too tight and go over to the tackle and step off three yards and tell him that is where he should be.

Q. Well, now, in the film which you have seen often, did you not notice that the end on slot right or the end on slot

left was varied in his position sometimes two yards from the tackle and on other times five yards from the tackle?

A. Well, he wasn't supposed to be. He is supposed to be three yards—I will tell you, it is real hard to tell from the film because of the angle of the camera.

Q. You saw the game yourself from the press box, didn't you?

A. Yes, sir.

Q. Would you say that Georgia's ends were always three yards?

A. No, sir; they were not always three yards. They were supposed to be.

Q. Don't you know that on many occasions that the end, Mickey Babb, moved his position from three out to five, back to two in order to take care of the offensive—I means, the defensive end playing opposite him?

A. Well, I think that would come under the discipline that we talked about earlier. He should have been three yards.

Q. But you know that he wasn't, don't you?

A. No, sir.

Q. You were watching from the press box?

A. Yes, sir.

[fol. 460] Q. You say he was three yards on every time?

A. He was—he—no, I will not say that. He should have been three yards.

Q. I know, but I am—in the game he wasn't doing what you had coached him to do, though, was he?

A. If he was supposed to be—he was supposed to be exactly three yards, and I will assume that he may have been two yards or he may have been four yards; yes, sir.

Q. All right, sir. Well, then, if that is correct, then he is not doing what the notes indicated that he ought to have done, is he?

A. If he was supposed—if he was supposed to be a three-yard end every time; no, sir.

Q. And if whoever was being told this was relying on that, then he wouldn't be getting much benefit out of it,

would he, if he was relying on him being three yards so he could set up his defenses to meet it but the man didn't know what the note said he was going to do, that—that is not too good, is it?

A. Well, I think that we would have to sit down and—

Q. All right, sir.

A. You can't tell from the film, but I think that he was three yards most of the time.

Q. He is going to be here as a witness. The matter which we discussed before lunch about the first touchdown which was shown on the screen that Williamson scored, the homerun—

A. Yes, sir.

Q. —the man assigned to defend him on that play was a man who was not in your plan as a defensive player, was he?

A. The man assigned—the man assigned was not; that is correct.

[fol. 461] Q. The man assigned to defend Williamson on that play had hardly played any defensive football at all, had he?

A. Now, we are speaking of practice, because he had never played in a football game before, college game.

Q. Well, on practice; you didn't practice him on defense, did you?

A. Not very much; just so we could line him up.

Q. On defense against the Alabama pro-set did Georgia employ the same defense or type of defense that Alabama employed against Georgia's pro-set?

A. Alabama was using the rover defense, and we were using the overshifted six. They used a rover man to the wide side of the field most of the time, and we overshifted most of the time. We just overshifted to the slot away from the split end most of the time.

Q. Did you change that at the half?

A. No, sir; we just tried to get our ends to play it better.

Q. Sir?

A. No, sir; we tried to get our ends to play it better.

Q. You used the word "overshifted"; Georgia employed an overshift in its defense against Alabama?

A. We used—we used a half a man overshift; yes, sir.

Q. Did Alabama use an overshift in its defense against Georgia?

A. They used a full overshift; yes, sir.

Q. Both teams were then using overshifts?

A. Yes, sir.

Q. Without going into too much detail, I want you, if you can remember from having seen the film, it was not [fol. 462] shown today, the part I am now talking about; when Alabama scored its second touchdown, do you remember how that—

A. I remember just exactly how it happened.

Q. Would you describe it to us, please, sir?

A. They were in a pro left; they had the right end split.

Q. Pro left, right end split?

A. With a right end split.

Q. That was the same formation they scored their first touchdown off of, wasn't it?

A. Yes, sir.

Q. The same formation when they scored their second touchdown, the pro left, right end split?

A. Yes, sir.

Q. Then what happened?

A. And they drove their end deep on our halfback and turn him in towards the middle between our halfback and safety man. The halfback came out in the flat about six yards down the field, and our end started to be playing off, did not stay off but started to rush the passer and left the right halfback wide open, and then they threw the pass.

Q. And they threw to him and it was a touchdown?

A. Yes, sir. He ran on over with the ball.

Q. So, unfortunately, that resulted from a Georgia error on the part of its end play?

A. On the part of its end and halfback play; yes, sir.

Q. All right, sir. You remember the next touchdown Alabama scored, how that was scored?

A. I don't know the play it was on, but—

Q. Well, wasn't it off of the same formation, Georgia's pro-set, pro left?

A. They scored another—they scored another play; I [fol. 463] am sure they went over the one yard line on the same type play with the split end and turning into the middle and catching a low pass. It was the same type formation; yes, sir.

Q. Was the end, the Georgia end, also supposed to cover the flat on that?

A. Well, Mr. Schroder, let me straighten that up.

Q. All right, sir.

A. Our end was given the opportunity to play in three different spots. He was either, as we call it, in a triangle, which means between the tackle and the end about four or five yards off the line of scrimmage; he could go out to the inside shoulder of the end and play out there. Or he could move back in and rush the passer. Now, it is a guessing game, so I don't think that you could say he is wrong. Maybe he didn't do the right thing on that play, but I don't think you can say he is wrong.

Q. Well, I haven't said he was wrong. I was using your language when you said that the touchdown resulted from the—

A. The first touchdown when he was off the line of scrimmage and started to rush; yes, sir; the second time he was on the line of scrimmage and forced and the ball was thrown over.

Q. Do you know of any play that Georgia has that Alabama doesn't have?

A. I couldn't answer that question. I don't know Alabama's plays.

Q. Have you seen about every play Georgia used also used by Alabama or other teams that you played during 1962?

A. I would say that most teams with the same formations will have very similar plays.

Q. All right, sir. Most teams in the Southeastern Con- [fol. 464] ference do have the formations that we are talking about now, the pro-set and the slot?

A. I would assume that's correct; yes, sir.

Q. All that use the "T" formation, that is?

A. Everybody except Tennessee.

Q. Everybody except Tennessee uses the "T" formation?

A. Yes, sir.

Q. You said this morning that during the middle of the season it would be impossible to change a formation—

A. No, sir.

Q. —or make a drastic change. If I have misstated the answer you gave, correct me.

A. The thing I said is it would be almost impossible to make a drastic change in your offensive plan or defensive plan in one week, I mean, just completely come out with something new.

Q. Yes, sir. You are familiar with the fact that Alabama did change its offensive pattern in the middle of the season or towards the end and got a whole new formation that they used in the game against Tech?

A. Yes, sir.

Q. And Tech did the same thing against Alabama?

A. Yes, sir.

Q. They both went into a spread on the same day?

A. Yes, sir.

Q. And neither had used a spread before?

A. Yes, sir.

Q. Did you know that both called it the same thing?

A. Called it—no, sir.

[fol. 465] Q. It had the same name, both Tech and Alabama, for their spread formation?

A. No, sir.

Q. Well, you didn't know. Let me return to the notes, now, please, sir, before I ask you some questions about the film. There were quite a few questions asked you—

Mr. Schroder: Excuse me.

The Court: Do you want some water, sir?

The Witness: No, sir; thank you.

By Mr. Schroder:

Q. You were asked quite a few questions about them this morning, and I want to make sure your answer is as you want it to be in the record. The first note on the first page, in fact, the only note on the first page having to do with this matter is "Reismueller, greatest in history", and you and I have, I believe, discussed that.

A. Yes, sir.

Q. That insofar as you know he is not the greatest in history to attend Georgia?

A. Georgia; yes, sir.

Q. On top of the second page there is a note "Rakestraw to right". Now, does that mean anything to you?

A. It means absolutely nothing.

Q. The next note reads "optional left pass if can block man on corner, keeps running". Now, do you know what [fol. 466] Georgia's optional left pass play is?

A. We didn't have pass pattern we called the optional left.

Q. Coach Griffith said that yesterday until he looked at a 1961 game plan, and they did use an optional left pass.

A. I am talking about 1962. We did not have—we did not have—what did you want me to answer?

Q. With reference to that second note "optional left pass if can block man on corner, keeps running"; does that mean anything at all to you?

A. To just—as far as it is concerned to me, if it meant—let me answer it this way. We didn't have that as a pass pattern, but if an optional pass was called, I assume a quarterback would run with the football if he was blocked; you would hope he would.

Q. You say you did not have that optional left pass, Georgia had no play like that in 1962?

A. No, sir. We had a—we had a—let me qualify that. We had a roll-out pass which, if it is a run or pass, some people call it an option to run or option to pass. We had that.

Q. Yes, sir.

A. But if the pass is called "optional left pass", we did not have that and would not mean anything to me.

Q. That would mean the quarter back would have an option as to which end to throw to down the field, the tight end or close end, being the right, and crossing over, or the left end down deep?

A. Well, if you said "optional" to me, it would mean that the quarterback is going to run or throw or else have two or three receivers downfield to throw; yes, sir.

Q. All right, sir. But you say Georgia had nothing like [fol. 467] that in their plans for Alabama?

A. Again, it is a technical point. We did not have a play we called "optional left pass". Anytime the quarterback drives out with the football, it is an option.

Q. But you did not have an optional left pass; that is the way the note reads, isn't it?

A. Yes, sir.

Q. I think you discussed with Mr.—maybe with me, the next note, which is "well disciplined ball club".

A. Yes, sir; have discussed it with you.

Q. And unfortunately Georgia was not well disciplined during the game? Alabama—the next one we have already talked about on top of Page 3, "on side guard pulls on sweep". The next note is "don't overshift", and you have already testified that both Georgia and Alabama were overshifting their defenses; that's correct, isn't it? You testified to that?

A. I testified that both Georgia and Alabama did overshift their defenses.

Q. All right, sir. Now, the next note is "Woodward commits fast, safety man". We have agreed that Woodward is the type of man who likes to get in and make a tackle?

A. Yes, sir.

Q. Now, if that sort of information—did we discuss this before lunch?

A. I don't believe we discussed it; we have discussed it.

Q. "Woodward commits fast, safety man"; that would indicate to you, as Alabama's Coach, that perhaps you would take advantage of it by throwing a pass into his zone because he had committed himself by coming up? Do [fol. 468] I make myself clear?

A. Yes, sir; you are very clear, very clear.

Q. Well, now, I believe you testified that Alabama did not take advantage of that—of the fact that Woodward committed himself fast because they threw no passes into his area?

A. That is exactly correct.

Q. All right, sir. Next one on Page 3, last one on Page 3 is "weak defense, anybody except Blackburn".

A. Yes, sir.

Q. And I believe your testimony this morning was that he had been ill or was ill and didn't play but five minutes?

A. I didn't put any time on it.

Q. Very shortly?

A. Very little; yes, sir.

Q. Well, just as a matter of, say you are an expert, if someone were trying to help somebody in a game and this fellow was the best man and he was sick, I'd be inclined to tell the opponent he was sick and he didn't have to worry about him, wouldn't you?

A. If he wasn't going to play and he know it, I would think that would be pretty good.

Q. He was sick for some week or so around there on the field, was he not?

A. Yes, sir; he was sick during our practice before the Alabama game.

Q. During practice?

A. Yes, sir.

Q. The next entry on top of Page 4, "Babb, slot right, split right end out"; that is anything in that note that means anything more than slot right?

A. No, sir.

Q. If you are in slot right, the right end has to be split [fol. 469] out, doesn't he?

A. Yes, sir.

Q. Nothing unusual about that; everybody that uses that slot does it that way, don't they?

A. That is a slot?

Q. A Slot.

A. Yes, sir.

Q. And everybody who uses the "T" formation uses a slot, as you know of here in the Southeastern Conference?

A. I assume so; yes, sir.

Q. That wasn't something new?

A. Slot formation?

Q. Yes, sir.

A. Oh, no.

Q. Wasn't new at Georgia?

A. No, sir.

Q. "Long count" is the next note on Page 4, "left half in motion". Now, I think that was pointed out by you on the film at one time; didn't you say a man—

Q. Isn't that a "garden variety" play by teams using the "T" formation?

A. Say it once more, please.

Q. There is nothing unusual; that is a common play?

A. It has come back in in the last few years and most people use it.

Q. Most people use it anyway, don't they?

A. Yes, sir.

Q. Alabama was using it against Georgia, weren't they?

A. I am not sure whether they used the overpass on us or not.

Q. Sir?

A. I am not sure that they used what we call the over-[fol. 470] pass or long motion on us.

Q. This note I mentioned doesn't read "pass"; it reads "long count, left half in motion".

A. I am not sure they used a long motion against us.

Q. You would have to check the film for that?

A. Yes, sir.

Q. But if they didn't use it, they would be one of the few that were not using it in the Southeastern Conference, wouldn't they, Alabama?

A. Yes.

Q. Next note is "best since Trippi, Porterfield". Of course, that is a matter of opinion, but you don't know—you know Charlie Trippi, but did you ever see him play?

A. We have discussed this before in the deposition. As I told you, I had seen him in a couple of films. I had never seen any of the interim football players and I would have no way to judge.

Q. You knew Trippi was also an excellent defensive player?

A. Well, I have heard that he was an excellent defensive football player; yes, sir.

Q. And Porterfield is the one unfortunately who was in the Alabama game supposed to be covering Williamson on that first pass and he wasn't supposed to be in there on defense?

A. Yes, sir.

Q. He is not a defensive player, is he?

A. Well, no, sir.

The Court: What was your last question?

[fol. 471] Mr. Schroder: "He is not a defensive player?"

The Court: Oh.

Mr. Schroder: Speaking of Porterfield.

By Mr. Schroder:

Q. On Page 5, the top note, "Babb on a hook on the goal line"; is there anything unusual about that play?

A. No, sir.

Q. Everybody hooks on the goal line if they are going to pass to the man; they use a hook?

A. Well, yes; yes.

Q. They have that?

A. You don't have as much yardage.

Q. That's right; you can't go down and out. You have only got ten yards; you have to turn around and hook?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. The next one is the one I believe we have discussed at some length, "slot to right, ends normal three yards"?

A. Yes, sir.

Q. There is one thing about that entry, it says "e-n-d-s", "ends normal", which to me would mean he would have both ends split three yards. Does Georgia have any formation where both ends are split three yards?

A. No, sir.

Q. The next note, "right halfback on fly, left half back [fol. 472] quarterback gives to left half, left guard pulling blocks on corner." Does Georgia have any such play like that in their repertoire?

A. I think our countertrap would have to be checked on that; I am not sure.

Q. Well, does that mean anything to you?

A. As it is written, no.

Q. Sir?

A. As it is written, no.

Q. On top of Page 6, I don't believe you have discussed this note.

A. No, sir.

Q. Everybody brings in wide slots when they get down to the goal line, because you need all your power toward the center of the line?

A. To keep people from shooting inside; yes, sir.

Q. That's right. That is a common variety formation, isn't it?

A. Yes, sir.

Q. Now, you discussed this next note at some length on direct-examination, and all it says, "can't quick kick". Mr. Burnett added to that Georgia has nobody that can quick kick. Now, without—nothing said here about what formations you are in when you quick kick, is there?

A. No, sir.

Q. Well, that is an untrue statement, then, because Georgia can quick kick and does quick kick, doesn't it?

A. Yes; we quick kick.

Q. Yes, sir.

A. From the quick kick formation.

Q. That's right. But this says simply they can't quick kick, and that is not true, is it?

A. We can quick kick from a quick kick formation.

[fol. 473] Q. Therefore, what? This is not true, is that right?

A. Not true.

Q. Not true. The next one, I believe, we discussed also. You discussed with Mr. Joiner on Page 6—

A. Yes, sir.

Q. —"slot right, right half on fly, screen to him." Georgia does not have that play in its offensive plan, does it?

A. Did we ever decide who "him" was?

Q. Let me put it to you this way. How many individuals are mentioned in the notes?

A. The right halfback is mentioned.

Q. It refers to one individual and that is the right half?

A. Yes, sir.

Q. And the "him" would have to refer to the only one that is mentioned, wouldn't you think?

A. If it refers to the right halfback, we do not have the play right.

Q. Is there anyone mentioned in there other than the right half?

A. No, sir.

Q. Well, then, Georgia does not have the play described in that note, does it?

A. Not that screen pass; no, sir.

Q. As a matter of fact, if someone was trying to give Alabama some information on what Georgia's offense was and gave them that information, and they spent two weeks planning, working their boys in defending against that play, and it turned out at the game they didn't throw to

the man the note says they are going to throw it to but threw it way out the other side, that would be nice, would it?

A. No, sir.

Q. Throws it the opposite way? Your screen pass calls [fol. 474] for an opposite way than the way this is written, doesn't it?

A. Opposite direction; yes, sir.

Q. Opposite direction?

A. Yes, sir.

Q. All right, sir. The next one reads, "29-0 Series, Babb catches everything they throw." As I understand it, Georgia does not even have a series known as 29-0 Series?

A. No, sir.

Q. I think it was testified to, however, yesterday, that Georgia has what is known as an 029?

A. 029, yes, sir.

Q. And that is known as the outside belly?

A. Yes, sir.

Q. That is when the quarterback gets the ball, comes out here half into the other back's belly and half into his, and they decide when they get to the line of scrimmage who is going to take it, in effect?

A. Yes, sir.

Q. "Babb catches everything they throw" couldn't—do they ever throw off of that 029?

A. I didn't think that is what you were going to say.

Q. Do they ever throw off of outside—

A. We don't have—for the Alabama game we did not have an 029 pass.

Q. All right, sir.

A. We had an 037, which is—which is the pass that comes off—

Q. Comes off the other end?

A. I mean, you have to assume a lot there.

Q. Certainly you did not have a 29-0 series for the Alabama game and you did not have an 029 pass for the Alabama game?

A. No, sir.

[fol. 475] Q. Well, I think you anticipated the next one. Mickey Babb does not catch everything that is thrown?

A. I thought you would ask me that. No; he did not catch everything. I wish he did.

Q. I wish he did too. The next one on Page 7, I think we have talked about that?

A. Yes, sir.

Q. And that is a common variety formation, "slot right, left end out fifteen yards" known as the pro—that would be called a pro left—no, that is a pro right?

A. We call it pro right.

Q. Pro right. And that is a common variety formation for all teams using the "T" formation?

A. Yes, sir.

Q. And there is nothing in these notes to indicate that that formation or any two formations are to be used by any team being discussed, nothing in the notes to that effect?

A. No, sir.

Q. Now, the final note having to do with a defense, "drop end off, contains with tackle". That is the—what you were describing a moment ago that Georgia was doing?

A. Yes, sir.

Q. When Alabama scored the second and third touchdowns, because the ends—well, the first time the end didn't —was out of position, let's put it that way?

A. Yes, sir; he was wrong; yes, sir.

Q. And, any way, Alabama used that same thing against Georgia, did they not? Well, I saw it in the film.

A. I am not trying to—I am just—with their monster [fol. 476] formation, they—well, yes, sir; they would have contained for tackle.

Mr. Schroder: All right, sir. Your Honor, let me confer just a minute here.

The Court: All right, sir. Let me ask a question.

Examination.

By the Court:

Q. I am certainly no authority. Did Saye play quarterback?

A. Yes, sir.

Q. Rakestraw play quarterback?

A. Yes, sir.

Q. Anytime you got ready to punt, Saye had to be in?

A. Yes, sir.

Q. Rakestraw never punted?

A. No, sir.

Q. So, on an ordinary formation, on a "T" formation the quarterback stands right behind the center, doesn't he?

A. Yes, sir.

Q. And you had nobody who could quick kick other than Saye when he was in there.

A. Yes, sir.

Q. Therefore he couldn't be immediately behind the center?

A. Correct.

Q. He would have to be at least two, three, or four yards, how far?

[fol. 477] A. We placed him six yards.

Q. Six yards?

A. Yes, sir.

Q. So he couldn't run from a true "T" formation, quarterback position, Saye couldn't, and punt?

A. No, sir.

Cross examination (continued).

By Mr. Schroder:

Q. Can any other quarterback?

A. No, sir.

Q. It is physically impossible, isn't it?

A. Correct.

Q. When you kick the center right in the—if you did it—

The Court: Isn't it possible sometimes, or how do you true quick kick; if you had a halfback you could quick kick?

The Witness: If you had a halfback to quick kick, there is two ways to do it. One, you can give him a direct snap between the center's legs and between the quarterback's legs too, and he sidekicks. The quarterback can take the ball, pitch it to him, and he can take a sidestep and kick it. We could do that—if we could do it we could do it out of our slot or pro formations, but we can't.

Mr. Schroder: We had it over there about two years ago when Bobby Walden tried to quick kick, Your Honor; I [fol. 478] think you have seen this; and he kicked it right into the fullback's back.

The Court: I remember that.

Mr. Schroder: You remember that?

The Court: How does Georgia Tech quick kick, or do you know?

The Witness: They have always quick kicked with their fullback.

The Court: The quarterback would be the—would be standing right behind the center?

The Witness: Yes, sir.

The Court: And so—under that condition there would be an element of surprise, wouldn't there?

The Witness: Yes, sir.

The Court: Which is the chief weapon of a quick kick, isn't it? I mean, a chief point?

The Witness: Yes, sir.

[fol. 479] By Mr. Schroder:

Q. When you got Saye back there to quick kick, they can't defend against the quick kick, because they know he can run and they know he can pass, don't they?

A. Correct.

Q. They don't know he is going to quick kick, do they?

A. No, sir.

Q. And they better not plan on him quick kicking; it will pass right over their heads, won't it?

A. I would hope it would; yes.

Mr. Schroder: Yes, sir; that's all.

The Court: You don't have any further questions? Any further questions?

Mr. Cody: No, sir.

Mr. Schroder: I was going back on the film; I will wait, I mean, when my side is coming up.

The Court: All right, sir.

Mr. Joiner: No questions, Your Honor.

The Court: Thank you, sir.

[fol. 480] (Whereupon the witness was excused from the stand.)

The Court: All right, sir, call your next witness.

Mr. Cody: We rest our case, Your Honor.

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PLAINTIFF'S MOTION FOR DIRECTED VERDICT

Mr. Lockerman: Your Honor, under the rulings of the Court, as Your Honor well knows, the Court has ruled that the Defendant in this case had the burden of proving the truth of the charges against the Plaintiff as complained of by the Plaintiff in this article. I know that Your Honor has read the article very carefully, as all of us have, and I know that Your Honor is, therefore, very familiar with the charges that the Defendant made against the Plaintiff.

They charged him, just for the purpose of summarizing briefly, they charged him with being a fixer and a rigger, with having fixed and rigged the game against—between the University of Georgia and the University of Alabama in 1962 by furnishing all of the vital secrets and information concerning the Georgia plays, both offensive and defensive, to Coach Bryant. It also charged him with being corrupt, and, as Your Honor well knows, we allege in the Plaintiff's Petition that the innuendoes in the article are

such that it charges that the Plaintiff did these things and furnished this information as a gambling device and thus [fol. 481] implied, of course, that the Plaintiff either was gambling himself on the game or that he was doing so for the purpose of some gambling procedures.

Now, we take the position that under the Court's ruling, what they call their plea of justification, that they had the burden of proving by a preponderance of the evidence under the law that those things are true. I think when you analyze the things that they have shown by the testimony that they have introduced that the very most that can be said about it, that is, if anything in the way of proof, is that if the information was furnished as they contend, then all that it did in any way according to their own witnesses would have been helpful, and I think that is the word that their witnesses used, "would have helped the opposing team."

Now, the fact is that all that they say about those notes is that—as I understand it, and I am terribly handicapped myself because I don't know very much about football, and I admit it, but, as I understand it, about all they really say about those notes is that they reflect two coaches; Griffith and Inman, indications of two formations. I don't believe that the notes use the word "formations" at all, but the contents, the charges in the article referred to Georgia's plays both offensive and defensive, and certainly that indicates that they—that they claim that Wally Butts furnished the Georgia plays, and certainly it was in the plural as used in the article which carries the implication that he furnished Georgia's plays they intended to use.

The Court: Mr. Lockerman, let me ask you this question. Didn't Coach Griffith, and Coach Inman, and didn't [fol. 482] Coach Pearce testify that in their opinions those notes would have been helpful in defenses against Georgia's plays? Wasn't that the gist of their testimony, or am I wrong?

Mr. Lockerman: That they would have been helpful in —what did you say?

The Court: Helpful in defending against Georgia's offensive; substantially, isn't that what they testified? Isn't that the gist of their testimony?

Mr. Lockerman: It may be that they did say what amounts to something along that line, but—

The Court: And if they had had that information, one of them testified this, that if they had had this information, as an Alabama coach it would have been helpful, they thought it would have been helpful to them.

Mr. Lockerman: Let's go just a little bit further, though. They said that it would be helpful in what respect? It would have been helpful in the respect that Alabama would have used, say, less time in their practice because they would not have, say, gone through as many formations. But, one of them, specifically—I do not remember—I do not remember which one, but he said, even then, before completing the practice for that game they would have practiced all the formations that they had in their repertoire.

[fol. 483] Now, if all it is going to do is save a little time for the University of Alabama in some practice sessions, If that means that they are going to practice one hour instead of—I don't know whether they practice an hour or whether they practice a great deal, but the whole question is, does that amount to having fixed and rigged this ball game which the Post charges them with doing?

Now, just to be helpful, I think that two coaches talking together about football in general, and certainly that is the position of the Plaintiff in this case or would be the position of the Plaintiff in this case, that coaches do talk about football in general, and if you talk about football in general you are apt to get something helpful in that discussion. I would think that would be the reason they would talk about it.

The Court: My recollection, Coach Griffith said he didn't think—one of the coaches, maybe it wasn't Griffith, said he didn't think that coaches would discuss particular plays prior to a particular game.

Mr. Lockerman: But when you go through these notes, as has been done by Mr. Schroder on cross-examination, I think that when you sum it all up, that what each one of these coaches has, in effect, said when he got through with the cross-examination was that they really did not amount to anything of any vital importance.

The Court: Wouldn't that be a question for the Jury to pass on?

[fol. 484] Mr. Lockerman: Well, I would—I don't see how they could possibly ever—I mean, with all the technical information that was discussed, I don't see how they could ever arrive at it.

The Court: What are you asking this Court to do?

Mr. Lockerman: Your Honor, I undoubtedly should have started out with the statement at the conclusion of the Plaintiff's case in chief—I mean, the Defendant's case in chief, under the burden that they now have and under the Court's ruling that they have the burden of proof, that they have not shown by a preponderance of the evidence that they have put in, they have not carried the burden of proof that they had thrust upon them or placed upon them, and—

The Court: I will charge the Jury in regard to preponderance of the evidence, but if there is any evidence here, the matter would be left up to the Jury to decide which witnesses or what witnesses or whose witnesses—they determine the preponderance of the evidence, not the Court.

Mr. Lockerman: That would be—that would be true, Your Honor, if both sides put in, you know, evidence, under the preponderance of the evidence.

The Court: I expect to charge the Jury that as far as [fol. 485] proving the truth of the charges are concerned, the burden would be on the Defendant in this case under a plea of justification.

Mr. Lockerman: Well, that is our position, that they have not, by the evidence that they have put in, they have not proven the truth of the charges in any substantial way at all, and they have not carried that burden.

The Court: You would yet have to submit it to the Jury on the question of mitigation of damages.

Mr. Lockerman: Well, yes, sir; but our point is this, that as the case now stands that we are asking the Court to direct a verdict to the effect that insofar as their burden of proving the truth of the charges, we would have to go ahead, of course, with other phases of the case, but, I mean, under the burden that they had, they had to prove in their initial presentation of the case the truth of these charges. Therefore, if they don't carry that burden, then I think that the Court should—should direct that this has been a libel. They have not—

The Court: Oh, I am going to charge the Jury that this article is libelous per se; I expect to charge the Jury that the article itself is libelous per se. I think even the use of the word "corrupt—the Georgia Statutes vary a little on libel. Under the Georgia law a man in his profession, whether he is a doctor or a lawyer or farmer of coach or anything, who has been maligned, I think it is libelous [fol. 486] per se, and I will charge that the article is libelous per se.

Mr. Lockerman: My associate has just called my attention to this case of—no; it is not a case; it is Odgers' *Libel and Slander,* the fifth edition, Chapter 7 under the subject of justification. At Page 181 the author stated, "But the whole libel must be proved true. It will be no defense to the action to prove that a part is merely true. The defense must be pleaded to the words set out in the statement of claim and not to some other word of Defendant's own. Justification must be as broad as the charge and must justify the precise charge. If any material part be not proved true, the Plaintiff is entitled to damages in respect to some part."

The Court: I think the Defendant has the burden of proving that the sting of the libel was true, and if they fail to do that, then I think it is a matter for the Jury—for the Jury to determine whether or not they failed to prove the sting of the libel.

Mr. Lockerman: Your Honor, I did want to call your attention—

The Court: You go ahead, sir; I didn't mean to interrupt you.

Mr. Lockerman: The definition that is given in Webster's *New International Dictionary* of a "fixer" and certainly they have charged him with being a fixer—

[fol. 487] The Court: Yes, sir; I know—I am not exactly sure what "fixer" means, but I know what the word "corrupt" means, and I think the word "corrupt" would—I am going to charge the whole article was libelous per se.

Mr. Lockerman: Yes, sir.

The Court: Why doesn't that care for it all?

Mr. Lockerman: Certainly it will in Your Honor's charge to the Jury, but we felt that we should make a motion at this time—

The Court: Yes, sir.

Mr. Lockerman: —to the effect—a motion for a direction by the Court which, in effect,—this is a rather unusual situation, as Your Honor knows, because of the switch in the position of the parties.

The Court: Yes, sir.

Mr. Lockerman: But we do feel that the record should show that we filed a motion for a directed verdict—

[fol. 488] The Court: I want you to have every opportunity.

Mr. Lockerman: —on the point that the Defendant had not, under the evidence that it has shown, proven the truth under the burden that it had of the things that it has said against the Plaintiff in this article.

The Court: Mr. Lockerman, I think it would in error for this Court to withdraw that issue from the Jury.

Mr. Lockerman: Yes, sir.

The Court: I think you would be jeopardizing your whole case.

* * * * * * *

HUGH FLEMMING having resumed the stand, testified further as follows:

Cross examination (continued).

By Mr. Schroder:

Q. Mr. Flemming, do have in your hand there a toll ticket representing a call from Cullman, Alabama, to Atlanta, Georgia, on September the 10th, 1962?

A. Yes, sir; I have.

Q. Would you please give the Reporter the exhibit number that has been given that one, I believe,—

A. It shows Exhibit 30.

Q. Thank you.

[fol. 489] A. Plaintiff's.

Q. Let me have a copy for opposing counsel. Could you interpret that for me, please, sir? You might let me have a copy too.

A. Yes, sir. This is a station call on September the 10th from Cullman, Alabama, to Atlanta, Georgia, to telephone number 874-1967. There is no name of the calling party.

Q. Does it indicate a charge card at the top?

A. Yes. It was billed on credit card 5434351 A-K 35.

Q. And that is—that, according to your information, is Coach Butts' credit card?

A. That is a credit card on that particular telephone number; I don't know whose it is.

Q. Do you have one on September the 11th, 1962, from Birmingham, Alabama, to Atlanta?

A. Yes, sir; I have.

Q. That one was placed at what time, sir?

Mr. Cody: Your Honor, may I interrupt this witness just a moment?

The Court: Yes, sir.

Mr. Cody: In the interest of time I am perfectly—I see he has a number of these toll tickets. I am perfectly willing for him to take them back and make the same type of

schedule that we have done in Athens and Tuscaloosa and Atlanta and Chicago, and list it, and I will agree that that is a correct summary of what those toll tickets show. We take his word for it. It can save a lot of time.

[fol. 490] Mr. Schroder: I agree with you, but—will you agree with me that the toll tickets I have now need no further explanation by any expert witness if I need to introduce them?

Mr. Cody: I will; I will agree to that.

Mr. Schroder: There is no need, then, to pursue this further. I don't need any study of it made.

* * * * * * *

FRANK GRAHAM, JR., called as a witness by the Plaintiff, after having first been duly sworn, testified by deposition as follows:

Cross examination.

By Mr. Schroder:

Q. State your full name, please, sir.
A. Frank Graham, Jr.
Q. And your address?
A. 201 Congress Street, Brooklyn 1.
Q. Your occupation, sir?
A. I am a writer.
Q. What type of writing do you specialize in, if any?
A. Chiefly sports.
Q. What is your age, Mr. Graham?
A. I am 38.

Mr. Schroder: Speak a little louder, please, sir.

By Mr. Schroder:

Q. How long have you been engaged in writing sports?

[fol. 491] A. I was a publicity man, publicity director of the Brooklyn Dodgers, for which I did a lot of writing from 1951 through 1955. Since then I have been chiefly a writer.

Q. Specializing in baseball or in general sports?

A. General sports. I was assistant managing editor of Sports Magazine, also, for two years.

Q. Where were you educated, Mr. Graham?

A. Columbia University.

Q. Did you major in journalism?

A. No, I majored in English.

Q. What year did you graduate?

A. 1950.

Q. Have you written a great deal on the game of football?

A. Not a great deal, no.

Q. Are you what one might call a football fan?

A. Yes, I have watched football ever since I was a child. My father was a sports writer and I started going to games with him, and I played a little in high school at Iona Prep.

Q. I-o-n-a?

A. Yes.

Q. Do you know Furman Bisher?

A. Yes, sir.

Q. How long have you known Furman Bisher?

A. I don't believe I ever met him face-to-face until some time in February, the end of February, of this year. When I was at Sport Magazine, also with the Dodgers, I talked to him on the phone several times, and I may have met him at a World Series, about 1954 or 1955.

Q. However, you don't recollect having met him face-to-face until February of 1963?

A. That's right.

[fol. 492] Q. Did you talk to him in 1963 prior to your meeting him face-to-face?

A. No, I didn't.

Q. Where did you meet him on this occasion?

A. I met him here in New York.

Q. What were the circumstances of the meeting?

A. I had just come back from Atlanta, and Furman Bisher was in town on some kind of speaking engagement, I believe, and he called the Post to say that he had a

story, and I had a call from Roger Kahn, senior editor here, and he said Furman Bisher was in town and he would like me to come in and meet him, talk with him.

Q. Do you recall the date on February that this occurred?

A. Well, it was the Monday after Washington's Birthday, I believe. Washington's Birthday was a Friday, I think.

Q. That would be—

A. About the 25th or 26th.

Q. About the 25th or 26th?

A. About that.

Q. Let me interrupt that thought for a moment and ask you, did you bring your notes that you used in writing the story?

A. Yes.

Q. Would you be able to give me the specific date better by consulting the notes, or would that date appear in the notes?

A. No, it would not appear in the notes.

Q. Had you, prior to that time—and we will assume that it was February 25th—been in touch with the Curtis Publishing Company about the story that Furman Bisher called the Post about?

A. Yes.

[fol. 493] Q. What was the story that Furman Bisher had that he wanted to consult the Post or you about?

A. He said it was a story about Georgia football.

Q. Did it turn out to be the story that you wrote in the Post in the issue of March 23rd?

A. It did.

Q. Did you talk to Furman Bisher on the occasion that he was in New York on February 24th or 25th?

A. I talked with him the evening of February 23rd and briefly on the telephone on the next day, which would be Tuesday.

Mr. Schroder: Well, there is a correction there. We understood that this is Monday after Washington's Birthday; I believe the witness said "the 23rd" when he meant "the 25th."

By Mr. Schroder:

Q. Where did you meet with Furman Bisher on the evening of February 25th?

A. At the Manhattan Hotel.

Q. Manhattan Hotel?

A. Yes.

Q. Is that where he was staying?

A. Yes, he and his wife were in town.

Q. Was that the first time that you recall in the year 1963 that you had been in communication with Mr. Bisher?

A. Yes.

Q. And I believe you said that he called you or did someone from the Post call you?

A. Furman called the Post and the Post arranged for me to meet him.

Q. Did you spend some time with Mr. Bisher at the Manhattan Hotel that evening?

[fol. 494] A. Yes, we spent an hour and a half.

Q. Did you meet in his room or down in some other room?

A. Downstairs, in the cocktail lounge.

Q. And you were with him and his wife for an hour and a half?

A. Yes, she came later. I was with Roger Kahn.

Q. Kahn went with you to see Bisher?

A. Yes.

Q. What, in general, did Mr. Bisher tell you at that meeting at the Manhattan Hotel?

A. He told me substantially what I had learned in Atlanta, much of the information which was in the affidavit which George Burnett signed for the Post.

Q. Did Mr. Bisher indicate to you the source of his information?

A. Yes. Apparently he got a good deal of it from Cook Barwick.

Q. Did Mr. Bisher subsequently do some work for you or the Post in connection with gathering information for your article?

A. Yes, he did.

Q. Was he employed at that time, that evening that he met with you?

A. Yes, that day. He may have been employed before I met—I don't know if there had been a firm understanding, but the agreement was that I would come and meet him and talk to him and tell him what I had heard and he, in turn, verified this information, or some of it. Then he was to—originally I was going back to Atlanta, and then it was decided—I think you will have to check with Mr. Kahn—then it was decided, so far as I know, because he would have more entrees to people in Atlanta, that he would complete the investigation down there. They would send me—he [fol. 495] would send me material from which I would complete my story.

Q. What was the pay by the Post or what was the agreement as to his compensation?

A. I don't know.

Q. That was not discussed in your presence?

A. No.

Q. As I understand your testimony, Mr. Graham, Mr. Bisher confirmed what you said you had already heard in Atlanta when you had been there on the previous date in communication with George Burnett?

A. Yes, he had heard much—some names, I believe, he was unfamiliar with, some questions he asked me, and then he said he would go back that week and he would get more information or talk to more people, et cetera.

Q. Do you remember what information it was that he had and which he discussed with you which you didn't have, by way of names or any facts?

A. That I didn't have?

Q. Yes, that he gave you.

A. No. He just gave me a general background. He talked to me of the background of the situation in Atlanta, the situation at the University, and identified some people for me more precisely, people whose—

Q. I understand you said that you mentioned some names to him with which he had not previously been familiar.

A. Yes, there were names like Milton Flack.

Q. He had not heard that name before?

A. He had heard the name, but he was a little vague on some of the details, how Flack fitted in et cetera. I would say substantially the information we had, he had, because there were only two affidavits in existence.

[fol. 496] Q. One which Burnett had given to you and the other one he had given to the—

A. University.

Q. Did he have that affidavit with him when he met with you?

A. No, no, he had no affidavit.

Q. When did your visit take place to Atlanta in connection with this story?

A. I flew down on a Wednesday evening, which was the 20th.

Q. What were the circumstances leading up to your trip to Atlanta?

A. I was called at home by Mr. Kahn, who said that the Post had an assignment for me, and would I come in and talk to Davis Thomas, the managing editor of the Post, on a Tuesday morning.

Q. Your call by Mr. Kahn took place when?

A. Monday of that week.

Q. That would have been what date?

A. That would have been the 18th.

Q. The 18th?

A. Yes.

Q. And Mr. Kahn told you that he had an assignment for you to do for the Post?

A. Mr. Thomas had an assignment for me. As I understood it, Mr. Thomas said that he had a story which involved sports and he asked Mr. Kahn to get a sports writer.

Q. Then you came into the Curtis Publishing Company's office the following day?

A. Tuesday.

Q. Tuesday?

A. Yes.

Q. And you talked with Mr. Kahn and Mr. Thomas?
A. Yes.

[fol. 497] Q. What was the substance of that conversation?

A. They said they had information about a man—they were not positive—a man or a boy, they didn't know who he was—whether a college student or an outside person—who had overheard a telephone conversation between Wally Butts and Bear Bryant, in which certain information was passed from Butts to Bryant, and they asked me to go down to Atlanta to meet an attorney in Atlanta who was coming in from Birmingham, Roderick Beddow, and I was to go to the Heart of Atlanta Motel, get there on Tuesday night, and on early Wednesday morning I would be called by Mr. Beddow.

Q. Mr. Beddow is the lawyer representing the Curtis Publishing Company in the libel suit pending against it in Birmingham?

A. That's right.

Q. And I believe Bear Bryant is the Plaintiff in that action and the Curtis Publishing Company, along with Furman Bisher, is the Defendant? Did you know that before?

A. I had read something in the paper about it and I heard more about that that Tuesday morning.

Q. That was when you had your meeting with Mr. Kahn and Mr. Thomas?

A. Yes.

Q. What did they say to you about the lawsuit pending in Birmingham against the Post and against Bisher?

A. They simply said that this firm in Birmingham was representing them in a suit, this suit, and that through this firm in Birmingham, this information had been sent to them.

Q. What else did they have to say about that lawsuit?

[fol. 498] A. That is all that I can recall.

Q. You say—

A. That there was a suit for $500,000, that Bisher had written this story in the previous fall, I don't remember

the date, and they were being sued, and out of this—let's see—they were being sued by Mr. Bryant, and their lawyer, Roderick Beddow, had sent them this information and they wanted me to go down and see if there was a story for the Post.

My assignment was to go down and meet with Beddow to talk to this—to talk to the man who turned out to be George Burnett.

Q. You went to Atlanta on February 20th, I believe you said?

A. Yes.

Q. And you went to the Heart of Atlanta Motel?

A. Yes.

Q. You didn't see anyone, I assume, that evening in connection with this story?

A. No, I didn't. I didn't get there until about midnight.

Q. The following day you met with Mr. Beddow?

A. Yes. Mr. Beddow and an associate of his named Fred Boteger, B-o-t-e-g-e-r.

Q. B-o-t—

A. -e-g-e-r.

Q. Was he introduced to you as an associate lawyer?

A. As an associate.

Q. Do you know—

A. He wasn't a lawyer. He was a private investigator, I believe. But he was introduced as an associate.

Q. He was a private investigator and came over with Mr. Beddow from Birmingham to meet and discuss with you the story about this telephone call?

[fol. 499] A. Yes.

Q. What time on the morning of the 21st did Mr. Beddow get in touch with you?

A. I would say about between 9:30 and 10:00.

Q. Was he staying at the same motel?

A. No. He and Mr. Boteger had just arrived from Birmingham. They flew in that morning.

Q. He contacted you first by telephone?

A. Yes, he called me and I said that he was to go to the office of Pierre Howard,—

Q. And you—

A. (continuing) —in the Healy Building.

Q. And you later did go to Mr. Pierre Howard's office in the Healy Building?

A. Yes, I did.

Q. That was on February 21st?

A. That was on that morning, yes.

Q. Who was in Pierre Howard's office when you had your meeting there?

A. The three of us, Beddow, Boteger and myself, and Pierre Howard, and we were joined shortly after by Milton Flack.

Q. Was that the first time that you had met Milton Flack?

A. Yes.

Q. How long was Milton Flack in the office while you were there?

A. He arrived a few minutes after I got there, and he was there, I would say, all of the rest of the time that I was there. We had our—we ate lunch in the office. We sent down for sandwiches.

Q. What was the nature of the conversation that took place in Pierre Howard's office with Mr. Flack?

A. Pierre Howard and Milton Flack recounted the story that George Burnett had told them.

[fol. 500] Q. Howard and Flack were recounting the story that Burnett had told to them?

A. Yes, and then filling me in on some background on Georgia football and the situation there as they knew it. Some of the conversation was casual and some directly pertained to this matter.

Q. You got there you say around 10:00 o'clock in the morning?

A. Yes.

Q. And you remained there for the remainder of the day?

A. No, we were there until after lunch. We put in a call to George Burnett to get him to come—

Mr. Schroder: Just a moment; you read that wrong.
Mr. Lockerman: "No, we—"
Mr. Schroder: "They put in a call—"

By the Witness:

A. They put in a call to George Burnett to get him to come, and just about the time—just after Pierre Howard called Burnett—no, just before Howard called Burnett, Burnett had been called by Cook Barwick and had been asked to come to Barwick's office in Altanta, I believe in the Federal Building, and there talked to Bernie Moore, who was the commissioner of the Southeastern conference.

Q. Let me get the sequence a little clearer in my mind. You arrived in Atlanta on the evening of February 20th; is that correct?

A. Yes.

Q. On February 21st, at 10:00 a.m., you went to the office of Pierre Howard, pursuant to instructions given you by [fol. 501] Attorney Beddow from Birmingham?

A. Yes.

Q. Around 10:00 a.m.?

A. Yes.

Q. At Pierre Howard's office that morning—

A. Yes.

Mr. Schroder: Cody, I am not going to read that part.
Mr. Cody: Skip it; it is okay.
Mr. Schroder: All right.

By Mr. Schroder:

Q. During that morning meeting attended by the people whose names I just listed, were you considered to be the representative of the Curtis Publishing Company?

A. Yes, I was.

Q. Did you discuss a price that Curtis would pay for the story?

A. I did. It was to be done through Pierre Howard acting as agent for Mr. Burnett.

Q. Did Milton Flack engage in the conversation that related to the purchase price of this story?

A. Yes, he did.

Q. Was there any negotiation or negotiating done with reference to the price or was it just fixed, and that was it?

A. No. I said the Post was willing to pay $2,000 for it.

Q. What was the counter-offer?

[fol. 502] A. There was none, but both Milton Flack and Pierre Howard thought he should get more, especially if this were an exclusive story. So then I said I would—I was prepared to offer him $2,000 just for George Burnett's affidavit in this case; that if the story appeared in print, was published and was a Post exclusive, then, in addition, he would get $3,000 more, after the date of publication.

He was to get $2,000 immediately, which I believe was wired by Davis Thomas after I told him it was all right to go ahead, and it was wired to Pierre Howard.

Q. Was that check made payable to Howard?

A. I believe it was to Howard. Now, I never—

Q. You never saw the check?

A. No.

Q. Was there any discussion as to a payment by Curtis by Pierre Howard?

A. No, none whatsoever.

Q. Was there any discussion as to any payment by Curtis by Milton Flack?

A. No.

Q. Do you know whether or not Curtis has paid Pierre Howard?

A. No, I don't believe they have. So far as I know. I have never heard. Later, I believe, and you will have to check this, I believe Milton Flack was paid $500.

Q. Was that discussed at the meeting that you attended that morning?

A. No.

Q. On the 21st?

A. No.

Q. I believe you said at the time you were in Pierre [fol. 503] Howard's office on the 21st that Burnett was at Barwick's office?

A. He was to go there. Apparently he was in the suburbs of Atlanta on business and a call was left for him some time that morning, but he was out—

Q. A call was left for him?

A. For Burnett.

Q. Do you know where?

A. I don't know where.

Q. Do you know who made the call?

A. Pierre Howard.

Q. While you were there?

A. Yes. I believe he called the secretary and said, "See if you can get George Burnett," as I recall it. I am not sure.

Q. Was it made clear to you that this meeting was being done with the approval of George Burnett?

A. No. There was no—when I spoke to Milton Flack there was still some doubt as to whether he would—wanted to cooperate.

Q. Who, Burnett or Flack?

A. Burnett.

Q. Give me the substance of that conversation.

A. He said that he was very upset about this; George Burnett was very upset about this matter; that he had been worried about it for a long time, and the whole thing had been on his mind, and he was reluctant to get into it, even from the start. And he said when the thing had first been brought up, he had been brought to Johnny Griffith, the coach at Georgia, and he had asked Griffith to try to leave him out of it, which, of course, was impossible once Burnett reported the story.

Q. This is Flack's story to you?

A. Yes.

[fol. 504] Mr. Schroder: Look's like we are getting into hearsay. I didn't notice it. Flack was telling him something, but—

Mr. Cody: What page.
The Court: Sir?
Mr. Schroder: I don't know; some of it—
Mr. Cody: Okay.
Mr. Schroder: I haven't started skipping yet. Some of this I am getting into hearsay.
The Court: If you can agree to it, it is all right with me.
Mr. Schroder: It would not be proper to read it.
Mr. Schroder: The next questions seem to be all right.

By Mr. Schroder:

Q. Go ahead.

A. And so then Mr. Beddow said, well, the best thing was to get Mr. Burnett in here and see what he wants to do.

Q. So that insofar as you knew, the story really wasn't [fol. 505] available when you went to Atlanta?

A. I had thought it was, but when I got in there there apparently was some doubt about it.

Q. Later that afternoon or later that day you say Burnett came to Pierre Howard's office—no?

A. No.

Q. Excuse me.

A. No. We had lunch there, and we just sat around for a while and then finally we understood that he was in—George Burnett was in talking to Cook Barwick and Bernie Moore, and we decided to go back to the Heart of Atlanta Motel, and Boteger and Beddow and I went back.

We waited a while and then Milton Flack, I think, had some business or somebody to see so he left for a while and then he came in, and then later in the afternoon, I believe it was after three o'clock, when Pierre Howard and George Burnett came over.

Howard—Burnett had apparently come from Cook Barwick's office, picked up Pierre Howard.

Q. Then he came on out to the motel?

A. Yes.

Q. Originally Flack had gone to the motel when you left Howard's office, with you, and then he left—

A. No. Flack didn't come originally. I think he had something to do.

Q. But then he did come to the hotel?

A. Then he arrived before—

Q. Before Burnett and Howard?

A. Yes.

Q. What was the nature of the conversation that took place in the motel when Howard and Burnett arrived?

A. We were introduced to him and he started off by telling about the meeting which had taken place that day [fol. 506] in Cook Barwick's office. He seemed to be upset about what had happened to him there.

Mr. Schroder: Just a minute, Mr. Witness; getting back into hearsay now. I am reading on Page 24 now, Mr. Cody.

Mr. Cody: What line are you on?

Mr. Schroder: I am on line 10 where the paragraph begins there where it says, "He said," and it goes into some conversation; I am going from there, Mr. Cody, over to the top of Page 26.

By Mr. Schroder:

Q. Now, when Burnett and Howard came to the motel room there in Atlanta where you were, this was what was related to you by Burnett and Howard that you have just testified to?

A. Yes. Burnett did almost all the talking once he arrived in the room.

Q. Did you, as representative of the Curtis Publishing Company, come to an agreement with Burnett as to the publication of the story and the price that Curtis would pay him?

A. No.

Q. That had already been determined in Howards office?

A. I had talked with Howard about the Post offer before and then it was agreed that I would see Howard next day in his office after I had talked to Burnett.

[fol. 507] Q. Was the amount of money to be paid to Burnett discussed with Burnett?

A. No.

Q. Did he know or indicate to you that he knew?

A. It was never mentioned between us. I handled all that with Howard.

Q. You assumed that the client knew what the lawyer was negotiating?

A. I assumed, but I didn't know.

Q. You did take an affidavit from Burnett?

A. That was the following day.

Q. The following day?

A. Yes. He went through the whole story. That was this afternoon, in—Thursday afternoon, in the Heart of Atlanta Motel.

Q. Who was—

A. When he got through talking, we had a drink and we had to wait a while because Mr. Beddow and Mr. Boteger were going back to Birmingham on the plane and they were waiting for their plane and we had a drink and Mr. Howard was going somewhere and then I stayed with —the five of us left and then finally Mr. Boteger and Mr. Beddow left and I said I would call them in the morning in Birmingham.

Q. For what purpose?

A. To talk to them about the whole situation, what he had heard. Because we were not—we were never alone after we met Mr. Burnett and I wanted to get their reaction, et cetera.

We stayed—well, it was after dark when they left for the airport, and afterwards I went out to dinner with Flack and Burnett. They took me to a place in Atlanta to eat.

[fol. 508] Q. When was it that you and Burnett were alone? Was it that day or the following day?

A. It was the following day. Well, I am just trying to think—yes, I was alone with Burnett the following morning. On Friday morning, which was Washington's Birthday, I went to—that was the 22nd—I went to Pierre Howard's office.

I got there before Burnett, and then I talked to Howard and Howard—Howard and I made the final arrangements on the story, and I said that money would be wired by the Post to Pierre Howard.

Q. Was Burnett there during that conversation?

A. No. Burnett came in and Howard said, "Now, you will want to talk to him alone, to go over any questions that you have in your mind."

So we went into another office in the back where the two of us talked alone for a while.

When that was over I went out and Pierre Howard sent in a girl who was apparently a notary public, and I left for lunch, and he said while I was gone—while I was gone he and the girl and Burnett would prepare his affidavit, and she took down his story, and I was to come back later in the afternoon and pick up the affidavit.

Mr. Schroder: Who is following the deposition?

Mr. Cody: Give us the page.

Mr. Schroder: Page 29 at the top is hearsay and I am skipping it. That is the first question, on down to line 23. I am beginning reading on line 24 on Page 29.

[fol. 509] By Mr. Schroder:

Q. Now, when you first met with Messrs. Kahn and Thomas in New York, before you went to Atlanta, and they pointed out to you the purpose for them calling you, did you make notes during that conversation?

A. I took a couple of notes, just a couple of names, the name of the motel where I was to go, et cetera.

Q. Did you take any notes at that time having to do with the substance of the story?

A. No, I didn't.

Q. When you met with the people that you said you met with in Pierre Howard's office the first time, did you make notes as to what was said in that conversation?

A. I took very few notes then. I may have written down an unfamiliar name. I would say most of the notes that I

took were the next day when I was alone with George Burnett.

Mr. Schroder: The next one, Mr. Cody, is line 16 on Page 30; the question and answer both would be hearsay. I am reading beginning at line 24 at the bottom of the page. I am just skipping one question and one answer.

By Mr. Schroder:

Q. You didn't make any notes to amount to anything during that conversation?

A. No.

Q. Or what was said—

A. No, I wanted to get it from him, most of it.

Q. When they were filling you in on Mr. Burnett's background at that time did they indicate to you—

A. I did—I will say this: I did take notes on some of [fol. 510] the names of people. I took notes on some of the names that he had overheard, Burnett had overheard mentioned during this telephone conversation.

Q. Did—when Flack and Howard were telling you about Burnett's background, did they tell you about the matter of the bad checks that he had written?

A. Yes.

Q. You knew that then before you heard it from Burnett?

A. Yes.

Q. Did they tell you how many there had been?

A. Pierre Howard said two.

Q. How many did Flack say?

A. He said two.

Q. You knew that, then, before you met Burnett?

A. Yes.

Q. When Burnett subsequently came to the motel room that afternoon with Pierre Howard, and you had a general discussion among all of you about the meeting in Barwick's office and I suppose—

A. Yes, Burnett did almost all the talking then.

Q. Did you make notes of what was said in the conversation?

A. Very few. I remember once I interrupted him to write down the number that he had dialed that day, when he was hooked into this long-distance call.

It was Jackson number, I believe, which I used in the story, and I had him repeat that.

Q. On the occasion of Burnett's visit to the motel room on the afternoon of February 21st, did he have these so-called notes with him that he said he took?

A. No, he never had the notes, at any time during the—we were never able to get the notes at any time during [fol. 511] the entire preparation of the story.

He had thought that he could—let's see—he said that he was going to try to get them on Friday. I called Pierre Howard—I went to see Pierre Howard on Friday morning, the 22nd, and they still didn't have them and they were trying to get these notes and they were not able to get in touch with Cook Barwick and Barwick wasn't coming into his office that day, because it was Washington's Birthday, and I said that I would like to get the notes, if possible, to check dates and a couple of names that were mentioned, et cetera, and see everything that I could on this, and they promised to keep trying.

Howard said if he didn't get them before I left Atlanta, that he would send them, rush them to me by air, the first part of the following week.

Q. Were they rushed to you by air?

A. I never got them.

Q. You have never seen the notes yet?

A. No.

Q. Then you wrote the story without benefit of having seen the notes?

A. That's right. I had to depend on Burnett's recollection, the recollection of Flack and Howard from what Burnett had told them about the notes.

Q. Did anyone at any time indicate to you that anyone else had overheard the conversation that Burnett said he overheard?

A. When I was here in New York, I had been told that there were two—possibly two people there, but we didn't know how many had overheard the conversation. There was a man named Carmichael mentioned.

[fol. 512] Q. That he was there when the call was intercepted?

A. Yes.

Q. Did you—

A. When I spoke to Burnett and Flack and Howard about it, they said that Carmichael was a friend of Wally Butts and didn't want anything to do with this case, didn't want to be brought into it.

Q. Did you get in touch with this Carmichael?

A. No. They said that he positively didn't want to talk.

Q. Did you interview anyone other than Burnett and Flack and Howard?

A. No.

Q. Did you, after you came back to New York, ever interview anyone in connection with this story, other than Furman Bisher?

A. No. When I came in on Monday then it was decided that Furman Bisher would complete the interviewing on the story, that he would have a better—he knew most of these people and would have a better chance to get us the information than I would have.

Q. And you came back to New York you say from Atlanta or did you say, on Monday?

A. No. I came back on Saturday. I came into the Post office on Monday morning but I flew back on Saturday afternoon. On Saturday morning—I had stayed over in the hopes of getting these notes. They were never released by the university to us.

Let's see. On Saturday morning, I called Pierre Howard at his home, and there was still no chance to get the notes. I called Milton Flack and he and George Burnett said they would drive me to the airport that afternoon.

[fol. 513] So that morning I went to the public library in Atlanta and I looked over—I went through all the news-

papers for a couple of weeks before the Georgia-Alabama opening game last year and for a few days afterwards.

Q. Did you make notes of what the newspaper articles said?

A. Yes.

Q. What was the substance of the articles in the newspapers that you read prior to the game and after?

A. There was some—I am trying to think—the substance of it was that Georgia was hopeful. Johnny Griffith said that they knew they were playing a strong club and they had a lot of hope.

They had some good, young players, a lot of sophomores on the team that he had high hopes for, but that Alabama was favored by from 14 to 17 points. And Bear Bryant said he expected a very close game.

Q. Did you use any of those articles in your publication of the story?

A. Yes, I did, yes.

Q. Were the names of the Georgia football players prominently mentioned in those articles?

A. Some were. I went through and copied down the names of all their leading players who were mentioned at any time during the two weeks before the game, for spelling, et cetera, and then their position.

Q. Were the names Babb and Rissmiller mentioned prominently in the newspapers—

A. Yes.

Q. (continuing) —prior to—

A. Yes.

Q. Ever since practice started on September 1st?

A. Well, their names were mentioned. I copied them [fol. 514] down. I don't remember how many times. When I would see a player who would play a prominent part in the Georgia team, I wrote down his name with his position.

Q. Were the names Rissmiller, Babb, Rakestraw, Blackburn—

A. I don't remember Blackburn—

Q. Woodward—

A. Yes, Don Blackburn.

Q. Those names were mentioned prominently—

A. I don't remember Blackburn so much, but apparently he was mentioned, because I have it.

Q. When did you first hear Blackburn's name?

A. I guess there, because—

Q. You mean in the newspaper?

A. In the newspaper.

Q. What names were mentioned to you by either Howard, Flack or Burnett when they were relating what Burnett was supposed to have overheard?

A. Babb and Rissmiller and Rakestraw.

Q. Now when you came on back—

Mr. Schroder: Evidently it was withdrawn.

By Mr. Schroder:

Q. Flack and Carmichael took you to the airport?

Mr. Lockerman: I think it says "Flack and Burnett".

Mr. Schroder: The question—line 14.

[fol. 515] Mr. Lockerman: Oh, yes, yes.

By the Witness:

A. No.

Q. Flack and Burnett took you to the airport?

A. Yes.

Q. Was the forthcoming story discussed going out to the airport by the three of you?

Mr. Schroder: Well that is again—that is on line 21, Cody, on Page 37.

Mr. Cody: I think—go ahead; that is all right.

Mr. Schroder: Sir?

Mr. Cody: Go ahead.

Mr. Schroder: I am looking now at line 21 on Page 37 where it says "We were talking"; that is hearsay, of course, which would also apply to Page 38—May I address counsel just a minute on some of this?

The Court: Yes, sir.

Mr. Schroder: Mr. Cody, I am going on over to Page 40, if it suits your convenience and start on line 14.

[fol. 516] Mr. Cody: Page 40?

Mr. Schroder: Yes, sir.

By Mr. Schroder:

Q. Now, when Bisher came to New York on that Monday, I believe you testified earlier that he was the one that got in touch with the Post?

A. That's right, sir.

Q. And he offered his services to the Post?

A. Yes.

Q. They accepted his services?

A. I don't know on what basis what was done, whether he himself wanted to write the story. He didn't know at any time that I was in Atlanta.

Q. Well, did he indicate to you or to the Post officials in your presence the reason for his getting in touch with the Post officials when he came to New York on that Monday?

A. Yes he said that he had what he—I don't have the exact words, but something about having a very important story about Georgia football.

Q. Obviously, he didn't know up to that time that the Post already had the story?

A. Apparently not.

Q. Did he indicate to Mr. Kahn in your presence when you all met at the Manhattan Hotel, that he was still interested in writing the story or selling the story or giving the story to the Post?

A. Well, apparently he and—you see, I don't know all the details—apparently he and Roger Kahn—Mr. Kahn apparently told him before we met that I had been in Atlanta, so that the Post had the story.

[fol. 517] Q. So that when you met with him he already knew that the Post had the story?

A. Yes.

Q. And then he assumed the role of assisting you?

A. Yes.

Q. By making field investigations or whatever you writers call them?

A. Yes.

Q. In Georgia for the Post?

A. Yes.

Q. Have you seen Furman Bisher since that meeting in the Manhattan Hotel?

A. No.

Q. Have you talked with him over the phone or communicated with him in any other manner?

A. Yes, he called me later in the week.

Q. From Atlanta?

A. Yes.

Q. Later on in the week of the Monday that you met here?

A. Yes.

Q. What was the substance of—

Mr. Schroder: Well, I guess it would be all right to read that part; it is in the article.

Mr. Cody: Yes.

By Mr. Schroder:

Q. What was the substance of that conversation?

A. He told me that he had talked to people at the University of Georgia. He had been—he gave me some quotes from a couple of football players, from the trainer, Sam [fol. 518] Richwine, and the coach, Johnny Griffith.

Q. Is that the last time that you have had any communication with with Mr. Bisher or have you had subsequent conversation with him?

A. That was the last time.

Q. When the story had been more or less—

A. He was,—I believe in between, I believe he was in touch with Mr. Kahn.

Q. Giving Mr. Kahn additional information about the story?

A. I don't know. He talked to him I know because Roger Kahn told me that he would call me on Friday.

Q. I am going to jump ahead just a moment. When the story was almost completed, did you then or at any other time send it to Mr. Bisher for corrections or for whatever he wanted to do with it?

A. I sent him a copy of the story, the following week, which would be a week after I saw him. The week after that Monday that I saw him at the Manhattan Hotel.

Q. That would be the first week in March, I assume?

A. Yes.

Q. You sent Mr. Bisher a—

A. I sent him a copy of my story, as I had written it for the Post, which he was to have for his files whenever the story was to be written in Atlanta, for the newspapers.

Q. Did he make any corrections?

A. No.

Q. Or suggestions?

A. No.

Q. After the story had been completed?

A. No.

[fol. 519] Q. Had you asked him to make any corrections or suggestions if any occurred to him before the story was published?

A. No, I sent the story to him, I say that week, and I have not heard from him again.

Q. Mr. Bisher then had the story in final form during the first week in March which was approximately two weeks before it hit the newsstands?

A. Yes.

Q. Now, Mr. Graham, will you kindly refer to your notes, because I want to ask you some questions about the article itself.

A. Yes.

Q. Mr. Graham—

Mr. Schroder: May I address counsel, please?

The Court: Yes, sir.

Mr. Schroder: Please look ahead so if there is any part you want to object to.

Mr. Cody: Okay.

By Mr. Schroder:

Q. Mr. Graham, I am looking at Page 80 of the March 23rd issue of the Saturday Evening Post. The title of the story is "The Story of a College Football Fix." Below that in smaller letters is the following: "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last [fol. 520] Fall." And below that is "By Frank Graham Jr."

Now, is that language which I just read, is that yours or is that someone else's?

A. That was the editor's.

Q. You had no title on your story?

A. I think I just put "The George Burnett Story," or—I believe that was it.

Q. Now, looking again at Page 80, there is an insert in white that read:

"Not since the Chicago White Sox threw the 1919 World Series . . ." and there is no need for me to quote the full quotation there; and ends: "For now we can only be appalled," and the concluding two words are: "The Editors." Did you have anything to do with the preparation of that insert?

A. No.

Q. The first time you saw that, I assume, then, is when the magazine hit the stands?

A. I saw it in print, but it was before the magazine was—

Q. What you writers call that?

A. Well, it was on a sheet which had been marked up, ready to go to the printer.

Q. Now the photograph on Page 80 and the three photographs on Page 81—well, I will say on the next page, because mine does not show a number—

A. Yes, it is 81.

Q. (continuing) —and the two photographs on Page 82, and the one photograph on Page 83, do you know the source of those photographs?

A. No, I don't.

Q. Were they sent to you?

A. No.

Q. You don't know, then, where Curtis got them?

[fol. 521] A. No, I don't.

Q. Did you finish them to them?

A. I believe on this one, the one of George Burnett, on Page 80, a photographer—

Q. 81, is it not?

A. 81, pardon me. A photographer on assignment for the Post took that picture. I don't know his name.

Q. While you were in Atlanta?

A. No.

Q. Or at some subsequent date?

A. At some subsequent date.

Q. You don't know, then, where the Post got the other pictures that I have referred to?

A. No, I don't.

Q. You did not furnish them?

A. No.

Q. On Page 81, the first three paragraphs of the article, what was the source of your information that you put forth or set forth in them?

A. George Burnett.

Q. Do you have the notes?

A. No. Much of this I took from his affidavit, and, for instance, I did write down the number. Much of the story, of course, was taken directly from the affidavit which he signed.

Q. The fourth paragraph, beginning with—beginning with "Like most males over the age of four . . . " and ending with " . . . football history," what was your source of that information?

A. The first two sentences were from George Burnett himself, and—

Q. Did he, for example—you said the first two sentences were from George Burnett.

Did he refer to the two coaches as being "collossi"?

[fol. 522] A. No, that was my word. He mentioned two of the biggest names in Southern football, something like that.

Q. Is there any other language in that paragraph which is your own and not George Burnett's?

A. I would say the way it was phrased, like most males over the age of four in Atlanta.

Q. Burnett did tell you, then, that he was a football fan?

A. Yes, he said he had always been interested in football. He told me that he had played football in college—in high school in Texas.

Q. Did he indicate to you that he was interested in football in the State of Georgia?

A. Yes, he said, like everybody else, he was interested in the games, knew these people. I had known Wally Butts from afar. I had only met him once. But he was interested in these people.

Q. Did he indicate to you familiarity with the players' names?

A. No, no, not especially. We were talking about it at one time and he said it was a young team. But he was not familiar with all the names.

Q. Did he indicate to you that he had seen the University of Georgia play any football games the previous season, being 1961?

A. No, he didn't say.

Q. Did you ask him?

A. No.

Q. The next paragraph beginning "After a brief wait . . ." and the next two sentences after that paragraph, or the next three sentences after that paragraph, which include quotations, they were taken by you from the affidavit?

A. Yes.

[fol. 523] Q. Not from any notes that you had?

A. It may have been partly from the notes. It was partly from the notes and partly from the affidavit.

Q. Let's move on to the next paragraph, which I shall read:

"As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama." Now, what detailed information did you have in mind when you wrote that particular language?

A. What he had told me. He said: "Whereupon, Wally Butts proceeded to give detailed information pertaining to the University of Georgia's offense and defense to be used in the Alabama-Georgia game the following week."

Q. Did he tell you what information he had when he used that language?

A. He said: "At regular intervals Bear Bryant would ask Wally Butts certain questions pertaining to defensive and offensive maneuvers. Wally Butts would either ask him in detail or—

Mr. Cody: "Answer him".

By the Witness:

A. Wally Butts would either answer him in detail or would say, 'I don't know about that, I will have to find out.'"

Q. Go back—excuse me. I thought that you were through. Are you reading from your notes?

A. No, from the affidavit.

Q. Did Burnett at any time tell you the particulars of the questions which he said that Coach Bryant asked Coach Butts?

[fol. 524] A. He said here, for instance: "A question in particular that Bear Bryant asked was, 'How about quick kicks?' and then Wally Butts answered by saying, 'Don't

worry about quick kicks, they haven't anyone who can do it.'"

Q. Let's go back a moment, where you were reading: ". . . Wally Butts proceeded to give detailed information pertaining to the University of Georgia's offense and defense. . . . " Did he give you any of the detailed information which he said he heard Wally Butts giving to Coach Bryant?

A. No, he said that he would have to have his notes to refresh his memory.

Q. So that you used that language just based upon what he said in his affidavit, without knowing exactly what information he was talking about?

A. That, and such things as he also told him that Woodward committed himself fast on pass defense, and he said that he would have to get the notes to refresh his memory on it.

Q. Now, we have in that same sentence the language: ". . . to be used in the Alabama-Georgia game the following week." What is the source of the information there? Did he tell you that they said this was what was going to be used in the game or how did he indicate to you—

A. He said they were talking about the game coming up which was in eight days, as he said in here, pertaining to the University of Georgia's offense and defense to be used in the Georgia-Alabama game the following week.

Q. Did he tell you that was his language or that is what they said was going to be used in the game, or did he tell you anything about what it was?

A. This was his language.

[fol. 525] Q. All you have is what is in this affidavit?

A. Yes.

Q. Do you have anything in your notes indicating that there was anything said between the two coaches about what was to be done or what was to be used in the upcoming game?

A. No.

Mr. Schroder: I don't know what that means.

By Mr. Schroder:

Q. The next language in the affidavit is: "At regular intervals Bear Bryant would ask Wally Butts certain questions pertaining to defensive and offensive maneuvers." Did Burnett tell you what he meant when he used the language "regular intervals"?

A. He just said that Bryant would ask him a question and he said that he was struck by the tone in which Butts answered these questions, that he seemed to be answering them reluctantly, to him—

Q. That is not my question, Mr. Graham. Did Burnett tell you what he was basing the use of the word "regular" on or did you just take it from his affidavit?

A. I took it from his affidavit.

Q. Did Burnett tell you what any of the questions, certain questions that Bryant asked Butts, pertaining to defensive and offensive maneuvers, were?

A. No. Except for instance about quick kicks.

Q. Other than what is set forth in this affidavit there was no discussion as to the substance of the conversation?

A. No, just that he was—couldn't remember anything definite about it, he said, without his notes. He could re-[fol. 526] call some of the names, but—

Q. Now, returning to the article in the magazine, about half way down the first column, there is a paragraph which reads: "Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack."

Mr. Schroder: That being a quotation from the article.

By Mr. Schroder:

Q. Did Burnett furnish you with any details as to what offensive plays were discussed?

A. No. He just said that there was talk about this in which Butts mentioned specific things, but which he could not recall.

Q. So that—

A. What they were, numbers of plays or—

Q. So that when you wrote your articles, you just took it from the affidavit?

A. Yes, and from my questioning of him.

Q. Sir?

A. From the affidavit and from my questioning of Burnett.

Q. Read to me from your notes, please, sir, what you used when you wrote the language which I have just quoted.

A. He said that—he said—I asked him if there were any specific things that he could try to remember, and he said they discussed certain formations which he could not recall the details of, which Georgia would use inside the ten-yard line.

Q. And you don't know or he didn't tell you what he meant by that language?

A. No.

[fol. 527] Q. Skipping a sentence in that same paragraph, you have written:

"Occasionally Bryant asked Butts about specific offensive or defensive maneuvers. . . ." Did Burnett tell you what he meant when he was conveying that information to you?

A. Well, it was—for instance, certain things like quick kicks, which was one thing that stuck in his mind, that Bryant was trying to find out at certain times would they use a quick kick, could they be expected to look out for a quick kick in certain instances, and Butts said: "Don't worry about them, they haven't got anyone that can do it."

Q. What do you have in your notes pertaining to that sentence that I have just read?

A. I just have—I asked him about that and he didn't elaborate. There was nothing more for me to add, so I just said, "No quick kickers," and referred back to the affidavit.

* * * * * * *

PAUL WILLIAM BRYANT called as a witness by the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination,

By Mr. Schroder:

Q. State your full name, please, sir.

A. Paul William Bryant.

Q. What is your occupation, Mr. Bryant?

A. Football coach, Director of Athletics, University of Alabama.

[fol. 528] Q. How long have you been in the coaching profession?

A. Well, since I graduated from college, since 1936.

Q. Where, briefly, have you coached other than at the University of Alabama?

A. I was assistant coach at Vanderbilt University.

Q. Speak up so they can hear you.

A. I was assistant coach at Vanderbilt University. I was coach at the University of Maryland, the University of Kentucky, Texas A & M, and now at Alabama.

Q. At the last four places or institutions that you related, were you the head coach at Maryland, the head coach at Kentucky, the head coach at Texas A & M, and at Alabama?

A. Yes, sir.

Q. How long have you been the head coach at the University of Alabama?

A. We are starting my sixth year, sir.

Q. Mr. Bryant, the Saturday Evening Post published an article in its March 23rd, 1963 issue entitled "The Story of a College Football Fix", you are, of course, familiar with that article.

A. Yes, sir.

Q. In that article it is reported that on September the 13th, 1962, Coach Wallace Butts, athletic director at the time of the University of Georgia, initiated a telephone call to you in which it is stated in the article certain informa-

tion relating to the University of Georgia football formations, football plays, and defenses which they proposed to use in the forthcoming game between his school and your school were transmitted by him to you. You are familiar with that general statement as to what is in that article?

[fol. 529] A. Yes, sir.

Q. Do you have any recollection, and if you do have a recollection of that telephone call, of the substance of what was said and as I said, if you do, would you please relate it to the Court and Jury?

A. Sir, I don't know whether he made the call or not; I don't remember. According to the records of the telephone company which I have seen, of course, the call was made.

Q. Do you have any recollection as to what was said in that conversation?

A. Specifically; no, sir.

Q. Do you—let me put it this way. Have you had other telephone conversations with Coach Wallace Butts?

A. Yes, sir.

Q. Have you had numerous conversations with him?

A. Yes, sir.

Q. With reference to other coaches, not only in the Southeastern Conference, but in other areas of the country have you had conversations over the telephone with those people?

A. Yes, sir.

Q. It is also related or set forth in the article that on Sunday, September 16, 1962, you and Coach Wallace Butts had another telephone conversation, which, I believe the Post states, was initiated by you. You are familiar with that general statement as it appears in the Post?

A. I am familiar with it, but I do not remember whether or not I made the call, but according to the telephone company's records, again, the call was made.

Q. All right, sir. Coach Bryant, will you please state to [fol. 530] the Court and Jury whether in any conversation you had with Coach Butts at any time he conveyed to you any information—

Mr. Cody: Your Honor, I—

The Court: What is your objection, Mr. Cody?

Mr. Cody: Mr. Schroder is an expert on leading questions, and I want to object.

The Court: I think both of you have been.

Mr. Cody: I have no objection to him asking the witness to relate the substance of any telephone conversation he has overheard with Coach Butts, but I don't—I want to object to leading questions.

The Court: I don't know that question was leading. Read the question back, Mr. Reporter.

(Whereupon the question was read aloud by the Reporter.)

The Court: I don't know what the question—will you finish the question.

[fol. 531] By Mr. Schroder:

Q. —relating to the plays, formations, or defenses to be used by Georgia, the University of Georgia—

Mr. Cody: Before you answer—

The Court: Don't answer, Coach Bryant.

Mr. Cody: I want to renew my objection.

The Court: Let him finish the question. Have you finished it, Mr. Schroder?

Mr. Schroder: No, sir; I haven't.

By Mr. Schroder:

Q. —so far do you understand what I have asked you up to now?

A. I would like to have it again, please, sir.

Mr. Schroder: I don't know that I can restate it exactly.

(Whereupon the question was read aloud by the Reporter.)

By Mr. Schroder:

Q. —in a forthcoming game with the University of Alabama?

[fol. 532] Mr. Schroder: Don't answer it; there is an objection.

The Court: All right, sir, Mr. Cody. Did you object to it?

Mr. Cody: As leading; yes.

The Court: I overrule the objection.

By Mr. Schroder:

Q. You understand the question now, sir?

A. Yes, sir.

Q. What is your answer?

A. Absolutely not, and I had had, I wouldn't have taken it, because he is for Georgia and I am for Alabama.

Q. What do you mean by—I don't understand the meaning of your answer. I understand you said absolutely not, but I didn't get the next thing you said.

A. Well, if he would give me something on the University of Georgia, well, then, the first thing I would think they weren't going to use it, because he is for Georgia and I am trying to beat them; I am for Alabama.

Q. All right, sir. It has been testified here by witnesses that in the telephone conversation of September the 13th, 1962, a record of which was supposed to have been made by one George Burnett, a discussion of certain formations to be used by the University of Georgia was had. In order that you might know what it is that I am addressing myself to, I will attempt to demonstrate it by use of this blackboard [fol. 533] or greenboard. Can you make anything out of, first of all, the formation on the other half of the board? If you can't see it, I will move it closer to you.

A. That is what we refer to as a slot formation.

Q. All right. Can you make anything out of the formation on the lower part of the board?

A. That is also a slot formation with a weak side end spread out.

Q. I want to direct a few questions to the formations on the upper half of the board described you as a slot formation. I want to ask you, Coach Bryant, is that what is known in the trade—when I say "the trade" I mean the college football trade—as a normal slot formation?

A. Yes, sir. The terminology differs in different places, but I think most anyone would refer to that as a normal slot formation.

Q. And when you use the word "normal" in describing that slot formation, that would include the split end being out three yards from the tackle?

A. Normally three yards from the tackle to open up the running lane.

Q. In the University of Georgia spring football game in 1962, which of course, is open to the public as all spring games are, did the University of Alabama send any scouts to Athens, along with other universities that Georgia was going to play, to scout, to see what the University of Georgia had?

A. We certainly did.

Q. Did the University of Georgia similarly send its scouts to Birmingham—to Tuscaloosa at the University of Alabama spring game?

A. Yes, sir.

Q. In 1962?

A. Yes, sir; I saw a couple of them myself.

[fol. 534] Q. The individuals that do the scouting for the various universities return from the game that they are scouting and prepare what is known as what?

A. A scouting report.

Q. Are you familiar with the scouting report prepared for the University of Alabama covering the spring game of the University of Georgia in the spring of 1962?

A. Sir, I am not entirely familiar with it now because that was our opening game, and I have studied many since then, but I am somewhat familiar with it.

Q. Was the formation on the upper half of the board which you have described as a normal slot used by the University of Georgia in its spring game of 1962?

A. According to our report; yes, sir; a hundred and nine times.

Q. Sir?

A. According to our report, a hundred and nine times.

The Marshal: Let's have order, please.

By Mr. Schroder:

Q. I will return to a discussion of that for a moment, but let me drop to the formation at the bottom of the board which, as you described it, is a slot, a normal slot right with the left end out fifteen yards. Did the University of Georgia employ that formation in its spring game of 1962?

A. Sir, I don't believe so. I could be wrong; I don't believe so, but they had used that formation, I think, the year before a few times.

[fol. 535] Q. Now, let's move forward to the fall of 1962. Football practice cannot begin before September 1st?

A. Yes, sir.

Q. The University of Alabama, I assume, did begin its fall practice on September 1, 1962, as did the other universities in the Southeastern Conference?

A. Yes, sir.

Q. What is the function of you, as head coach, and that of the assistant coaches during that period of September —from September 1st until the first game which was September the 22nd with reference to making plans, coaching, training, or whatever terminology should be used?

A. Well, to begin with, sir, we plan early more for conditioning, physical conditioning, and as the game approaches, well, then, we begin going over—well, before that, we go over plans that we use from year to year; in other words, our basic defenses, our basic offenses that we think we do fairly well with, and then as the game approaches we go into our game plans.

Q. When you use the word "game plans", do you mean to include that both your offensive and defensive formations?

A. Yes, sir.

Q. Would you please relate to the Court and Jury, Coach Bryant, what you trained and coached your boys with respect to defensive formation to be expecting when they played the University of Georgia on September 22, 1962?

A. You want me—well, actually—

The Court: Does he want to go down to the board?

[fol. 536] The Witness: That is all right, Your Honor.

Mr. Schroder: Maybe you'd better use the board.

By Mr. Schroder:

Q. Go ahead and talk if you want to.

A. Basically speaking we felt like the University of Georgia had Tennessee tendencies and the University of Alabama, because they had coaches from the University of Tennessee and from the University of Alabama which over the years have played defense very well. Bob Ford was one of our coaches that went over with them the year before.

Q. We over with who?

A. Georgia. And we haven't played defensive too poorly. We felt like they would have some of our tendencies, so, basically speaking—I will put the football there in the center—basically speaking—and this is the important thing, we thought, defensively that they would be in a three-deep. Certain things you can do with a three-deep. Certain things you can't do.

Q. When you say "three-deep", please make it in layman's language.

A. Three-deep would be, you have two halfbacks and a safety man back here to cover the deep part of a field.

Q. All right, sir.

A. In other words, you win or lose first from passes, and if you have three-deep men back here, they play the deep part of the field. Now, the differences in that—do we have an eraser, sir?—is some teams, we did for years—

[fol. 537] Q. Before you knock that down; is that Georgia's defense or Alabama's?

A. I said, basically speaking, I thought they would have the Tennessee and Alabama tendencies because of the Tennessee success with it, and because we have had fairly good success, and Bob Ford is over there, plus the fact we saw them in spring practice with the three-deep. The difference—

The Court: Why the Tennessee tendencies? Was there a Georgia coach from Tennessee?

The Witness: I think they have at least one from there, and we have Tennessee tendencies because over the years they beat us so many times, we tried to join them, but here is the difference. Here is a three-deep and here is a four-deep. These men vary. But, basically, we thought that they would certainly be a three-deep. Does that answer your question, sir?

By Mr. Schroder:

Q. That is a defensive formation—

A. Yes, sir.

Q.—that you have described?

A. Yes, sir.

Q. Would you please describe now for the Court and Jury what offensive formations you trained your boys to expect at the Georgia—during the Georgia-Alabama game?

A. Well, first of all, sir, having been in the—as we call it—we call it the slots; first of all, they were in this slot a hundred and nine times in the spring game. We have to assume that they are going to be in that in our game. [fol. 538] However, since we used the same thing some, we don't feel like—we didn't feel like that we would have to work as much against that if it was something they didn't use. Next to this particular offense, this thing that we thought, based on their personnel, particularly the big fine—I should say great end, Babb, I expected fully—fully expected them to be in a wide slot, a wide slot like this

with the end way out. The reason for putting him way out, of course, is to get him off the line of scrimmage where you can't hold him up.

First of all, let's go back here. If he is in here, and here is a linebacker and here is a halfback, and here is a safety, you can mix it up and cover him or attempt to cover him with different people. One time you can try him on it; the next time you can try him on it; and occassionally you can put him on it, but when you put him way out like that, then the halfback has to move out, and not only can't he get off the—

Q. When you say "the halfback," you mean the Alabama halfback?

A. The defensive halfback has to move out with with him, and you—you can no longer mix it up with three different men covering, which makes it more difficult. All you can do then—all I think you can do, you can double cover him occasionally with this man out like that. Now, then, when you put him out here, it certainly weakens your running strength in here. It has not weakened anything over here, because that man can take one-step motion and be there and have your normal defense. So, you have weakened your running attack here.

So, in addition to that, I fully expected them to take this man here and move him over here, giving him strength over here with this one man still out, way out here, [fol. 539] fifteen yards or so, and of course, that is an unbalanced line. You haven't weakened yourself too much to the weak side, but you have—you have at least a yard or a yard and a half less distance to go to get there. You have strengthened yourself to the strong side running tremendously. So, with this unbalanced thing which you drop an end off out here and double cover him a lot, it is much more difficult to drop the end off because you have running strength in here, and I fully expected them to do that.

I fully expected them to move him from side to side because there was a great deal of difference on our own half-

back defense plus the field position. An important thing is field position. We expected occasionally for him to be out from regular formation, but you can see when you put him out there on regular formation, that you have taken away a lot of your strength right in here, and we use the same formation, and I use—we take away a lot of our strength right in there. Does that answer your question, sir?

Q. Yes, sir.

A. If it doesn't, let's go over it again.

Q. Let me—let me go to the greenboard here for a minute, now, while we have it here. Without regard to what the name is up here, do different teams use different names for set formations?

A. Different terminology; yes, sir.

Q. Well, we have been using Georgia's terminology when we were referring to this particular formation, and it seems they call it a pro-set, that is a normal slot with the other—the other side end out fifteen yards?

A. Well, we call it—I think it is simpler to call it slot, [fol. 540] because they know what they are saying when they say slot, and in this case, left end out.

Q. Fifteen yards?

A. Eight, fifteen; we put him out seven sometimes.

Q. Did the University of Georgia employ that formation in its game against the University of Alabama on September 22, 1962?

A. Unfortunately they did; we didn't expect that much of them.

Q. What sort of a defense did you have planned by the use of that formation setup?

A. Well, sir, first of all—

Q. Just erase that out.

A. Yes, sir. First of all, we thought that to beat Georgia the first thing we had to do was stop Rexler—

Q. Rakestraw?

A. —Rakestraw, the great quarterback, and we would rather have him passing than running. In other words, he

does both very well, but we thought we would prefer him to throw than run with the ball. Although in the latter part of the season, the year before after he got over his injuries, he did both very well. So, what we decided to do, something we didn't do very often—let's put the three-deep back here—we decided to play a five-man line, a five-three, or what amounts to a five-three. We usually play a rover, a wide tackle six, a wide tackle—I will show that. We, normally speaking, play defense like this, and put an extra man to the formation.

Q. To strengthen the formation?

A. To strengthen the formation, or to the field position. In other words, if that was on the hashmark—

Q. Tell us what a hashmark is?

A. A hashmark is the mark there where they put the [fol. 541] ball down. Sixty-seven per cent—normally speaking, sixty-seven percent of your football is played on one of the two hashmarkings. You are only in the middle thirty-three per cent of the time, normally speaking.

Q. That is with reference to side-to-side?

A. Yes, sir.

Q. All right.

A. We either put it to the formation of the extra man or if it is along the side of the field we put the extra man or double-wobble, meaning by double-wobble—let's take the halfback, move a little wider out, move this safety over a little bit more, and this man here plays a little deeper because he has an extra man up there to take care of that area. But we were afraid on that defense that their fine quarterback would hurt us coming out there on the option, either way, running or passing. We decided—wait a minute; before I leave that, if we don't play that defense we will play what we call our north category, and move the guards. In other words, with our ends there, our tackles here, our linebackers here and have the guards either move like that or play balanced, and that becomes a stack, you can see where one is stacked behind the other, but it is a balanced defense because we have as many men on one

side as we do on the other. But there, again, in certain situations we don't want to bring our ends in there hard to contain their quarterback to make him throw the ball, because we don't know we can cover the flat, but we want to contain him.

So, for that game and for every game, for that matter, we have a new defense every week. It may vary. May not be much change, but the other defenses play year in and year out, but for this particular game, in an effort to [fol. 542] contain him quickly, we wanted to put out two men here, depending on the split, and see how fast they could get back here to contain Rakestraw and make him have to throw instead of run with the football. Now, then, in doing that, then we had to put—we put our tackles here in different places. But let's put them right here, and we will put a guard behind a guard expecting them to read and slant to stop the trap. Now—

Q. Everytime you say something like "reading" and "trap"—

A. What I mean by "reading," gentlemen, is you are sitting and watching this man; if he blocks down to that man, common sense would tell you that the play is probably coming in here, and he can go there. If he blocks out here, common sense will tell you the play is coming in here, and he will go here. If he sets for a pass, common sense will tell you it is a pass, and you start back. If he pulls in that direction, common sense will tell you the play is over in that direction, and you go in that direction. If he pulls in this direction, common sense will tell you the play is over here, and you will run through or come in this direction. They are there to try to stop the trap, to mix it up, and still pursue the play.

Now, then, over here we will take our fullback and either pull him up on the line or put him behind here. That was our plan, or put him behind there to where he would be in the pass defense over on this side. On the other side, on the other side most of the time we were going to cover the flat with the halfback, and we had a great fullback player

named Jordan, and we wanted to put Leroy right there because this side of the formation hasn't changed, and with one-step motion, that becomes a strong side. We wanted [fol. 543] Mr. Jordan there, because there he can get to both sides of the field, and he could make every tackle. That was our 'Bama defense at the Georgia game, the opening game.

Q. All right, sir. Was Alabama in the defense which you have just described when the University of Georgia first went into its normal slot with the weak side end out fifteen yards, being the one described on the board?

A. As I recall it, sir, we were in that 'Bama defense.

Q. That is the defense you have just described?

A. In the first of the game, five or six times and we were hurt on it. That doesn't speak very highly for me putting it in there, but we were hurt on it, I think four times, and we should have been hurt on it the other times. I wasn't against this; it wasn't a sound defense.

Q. Is that—

A. Against this it would be a sound defense, but not this. What they ran in the spring, it was a sound defense, but this—this it was not.

Q. Will you explain why it was not?

A. I certainly will, sir. All right, we put Jordan over here where the action is going to be. Lo and behold, they take the big, old, tall end and move him way out here, and we have got to put somebody out there with him, so that takes Jordan out there, and we move this man in a little, stunt this one over here, and they were smart enough to take our best football player and take him out of the park to where he couldn't do anything but play pass defense and get all mixed up, and we were counting on him being in here where he could get the folks.

[fol. 544] Q. The University of Alabama defense setup, then, was not adjusted for the formation which you—which is drawn on the second—on the lower part of that?

A. That was supposed to have been our basic defense, sir. If we know we are going to get a lot of this, we expect

this occasionally, but if we know we are going to get a lot of this we are going to play what we call split, which comes in what we call a north category that I showed you a while ago where we have the same number of people on each side, and where we can drop an end out there to take away the very short passes, keep the pressure off the halfback.

Q. Therefore, if you were expecting what is described there as the pro formation, you would have prepared your defenses differently than you did as you have described here?

A. Only the 'Bama defense; the rest of them were fine.

Q. Yes, sir.

A. Yes, sir.

Q. And when they did go into the so-called—what Georgia calls the pro-set, that had the effect of Leroy Jordan, who is your best linebacker, I assume—

A. He was our best football player, sir.

Q. Yes, sir. That took him out of the play?

A. Yes, sir.

Q. As a result of which, I believe you said, the University of Georgia did successfully employ that on at least four—they only ran it five times, I think the testimony yesterday showed, and they did succeed with that formation four out of the five times that they used it?

[fol. 545] A. I don't know whether it was three or four, sir, but we should have been hurt every time we were in it.

Q. Was something done to take care of the situation or to adjust your defenses later on in the game?

A. Well, we are not stark idiots. We will not do the same thing. I don't remember how soon. I know at the half we went over it, and we didn't play it any the second half. Jordan was calling the defenses, and knowing Leroy, I doubt if I told him to change, but knowing him, when they start taking him way out yonder, he will change and get back in here where he belongs, whether I told him to or not, and I think any good, smart football player would.

Q. You may return to the stand. In preparing your teams for the fall session, do coaches during the summer

exchange films with other coaches of the games that their respective teams have played during the summer?

A. Oh, normally speaking, yes, sir.

Q. Is that—does that sort of an arrangement exist between the University of Georgia and Alabama?

A. Yes, sir; and other schools. We have already exchanged with them, I think for this year.

Q. And the purpose of that—will you describe the purpose of that, please, sir?

A. Well, the purpose of that is to chart what they do, field position, number one; down yardage, number two, but to find out what they do what as best you can or when they have done what and who does it.

Q. And since all universities, or universities do do that, there is nothing wrong with that, with universities swapping films with each other?

A. Oh, no; everyone does it. The Conference approves it, N. C. A. A.; everybody approves it.

[fol. 546] Q. And the film, for example, that you exchanged with the University of Georgia during the summer of 1962, you were then given an opportunity to review every game they played during the year 1961?

A. Sir, I don't remember whether—how many we exchanged with them, and I personally don't review them all, but our staff does, and our players will before the game.

Q. And that is with the idea of learning as much as you can about each other? They are doing the same thing with Alabama films, are they not?

A. You can bet your life they are.

Q. And that is the—the idea of that is to learn as much as each coach can about the other team with reference to its formations, its plays, its defenses, and its personnel?

A. And personnel; yes, sir.

Q. In the last—let's see; the Georgia-Alabama game was played in September, 1962, September the 22nd—

The Court: Just a moment. The defense counsel, in fairness, wants the blackboard moved back. The Marshal can move it back.

Mr. Schroder: Sure.

The Court: If you are going to use that any further, you can keep it.

Mr. Schroder: No, sir. I will assure you it was not intentional.

[fol. 547] By Mr. Schroder:

Q. In the week of the game, which was played on September 22, 1962, or—I don't remember whether Friday was on the 13th, or Thursday; well, September the 13th, regardless of whether it was Thursday or Friday, from September the 13th until September the 22nd, what, if any, significant changes did you make in the Alabama defensive plan for the University of Georgia?

A. I don't think we would ever make any significant changes, sir. I think you set your basic stuff down normally speaking as you are drawing near the game. If you will—I say "if" and I am always apologizing to the team for saying "if"—I say if they should do this we will do that, or if they do that—probably do it on the day of the game, right on up, because based on something they could do, something that they ought to be doing, based on their personnel, and something you saw somebody do ten years before, you get—you want them to be sound; you want them to feel like they are prepared for any and everything. so, we will say, if they do this, we will do that.

Q. Yes, sir.

A. And as I say, I always apologize about all those "ifs."

Q. The purpose of that is, I believe you said, to get your boys' confidence, or if anything new is thrown against them they will be prepared?

A. Yes, sir.

The Court: I believe you are leading him, Mr. Schroder.

[fol. 548] Mr. Schroder: I didn't mean to, Your Honor. I thought he had already testified to it.

By Mr. Schroder:

Q. What is the purpose of that?

A. Well, the purpose is when they go on that field, I want them to feel like—I don't care if it rains, sleets, or snows, if they come out in nine spreads, whatever they do, we are prepared; it is a challenge to them, between me and that fellow I am playing on the other side.

Mr. Schroder: Let me see the notes, please.

By Mr. Schroder:

Q. I believe you testified a moment ago with reference to the recorded—when I say "recorded," that is a bad word—with respect to the telephone calls that the records of the company showed were made on September 13 and September 16, you had no indication of what might have been said?

A. I don't have any recollection that they were made, but if they were made, I do not have any recollection what was said.

Q. You were, at that time, head of the athletic department at Alabama, as Coach Butts was at Georgia?

A. Yes, sir.

Q. Tell us what there is that could be discussed by—or what ought to be and what is discussed between athletic directors before their two teams meet?

A. If we talked, if we did, some things that we could have talked about or should have talked about—

[fol. 549] Mr. Cody: Your Honor, I want to object to that.

The Court: Yes, sir; I think that is highly speculative. I will let him do this, Mr. Schroder. I will let him testify what athletic directors of that nature—

Mr. Schroder: Subjects they would discuss.

The Court: —if he calls to other athletic directors, and the usual procedure.

Mr. Schroder: Yes, sir.

The Court: But as to the contingencies, and "we could have talked," I think that is too speculative.

Mr. Schroder: I withdraw it.
The Court: All right.

By Mr. Schroder:

Q. You had been athletic director of the University of Alabama for how many years?

A. Beginning the sixth year, sir.

Q. Were you also athletic director of the other universities you mentioned?

A. I was at Texas A & M, and I was not at the University of Kentucky and University of Maryland.

[fol. 550] Q. You have been athletic director for how many years now?

A. I guess nine.

Q. When a school is preparing to meet another school in a football game, what is the custom among athletic directors with regard to what arrangements have to be made, and do they talk about matters such as that?

A. Sir, I don't know what the customs are, because I am a football coach too, so, certainly, the arrangement has to be made with the athletic directors and approved for everything, approved by them. Being a football coach, too, I don't believe I could give you an intelligent answer on what a director of athletics would do on it.

Q. Did you have matters personally between yourself and Coach Butts—you spoke of many conversations that you did have with him during 1962, both before September 22 and after September 22; did you all have matters of a personal nature that you discussed.

A. I don't think we did. I think we had many matters that we discussed at one time or another pertaining to our football program and the football game or games, and one financial matter, I think, we had in common that I have discussed with him quite a few times.

Q. Was that an investment in some company?

A. Yes, sir.

The Court: You mean you all had a common investment?
The Witness: Yes, sir.

[fol. 551] By Mr. Schroder:

Q. Coach Bryant, I am going to hand you what has been identified as Defendant's Exhibit 12, and for your information that has been identified and authenticated by the witness George Burnett as representing notes he made during—

A. I have got to borrow some specs here, sir; I left my specs on the plane.

Mr. Cody: I will lend him mine.
The Witness: These are curious too.
The Marshal: Let's have order.
The Witness: I will try these.
Mr. Schroder: Can you read with those all right?
The Witness: Yes, sir; I think so.

By Mr. Schroder:

Q. Starting with Page 1, Coach Bryant, there is a notation at the top which reads "Bear - Bryant. Wally - Butts," is there anything unusual about that entry, if it relates to what you and Butts were supposed to have been talking about over the telephone with each other?

[fol. 552] A. The only thing that I can say there, sir, is as long as I have known Coach Butts he has never called me "Bear," if he is supposed to be talking to me, never.

Q. How does he address you?

A. He calls me "Paul." If he is speaking somewhere, like in Cullman the week before our game, he will refer to me as "Bear" because hoping the people will know I am the Alabama coach, I guess, and make his stories funnier, but he has never called me "Bear," ever.

Q. Let's pass on now to the next note or the only other note on that Page 1, which reads, "Reismueller, greatest in history"; does that mean anything to you, and if it does, will you tell us what it is?

A. Well, Rissmiller we thought was a terrific prospect, and we tried to recruit him, but they beat us for him. I have heard Coach Butts at banquets—maybe not at banquets, but on press talks with me or talking with a group comparing personnel there then with personnel he had, but I don't ever recall him comparing Rissmiller with some of his great tackles in the past when we were talking, but I think he is a terrific football player and sorry we had to play against him.

Q. I believe you said you were familiar with his capabilities?

A. Very familiar with them; yes, sir; we tried to get him.

Q. Turning to Page 2, the first line there, "Rakestraw to right"; then it has a line drawn under that.

Mr. Schroder: I am unable to know, Your Honor, whether that is one entry or whether it is connected with the entry below it.

[fol. 553] By Mr. Schroder:

Q. So, Mr. Witness, will you take them separately, see there in the first line reading "Rakestraw to right," and tell us what, if anything, that would mean to you, and then take the next entry below that by itself and tell us what, if anything, that entry would mean to you, and then take them both together and tell us.

A. "Rakestraw to right" wouldn't mean anything to anyone, I don't think. "Optional left pass", to me that would mean it is going to be a run or a pass.

Q. That is what "optional" means?

A. Yes, sir.

Q. You have got the option of running or passing?

A. Running or passing; yes, sir. "If can block corner man keeps running", I think that is right. If my little boy didn't do that, I would want to spank him. You block them, you keep running. If you don't block them, you would throw the ball; I guess that is what it means.

Q. All right, sir. The next entry reads, "well disciplined ball club, added two coaches"; what, if any, comment would you like to make about that—maybe—does that mean anything to you in general or in particular?

A. Well, no, sir; not really. But if that was said, I would think I would be the one saying it about our ball club, and we had a couple of new coaches.

Q. Did you consider your team to be a well disciplined ball club?

A. Yes, sir; self disciplined.

Q. Turning to Page 3, Coach Bryant, the first note at the top of that page reads, and I quote, "on side guard pulls on sweep"; what, if anything, does that entry mean to you as related to either your team or the University of Georgia's team?

[fol. 554] A. Well, to me that would mean that the on side guard pulls on the sweep. We pull our on side guard on the sweep—we don't pull him; we have a signal where he swaps assignment with the next man, but I don't think—I could be wrong; you can see if I am—they didn't pull the on side guard. Missouri does it, and they do it well. They are the only team I know of that does a real fine job of pulling the on side guard.

Q. Will you please step down and use part of this board where I can preserve the other, because some other witness may want to use it, or if you erase it, put it back just like it is, and please indicate or describe to the Jury what you mean by an exchange or a swing or a switch.

A. First place, sir, gentlemen, the on side is the side where you are going, where the ball winds up. The guard pulling and leading the play around here; that in our terminology that would be pulling. But we have these two men on our sweep; they are responsible for 1, 2 wherever they are lined up. Let's say we have got a stack like that, a defensive man there, and one there. The on side, the man in front is 1; the second man is 2. Well, this man's assignment is 1, and he is way outside, and it is a very

difficult block; it is an impossible block. So then we will say a signal—actually our signal is "green".

Q. What is it? "Green"?

A. "Green."

Q. Who says that?

A. This man would be the one who makes the call, because he is the one that has got the impossible block. He would say "green", and this tackle would swing here, he would swing or pull right around there and block him. He would go on to that point there and try to block who wound up as number 2.

[fol. 555] Q. Is that—from what you have drawn there on the board, would it be correct to say that is an area blocking?

A. That is what we call it; yes, sir; area blocking. You go to an area, and the number that is there when you get to that area, that is the man you block.

Q. The tackle would take the guard because the opposing defender is on the outside, and he can't block?

A. The area outside the guard; yes, sir.

Q. So the tackle takes him when this man says "green"?

A. Yes, sir.

Q. The tackle blocks him and the guard then takes over the tackle who was supposed to block right in this area here, whoever it happens to be?

A. Whoever winds up down there when he gets there.

Q. That is known as a "swing block" or an "exchange block"?

A. Exchange block. We call it a "slot block" or an "exchange block" where they are swapping assignments.

Q. The next entry is described or reads as follows: "don't overshift". Now, Coach Bryant, what, if anything, does that mean to you, relating the question to the University of Georgia and/or the University of Georgia football team?

A. Well, both of us use—we overshift a lot, and so do they.

Q. When you say "overshift," would you describe that to the Jury what it means?

A. Yes, sir; it was something that I had up here earlier about putting a rover to one side or the other. There are different ways of doing it. We move the rover over. Let's say, now, this time that we are in a balanced defense, and we have a man here and a man here and a man here, and [fol. 556] one here, and one here, and one here, with three deep, and a linebacker back here; that, of course, is a balanced defense. To us that is a north category. Any balanced defense, regardless of where they are lined up, where it is the same number of people on each side, it is a north category. A while ago when I took a man and put him on the other side, or vice-versa, to us, that is east and west, actually, and it is a rover defense; to overshift, you move these people in or out. This man will move in here pretty tight; this man will move over here; this man here would move there, and you would have your end there, with your linebacker there, and you would wind up with the same thing we referred to as an "overshift" or "rover defense."

Q. Thank you, sir.

A. Does that answer it?

Q. Yes, sir. Is it or was it your testimony that the University of Alabama does that and did do it in that game?

A. Oh, we have done it for years, sir, and I think we have done a lot of it. I didn't check the film on it. I think they did a lot of it against us.

Q. In the 1962 game?

A. Yes, sir.

Q. The next entry reads, "Woodward commits fast-safety man." Obviously that is referring to some one particular individual. Could you amplify as to what that means to you?

A. Well, to me—I thought he was a real fine defensive safety or defensive football player, and to me committing quickly, that would have to be forward. I don't believe anybody would commit quickly in the wrong direction. So, if they are on defense, there is a safety; that would have [fol. 557] to mean he comes up fast, to me.

Q. Do you know whether or not Woodward does do what you have just described there?

A. I actually don't. If he does, I ought to be "bored for the hollow," because we don't throw a pass in there. If he comes up fast, we should have been throwing in there, and we haven't.

Q. Next entry reading, "weak defense, anybody except Blackburn"; evidently—I mean, obviously the notes are referring again to a specific individual. Would you comment on that, if it means anything to you related to either team?

A. It doesn't mean anything to me. I was looking at our scouting report this morning, and, of course, they have corrected this. It will be strong this year, but in our scouting report they said the whole secondary was weak.

Q. That was the scouting report that your scouts had prepared?

A. Yes, sir.

Q. For the Alabama-Georgia game?

A. Yes, sir. The secondary was the weakness.

Q. Does the name "Blackburn" mean anything to you?

A. The only thing that I—the only thing that I remember about it, I think he was ineligible and got eligible before we played.

Q. Top of Page 5, "Baer slot right, right end, split right end out," and we are assuming, without knowing, that "Baer" means "Babb", but at any rate, uncorrected or corrected, does that entry mean anything to you when related to the Georgia or Alabama football team?

A. If I just saw that I would think it was me, ause [fol. 558] of the Baer part, and secondly because o the formation that we had used last year, ninety per cent of the time, probably ninety-five per cent of the time.

Q. Does Alabama employ the split right—slot right, split right end out?

A. We employ the slot right, left end out, and we also employ the slot right left end over and out the other way,

not a great deal, but occasionally, and come out of the huddle quickly, hoping it might foul the defense up; they might be overshifting in the wrong direction, sir.

Q. Next entry reads, "long count, left half in motion"; what, if anything, Coach Bryant, does that mean to you when related to the University of Georgia and/or the University of Alabama football teams?

A. I don't recall whether Georgia ever did that much to us or not. I do recall that we played Georgia in Birmingham when Coach Butts was coaching, that we used it quite a bit, and hurt them with it quite a bit, and I do recall that by putting a wide man, and I have talked with Coach Butts about this because he has hurt—he has hurt everybody, but he has hurt the four-spoke defense, the type that Tech and Tulane, and a lot of them employ, putting a wide man out and long motion toward him, and throwing certain patterns off of that. When we hurt his team in Birmingham, it was more about the keeping; a boy kept it, and ran with it. That's right, we do that.

Q. All right. You don't know whether Georgia does it or not?

A. I believe year before last—I may be wrong—that with an unbalanced line, with the end wide, that they did it a couple of times. Now, either that, or I saw them do it in a film, but I can't be sure, sir.

[fol. 559] Q. Did Georgia use an unbalanced line against Alabama in 1961?

A. Yes, sir; they did, and I thought it was a real smart strategy.

Q. Did the University of Georgia use an unbalanced line against Alabama in 1962?

A. Sir, I really don't remember. I expected it, but I really don't remember whether they did or not.

Q. The next entry reads, "best since Trippi," with the name "Porterfield" under the line I just read; what, if anything does that mean to you, Coach Bryant, when related to the University of Georgia football team?

A. Sir, I don't know. I have heard Coach Butts bragging on Georgia's players, and they all get better after you quit coaching; mine will get better, too; but I never heard him compare anybody with Mr. Trippi. I don't know what that means.

Q. The top of Page 5, there is an entry reading, again, "Baer on a hook on goal line"; does that mean anything to you related to either your team or that of the University of Georgia?

A. Well, only thing, sir, when you get down that close, you either have to hook or go out of bounds or something. I mean, out of the end zone. The area is so small, you at least have to cut your patterns down, regardless of whether it is a hook or sideline cut or what, because particularly on a hook you are going to the end zone, and of course, you are out of bounds when you go over that, so I think that would apply to anybody's football.

Q. Next entry, "slot to right, ends normal, (3 yards)"; as you read that entry, would you try to diagram it on the board here, please, sir?

[fol. 560] A. Yes, sir. It don't—really—what did it say? Slot right, ends three yards; it really doesn't mean a great deal to me; both ends out three yards. I don't think they are out wide enough to change secondary defense. You have got to get a man out, way out, so we don't do it, and I don't—that doesn't mean a great deal to me. We do put them way out like this. We did against Oklahoma in the Orange Bowl to make it difficult to cover the whole field and making it difficult to put two men, which we call double covering, on two different people, but so far as ends three-yard slot, that doesn't mean anything to me.

Q. All right, sir. The last entry on Page 5, Coach Bryant, reads, "Right halfback on fly, left halfback, quarterback gives to left halfback, left guard pulling blocks on corner"; does that mean anything to you as related to either Alabama or Georgia's football teams?

A. "Right halfback on fly, left halfback, quarterback," don't make sense to me; I don't know what it is talking about.

Q. Top of the next page, "Wide slot till goal line"; that was read by me from the notes there. Now, does that or not mean anything to you when related to either Georgia or Alabama's football teams?

A. Well, normally everyone, we do, I am sure, I think everyone does, the nearer you get to the goal line the more you cut down your formation to help—

Q. What do you mean by "cut down"?

A. Pull them closer together in an effort to keep leaking people from coming through, people leaking through the seams and throwing you a loop. When you get down there you don't want people coming from the inside out and [fol. 561] throwing you a loop, and I assume that is what that means; I don't know, sir.

Q. Next entry reads, "can't quick kick"; does that mean anything to you when related to the University of Georgia's football team?

A. No, sir; it doesn't; to ours either. We quick kick, and Georgia—I don't think it quick kicked this year, but Georgia quick kicked us last year, I think; if they didn't they quick kicked—I remember seeing them quick kick.

Q. The next entry reads, "slot right, right half on fly, screen on him." Does that mean anything to you?

A. No, sir; I don't know what that means.

Q. Can you mentally reproduce the picture?

A. Well, if "fly" means the man is in motion—I don't know whether it means motion. There is your right slot. Let's see what it says; "slot right, right half on fly." I would assume that that means him in motion. "Screen to him," I would say that it means him screening out here, and offhand, I wouldn't think this is a very sound play.

Q. When you say "screen to him," that means—

A. Let the lineman come through and send these people to take the secondary people back and try to have an area in here, and these linemen, after blocking or coming out here, setting up a wall or some interference in front of this man, and he goes back a little deeper and drops the ball out here to him the flat, and he has some people in front of him

to run interference for him, and the men already downfield would come back and block people like that, and if it works, you get a long gainer out of it.

Q. Do you have—

A. Tech does that very well.

Q. Do you have any play where you screen to the fly man as—do you know what the fly man is?

[fol. 562] A. I assume that it is the man in motion, sir, but I don't know. We refer to it as something else.

Q. You don't use the terminology "fly"?

A. No, sir.

Q. All right, sir. The last entry on Page 6 reads, "29-0 series, Baer catches everything they throw"; does that mean anything to you, Coach Bryant?

A. No, sir.

Q. In regards to either your team or the University of Georgia?

A. No, sir; it doesn't.

Q. You do not have any series by that name?

A. We have a—we have a play 29, sir, but we don't throw off of it. It is a fullback option.

Q. Top of Page 7, "slot right left end out fifteen yards." Is that the formation that appears on the bottom half of this board here?

A. Yes, sir.

Q. And I believe you have already testified at some length about Georgia's employing that formation in its 1962 game?

A. Yes, sir; and it is our basic formation. This is the first year we have had it as our basic formation, because we had a great passer, Joe Namath.

Q. N-a-m-a-t-h?

A. -t-h. We had a great end in Richard Williamson, and that is our basic formation. We had big strong halfback over here, Wilson, who would block like an end, and great runner, "Cotton" Clark. We thought that was the only formation for us to use. That was the formation that we ran in over ninety per cent of the time.

Q. When Georgia employed it against you, is that the formation that you had Leroy Jordan out in the pasture, as you said?

[fol. 563] A. Yes, sir.

Q. All right, sir. The next and last entry, "drop end off, contain with tackle," having a "Georgia" and an arrow pointing to "drop," and having "Defense" written below it within parenthesis. Did that entry mean anything to you as related to either Georgia's or Alabama's football team?

A. Well, it does to us, sir, because we have been doing that for years. We drop the end off and try to contain with a tackle. I might say the last time we played Coach Butts' team in Athens, he also broke us of doing it because he hurt us badly, but that is what we wound up doing in this game.

Q. Do you know whether or not the University of Georgia uses that same defense?

A. They use it some; yes, sir; I don't recall how much.

Q. That's all the notes. Well, there is an entry, final entry; you might read that and say if that means anything to you?

A. Well, the "614" is one of our office numbers. That is the only thing that means to me.

* * * * * * *

PAUL WILLIAM BRYANT having resumed the stand, testified further as follows:

Direct examination (continued).

By Mr. Schroder:

Q. Coach Bryant, returning to the Saturday Evening Post article for a moment, it reads, Page 81, Column 1, that the telephone operator was overheard to say this to the [fol. 564] other party on the phone, " 'Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?' " This call,

although the Post article reads that it took place on Friday morning, September 14, I believe that the notes which you just had in your hand indicate the man listening in one the call recorded that it happened on Thursday morning, September 13. I want to direct two questions to you with respect to that quotation I just read from the article. The first one is, how close is the practice field at Tuscaloosa on the University campus to the telephone there, the nearest telephone in the office there?

A. To 641, sir?

Q. Yes, sir.

A. Well, it's three blocks, but since this came out, I have timed it, and knowing where the car was, walking out of my office and getting in the car and driving to the practice field and going through the gate and walking out to where I would be on the practice field and coming back, it takes thirteen minutes for me to do it, knowing where the car was and knowing I could get in the gate, and so forth.

Q. Does the date September 13, 1962, have any significance to you since the notes here that you have been looking at a moment ago indicate that the telephone call was intercepted at about 10:30 or 10:40 in the morning?

A. I don't know what you mean, sir.

Q. Was the University of Alabama practicing football on that day at that time?

A. No, sir; we were not. We had discontinued our two-day practice; we were not practicing that morning.

Q. Going further down Column 1 and reading again, this [fol. 565] quotation which is attributed to Burnett. "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other, it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off." Coach Bryant, to your knowledge, did Georgia quarterback Larry Rakestraw have the defect or deficiency described in that quotation which I described to you?

A. Not to my knowledge, sir.

Q. Would that have been of interest to an opposing coach or opposing players to know that a quarterback on the offensive team did have that tendency?

A. Well, sir, it might have been to some, but due to an experience I had once, it wouldn't have been to us.

Q. How is that?

A. We wouldn't have been interested at all.

Q. It is of no interest to know whether or not the quarterback is going to pass or run?

A. Well, if he knew that, but we knew that about a quarterback once, and we played him. We had gotten it out of a film, and we double checked it the week before, and I thought we were going to win the game, and the press and experts and so forth thought we were favored, and we played the quarterback, and were beaten thirty-four to seven or thirty-four to nothing, and I haven't been interested in what quarterbacks do anymore.

Q. What team was it?

A. It was L. S. U., that means Louisiana State University, L. S. U., when I was with Kentucky.

Q. There is one note among the others I reviewed with you before the recess this morning which one of my part-
[fol. 566] ners did not get the full answer, and I am not sure I did either, so I will ask you once more about it. It is on Page 4, and it reads, "Baer slot right, split right end out." Now, my question about that particular entry is this: does it mean anything to you with reference to the University of Georgia football team?

A. It does to our team, sir.

Q. Does it mean anything to you with reference to the University of Georgia's football team?

A. No, sir. However, the year before, and we were anticipating it this year, but they didn't have the slot, as I recall it. They had the end tight with the back which would actually be a wide slot with unbalance, but the way that is written there it doesn't mean anything to me as to the Georgia team.

Q. But you say it does mean something to you insofar as your team is concerned?

A. Yes, sir; it does; because our basic formation is the one on the bottom there which is slot right, left end out, and occasionally we will come up, and, of course, with that, your strength, your running strength is over here to your right.

Q. To here?

A. Yes, sir. But your throwing strength, I mean you have the type passer we have, he is out on the left, and they may put their rover or anyone may put their rover over there.

Q. When you say "rover"—

A. Double defending—

Q. The defending—

A. Double cover.

Q. All right, sir.

A. You come out quickly with the end on the other side.

[fol. 567] Q. With the end over here?

A. Yes, sir; and we do that occasionally. And we want to go quickly when we do, hoping that they will have the rover on the wrong side or make a defensive mistake.

Q. Returning to the article, again, there is reference made in the article to the fact that something was said in the conversation, the alleged conversation about—and I can't find it at the moment—but about a telephone—whether or not Coach Butts was going to be at home on Sunday, and that you were to call him back on Sunday. I believe I asked you about that a moment ago, and you said you had no independent recollection of it, and that you had learned only by looking at the telephone records that there was conversation on Sunday between somebody using a phone in Tuscaloosa and someone using a phone at Coach Butts' residence.

Mr. Cody: Well, now, I want to object to Mr. Schroder testifying, Your Honor.

Mr. Schroder: I am not trying to—

Mr. Cody: I don't mind it if you will take the stand.

The Court: Yes, sir; I think you can ask him—the proper method—I sustain the objection. I think the proper method would be, was there a phone call on that day, and what was the gist of the conversation, if you remember it.

[fol. 568] Mr. Schroder: All right, sir.

By Mr. Schroder:

Q. Was there a phone call on that day from you to Coach Butts that you recall?

A. Not that I recall, sir, but according to our record, our telephone record that we had, a call was made.

Q. All right, sir. Do you or not know the substance of it? Do you know what was said?

A. On that particular time?

Q. Yes, sir.

A. No, sir; I do not.

Q. Were any other calls made by you on that day?

A. According to my—our records, and this surprised me, because actually I thought I was in Birmingham doing a commercial for Coca-Cola, but according to the record from the telephone company I also talked with Coach Darrell Royal.

Q. Who?

A. Darrell Royal at the University of Texas shortly before the call was made to Coach Butts' number.

Q. Do you have any knowledge about what you talked to Coach Darrell Royal about?

A. It had to be football, but I don't know.

Q. How long did that one last?

A. I think according to our records thirty-seven minutes.

Q. During September, 1962, did you or not have occasions during which you discussed matters with Coach Wallace Butts?

A. Yes, sir; both personally and over the telephone.

[fol. 569] Q. Will you tell us what some of the matters were that you did discuss with him?

A. Well, some of the things that I know I discussed with him, I don't know when, sir, but first of all it would be schedules. I don't mean this is in any certain order of importance, but schedules, because we have discussed—been discussing over and over about the advisability of moving the game further up into the year, about playing over there, whether or not to play the game in Tuscaloosa or in Birmingham, for Georgia to buy some lights and get them up there where we can play at night and draw a lot of people.

I know that we are bound to have discussed tickets. We certainly should have, because I don't think they have the IBM machines that we have to keep up with the tickets. His ticket office could never tell us how many tickets they had sold or how many they had left, and consequently when we played the University of Georgia we had a sell-out. We have four or five thousand outside that can't get in, and later on they send us back several hundred, five hundred tickets that we could have sold a dozen times, and I should have been talking with him about that, whether I was or not.

You have always got problems—not problems, but you have got to discuss your band situation. They don't just walk up and march in. They have to have preparations made for it. As I recall it, maybe one or two high schools—I don't recall—but they were very fine, did a wonderful job. They represented Georgia last year. We could have been talking about that.

We could have been talking about what time they wanted to work out; I don't know.

[fol. 570] We could have been talking about this investment we are both interested in; I don't know.

Q. Do you know whether or not you were talking to him about the enforcement policies of certain rules?

A. I was leading that because—yes, sir; I don't know about that particular day, but I discussed it with him several times. He was in Buffalo at an informal meeting, and there were several—we were directed by—in writing from the Commissioner and from the NCAA, or the Coaches'

Association, about the way they were going to interpret or enforce the butting or the unnecessary butting or the late whistle the butt block, and I still don't know what they meant, but when Wally returned from the meeting in Buffalo, he called me, and I appreciated it very much. He didn't only say Alabama, but since we play defense pretty hard, I think he said, "I think this was directed at you and L.S.U. and maybe someone else," but said "it is something you should know, because the directors are coming out with it." I don't know whether it come out then or not. "But there is something you should know, because it would be a shame for you or any team to lose a good player like Leroy Jordan," just using Leroy Jordan as an example, "any time, early in the game, or something, just because you didn't know how they were going to interpret the rule." It wasn't a rule change; it was an interpretation. So I asked Wally, I said, "When I see you, let's get together, and I will talk about this."

I did on a couple of occasions, I have talked with him about it on the phone. I went to a meeting in Birmingham where he made a talk about it. Commissioner Moore presided. We all—we wound up then in confusion. We invited Mr. Gardner to our campus to observe our practice. [fol. 571] We wanted him to see what we really taught, not so much to interpret the rule, but we wanted him to see what we taught, because I don't want to go out there on Saturday with folks coming in blowing whistles and me not knowing what they were blowing them about and costing us a football game. Although Mr. Gardner helped us tremendously, I didn't know how they were going to interpret the rule until about the third game, because you play and you see how they are going to act, and I am sure I talked with him about that on numerous occasions.

I talked with him about football, football in general, because that is my business; that is my hobby; and I just talk to him in general about football. I know I have talked to him about our football. I know I have talked to him about his football, particularly his passing game, because

he is the greatest passing coach this area has ever known, and most of us, what little we know about passing, we learned it from him. I had talked this over with several about passes in particular, but we could never make it go. We scored a touchdown against the University of Tennessee this year, and I think it was responsible for this game, because we hadn't been scoring on it. And another one was on a pass that he has hurt everybody on, particularly Georgia Tech or a team using the Georgia Tech defense with a wide man, whether it is a back or end, and a long motion in running a deep circle, a deep side line, and I know I have talked to him about that, because those are two things we wanted to do.

I have talked to him, I am sure, a lot of times about football in general. You can't get two coaches together when they don't talk about that.

Q. Is there anything unusual about that?

[fol. 572] A. About them talking?

Q. Yes, sir.

A. I don't know. I think I have read where a whole lot of them say they do. I have talked a whole lot with different coaches. I used to talk a lot to Coach Dodd here at Georgia Tech. I used to talk a lot to Coach Woodruff down in Florida, and I probably shouldn't say this, but Coach Woodruff, is longer winded on the phone that Coach Butts is. You get him on there, and you are going to miss dinner.

Q. What was—let's see; the first game in 1962—what was the record of the University of Alabama in football in 1962?

A. We had a great bunch of youngsters that dedicated themselves, and they won them all.

Q. Well, did they receive any honor?

A. They received the National Champion, both news agencies, Associated Press and United Press, and the MacArthur Bowl Award for National Champions also.

Q. Coach Bryant, these notes that you and I have been discussing before the recess when we went over them one by one, would those notes, in your opinion as a football

coach, be of any assistance to a football coach preparing his team to meet a team in the near future when the information contained in those notes is alleged to have been transmitted by someone connected with the team that you were preparing your team to play?

A. Sir, there may have been a couple of things in there I would have rather known than not known, but those notes, as far as I am concerned, would not help me one iota. As a matter of fact, all it would do is get me confused. The kind of things I want to know weren't in the notes.

[fol. 573] Q. Well, as a head football coach preparing your team for a game, what sort of things would you be interested in?

A. May I go to the board?

Q. Yes, sir.

A. First of all, what you do in the way of offense or defense or preparation is not going to win; those players wearing those uniforms are going to win and what they have in there is going to win. The things I would like to know, I would like to know the game plan, and the kind of stuff we have been talking about is not the game plan. The first thing I would like to know, they are a field position football team. The field, the sidelines and hashmarks are not going to change, so the first thing I would like to know, both offensively and defensively, is what this team is going to do over here on the hash mark, because they will be on the hashmark sixty-seven per cent of the time and I thought that Georgia, when I learned their game plans, which was last week, did a real fine job, because they came out and put their formation into the hashmark knowing that we overshifted or put our rover to the long side of the field, for at worse they were going to get a balanced line defense, they weren't going to have to block the extra man over there. That was real important. I wanted to know what they were going to do there. If I had known they were going to do that, then I would line up in a balanced defense and disguise. On the snap of the ball I would have two extra guys getting over here where they are going.

Now, then, in the middle of the field out here, in game plans we'd like to know what their plans were. I learned last week that their plans out here was to take their formation and put it one way, knowing that we were going to [fol. 574] overshift and put an extra man over here. See, we have one more man over here than we have over there. Now, they have us over here. They take a one-step motion, and they are back and their strength is over there, and they hurt us. That is what I'd like to know.

Now, the next thing I'd like to know is, you have eleven to fourteen or fifteen first downs in the ball game. You are going to get the ball, normally speaking, from eleven to fourteen or fifteen times. If you get it any more than that, you are getting beat and they are kicking off to you. What I want to know, both offensively and defensively, I want to know what they are going to do on first down, because it is a guessing game on first down. After the first down somebody has an advantage, see, so the first down—now, in our football, and I will be quiet, I know I am talking too much—but in our football, here is a twenty yard line and here is a twenty yard line, and I don't care, you can check the pros, the Georgia Tech or Georgia or South Carolina or Notre Dame, I don't care, anybody; there will be five to seven plays in this area here between the 20's, five to seven plays that is going to determine the game. It may be one down to make two yards; it—offensively or defensively. It may be one down to make sixteen yards, either offensively or defensively. It is going to be five to seven plays that is going to decide the game. I want to know what they are going to do on those five to seven plays. When they get down in here on the goal line, I don't care what they do. They only got eleven, and we are going—we don't care what they do down there.

So, if you will tell us what they are going to do field position-wise, and what they are going to do on first down, [fol. 575] and what they are going to do on these big downs, five to seven of them, then we have a game plan, and if you can't win then, why, you are playing somebody

that is an awfully lot better than you are. Does that answer your question?

Q. Yes, sir; thank you. On the first page of the Saturday Evening Post article about you and Wallace Butts. I am going to read it to you, quote, "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

"Before the University of Georgia played the University of Alabama, last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ball players gone wrong as in the 1919 Black Sox scandal. The corrupt here were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know yet. For now we can only be appalled."

Coach Bryant, I want to ask you this question. Did or not you and the Plaintiff in this case, Wallace Butts, throw, fix or rig the outcome of the Georgia-Alabama game as you have been charged with doing by the Saturday Evening Post?

A. Absolutely not, and if we did we ought to go to jail, and anybody that had anything to do with this ought to [fol. 576] go to jail, because we didn't. Taking their money is not good enough.

* * * * * * *

Cross examination.

By Mr. Cody:

Q. Coach Bryant, do you—you have got a very vivid memory of this football game of September 22, 1962, and

you have pretty well described that to the Jury. That game lasted sixty minutes, didn't it?

A. Yes, sir.

Q. As does every game?

A. Yes, sir.

Q. Has it occurred to you to check up on the length of this telephone conversation you had with Coach Butts on September the 16th?

A. It has.

Q. How long was it?

A. According to the record I got, sixty-seven minutes.

Q. And you don't remember anything about it?

A. I don't remember when or which one. Insofar as the football game, my vivid memory, I went over the notes up there this morning. Outside of that I hadn't even looked at them since the game or the movie.

Q. You put this call in to Coach Butts, didn't you?

A. I don't know.

Q. You don't remember whether you—

A. I don't know the call was placed.

Q. You don't know you made the call, and you don't remember anything that was said?

A. I remember plenty of things that were said sometime, [fol. 577] sir. I don't even know the call was made. I am not sure all these notes weren't made after the call was made.

Mr. Cody: I move to strike that, Your Honor; that is not in response to my question.

The Court: Well, let's get the session down to what the facts are.

By Mr. Cody:

Q. You say your extension number is 641 on the switchboard down there?

A. That is one of them; yes, sir.

Q. What's this investment you and Coach Butts made; what is that?

A. Continental Enterprises, sir.

Q. Who got you into that?

A. Nobody got me into it; I got myself into it. A friend of mine told me that he thought it was a good investment, and I got myself into it.

Q. And if you sold out today—you still have your investment; is that right?

A. Some; some; yes.

Q. And if you sold out today, what would your loss be?

A. Well, since I talked to you in Birmingham, sir, it's gone down a little. I would say that my loss would be half of about sixty thousand dollars. It would put me a little loser; I am a pretty good winner on it so far.

Q. When we were talking about it in Birmingham, you said it was sixty then, didn't you?

[fol. 578] A. I think I said it would be forty to fifty. It's gone down a little. It would be a little more than it was then.

The Court: I didn't—is that loss or gain?

The Witness: That is a loss.

The Court: A loss?

The Witness: Unfortunately.

By Mr. Cody:

Q. Who is the man that got you in that investment?

A. No one got me into it, sir; Mr. Sam Wilson.

Q. In Jacksonville?

A. Yes, sir. He is the friend that told me about it, told a lot of people in our profession about it. He didn't get me into it. I thought it was a good deal, and the first time I bought it I made for me a lot of money out of it. The next time I bought it it went down.

Q. Do you remember when I was in Birmingham taking your deposition?

A. Yes, sir.

Q. On May the 27th?

A. Yes, sir.

Q. Didn't you make this statement: "And as a matter of fact, one of them, the reason him telling me is a good company, and going to make money, one of the reasons I [fol. 579] invested in it was because of Wally." Who were you talking about then, Wally Butts?

A. If I said that I was talking about Wally Butts, and I must have said it if you have it there.

Q. Did he induce you to buy—

A. No, sir, but he was a close friend to these people that I think own control of the company.

Q. But you did say, when this deposition was taken, that you went into it on account of Wally?

A. I don't believe I said it, but if you have got it down there, maybe I said it.

Q. Well, you remember being sworn before you gave this deposition?

A. Yes, sir.

Q. And it was before a Court Reporter?

A. Yes, sir.

Q. And your counsel was present?

A. Oh, I remember that, but Wally didn't talk me into buying it.

Q. What's that?

A. Wally didn't talk me into buying it.

Q. I didn't ask you that.

A. I might have talked him into it as far as that goes.

Q. I am talking about what your testimony was on May the 27th.

A. Well, it's the same now.

Q. Now, Coach Bryant, let's get back just a minute to some of these possible subject matters that you might have discussed on the phone with Coach Butts. Did you know that he hadn't had anything to do with the football team in nearly three years?

A. Why, certainly I knew that. He was Director of Athletics.

[fol. 580] Q. But he had nothing to do with coaching; you knew that, didn't you?

A. Why, certainly I knew it.

Q. All right, sir. Now, why would you be talking to him about a change in the schedule?

A. He is the Director of Athletics; he makes the schedules.

Q. Well, Coach Bryant, we are talking about an upcoming game that was to take place on September the 22nd, and you—we are talking, too, about a telephone conversation on September the 16th, six days off. How could you change the schedule of that game?

A. I didn't say I talked to him about the schedule on that date. I said sometimes I talked to him about schedules, many times. I doubt very seriously if we talked about the schedule that day, other than we might have talked about how fortunate we had been to move it from Tuscaloosa to Birmingham, because it was originally scheduled for Tuscaloosa and we would have made thirty or forty thousand dollars more out of it to play in Birmingham.

Q. I know you—

The Court: The Athletic Association would have made thirty or forty thousand dollars?

The Witness: Yes, sir. I represent them.

By Mr. Cody:

Q. I notice you made a reference to Leroy Jordan when you were giving us this talk about what you might have discussed on the telephone on September the 16th. You say he was the best player on your team and you had [fol. 581] reference to the possibility of him being out of the game?

A. Sir, the first time that Wally called me after he returned from Buffalo is when Leroy Jordan was mentioned, the first time.

Q. And you remember the conversation?

A. Yes, sir; I sure do. You mention Leroy Jordan, and I will remember it pretty good.

Q. When did that take place?

The Marshal: Let's have order.

A. I didn't look that up. You can look it up. I think it was sometime late in July.

Q. Who is president of the University of Alabama?

A. Dr. Frank A. Rose.

Q. Do you remember talking to him about three hours one Sunday night?

A. I certainly do.

Q. Did you know that on that same morning he had had a conference in Birmingham with Dr. Aderhold, President of the University of Georgia?

A. I didn't know it, sir, until about the middle or after he got through with me.

Q. And this matter that we are discussing today was the same subject matter of that conversation?

A. Yes, sir.

Q. In his conversation with you?

A. Yes, sir. And later at other places with Dr. Rose.

Q. Are you familiar with this letter that Dr. Rose wrote to Dr. Aderhold?

A. I saw it.

Q. In which he quotes you?

[fol. 582] A. I saw it in the paper or someplace, mostly in the paper, I think.

Q. Didn't Dr. Rose show it to you?

A. No, sir.

Q. Are you familiar with the letter?

A. I saw it in the paper, I think, sir; I know I saw it in the paper.

Q. Do you remember what was in it?

A. I remember some of the things that were in it.

Q. Let me ask you if one or two of these statements are true.

A. Okay, sir.

Q. "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant on at least two occasions." Is that true?

A. Yes, sir.

Q. Passing on to the third paragraph, "Coach Butts had discussed with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause Leroy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team"; is that right?

A. No, sir; it is not, and if you will get his letter that he wrote later, you will see that it is not.

Q. Let's pass on to the fourth paragraph, then. "Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penal- [fol. 583] ize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16." Is that correct?

A. No, sir.

Q. As a matter of fact, you called him on September 16; that is your evidence, isn't it?

A. I don't know that I called him. According to the telephone records somebody called him, and I suppose—I probably did, but I don't know that, sir.

Q. Let's pass on to the next paragraph. "It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legalities of his defenses. This Mr. Gardner did the following week." Is that correct?

A. No, sir; it isn't. You get Dr. Rose's letter—you get Dr. Rose over here, and he will answer that pretty well for you.

Q. We will get to him later. Let's finish your part of it first, sir.

A. Okay, sir.

Q. Passing to the next paragraph. "Coach Bryant informs me that calling this to his attention may have favored

the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules." Is that correct?

A. No, sir. We don't use illegal plays anyway. It might have saved us penalties or saved us losing Jordan.

Q. And how long has Dr. Rose been President of the University of Alabama?

A. Sir, I think six years.

[fol. 584] Q. Was he there when you came as coach?

A. Yes, sir.

Q. Do you know whether or not he ever taught English?

A. I don't know, sir.

Q. You know anything about—

A. I think he is capable of teaching anything.

Q. You know anything about his educational background?

A. No. I know he is one of the best educated men in the world but not on football terminology. I can beat him on football terminology.

A. I think that letter was hurriedly written by the President, going out of town, to another President, that he thought it was in confidence, and I think that he—he came out with another letter explaining the difference in plays and techniques, and that he didn't understand football terminology, and I think you get him up here on this stand he will straighten that out real quick like.

Q. Let me ask you this question, then, Coach Bryant. Doesn't it seem strange to you that in your three-hour conference with Dr. Rose that you then remembered the subject matter of this alleged telephone conversation, and yet you don't remember anything about it now?

A. I didn't remember anything about the telephone conversation then or now any more than I have said. The things that we could have talked about, I don't know even it was a telephone conversation. I told him the same thing that I am telling you now.

* * * * * * *

JIMMY SHARP called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

[fol. 585] Direct examination.

By Mr. Schroder:

Q. State your full name, please, sir.

A. Jimmy Sharp.

Q. Where do you live, Mr. Sharp.

A. Well, I am presently residing in Tuscaloosa at the University of Alabama. My home is in Montgomery, Alabama.

Q. Speak up so the gentlemen over here can also hear you, please sir. Where did you receive your college education, Mr. Sharp?

A. At the University of Alabama.

Q. Did you engage in athletics while there?

A. Yes; I did.

Q. Did you play football while there?

A. Yes.

Q. What position did you play on the football team?

A. I played guard.

Q. Were you on the first team?

A. Yes, sir.

Q. In last fall's game, 1962, between the University of Georgia and Alabama, did you play as first string guard for the University of Alabama?

A. Yes; I did.

Q. Mr. Sharp, in that football game, which was played in Birmingham, did or not the University of Georgia present a formation which came as a surprise to the University of Alabama?

A. Yes. We weren't prepared, we weren't expecting the formation that they came out with. It was what we refer to as a slot out.

Q. Would you diagram that one on the board here for me, please, sir?

[fol. 586] A. This end split way out. There is the basic line formation which we weren't expecting, and the defense we were in at the time, the reason we weren't expecting it, all our game plans—

Q. Would you please let the Jury hear what you say. Speak a little louder.

A. This was the formation that sort of—it confused us. It did confuse us. We hadn't anticipated it, and we couldn't make the necessary adjustments.

Q. Is that commonly known or would a description of that be slot right with the left end out fifteen yards?

A. Yes, sir.

Q. All right, sir. That formation was presented by the University of Georgia during the first quarter of the Alabama game?

A. Yes; I believe it was five times.

Q. In what respects did it confuse you as one of the members of the defensive team and the other members of the Alabama Defensive team?

A. Well, me, in particular, as far as my position, I wasn't the one that was greatly affected. It was affecting our linebackers and our secondary. The way this would have—if we had played the defense that we had worked for in the game, it would have taken our linebacker, Leroy Jordan, the strongest player on our team, and placed him way out in order to cover this.

Q. Is that what happened?

A. Yes, sir. Well, at first it was just mass confusion, because we hadn't worked in practice on the adjustment. That would be the normal adjustment, and we hadn't worked on it, and there was a lot of confusion, and they were wide open to the play.

Q. That play was successfully used by the University [fol. 587] of Georgia on at least four out of the five times it was used?

A. Four; yes, sir; three of them were successful and on the fourth the fellow just dropped the pass. He was wide open down the sideline.

Q. The other—are you familiar with the other formation that was employed by the University of Georgia to any particular length or extent of time during the game? Could you describe what that was?

A. I guess you are referring to the slot formation?

Q. Yes, sir. Could you diagram that for me right here, please, sir? That is what is referred to as the regular slot formation?

A. Yes, sir.

Q. What distance is there in the regular slot formation between the tackle and the end?

A. Well, the normal distance here is three yards. Of course, it varies a few inches or something like that.

Q. You may go back to the stand. Did or not the University of Georgia in the spring game of that year, 1962, give any indication that that was their basic formation that they did expect to use?

A. Yes, sir; they did. In fact, they ran it out of a total of a hundred nine plays—a hundred and thirteen plays in the game, and they ran it a hundred and nine, some form of this slot.

Q. From that formation approximately how many plays can be run?

A. Well, there are a variety of plays you can run from that. You can run your whole attack. This is designed for several reasons. The basic principals behind it—by placing the slot man over there, you are trying to create a line for a running game and also to compliment a spin-[fol. 588] out action which Georgia had come on strong with this Rakestraw, and he was a real fine passer. You can get receivers out fast into that flat or down, you can —your halfback in the slot can aid in blocking; he is closer to the line. He can get to him quicker. Your defense is spread out to create that lane. Also the defense is confused by him being so close to the line that the defensive personnel doesn't really know who is coming. He's got an extra man, where before he had a little time to look and check. Georgia had used this formation in '61. At this

time they had experienced quarterbacks. They had just lost the fine Tarkington and no experience, of course, and they had primarily in their spring game, in their formation —what I mean by that, the three backs in the backfield, with no slot or split. They would run this formation and other formations in '61 a number of times. Towards the end of the season they began to run this formation and other passing formations. In fact, they ran the slot out in '61 also. But this time I think they had different distances. I am not sure about that, but this was the cause of the upsurge of Rakestraw and his passing game and into the '62 season we had taken all of the films and all the spring games statistics and plays and what they had done, and we believed this to be what they would do, since Rakestraw was such a fine passer, and they had more speed in the backfield. We thought that this would be the fine play.

Q. You mean formation?

A. Or formation.

Q. Does Alabama use approximately the same formation in its offense? Does Alabama use this formation also?

A. Yes, sir; they do. Georgia's offense and ours are very similar in some ways.

[fol. 589] Q. During the last week of practice before the game on Saturday night in Birmingham, September 22, were there any changes in the basic defensive formations that you had been coached on before that week?

A. No, sir. No changes. We, of course, when we work on the defense, we work on, I guess, about every formation that the coaches can think of that has ever been run, including some that some of the coaches make up, to expect the unexpected, but we hadn't felt they'd throw that, and it shows in the film, and by the five plays—well, the four plays being open, there was some little confusion.

Q. You said you hadn't expected Georgia to throw that?

A. I mean, the slot out.

Q. The slot with the left end out, known at Georgia as pro-set?

A. Pro-set.

Q. Were you a member of the 1961 National Champion Football Team?

A. Yes; I was.

Mr. Schroder: Just one moment. May I check?

The Court: Yes, sir.

By Mr. Schroder:

Q. During the game in Birmingham between Georgia and—the University of Georgia and the University of Alabama, did you yourself or did you hear any of your brother players on Alabama's team call out any such thing as "you can't run '80-8 pop' on us"?

[fol. 590] A. No, sir; I don't think I have ever heard that. That was new to me when I read it. We do—we are taught to key different people in the backfield and especially the guards. Jimmy Wilson and myself—

Q. Speak up, please.

A. Jimmy Wilson and myself were coached by Coach James to look into the backfield, to pick up keys and study the game films that we had on their previous games, things they have done, and try to pick up certain keys. We would holler out; we had a code we'd holler out for this to alert the other guards, but that was the difference between me and Jimmy.

Q. Other members of the team also have trade names or words they would use in exchanging information?

A. Yes, sir. Sometimes playing teams that had a swing-back sitting out by itself, they'd go to run back to the other side away from him, you'd catch him leaning back. It is a normal tendency; you can't get a level stance and come back this way; it is a tendency, the lean-back. We had certain codes. I know one game we used "red" and "white", "red" if you are going right and "white" if you are going left. The reason we used code names, we felt if we called out, "Richard, he's coming right", or "Bill, he's coming left", we are going to tip them off that somebody on their team is being tipped off, and at the half time they can go to the sideline and correct this.

Q. Is it customary or not during a college football game for the two opposing teams to carry on a lot of chatter among themselves?

A. No, sir; it is not customary. Of course, you are not supposed to. There is always some words passed.

Q. I didn't—I mean, friendly chatter?

A. Well—

[fol. 591] The Marshal: Order, please.

By the Witness:

A. I was referring to that too. You play against these boys two or three years, you begin to know them real well, and you studied the game films, and you study everything they do, and you know them, you get a good block on somebody. You say, "how did you like that, So-And-So," or something like that. It's always a little something going on.

Q. Always something going on? Did you or not get to know the Georgia guard, Wally Williamson, during the three years he was at Georgia?

A. Yes, sir; I got to know him.

Q. Wally play in that game for Georgia in Birmingham?

A. Yes, sir.

Q. Do you know the difference between a switch block or an exchange block by a guard and a tackle and pulling a guard out to lead interference?

A. Well, yes; I think I know—your terminology is not the same as ours, but I think I know what you are talking about.

Q. It is not really mine. You tell me what a switch block means to you or an exchange block or swap block?

A. A switch block or exchange block to me, in our terminology, I think, would be what we call a green.

Q. Green?

A. We have code names. We call it the line of scrimmage; it is according to how the defense is lined up. We'd come to the line and recognize the defense. We will do a lot of recognition blocking, seeing the defense and blocking

as such, and we come to the line and "green" is the exchange block between the guard and tackle, when the play [fol. 592] was going wide or spin-out pass where the two men that the guard and tackle had to block had outside angles on them, meaning that both the guard and the tackle would have to really get after it, and it was a real difficult block. So, by alerting each other with "green" the tackle would come down and block the guard's man and the guard would pull out and loop back in, getting a little depth to take the other man, thereby be in a little better position in being able to block them, and we did this very effectively.

Q. That is, when the guard and the tackle swapped, switched, or exchanged blocking assignments, the guard then comes into the area where the tackle was supposed to block and protect that area; is that right?

A. Yes, sir.

* * * * * * *

CHARLES PELL, called as witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. Your name is Charles Pell?

A. Yes, sir.

Q. Where do you live, Mr. Pell?

A. Tuscaloosa, Alabama presently.

Q. Where did you receive your college education?

A. At the University of Alabama.

Q. Are you still studying there?

A. Well, I am in summer school; yes, sir.

[fol. 593] Q. Have you participated in athletics there at the University?

A. Yes, sir.

Q. Are you a member of the football team?

A. Well, I was until I—my eligibility ran out.

Q. Did you—were you a member of the 1962 Alabama football team?

A. Yes; I was.

Q. What position did you play on that team, Mr. Pell?

A. I was a tackle.

Q. A tackle?

A. Yes, sir.

Q. What do you weigh? What did you weigh on the night of the game?

A. 189.

Q. Do you know Mr. Jimmy Sharp?

A. Yes; I do, sir.

Q. Did he play on the same team?

A. Yes; he did.

Q. He played guard?

A. Yes, sir.

Q. What did he weigh?

A. He weighed about 182.

Q. Were you on the first team?

A. Yes, sir.

Q. Now, Mr. Pell, in preparing yourselves to play in a football game against any university, do you have given to you any information relating to the strength and weaknesses of your coming opponents?

A. Yes, sir; we do. We have a scouting report which is compiled for each opponent.

Q. Would you please describe for the Court and Jury what is meant by a scouting report?

A. Well, a scouting report is compiled by one of the [fol. 594] assistant coaches. Some of the coaches, they divide up the games, and their responsibility is to scout this team and to pinpoint their strong points, pinpoint their weak points, and then to put it down into a scouting report. Also to study old films, break the games down. For instance, if—all the plays they run on first down and ten yards to go, all the plays they run on second down and long yardage, so on and so forth. This will give the team a picture of their tendencies. They also have the defenses that the team has been known to run. These defenses are

not only the previous year's, but also the defenses that it is known the coaches believe in, also the offensive ideas of the coaches, and they compiled this from years before and compile downs so the players can understand it and study it and learn it and be better prepared for the game.

Q. Is that common practice in football?

A. Yes, sir; it is.

Q. Now, did Alabama have a scouting report such as you have described preparatory to its game against the University of Georgia in 1961?

A. Yes; we did.

Q. Would you tell the Court and Jury in essence what that was?

A. Well, the scouting report was compiled by Coach Charlie Bradshaw, presently at Kentucky. It was his job to find a scouting report, and actually it contains all that I described, and it has an introduction. It gives us an idea of what we have to do to win, and by studying what Georgia would do or has been doing or we think they might do, we have a better idea. We go in the game prepared mentally and physically. In 1961 we had an idea of how Georgia was football-wise, and I quote, "They will be bigger and [fol. 595] physically stronger than we are. The backfield will not be as fast as their starting backfield of last year but they do have some good backs with Jackson and Gutherie." And it also tells us what we had to do to win: "We can beat Georgia if we give our very best 110 per cent effort." And it said also, "It will take our very best to win."

Q. Do you have a scouting report for the game of 1962?

A. Yes; I do. Also it contained all that I described before, plus "Georgia is going to have another fine football team. They will be bigger physically and stronger than last year." Their young backs, they have a lot more speed in their backfield, their quarterback string with Rakestraw had been improved since he had gained a year's experience, and he was a much more mature ball player, and their strength would again be in the line, and their weakness was in the defensive secondary.

Q. That scouting report or any scouting report is usually completed sometime in August?

A. Yes, sir. They usually have all their work down in August; yes, sir.

Q. And from the first day of practice on up until the first game the players are coached and trained in accordance with the information that is contained in the report?

A. Yes, sir. Also that and also during the spring practice of the previous spring we prepare for our first game and our next season game during the spring. That is the purpose of spring training.

Q. From September 1st until the game against Georgia on September 22, were there any significant changes made in the defenses that Alabama was preparing to use in that game?

[fol. 596] A. No, sir; there was not.

Q. What defense, primarily, did Alabama plan to employ against Georgia in the game of 1962?

A. Well, Coach Stallings, our defensive coach, had, after studying their spring game, which showed Georgia running the slot offense to a tune of 109 times out of 113, so Coach Stallings and the other coaches got together and devised a defense we called the " 'Bama" defense. This is a regular 5-3 defense.

Q. Is that what you are referring to when you refer to the slot?

A. Yes, sir.

Q. And the defense that Alabama was preparing against that particular formation was you called the 'Bama defense?

A. Yes, sir; it is a version of the 5-3 defense, and we just turned it 'Bama.

Q. That is just a code name?

A. Yes, sir; just a code name.

Q. Would you describe that defense to us, please, or maybe you could do it better if you came here and did it with chalk on the board.

A. Well, first of all—first of all we would have the end playing a 9 technique.

Q. Playing a what?

A. A 9 technique, which is principally outside-in. He's got containment.

Q. What do you mean by "he's got containment"?

A. He has to keep everything from coming outside of him. Then, also we had a man in the 3-technique right here. Then, we had a man—3-technique is between the guard and tackle. This is so he can play both ways and probably draw two blocks from one person, I mean, two blocks by him, therefore, freeing the linebacker so he can be more effec- [fol. 597] tive. Also we had a man head-on the center, right on his nose. Then we had a man in the 4-technique over here. Then we had a man in a 7-technique, what we called —which is head-on this halfback, that is in the slot. Then we had another end and the 9-technique on this side with the same responsibility as this one. This tackle was head-on the tackle. What this defense was primarily supposed to do—also, we had our linebacker in here. Then our big weapon, Leroy Jordan here. And that is basically what the 'Bama defense is.

Q. Is there anything in the use of numerals? I heard you say 9, 3, 4, or something; does that mean anything?

A. It simplifies the learning of your defensive assignment. We have rules for defenses that—for instance, the 9-technique, we have a 1-technique, a 2, 3, 4, 5, 6, 7, 8, and 9, which stretch from here all the way out to here, either in the gaps or on their nose, and doing this it is simplified. Instead of going through the whole thing, you tell them, "Your job is the 3-technique", and they know what the 3-technique man is required to do. Therefore he can carry out his job more effectively and learn it a lot easier, because there is a lot of stuff to that.

Q. This offensive set that is shown here is known as the normal slot?

A. Yes, sir; it is called—it is a normal slot used with every team we played. They use the slot offense, and we use it ourselves.

Q. And I believe you testified that Georgia had used this a number of times in its spring game?

A. They had used it quite a few times in their spring game also in '61, the year of '61. This was one of their offensive formations. So, therefore, the slot formation is nothing new.

[fol. 598] Q. Your scout report man who prepares your scouting reports, does he give the team at the University of Alabama any idea as to what formations he believes Georgia will stress because of having seen it before or the cause of its personnel?

A. Yes, sir. The coach who scouts the opposing—I forgot to mention, when he is scouting the team he has a team permanently. When he is on the staff, very rarely do they change teams. You see, a coach—well, for instance, let's say Auburn. A coach scouting Auburn for five years, he knows their personnel as they develop freshmen, even from high school. Also he knows their coaches. He knows generally how they think, and he is required to express his opinion on what he thinks their strategy will be.

Q. All right, sir. Now, is the 'Bama defense, code name 'Bama—

A. Yes, sir.

Q. —set up primarily for the game that we are talking about?

A. Yes, sir.

Q. Now, in that game on September 22, 1962, did the University of Georgia go into any formation which made that an inadequate defense?

A. Yes, sir; they did.

Q. Will you show what that formation was down here, please, sir?

A. Yes, sir. Early in the first quarter we were going straight in to our 'Bama defense and playing it pretty well. Then they came out in the slot split with the end out here split on the side opposite of the formation, and, as you can see, with Leroy here, with all these men in here, there is where is where we want to play Leroy, that was the idea

of the defense. As you know, Leroy was a tremendous line-
[fol. 599] backer, and the object is to keep Leroy in the thick of the battle where he is best, where he can be more effective. Now, we can't move our end out here to cover him, so what we have to do is take Leroy. We have to take Leroy from here and put him out here in the open for a pass defense in playing this particular area in here and the other is still the same. Now, as you can see, Leroy is out here, and where Leroy does his best work is in here, as has been proven, and this weakened our defense in here; it weakened it tremendously. In fact, they ran it only five times the first half, and four times that was successful. Well, they failed—they dropped a pass one time, so three times it was very successful. We could not defend this man and still have our strength in here where we needed it.

Q. Was something subsequently done to rectify the situation?

A. Yes, sir. The coaches in the press box, which is customary, they have scouts up there viewing, and on the telephone, they saw what was happening in this formation. We weren't prepared for this formation as to overshifting to compensate for the change in the formation. So, at the halftime—one of Coach Bryant's basic defenses is what we call the split defense or split six, and going back to directions, going back to just plain stuff, we could compensate and shift to their strength and get Leroy back in here where he can help us or/and be effective.

Q. During the—

A. Would you like for me to show the reason, the split defense, and how it would help us?

Q. Yes, sir.

A. Now, in the split defense we have what we call a rover. He is called in because when they come out of the
[fol. 600] huddle, before they line up, he is in the middle; then he will go to either the wide side or the strong side or unbalanced line, whichever is happening at the time, whichever formation they are in, so we go into the split, and we have a man in the 3-technique, as I showed you

before. We have Leroy here. We have a guard in the 3-and have the other linebacker here. Also have a man there, 7 and 9, and over here, which is the tackle, and the rover drops off. Now, as you can see, we have a sound defense now with our strength where we need it in here. We have our personnel, Richard Williamson, the rover, very effective pass defender and outside man, and he was very capable of giving them trouble on that split end out there. Now, Leroy is in here where the thick of the battle is, and everything in here, that is where Leroy can really make hay, and the second half can prove that this was a great help to us, and also Georgia came out in the second half running this formation more effectively, which indicates that they realized they had only run it five times and could have hurt us four, did hurt us three times out of five, could have hurt us four. However, we had changed our defense to something to strengthen our part of it, so, consequently, that formation was weakened and we came out on top.

Q. Thank you, sir, go back to the stand. During the period from September 1st until the Georgia game on September 22, in planning its defenses, did the University of Alabama or not concentrate on any particular two formations?

A. No, sir; they did not.

Q. Any three particular formations?

A. No, sir; I couldn't say that either.

[fol. 601] Q. If the normal slot, as you indicated a moment ago, would have the end three yards out from the tackle—

A. Yes, sir.

Q. —if that end was, say, lined up four yards rather than three, or maybe as many as five yards instead of three, would that cause Alabama to make any basic change in its defense?

A. No, sir; we wouldn't have to make a basic change at all with our split defense, because our ends, defensive ends —I can say this with authority because left tackles were

defensive ends on defense, so he would—he has his rules, and you have your certain coaching points on the defensive techniques. Now, if the end moved out—would you like for me to show you on the board?

Q. Yes, sir.

A. Well, at three yards he would be here, and then the five yards he would be, say, here, with your slot man in here. As you can see on our split defense we have this man—actually, he would be in here with a three-yard split, but to illustrate it so you can see it, I will make it much larger. Now, instead of this guy playing in here on his outside eye, as he would on a 0-technique, he would simply play, maybe, on his inside eye, and consequently playing out through the man in order to do his job of containment and rushing the passer and making sure they did not get outside of him. So, you see, we could still stay in our basic split defense, be fundamentally sound with this man right here playing through his head and getting right there to keep him from coming around.

Q. Thank you, sir. Mr. Pell, for Alabama to know formations and plays which any team that it is going to play, such as the University of Georgia, in advance, what advan-
[fol. 602] tage would that be to Alabama?

A. Well, I can think of no advantage it would be.

Q. What else do you need?

A. You'd need almost a thousand other things before you could use it.

Q. Describe what you are talking about?

A. Well, if a player—if a player would know his opponent's plays, what plays he would run, how he would run them, he does not know what situations he would run them in. For instance, would he run them on first and 10, first down and 10 yards to go for a first, or would he run it on the second down and 2 yards to go for a first? Would he run it on third, fourth; would he—would he run it backed up? Would he run it in the middle of the field? Would he run it on a sideline, one of the hashmarks? Would he run it down there at the score—would he run it on clutch plays?

There are so many things that determine what play should be run. It would take—take so much to drill a boy or a player into knowing what the other team was going to do.

Q. Is what you are saying that knowledge of the play is not important but knowledge of when it is going to be run?

A. That's right. As you know—well, no; I don't suppose anybody has a monopoly on a football play or a formation. Once they imagine up a new formation, there is nothing to keep another team from using the same formation, and in coaching clinics they go over football plays, successful football plays. You can even buy a book in the bookstore that has successful ball plays. So, knowing what the play is does no good. Knowing what the formation is does no good. You have to know how they run it and how effectively they run it and when and where and how.

[fol. 603] Q. Thank you, sir. What is the Alabama philosophy so far as coaching the players or training the players during the week of the game?

A. Well, Coach Bryant, he even said this yesterday at the clinic in a speech, and he firmly believes it, we would always work hard, fairly hard on Monday nights because of the boys having the—the players having labs in the afternoon. We would practice on Monday night pretty hard. Tuesday afternoon we'd practice pretty hard. Wednesday sometimes we'd practice fairly hard. When we say "hard" or "moderately hard"; well, "hard" would be full gear for two hours practice; "moderately" would be an hour and forty-five minutes practice with little full speed hitting, more dummy for perfection drills, getting quick and getting aggressive and going over your assignments. Then, on Thursdays most of the time you'd go out in sweats and go through your game plans, offensive plays, get them down, work on perfection drills again, go through our defense, and a short brisk drill of approximately an hour and thirty-five or forty minutes. And on Friday most of the time we'd have—if we are on the road, we usually get there on Friday, work out in the stadium, a light work out in sweats for approximately, maybe, forty-five minutes, get

loosened up, get used to the field, and then the game on Saturday.

Q. Now, you have played against Georgia for three years?

A. Yes, sir.

Q. In 1962 in Birmingham, speaking from the physical stand-point, how did the two teams compare?

A. Well, Georgia, in both '61 and '62, was both physically larger and stronger than we were in the line; there is no doubt about that. It came out in our scouting reports; we [fol. 604] knew it. The team as a whole in '62, they had fairly much more speed than we did.

Q. Well, the size of a player does not necessarily determine the ability, does it? I mean, not the ability, that is a bad word—that is an unfortunate word.

The Court: You say Georgia had more speed than you did in '62?

The Witness: Not—I say, as a team. Individually I would suppose I would have more speed. But 23—what we mean by speed is just out footracing, but where it counts is when you get real quick, your short movements. When there is not that much between you and an opposing ball player, if you are real quick it doesn't matter how much you play; you can pack a pretty good wallop in that little space, and we had to rely on quickness and desire.

By Mr. Schroder:

Q. Let me ask you this question, sir. In your opinion, can a football game he rigged or fixed without the players knowing about it?

A. No, sir; it could not.

Q. Could a football game be rigged or fixed without the players participating in the—

A. No, sir; it could not; no way.

Mr. Schroder: You may examine him.

Mr. Cody: You may be excused.

[fol. 605] The Court: What are you studying to be, a football coach?

The Witness: Well, I am studying—I am in the School of Commerce. I will be coaching next year.

The Court: All right, sir; thank you.

* * * * * * *

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY, PETITIONER,

vs.

WALLACE BUTTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOHN GREGORY, called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. State your full name?
A. John Gregory.
Q. Where do you live, Mr. Gregory?
A. 420 Woodward Way, Athens, Georgia.
Q. What is your occupation, Mr. Gregory?
A. I am the defensive football coach at the University of Georgia.
Q. How long have you been coaching at the University of Georgia?
A. Since 1957.
Q. How long have you been in the coaching profession?
A. Since 1949.
Q. Are you familiar with the University of Georgia films that were taken of the Alabama-Georgia game in 1962?
[fol. 606]. A. Yes, sir.
Q. Could you show that to us, please, and relate what the screen shows?
A. Yes, sir.

* * * * * * *

Mr. Schroder: Mr. Gregory, would you relate what is being shown there, please?

The Witness: Yes. This is the team coming on the field, the University of Georgia team in the white uniforms. Alabama, of course, is the dark.

This is the Georgia team, the players on the sideline before the kick-off. The captain is out in the middle of the field.

This is Georgia kicking off and Alabama receiving.

The Georgia team in this game covered kick-offs and covered punts real well.

Now, this is the Alabama team, and that is what we refer to as a pro formation at Georgia. This is pro right with Alabama's end. Our defensive end, the right end is off in what we refer to as the triangle, and he is supposed to cover the flat. That is a simple quarterback sneak by Alabama.

This is pro left with Williamson, the split right end. This was a badly executed play on the part of Alabama. I think it was going to be what we refer to as the outside belly, but it was—it was not well executed.

Again, this is a pro formation used by Alabama which is a slot with a split end.

[fol. 607] On this particular defense our end is back in a position where he can rush a passer. If you will notice our defensive linebacker, the right defensive linebacker is loosening up and he is to cover to the flat. He is keying that back of Alabama's and covering him when he swings out there.

Now, on this particular pass, Williamson, which is the split end, went down the field and broke to his left, and Namath, who is the quarterback, he overthrew him and the ball was wild.

Alabama is now in the punt formation, what we call spread punt at the University of Georgia.

In this particular game Alabama had a real good kicking game and Georgia usually got the ball deep in their territory.

This is a slot formation. We refer to it at Georgia a slot left. That is, a lot of teams refer to it as a tight slot. It looks—that slot looks like it might be a yard and a half. When that back goes in motion like that, that is what we call in our terminology as a fly.

This particular play is—is our outside belly series which is 029 at Georgia, and Rakestraw was the quarterback, and he kept the ball.

Now, this is slot right, we are going to run a trap play. Our left guard was supposed to trap, but Alabama, as you can see, Alabama had a defensive man that went around our center and made the play. Our center failed to block the man on his nose, and the defensive man made the play, made the stop right there.

This is slot right. Here is the play; here is the interception that was referred to in the magazine article that said that Rakestraw was rushed badly and the Georgia players were like a bunch of rats in a maze. Rakestraw was [fol. 608] not rushed at all. He should have run for a first down—

The Court: I don't think that is proper.

Mr. Schroder: No, sir.

The Court: No, sir.

The Marshal: Let's have order, please.

The Court: If we can't have order, we will clear the courtroom. Mr. Schroder, if he makes another remark like that, I will have to discontinue this testimony or something. I don't think that was proper.

Mr. Schroder: Just call the plays.

The Court: Yes, sir; whatever his feelings were, I don't think he should show them.

The Witness: This is Rakestraw on what we call a roll-out type pass at Georgia. He was trying to throw to our left end coming across here.

After the interception Alabama lines up in a pro, and Williamson is the split end, and he puts just a little fake [fol. 609] on Porterfield, who is the defensive left halfback, and beats him for a touchdown.

Mr. Schroder: That's all right; let it go; let it go.

The Witness: Alabama was attempting an extra point.

Georgia is in a slot right formation, and that is what we call at Georgia a power-pop play.

Slot right; Rakestraw is rolling out to his right, throwing to Babb, and Babb catches the ball and falls out of bounds.

This is slot right fly, and Rakestraw rolls out again. This looked like a kind of trap that was run real fast, the film was, and it looked like a countertrap by Georgia.

This is the pro left formation used by Georgia. This back is going in long motion, and Alabama did not adjust its defense to this particular play. This is the first time that we have used this formation in the game, and they do not put anyone out to cover this back that is going over in long motion. We complete the pass to him, and he makes a good run, but we get a fifty-yard penalty and the play is called back.

That is Georgia in spread punt formation. We tried to run off of the spread punt.

Georgia now is again in spread punt formation.

This is Alabama in a pro formation again, pro left. It was pop play, in our terminology, that Alabama ran.

On this particular play we didn't have anyone covering the flat, and the flat was wide open, and they threw the ball out there.

[fol. 610] This is a pro formation, a hook pass thrown by Alabama, a pop play.

Alabama completed a pass in the flat off of a roll-out type pass.

That was—in our terminology at Georgia that is what we call a Utah pass. This is a roll back type pass by Alabama.

This is a slot right by Georgia. I don't know what the play was going to be. It was a bad exchange between the center and the quarterback. I don't know what the play could have been.

Again this is a slot right. It is a trap play. This is a slot right formation with the back on the fly, and we run the outside belly, 048.

Georgia was in spread punt formation, and it was a bad snap over the kicker's head, resulted in a safety.

That was a pro formation and a sweep run by Alabama.

This is a pro formation again, and Alabama runs the outside belly. The quarterback kept the ball.

Alabama is in a slot formation, a slot left. They run the fullback off tackle.

Lights.

The Court: Mr. Schroder, do you have any particular play or any particular point, or just show the whole thing?

Mr. Schroder: Show the whole game.

The Court: All right.

[fol. 611] Mr. Schroder: I'd rather not ask the witness to comment on a play, just say what is going on and that is it.

The Witness: I didn't understand what you wanted.

Mr. Schroder: I understand; it is my fault.

The Witness: I didn't understand what the procedure was. Mr. Schroder, do you want every play called?

Mr. Schroder: Not necessarily.

The Marshal: Let's have order, please.

The Witness: Lights.

This is a pro right formation by Alabama and a roll back type pass, what we call the Utah pass at Georgia, a little pass he flipped to the halfback coming through the line.

A pro right formation with left end split real wide; man on fly; looks like what we would call at Georgia the 048 or the outside belly by the quarterback.

This is a pro left formation, a trap play by Alabama.

This is a slot formation, slot left. It is a quick hand-off to the right halfback, straight into the line.

This is a slot right formation by Alabama, a hand-off to the fullback in the middle.

[fol. 612] This is a pro left, a sweep which at Georgia would be 88.

This is a pro left. Namath rolls to the right, throws to the right halfback in the flat.

Mr. Schroder: Is that a touchdown?

The Witness: Yeah. That was Alabama's second touchdown.

This is a pro right, Rakestraw rolls and throws to Babb on a down and out, which was incomplete.

A slot right, fly; we run a counter trap play.

This is a slot right. We run a sweep.

This is a pro right by Alabama and a quarterback sneak.

This is a pro right formation. This is 30-2 pop in Georgia's terminology that Alabama just ran.

This is pro left, a sweep.

This looks like a lot, a give-off to the fullback.

Pro right, trap play to the fullback.

Pro left, fly, the outside belly series which at Georgia would be 029.

Pro left, pop play to the fullback.

This is slot right, fly; fullback runs off tackle, which would be 036 slant at Georgia.

This is pro left, a roll-out to the left by quarterback.

He throws to the right quarterback out in the flat and drops the ball and it is incomplete.

That is a slot left and quarterbacks sneak.

Slot left, fly, fullback runs off tackle; it would be the 037 slant.

Slot right, fly; Rakestraw rolls and throws complete to Babb on the left.

[fol. 613] Mr. Schroder: That was pro right?

The Witness: This is pro right formation. Babb, a split left end.

This is pro left, motion, tries to throw to Babb.

This is the pro left, the back coming in motion. Rakestraw rolls, tries to throw to him, complete out in the flat.

A slot left.

This was 19 pass, left end bent in. Pass was completed to John McClell.

The slot left, it was a 19 special pass, and Rakestraw tried to keep the ball.

Slot right, a 19 pass, left end hook. The left end was going out and trying to do a hook in there, and it incomplete.

Slot left, fly; this was a type of a bootleg.

This is slot left, fly, the outside belly series with the quarterback keeping the ball; it would be 029 keep at Georgia.

This is pro left, trap, just a quick fullback trap with the right guard trapping. I can't see this complete formation. I see a man split way out here. It looks like pro right. It is pro right, quarterback sneak.

Lights.

The Court: Turn on the lights.

Members of the Jury, I will admonish you—I think I have previously given you those instructions. We will recess until 3:20. Let the Jury pass out; everyone else remain seated.

(Whereupon the Jury retired from the courtroom at 3:05 p.m.)

[fol. 614] The Court: Recess until 3:20.

(Whereupon Court recess at 3:05 p.m., reconvening at 3:20 p.m.)

After Recess

The Court: All right, sir.

The Witness: Lights.

This is the beginning of the third quarter.

That is Alabama kicking off to Georgia.

Georgia is in a pro right with a motion. This is a pop play, 30-2 pop.

Georgia is in a slot right, fly; Rakestraw rolls to the right and tries to hit Babb, and he misses.

Slot right, motion; Rakestraw rolling to the right, tries to throw to the right halfback in the flat; it is incomplete.

This is a slot right, a sweep.

A pro left; it is a trap, quick trap to the fullback.

Pro left, what we refer to as a roll-back pass; throws to the end coming across and it is complete.

Pro left, roll right; he hit the end on a hook and it is complete.

Alabama quarterback rolls to the right, throws to the right halfback in the flat, and he scores a touchdown. The third Alabama touchdown.

Alabama tries to go for two points and throws in the end zone, and it is incomplete.

[fol. 615] Georgia is in a pro right, fly, 32 pop.

We make a pretty good gain, but we get a fifteen-yard penalty on the play.

Pro left, fly, a counter trap.

Pro left, fly, an option play, quarterback keeping the ball.

Pro left, fly, 33 pop.

Pro right, sweep right, 99 at Georgia.

Pro right, fly, 048 keep, the outside belly series with the quarterback keeping the ball.

Pro right, sweep right, 99.

Pro left, quick trap to the fullback.

Pro right, 21 trap, left halfback on a quick trap.

Slot right, sweep right.

Pro left, quarterback rolls to his left, decides to run with the ball.

Pro right motion, 33 pop.

Pro left, quarterback rolls right, throws to the right end on a deep circle hook, and it is complete on about the seven-yard line.

Tried the outside belly series again; it was a bad pitch, and they fumbled the ball and Georgia recovered.

Pro left; we run the sweep left, which is—which at Georgia is 88.

Pro left fly, 19 overpass, throws to the right end, goes out of bounds.

Pro left, 30-2 pop.

Pro right, motion, Rakestraw rolling with the ball and tries to throw to the motion man and the pass is incomplete.

Pro right, fly, tries to throw to right end—left end, tries to throw to the left end, incomplete.

This is pro right, fly, 32 pop.

Pro right, fly, 029, and he pitches.

[fol. 616] A slot left, just a quick hand-off to the right halfback.

Lights.

Lights.

This is pro right, trap play to the left halfback.

Pro left, quarterback rolls back, throws to the right halfback in the flat.

Pro left, 33 pop.

Slot left, fly, a quick hand-off to the right halfback.

Pro left, fly, 33 pop.

A slot left, sweep left, which at Georgia would be 88.

Pro left, fly, 029 keep. The quarterback the fullback and keeps the ball, goes right down close to the goal-line.

Slot right, sweep right, and he scored standing up for Alabama's fourth touchdown.

Slot right, completes it.

This is slot right, 99, it is a sweep.

Pro right, motion, F-29 screeno; away from the man in motion. We screened to the left halfback off of a drop back action by the quarterback, away from the man in motion.

Pro right, 99.

I'd like to point out here that we are running a sweep on this next play, the slot right 99, and our right guard swings behind the tackle and leads up through the hole.

This is pro right, sweep right, or 99, and again the right guard swings behind the tackle, blocks on the linebacker.

Pro right, straight ahead blocking, sweep right, 99.

Pro left, trying to throw a screen pass, would have been F-48 screeno, trying to screen to the right halfback crossing, faking a block, going up sitting in the flat, catching [fol. 617] a screen pass. The quarterback does not throw the ball, and he is thrown for a big loss.

This is a pro left fly, quarterback rolls to his right, throws to the right end, which goes down and breaks to his right. The pass is incomplete.

This is pro right, quarterback sneaks.

Pro right; it is kind of a bad exchange between the quarterback and the fullback. The play is 32 pop.

Slot left, fly, gives to the fullback, what would be 37 slant, 037 slant at Georgia.

Pro left, fly, quarterback keeps the ball on the outside belly series which would be 029 keep.

Pro right; this would be 31 trap in our terminology.

Slot right—I'm sorry; I couldn't see this man out here. This is pro right. They have got a man out left here who is not in the picture. He comes in at the last.

This is a pro right formation, a sweep right, which would be 99 in Georgia's terminology.

Pro left, a trap to the right halfback.

Pro right fly. This is the outside belly series, again, where he fakes to the fullback; quarterback keeps the ball, pitching out to the halfback coming around, and he scores for the fifth Alabama touchdown.

This is a pro right formation, quarterback rolls back, going to try to throw, but he kept the ball and didn't make it. It was a two points—extra point try.

Pro left, fly, and the play is 33 pop.

Pro right, sweep right, 99.

This is a pro right, fly, Rakestraw tries to throw but he is rushed real bad by this number 70 here.

Slot right, Rakestraw rolls to his left, tries to throw back to right end or what we call a bend in pattern at Georgia and the pass is broken up, incomplete.

Slot right, fly, going to be a screen pass to the left this [fol. 618] would be F-29 screeno, away from the motion man.

Slot right, Rakestraw rolls to his left, tries to throw back to the right end, Babb, and the pass is broken up, incomplete.

Lights.

Mr. Schroder: Is that the end of the game?

The Witness: End of the game.

The Court: All right, Mr. Schroder. Put the podium back up there, Mr. Marshal.

Mr. Schroder: I will get it.

The Marshal: I will get it.

By Mr. Schroder:

Q. Mr. Gregory, I believe you testified you are the head defensive coach at University of Georgia?

A. Yes, sir.

Q. What is your function or what is your job as such?

A. During the game it is my responsibility to call every defense from the sidelines.

Q. You mean every defensive formation that Georgia is going into on any play?

A. Yes, sir.

Q. How is that called?

[fol. 619] A. I do it with a set of hand signals which relays the message to the defensive quarterback, who then calls it to the team.

Q. Could you give us an illustration?

A. Yes, sir. For example, if I fold my arms like this, that defensive quarterback, who is one of our guards, knows that that is 60 outside. He steps to the defensive huddle and gives the call. "60 Inside."

Q. How many different defenses do you have?

A. For the Alabama game—

The Court: You may sit down, sir.

A. (By the witness) For the Alabama game we had about—from eight or ten; I couldn't specifically say. We have a general defensive plan, as most schools do, and for certain games we pick out specific defenses that we want to use in that particular game. I can't say the exact number of defenses that we had prepared for the Alabama game, but I do have a written record of every defense that was used by the Georgia team in the game, because I have a manager that stands right beside me on the sideline, and as quickly as I give the defensive call he writes down the defense that was called, the down, the distance, the hash mark, and any comments that I have to make regarding the situation on the field.

Q. What is there that goes into the thinking of a defensive coach, such as yours, when he is deciding what particular defenses to have his team go into?

A. I am on the sideline. A team has twenty-five seconds in the huddle. During that time I have to make the decision, the score in the game, the down and distance, the position on the field, such as the hash mark, whether it is [fol. 620] on the right hash mark or the left hash mark, the middle of the field, whether I think they are going to throw the ball, their history has been; I have to study every team we play. Certain teams have a history of doing certain things at a certain spot on the field. I have to know all of this, and I have just a few seconds to determine in my own mind what I am going to call, and then I make that call, and it is given to the Georgia team.

Q. Is that commonly done by all schools, all colleges?

A. It is done by a lot of colleges; I can't say all of them; I don't know. I do know it is done by a lots.

Q. Coach Gregory, you referred during the running of the film here on several occasions to Georgia and Alabama, whoever might have had the ball at the particular time, running, I believe you said, 30-2 pop on one occasion; would it be 43 pop on another occasion?

A. We don't have a 43 pop; we have a 33 pop.

Q. 33 pop?

A. We have a 33 pop and a 32 pop.

Q. What is meant by the designation "pop"? Does that mean that something is particularly done on that play that is not done on another play?

A. Yes, sir.

Q. What is that, please?

A. That "pop" means that the halfback is going to lead through the hole and block the linebacker and that the linemen are going to turn out block, like that, in other words the linemen on either side of the hole, they will turn out and block out and block in on one side and out on the other, and the halfback is going to lead straight through the hole and block the linebacker, and the ball is given to the fullback, and he follows him through the hole.

[fol. 621] Q. All right, sir. Now, we use these numerals 32 and 33, 99, 88; what do the numerals indicate when you

are describing a play, for example, that the University of Georgia has?

A. Well, for example, on 33 pop, the 3 means, in our numbering system, 3 is the fullback and the other 3, when we say 33, it means the number 3 back, the fullback is going to carry the ball in the 3 hole. We number the holes, odds to the right, 1, 3, 5, 7, and 9; evens to the left, 0, 2, 4, 6, and 8. We number the backs, 1 for the quarterback, the left halfback is 2, the fullback is 3, and the right halfback is 4.

Q. So, the first numeral in your two-numberal sets there, the first numeral indicates the ball carrier who is going to carry the ball?

A. Yes, sir.

Q. If it would be the left halfback, it would be 2; if it would be the right halfback it would be 3—I mean, 4?

A. 4; yes, sir.

Q. The second numeral indicates which hole in the line he is going through?

A. That's right.

Q. If he is going wide, it is—you say odds were to the right; that would be 9?

A. 9; yes, sir.

Q. If he was going wide on the left, that would be 8?

A. Yes, sir.

Q. The Saturday Evening Post refers in its article to an Alabama player or Alabama players—no; strike that. It refers in its article to the fact that one of the Georgia players complained that Alabama players were saying "you can't run 'a 8-pop' on us." Does Georgia have an 88 pop?

[fol. 622] A. No, sir.

Q. Is it possible to run what—is it possible to run a pop off of a sweep?

A. No, sir.

Q. And a 88 would be a sweep?

A. Yes, sir.

Mr. Schroder: Just a moment, please, Your Honor.

The Court: All right, sir.

By Mr. Schroder:

Q. Running through these notes right quickly—

Mr. Schroder: Could you hand them to the witness, please, ma'am?

The Clerk: Yes, sir.

By Mr. Schroder:

Q. I assume you have seen before a reproduction of the notes which you now hold in your hand?

A. Yes, sir.

Q. Will you run over those briefly, without me necessarily questioning you about each, but just go through them briefly and tell us what each means to you insofar as it is related to the University of Georgia's football team?

A. Well, naturally "Bear" Bryant and Wally Butts on occasions, I have heard Coach Butts talk to Coach Bryant [fol. 623] on the telephone, and I have also been around Coach Butts and Coach Bryant in coaches' conventions and meetings of the Southeastern Conference, and things like that. I have never heard Coach Butts refer to Coach Bryant as "Bear". He has always called him "Paul". I have heard Coach Butts—I have been in his office when he has talked to Coach Bryant on the phone, and he'd say, "Paul, this is Wallace Butts." I have never heard Coach Butts refer to him as "Bear".

"Rissmiller, greatest in history". Rissmiller was a sophomore tackle who had good potential; he is a good athlete. It was his first college football game that he had ever played in as a varsity man against the University of Alabama.

Q. All right, sir.

A. He did a credible job in the game.

"Rakestraw to right" doesn't mean anything to me; I mean, any—any team has a quarterback that goes to the right or goes to the left; doesn't mean anything.

"Optional left pass if can block man on corner, keeps running." The optional left pass is a pass that has been

used at Georgia previously and was last used against the University of Miami in 1961. This optional left pass, when we last used it, we used it off of a drop back action where the quarterback drops straight back, and he would not attempt to run on the corner. So, these notes here are wrong, if anything was used pertaining to these notes, it would be wrong, because—

Q. You mean if it regarded the University of Georgia?

A. If it regarded the University of Georgia; that's right. Now, also on an optional left pass, an opposing coach [fol. 624] would have to know the exact terminology of the opponent's team, or else he would not know what any one was referring to. I do not know as a coach, the exact terminology of other teams that we play.

Q. All right, sir.

A. "Well disciplined ball club." For a football team to win in the Southeastern Conference, it has to be well disciplined. To me discipline means they don't jump off sides; they don't fumble the ball; they don't get penalties that is unnecessary. It just means that they do things to perfection, and I would have to say that the Georgia team, in my estimation, was not a well disciplined football team. We made too many mistakes that hurt us real bad.

Q. Nothing unusual about a bunch of sophomores making mistakes, is it?

A. No, sir; they do it in every league.

Q. That's right.

A. And when you have to play them, they are going to make them.

"Added two coaches." We had lost some coaches at Georgia, and I reckon this is—I don't know what this is referring to; it could be referring to Alabama. I know they had added some coaches. We had added some coaches at Georgia. We added a boy named Frank Inman who came there last year from down at Richmond Academy in Augusta, and he wasn't there for spring practice. And then we added in the spring a coach that had come from the University of Nebraska, a Leroy Pierce.

Q. All right, sir.

A. "Onside guard pulls on sweep." It was not in the game plan against the University of Alabama to pull guards on sweeps. Since Johnny Griffith has been head coach at Georgia we have never pulled the onside guard [fol. 625] on a sweep. At the times, if the defense dictates such, we will swing the guard behind the tackle, and they will exchange blocks. In our terminology at Georgia, "swing" mean that the tackle and the guard are going to cross-block. They are going to switch assignments. A "pull" means that a guard is going to cross-block. They are going to switch assignments. "Pull" means that a guard is going to pull around the end and lead interference.

Q. All right, sir; next one.

A. "Don't overshift." The basic defense at Georgia last year was an overshift. We used an overshift practically the entire game against Alabama, because that was the basic defense from which all of last year was an overshift. We used an overshifted on us in the ball game quite a bit, especially when the ball is on a hash mark, and the wide side of the field is there, you want to overshift to the wide side to get your men over there in a position to protect that wide side of the field.

Q. All right, sir. The next one.

A. "Woodward commits fast-safety man." Woodward has had a history at Georgia, while he was a young sophomore, of coming up fast. That means that—by meaning committing fast, I am sure that that would be meaning that he comes up fast to the line of scrimmage on a running play and makes the tackle. If I were an opposing coach trying to use any information of those notes, and I knew that Woodward committed fast, all I would do would just fake a running play, make Woodward come up, and I would put the end down behind him, and I would throw over him for a touchdown. Alabama did not throw the ball in the vicinity or in the area in which Woodward's defensive [fol. 626] responsibility was in the ball game. They didn't throw a single pass in his defensive zone.

Q. All right, sir; next one.

A. "Weak defense, anybody except Blackburn." Weak defense, I thought the defense, to be honest, was a little better than the offense. The defense, in the year before, in the standings in the Southeastern Conference had finished sixth and the offense had finished eleventh, which is just one from the bottom. Now, "anybody except Blackburn", Blackburn was sick. He didn't practice much. He was—he had something wrong with his stomach, and he couldn't practice, and he was out of shape, and Blackburn did not play in the game except very little, right—I think right maybe at the end of the ball game he did play a little.

Q. Speaking of defense there for a moment, looking at the film a while ago that we saw, it appeared to me that Georgia covered those punts as well as any team that you could expect to cover any punt anytime?

A. Yes, sir; they hustled. They covered kick-offs well; they covered punts well.

Q. And looked like to me they were still hustling at the end of the game?

A. Yes, sir; they were still hustling.

Q. Next one.

A. "Bear slot right". That is just a standard formation, slot right. I reckon it is just—it says "Baer"; I guess they are referring to "Babb", I reckon that means it is a regular slot formation; it is just standard; most teams in football use it.

"Split right end out". I don't—that doesn't mean anything. I mean, the end splits—practically every team that plays football splits an end.

[fol. 627] Q. Would that be indicative of the lonesome end formation?

A. Could be; I mean a lot of teams, what we refer to in our terminology at Georgia as a lonesome end formation is an unbalanced line where we take an end and put him over on the strong side of the unbalanced line. That is what we call a lonesome end. I don't—"split right end out". I mean, you see both teams use split ends in that game.

Q. All right, sir.

A. "Long count, left half in motion." Every team in football has got different counts that they go on. Some of them go on quick counts; some of them go, for example, on one, or two, or three or four, just according to the play and what particular type of play they are going to run and what kind of snap count they want to use.

"Left half in motion." Everyone that could see the film, both teams were using motion men, I mean, backs going in motion one way or the other. I mean, that don't mean anything there as far as I am concerned.

"Best since Trippi, Porterfield." Well, I just say this, I never did have the opportunity to see Charlie Trippi play football. I know his reputation as being a great football player and an All-American football player. We have had a lot of good backs at Georgia since I have coached there that are much better than Porterfield. For example, we had Fred Brown in 1959. We won the Conference Championship. We had Bobby Walden who was a good back. We had Jimmy Orr who was a great back now playing with the Colts. We have had some good backs since I have been there.

Q. All right, sir.

[fol. 628] A. And I think they all were better than Porterfield. I mean, Porterfield is doing fine. He was a sophomore and he is a good boy. I think he is going to improve.

Again, it says "Baer on a hook"; I guess it is referring to Babb. Every team—every team—I know we do at Georgia, when we get down in scoring territory, we have a goal line offense. We have a particular set of plays that we use when we get down in scoring territory. When we get down inside the ten or around—close to the goal line, we have a goal line offense. Now, to my knowledge the last time that Coach Butts saw Georgia practice was on Saturday, September the 15th. At that time we did not have the goal line offense. We didn't make the final game plans for the game against Alabama until Monday, so I don't know about that.

Now, "Babb on a hook on the goal line"; you have to have a hook pass on the goal line, because you are limited down there by the end zone, and you can't run out of bounds, so you have to—a guy has to go down there and hook. Everybody has a hook pass. That is one of the simplest passes in football. Every team has a hook pass.

Q. If I remember your testimony—I mean, your statement while the reels were being shown, several passes were thrown by Alabama which you described as hooks?

A. Yes, sir; yes, sir.

Q. All right, sir. Next one.

A. "Slot to right, ends normal (three yards)."

Q. Does that say "end" or "ends"?

A. We don't have any double slot. That is what that would have to mean to me.

Q. All right, sir, go ahead.

[fol. 629] A. I mean—it says "ends normal (three yards)." We don't have—we didn't have a formation at Georgia where we split both ends.

Q. Next one.

A. "Right halfback on fly, left halfback, quarterback gives to left half, left guard pulling blocks on corner." I can't figure that one out.

The Marshal: Order, please.

By Mr. Schroder:

Q. All right, sir, go ahead.

A. "Slot or wide slot"; the year before we had used a wide slot, but we didn't have a wide slot at Georgia for the Alabama game. We had what we referred to as a tight slot, but the year before I know against Georgia Tech, I think we scored a touchdown from a wide slot formation, we didn't have any wide slot for the Alabama game, didn't practice one.

Q. All right, sir.

A. "Can't quick kick." Well, since I have been at Georgia coaching there, we have—I know when we had

Bobby Walden, he was probably the greatest kicker in the country, and he established the Southeastern Conference Record, and he led the Nation in kicking, and he is a great kicker, and we put in a formation which we got from the University of Texas which we kind of copied from them. We get this information from all schools. We copied this from the University of Texas. We call it the quick kick formation, which we kick quick from, and it is actually a double wing formation where we line up the man that is going to kick the ball about eight yards behind the center, and we snap him the ball and he can either quick kick the [fol. 630] ball or he can run or he can pass, and this doesn't change a single thing as far as our offensive playing is concerned. It doesn't change the blocking assignments or anything. We say "quick kick formation" and call the play. For two years Jake Saye has been kick quicking out of this formation, has been throwing the ball, and he was a good quick kicker, and we have gotten off some wonderful quick kicks.

Q. Is it Bobby Walden who used to kick from the same formation?

A. Yes, sir.

Q. In your regular punt formation, how far is the man who is to do the kicking, how far is he from the center?

A. Oh, about thirteen yards, any where from twelve to thirteen.

Q. You more or less leave that up to the individual to select how far back he ought to get?

A. Yes, sir; and it is according to how hard our center can snap the ball, how fast you can get it back there. Some of them are a little bit slow on that.

Q. Next one.

A. "Slot right, left half—" I can't—

Q. That is "right half on fly, screen to him."

A. Oh; "slot right, right half on fly, screen to him." We don't have any play like that. We screened in the Alabama game, but we screened away from the fly man. We didn't screen to the fly man. We don't have any such play as screening to any fly man.

Q. Next one.

A. "29-0 series." We don't have any 29-0 series. We have an outside belly series at Georgia which is an 029 or 048 or 037 slant or 036 slant.

"Babb catches everything they throw." Well, I mean, that is—

[fol. 631] Q. A matter of opinion, isn't it?

A. As far as I am concerned, that is just a ridiculous statement. I don't think any pass receiver could catch everything they throw. I don't see how they could.

Q. Top of Page 7?

A. "Slot right, left end out 15 yards." Now, this, evidently, this says "slot right, left end out 15 yards." Well, that is a pro formation. This is the formation—

Q. That is what you know as the pro formation at Georgia?

A. Yes; in my terminology, in our terminology at Georgia that is a pro formation. Now, that was the formation that Georgia and Alabama used in the ball game. Also about this formation sometime in August last year Coach Butts called me in his office, and he had a boy there—he is now a doctor—his name was Dr. Virgil Peavy, who was the academic grades and so forth. See, the boys went to class and all that, so we went in the office and he told me that he had run into Coach Bryant somewhere, and Coach Bryant was talking to him about this formation.

Mr. Cody: I don't think that is admissible.

The Court: That is hearsay.

Mr. Cody: Let's do it in legal fashion.

Mr. Schroder: That's already been in the case, Your Honor, about Bryant notifying—

[fol. 632] The Court: I don't remember anything about Bryant and Dr. Peavy.

Mr. Schroder: No, sir; not about Dr. Peavy, about the bomb play, the first time Alabama got the ball. It's been already told—

The Court: This is hearsay.

By Mr. Schroder:

Q. Pass on to the next one.

A. "Drop end off, Georgia, contains with tackle (defense)." Well, that is standard in any defensive plan. You have to have a defense where you drop the ends off to cover the flat, and, of course, when you drop the end off, there is no way you can contain the passer unless the tackle does contain him or else you stun the tackle and the linebacker can contain him.

Mr. Schroder: That's all, Your Honor.

The Court: All right, sir, Mr. Cody.

Mr. Cody: Will you identify this for me, please, Defendant's Exhibit No.—what is that, 18?

The Clerk: That will be 19.

[fol. 633] Mr. Cody: All right.

The Clerk: Defendant's Exhibit No. 19 for identification is a copy of a letter dated March 26, 1963, to James H. Therrill from John W. Gregory.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 19.)

Cross examination.

By Mr. Cody:

Q. Coach Gregory, let me read you one paper and ask you if you signed it. It is addressed—dated March 26, 1963, heading: "Athens, Georgia."

Mr. Schroder: I don't believe it has been introduced in evidence yet.

The Court: He doesn't have to introduce it in evidence; he has to identify it first.

Mr. Schroder: He hasn't identified it if the witness hasn't seen it.

The Court: You have to refer to the date—the date and who signed the letter and so forth. You will have to properly identify it.

[fol. 634] Mr. Cody: It hasn't been introduced.

The Court: No, sir; you don't have to introduce it, not yet.

By Mr. Cody:

Q. This is a letter dated March 26, 1963, headed: March 26, 1963, headed "Athens, Georgia"; addressed to Mr. James H. Therrill, Assistant Attorney General for the State of Georgia. Is that your signature?

A. Yes, sir.

Q. You mind if I read this to you just a moment?

A. No, sir.

Q. "After viewing the alleged notations made by George Burnett while listening to an alleged telephone conversation between Wallace Butts and 'Bear' Bryant on September 13, 1962, it is my opinion, as one of the coaches of the University of Georgia football team, that if such information was given to Coach Bryant before the opening game of the season, it conveyed vital and important information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team, and could have effective the outcome of the game on September 22, 1962." You say you signed that?

A. Yes, sir.

Mr. Cody: You can come down.

[fol. 635] Redirect examination.

Q. What were the circumstances under which you signed that?

A. I was called in to the—

The Court: Well, now, you—go ahead; go ahead.

Mr. Schroder: I think he's got a right to explain it.

The Court: I will let him explain it, but you can't impeach your own witness.

Mr. Schroder: Impeach him?

The Court: Go ahead.

By Mr. Schroder:

Q. What were the circumstances under which you signed that?

A. I was called into the head coach's office, Johnny Griffith, by Johnny Griffith, and he told me that the Attorney General had sent these prepared statements over there, and that they were trying to keep the assistant coaches out of it, but looked like they were going to get involved in it, and he showed me these notes, and at that time, I just kind of glanced at them. I didn't have—I didn't study them. I just glanced through them, and so forth, and then Mr. Griffith carried me up to the President's office, [fol. 636] Dr. O. C. Aderhold, and had copies of this statement typed by his secretary. I was in the office and Coach Griffith brought this statement in there, and I borrowed Dr. Aderhold's pen and signed this statement. You know, the coaching profession is a little precarious, and I was afraid that if I didn't sign this statement and go along with the head coach he has the authority to hire and fire his assistants, at his own discretion, that my job would be in jeopardy.

Q. Was anything said about this record being kept out of the public?

A. Yes, sir. Johnny Griffith the head coach at Georgia, told me—

Mr. Cody: Your Honor, I think, that is—that is getting back into hearsay, Mr. Schroder knows that.

The Court: Yes, sir; I will let him go into it.

Mr. Schroder: I think he's got a right to go into it to explain—

The Court: I think he can explain it.

Mr. Schroder: —conduct.

The Witness: Johnny Griffith, the head coach at Georgia, told me that the statement would not be made public, that they were going to carry this over to the Attorney General's office, and it would be placed in the files and that no [fol. 637] one would have access to it, and it wouldn't be

seen. And several days later it was published in the paper.

Mr. Schroder: Thank you. That's all, Your Honor.

Mr. Cody: You can be excused, Coach Gregory.

By Mr. Schroder:

Q. Was the statement true—is it true today?

Mr. Cody: Well, that is a conclusion; that is a conclusion.

Mr. Schroder: That is not a conclusion.

The Witness: You noticed in this statement I did not sign the statement.

Mr. Cody: He can't impeach his own statement.

The Court: Did you view these notations, Coach Gregory? Let me ask you this.

Examination.

By the Court:

Q. Before you signed this statement, did you view these notations?

[fol. 638] A. I just glanced through them, Your Honor. I didn't—I didn't study them.

Q. When was this, on March the 26th?

A. Well, I can't recall the exact date.

Q. I mean, it was after it was published in the Saturday Evening Post?

A. Well, I don't even know the date the Saturday Evening Post article was published.

Redirect examination.

By Mr. Schroder:

Q. But this was after—the Judge wants to know if it was after the Post came out?

A. This was when the Attorney General—

Q. Was it after the Post article was published?

A. Yes, sir.

Examination.

By the Court:

Q. And had you seen and read the Post article?

A. Yes, sir.

Q. And then you saw the notations—I imagine it was a photostatic copy?

A. I imagine so; it was just—just a copy.

Q. And it is your testimony—am I correct in this, I want to be sure—it is your testimony that Coach Griffith, and who else put pressure on you to sign it?

A. Well, I didn't—I didn't say anybody put pressure; I just said that I felt—I didn't say that. I said I felt that if I didn't sign the notes that it would jeopardize my job.

[fol. 639] JAMES WALLACE BUTTS called as a witness, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. Your name is James Wallace Butts?

A. Yes.

Q. You are the plaintiff in this lawsuit we are trying here today?

A. Yes, sir.

Q. Where do you live, Coach Butts?

A. 1490 South Milledge Avenue, Athens.

Q. How long have you lived in Athens, Georgia?

A. Since 1938.

Q. Where did you receive your education, Coach Butts?

A. I graduated from the Georgia Military College, in Military prep school, and later Mercer University in 1928.

Q. After you had graduated from Mercer did you then go into the coaching profession?

A. Yes; I coached four years at the prep school at Madison A. & M. School, and three years at my Alma Mater,

the Georgia Military College, in Milledgeville, and three years at Male High School in Louisville, Kentucky. Then, of course, I moved to the University of Georgia as assistant coach, 1938. In 1939 I was made the head coach. I retired from that position following the 1960 season.

Q. What is your age?

A. Fifty-eight, sir.

Q. Other than the three years that you coached in Ken-
[fol. 640] tucky, you have spent your entire time here in Georgia?

A. Yes, sir.

Q. During the years that you were head coach at the University of Georgia, as head football coach, how many times did you produce a Bowl team?

A. Well, with the cooperation of so many good football players, we made eight Bowl engagements.

Q. Could you name those for me, please?

A. We played in the Orange Bowl three times, the Orange Bowl being the first Bowl game that the University of Georgia had ever played in. We played in the Rose Bowl, the Sugar Bowl, the Oil Bowl, the Gator Bowl, and the Presidential Bowl.

Q. Have you ever coached the College All-Star Teams when they were playing the Professional Football League Champions?

A. Yes; we coached in the All-Star game in Chicago vs the Professional Football League Champions four times, and we, of course, have been in other All-Star games over the years.

Mr. Schroder: May I address the Court a moment, please?

The Court: Sir?

Mr. Schroder: Could I have the original papers there?

The Court: Yes, sir; yes, sir. I have had them here. There are so many orders and things I don't think are pertinent, but the original papers are right on the bottom.
[fol. 641] Mr. Schroder: Just the petition, Your Honor.

If it please the Court, this is the—what I am holding in my hand here now is the original petition that was filed by Mr. Butts in this Court on March 25, 1963. Paragraph 4 has been admitted by the Saturday Evening Post, therefore I am not going to go into it, but I would like to read it at this time, if I may.

The Court: All right, sir.

Mr. Schroder: "Plaintiff," being Wallace Butts, "during his career, has enjoyed a national reputation as a successful and respected member of the coaching profession, and has been accorded many honors, among which was his election in 1959 as President of the Football Coaches Association, a national organization of football coaches throughout America. Upon invitation he has coached the College All-Stars, the Blue-Gray All-Star Game, and the North-South All-Star Game. Plaintiff has, during his career, been widely sought as a speaker and lecturer on various aspects of football, and has spoken at clinics, banquets, and other such public gatherings throughout the United States. In addition, Plaintiff has been approached and offered employment as head football coach by several colleges and professional football teams in the country, due entirely to his reputation as a successful member and leader in his profession."

By Mr. Schroder:

Q. At the end of the 1960 season, Coach Butts, you tes- [fol. 642] tified a moment ago that you resigned as head football coach at the University of Georgia.

A. Yes, sir; that is true.

Q. What were the circumstances?

A. I resigned at the end of the 1960 football season because I had had trouble with high blood pressure. The two last games of the season gave me a lot of trouble, and I resigned as the head football coach, knowing then that I would never return as a head coach in college football. I hoped, of course, that I might have the opportunity to coach a professional football team.

Mr. Cody: Your Honor, I don't think that is in response—

Mr. Schroder: Which part of it?

The Court: What is your objection, Mr. Cody?

Mr. Cody: About what he hoped to do. It is not in response to the question.

The Court: I will let Mr. Schroder question him. Maybe the word "hope" is not proper, but I will let Mr. Schroder question him and bring that out.

Mr. Schroder: Thank you, sir.

[fol. 643] By Mr. Schroder:

Q. During the past year, 1962, have you or not been in touch with a national football team with respect to employment?

A. Yes, sir; the Dallas professional football team of the National Football League contacted me.

Q. That—has anyone contacted you regarding future employment as a coach, or in any other area relating to coaching since the Saturday Evening Post article?

A. No, sir.

Q. That is Mrs. Butts and your three daughters seated there on the bench right inside the rail?

A. Yes, sir.

Q. How well do you know Coach Paul Bryant of the University of Alabama?

A. I have known Coach Paul Bryant, first as a player at the University of Alabama when he played the end opposite Don Hudson. I knew him first as a coach when he was an assistant coach under "Red" Sanders at Vanderbilt University, during the seasons '40 and '41. And then, of course, I have known him real well since he was a member of the Preflight School in Athens in 1942.

Q. Have teams which were coached by you played teams coached by Coach Bryant?

A. The University of Georgia played against Coach Bryant when he was a coach at the University of Kentucky. I believe he was a head coach at that institution eight

years. We played against him one time when he was at Texas A. & M.; and then, of course, Georgia and Alabama always play.

Q. During the years that you have coached football, what has been your custom—if you know the custom of other football coaches you might give that, too—with re-
[fol. 644] gard to discussing football techniques, coaching points, and the like.

A. Well, Mr. Schroder, I will say this, that I have never turned down anyone who asked me a coaching point.

Q. What is a "coaching point"?

A. Well, any coach, for example, might know that on a particular pass play, that a sideline route is featured in this pass pattern, and at the University of Georgia, one reason, perhaps, that we have had some success is we not only require that the offensive football player running the sideline route run it, but that he be within four yards of the boundary line, which is a coaching point. When I was coaching the single-wing, I think we were perhaps the first in the business, instead of having the passer look for an open pass receiver, we looked at the defensive man in the area that we were throwing, or zone in which we were throwing, figuring that the defensive man cannot be right. That is a coaching point. Does that answer your question?

Q. Yes, sir; but I would now like to ask you, what is meant by teaching or coaching your boys that the defensive man could not be right? You don't get through to me.

A. Well, to explain that, Mr. Schroder, the way we worked out our pass patterns at the University of Georgia, we put a man to the right of a defender, to the left of the defender, and we occupied all of the others in the defensive plan, and for that reason we could say to our passer, if the man running the pass routes run the pass routes as they should, the defensive man cannot be right. Another example; we put one behind the pass receiver and one in
[fol. 645] front. We occupy the other receivers with our plan. We then can tell the passer that the pass defender cannot be right.

Q. Well, he cannot be right if he's got to cover two people, could he? Is that what you mean?

A. Of course, Mr. Schroder, we cannot accomplish this on every occasion, but that is what we try to do.

Q. All right, sir. During the year 1962, in particular, did you or not have occasion to talk to Coach Paul Bryant over the telephone, as well as in person, and if you did, would you relate to the Court and Jury the approximate number of times that you did do that?

A. It would be impossible for me to—to tell the Jury or anyone else the number of times that I have talked to Coach Bryant, or called him, but I have called him several times, and I have talked to him several times. Of course, the first time that I called him during the summer of 1962 was in regard to certain rule changes, or rather, I learned in Buffalo that rules that had been a part of the Rules Committee, the enforcement of the same would be improved.

Q. Well, in that area, why were you in Buffalo? What was going on there?

A. When I was President of the College Football Coaches Association of America, the idea was originated that since there were so many All-Star games throughout America, that the football coaches should sponsor a game of that kind and it could, in time, become the best of them all. So we lined up the Eastern Kodak Company to back this project, and it was started during my time as the President of the Association. For the past two summers such a game has been played in Buffalo, New York. On that occasion it is customary for the Board of Trustees of the Football Coaches Association of America to meet, and as past President it was my privilege in 1962 to attend an [fol. 646] informal meeting in which this particular phase of football was discussed, and the coaches in the meeting that day were in agreement that defensive football was getting a little out of bounds, that football coaches, in their enthusiasm in teaching defensive football, and chasing in pursuit, which is chasing the football player and demand-

ing that every defense man contact him with some part of his body, it was getting a little tough; and so the coaches themselves requested that, or planned to request that the officiating be strict in that area.

Q. Were you attending that meeting in Buffalo as a member of the Football Rules Committee?

A. Well, I was not an important member of the Rules Committee at the time; I was an interim member at large of the Rules Committee, but I felt that if I talked to Coach Paul Bryant, who, in my opinion, is the chief exponent of defensive football techniques, defensive football in general in this part of the country, and perhaps the United States, that I would be doing football, the game of football service.

Q. In what respects?

A. Of course, Mr. Schroder, the objective of most of the coaches that I have ever known is to win football games, but I have never—I have never known a football coach that willfully responds to anything that would cause unwarranted injuries, and I think defensive football at that time had reached that stage.

Q. And you discussed the topic with Coach Bryant because you say that he was one of the leading exponents, or what is it? I didn't exactly understand you.

A. Coach Bryant's record speaks for itself on defense. I sympathize with anyone who has to play him.

[fol. 647] Q. Was he, therefore, contracted as a leader of defensive football?

A. As a leader. I picked him out of all the Southeastern Conference coaches in this area; although I will say this, that Coach Frank Howard, of Clemson, is really the representative of the Third District of the N. C. A. A., the Third District would cover, of course, the Southeastern Conference. I'm not sure how many colleges or universities are represented in that group.

Q. Since your call to him—I believe you said it was either in July or August, 1962, when you came back from Buffalo?

A. I'm not sure about the date, but I think it was in late July.

Q. Had you previously discussed matters with Coach Bryant over the years?

A. Coach Bryant has been the head coach and athletic director at the University of Alabama for the past five years or six years, and since he returned to Texas A. & M.; I have called him many times.

Q. Have you called him, or talked with him since the conversation you have just related took place in July, 1962?

A. I have talked to him several times on the telephone. I have talked to him at least three times in person, that is, prior to the football season of 1962.

Q. Did you or not continue to talk with Coach Bryant throughout the season of 1962?

A. Yes, sir; the record will show that I did. I have called him many times, I am sure, on impulse, for no reason.

Q. On September 13, 1962, the Saturday Evening Post charges that you and Coach Bryant had a telephone conversation with each other, and that during that conversa-
[fol. 648] tion you gave Coach Bryant had a telephone conversation with each other and that during that conversation you gave Coach Bryant detailed information relating to the secret plays, formations, and defenses which the University of Georgia had in its game plan for the Alabama game. What is your answer as to that?

A. Emphatically no.

Q. Do you recall having any conversation at all with Coach Bryant on September 13, 1962, or on September 16, 1962?

A. Mr. Schroder, I have talked to Coach Bryant several times, many times over the years. I cannot positively identify one call from another, or give the date.

Q. The first time that that particular phone call, or those two phone calls were brought to your attention was some months after September, 1962?

A. The first time I heard about it was when I received a call.

Q. First time you heard about what?

A. The telephone call.

Q. What telephone call?

A. Purported to have been between Wallace Butts and Paul Bryant.

Q. On what occasion?

A. No date was given me; I received a call from Atlanta.

Q. When was the call made to you from Atlanta?

A. I—when I was attending a funeral in Philadelphia; I do not remember the date.

Q. Was it after the first of the year?

A. Yes, sir.

Q. Could it have been around the last day of January?

[fol. 649] A. I believe it was January the 30th, or late the night of January 30th.

Q. That would have been over four months since—after September 13?

A. Yes, sir.

Q. All right. Now, who made that call to you? Just a moment; just a moment.

Mr. Schroder: Your Honor, this might be considered hearsay, and unless Mr. Cody would permit me to go into it—

Mr. Cody: I would like to know who it was.

The Court: You can ask—is it pertinent as to who called him?

Mr. Schroder: I think it might be linked up later; yes, Your Honor.

Mr. Cody: I have no objection.

Mr. Schroder: He has no objection, so I will go forward.

The Court: All right.

By Mr. Schroder:

Q. Who was the party that called you, and what was said by that party and by you on that occasion, January 30th or 31st, 1963?

[fol. 650] Mr. Cody: Well, I object to the contents of the call; I have no objection to who it was calling. That is the question you asked him.

The Court: Yes, sir. Well, I will sustain the objection.

Mr. Schroder: I did not want to go into it. I acknowledged it is hearsay, and I wasn't going into it unless Mr. Cody let me.

The Court: All right, sir.

A. (By the witness) Mr. John Carmichael called me.

Q. Who is he?

A. He is an acquaintance of mine.

Q. What do you mean by "acquaintance" of yours?

A. I have known him for a number of years.

Q. How well?

A. I have never known him too well. I know who he is, and he's always been friendly to me, and it's been the same in my case.

Q. You know him socially?

A. No, sir.

Q. Business-wise?

A. No, sir; I have never been in any business with him. One time Mr. Carmichael did sell me some stock, I believe. The company didn't thrive too well, and he refunded the money, and I appreciated that.

Q. Have you ever been in his home?

A. No.

Q. Has he ever been in your home?

[fol. 651] A. No.

Q. In that conversation was any mention made of a so-called telephone interception?

The Court: I believe you are going into conversation, Mr. Schroder.

Mr. Schroder: All right.

The Court: Of course, I realize there is going to be a certain type of hearsay evidence in this, but I think this particular kind is inadmissible.

Mr. Schroder: All right.

By Mr. Schroder:

Q. Throughout the years when you and Coach Paul Bryant, or you and any other coach have discussed football, has there ever been any occasion when you told Coach Bryant, or any other coach, what plans you, when you were coach, what plans Coach Griffith, who is now the coach, planned to use in any game involving Coach Bryant, or those other coaches?

A. I have never known the game plan of Coach Johnny Griffith.

Q. What is game plan?

A. The game plan is necessary for every game, because every team has quite a number of plays, all of which cannot be used in any one game, and usually the offensive and the defensive plan is outlined for the players. I am not [fol. 652] sure exactly what the plan is at the University of Georgia at the present time.

Q. Well, is your answer to the question I asked you "yes", or "no"; or do you remember the question?

A. I want the question asked again, sir.

(Whereupon the Reporter read back the question.)

A. Mr. Schroder, the question is a little vague to me.

Q. All right, sir. I admit it is too long and ambiguous, perhaps. Have you, in any conversation with Coach Bryant, over the telephone or in person, ever discussed with him what the University of Georgia planned to do in a game to be played between Alabama and Georgia?

A. No.

Q. Is there any doubt in your mind about that?

A. Absolutely not.

Q. Is Coach Bryant the only one in your profession that you talked to in person or over the telephone?

A. The records show that I have talked to quite a few coaches, and I will say that I have slowed down on that. I used to talk to a lot more than I have in recent years.

Mr. Schroder: Under the rules as I understand them, Your Honor, the witness can refresh his recollection from any document which he knows is accurate?

The Court: Yes, sir.

Mr. Schroder: I am not asking the witness to read from the document, but merely to read from it—but merely to read it, and after—

[fol. 653] By Mr. Schroder:

Q. After your recollection has been refreshed, tell us some of the coaches and other athletic people to whom you have talked over the last number of years.

The Court: As I understand, Coach Butts is not going to read the document; he is going to read the document and refresh his recollection, and then testify.

Mr. Schroder: That is what I instructed him.

A. (By the witness) I do not need this record, Mr. Schroder, to remember some coaches I have called. I have been close to Ray Graves.

Q. Who is he? Now, identify him.

A. The head football coach at the University of Florida.

Q. You say you have been close to him; have you talked with him over the telephone?

A. I have talked with him over the telephone. I have talked to Frank Howard, the coach at Clemson. I have talked to Coach John McAloson (?), at the University of Pittsburgh. I have talked to Bob Woodruff, the former coach of the University of Florida; now the athletic director at the University of Tennessee. I have talked to Coach Clyde Earhardt, coach at the Presbyterian College, Clinton, South Carolina. Coach Bob Ford, former coach at the University of Atlanta and the University of Kentucky. Is that sufficient, Mr. Schroder?

Q. In your conversations with these coaches that you have just named—well, I'll put it this way; is that all that you have talked to?

A. No, sir.

[fol. 654] Q. All right, sir. In the conversations which you have had with these various coaches and athletic directors, was or was not football in general discussed?

A. I have talked football with every football coach I have ever been around. I started my football career when I was fifteen years old as a football player at the Georgia Military College in Milledgeville, and I have talked and lived football since that time. That was a long time ago.

Q. Well, let's get it up to more recent years. Have you talked or have you not talked with many coaches in the last two years on the subject of football in general?

A. I have talked to several coaches about football in general the last two years, but actually, the coaching game has grown away from me just a little bit. A lot of the coaches that I coached against are not in the coaching profession any longer, so naturally that would cut down on the number of calls made to people of that kind.

Q. Now, as athletic director at the University of Georgia, what were your responsibilities?

A. My responsibility, of course, was to plan the budget covering all sports. I had responsibility for supervising the making of schedules, and general supervision of the entire athletic program at the University of Georgia.

Q. I believe it's been testified to already that Paul Bryant held the position as athletic director, in addition to the position of head coach, football coach at Alabama?

A. That's true.

Q. What were some of the things that you and Coach Bryant did talk about when you were talking to him, re- [fol. 655] lated to matters covering the University of Georgia and Alabama?

A. Well, of course, Mr. Schroder, football is a big business, and there are a lot of things business-wise that must be discussed between athletic directors.

Q. Such as what?

A. For example, in the case of the University of Georgia and the University of Alabama, it is very important to the University of Georgia that the football game be played every other year in Birmingham, Alabama instead of Tuscaloosa, for two reasons. It's tough enough to play Coach Bryant any place, but in Tuscaloosa it's awful; and

the, of course, it's a difference of forty to fifty thousand dollars in the check that Georgia will receive, for that matter.

Q. Well, in that—

A. Then, of course, we have talked about the possibility of putting lights in at Athens. We have had some games over there when it was so hot that it was almost impossible for the spectators to survive. We have talked about moving the game back where it used to be, on a November date, which has proved impossible so far because the University of Georgia has so many national rivals playing in November.

Q. You talked about the difference in the game being played in Tuscaloosa and in Birmingham with respect to the financial aspects; where was the game scheduled to be played?

A. We have contracts with all of our opponents, and in the game contract between Georgia and Alabama, it is up to the University of Alabama to select the site of the game when it is played in the State of Alabama.

Q. In your conversations with Coach Bryant relating to playing the game in Birmingham, you have said, I think, [fol. 656] that it would mean forty thousand dollars more to each team because of the site where it was played?

A. That's about the difference, but I am giving only an approximate figure, the reason being that the stadium is larger. As another reason, the student body at Tuscaloosa takes up a lot of the seats, and some of them do not come to Birmingham. That is perhaps a selfish reason, but we did figure on it.

Examination.

By the Court:

Q. What would be the total seating, Coach, for a game—without getting into percentages—like the Georgia-Alabama game, the game of '62?

A. Your Honor, our check is—

Q. Approximately.

A. —approximately ninety-eight thousand, which is about the same as the check we received in Jacksonville.

Q. That would be Georgia's share?

A. Yes, sir.

Q. Roughly, it would be two hundred fifty or two hundred seventy thousand gross?

The Court: All right.

Direct examination (continued).

By Mr. Schroder:

Q. You have testified, I believe, that you and other coaches discuss these coaching points. Would you or not [fol. 657] have coaches come to you about your passing techniques?

A. Mr. Schroder, I hate to say this, but I had a very dignified gentleman in the coaching profession spend three days in my basement playroom, the late Gene Neyland. It is true that I was the first one to introduce the "T" formation in the South. I have had many coaches come to me for information; I have never refused one. The last lecture I made on pass offensive, for example, I had more than sixty letters requesting additional information, and I complied with the requests. I think you will find it true that the coaches that know a lot about football are perfectly willing to share the information they have.

Q. Have you sought information or help from other coaches?

A. Mr. Schroder, the University of Georgia has established the all time offensive record for the Southeastern Conference with the single-wing, and of course, it made me a good coach, but I got most of my information from two other coaches, Carl Snavely, then the coach at the University of North Carolina, and the late Dick Harlow of

Harvard. I went up to see Coach Dick Harlow, and I asked him for information, and he was a little busy and I had to follow him around, and finally I told him to sit down and draw the whole thing, which he did, and we named the offensive for Dick Harlow, then the coach at Harvard. We called it Harvard 3, Harvard 4, Harvard 7. I did give him that much credit.

Q. It is true, from what you have said, then, in your profession coaches willingly, it's unwritten law that they do help each other when they are asked to on specific techniques or plays or coaching points?

[fol. 658] A. Well, to give you an example, Mr. Schroder, you know I have a contemporary, his name is Robert D. Dodd. I would not hesitate to go out and see Coach Dodd and ask him for information on coaching points, and I am sure Coach Dodd would tell me exactly how he ran his plays, giving the coaching points, if I requested this information.

Q. Speaking of that, and particularly the school where Coach Dodd is connected, how do you feel about knowing Bryant as well as you did, when Georgia Tech plays Alabama?

A. Mr. Schroder, I pull for Georgia Tech in every game they play except when they play the University of Georgia. That is rather strange, and I know it. I pull for Auburn to beat Alabama because of my friendship with Coach Ralph Jordan, who was associated with me at the University of Georgia for seven years. Of course, when he played —when Coach Bryant played Bud Wilkinson, I pulled for Alabama because they were representing the Southeastern Conference.

Q. Who is Bud Wilkinson?

A. Bud Wilkinson is one of the finest football coaches ever developed in America; President of the Football Coaches, and athletic director at the University of Oklahoma. Also, he head up the Kennedy Physical Fitness Program.

Q. You know him?

A. Very well.

Q. Wilkinson?

A. Yes, sir. In fact, I have called him many times.

Q. Passing briefly, or passing for the moment to the so-called Burnett notes, I want to ask you a few questions about those, and if Mrs. Stilwell will be kind enough to hand the original to you, you can follow me as I refer to [fol. 659] them. It is contended by the Saturday Evening Post that in a telephone conversation between you and Coach Paul Bryant on September 13, 1962, that you told Coach Bryant the following things, the first of which is, and I quote: "Reismueller greatest in history." I will ask you with reference to that quotation, first, whether you have ever discussed the man whose name I have just mentioned with Coach Bryant at any time, assuming in my question now that what they were talking about was what—what they were talking about here when they wrote it down here was Rissmiller, and not Reismueller?

A. Mr. Schroder, the answer to that is that I have talked to Coach Bryant about Rissmiller. Coach Bryant was a little concerned about the recruiting of Rissmiller for the University of Georgia, and I have talked to him about it, and I assured him that Rissmiller came to the University of Georgia because his uncle lives at Cedartown, Georgia, and because it was his desire to come to the University of Georgia.

Q. Is that—excuse me.

A. In connection with that, Coach Bryant has asked me: What kind of a football player is Rissmiller? The only thing that I have ever said to Coach Bryant, or anyone else about Rissmiller is that he is the finest physical specimens that I have ever seen in football. I have never told Coach Bryant, or any other coach, that Rissmiller could be trapped, that Rissmiller would or would not carry out his offensive assignment. I have never put my judgment up against the judgment of the coaching staff at Georgia

in regard to Rissmiller. I would not pass on how good a [fol. 660] football player he was until I could watch him in group work, which I never have, and also I would have to have the benefit of the grades, which are kept on every football player—

Q. What sort—

A. —because for a football player to be good, he must be consistently good.

Q. What do you mean by grades kept on a football player? You mean in school?

A. I think it is true that every football player that plays in the Southeastern Conference, or any other place where the football competition compares to the competition in the Southeastern Conference, that everything that a football player—any position he does is graded.

Q. Graded by his coaches?

A. Graded by his coaches. The work is usually divided up among the coaching staff, and each coach is assigned one of the—one or more of the players.

Q. The information upon which a coach might grade the player to whom he is assigned is obtained how?

A. By studying the movies.

Q. You remember discussing with Coach Bryant something about the recruiting of Rissmiller? Was Coach Bryant likewise interested in getting that boy to go to the University of Alabama?

A. Mr. Schroder, I would like to say this. I enjoyed Coach Bryant's disappointment in not getting Rissmiller.

Q. Then I assume he was interested in getting him over there?

A. I think a lot of colleges and universities were interested in him, because he was selected in the State of Penn- [fol. 661] sylvania as one of the two or three best tackles in that State his senior year.

Q. Is what you have just said the extent of any discussion that you ever had with Coach Bryant that you recall, in which the name Ray Rissmiller was mentioned?

A. I repeat, I have never said to Coach Bryant, or any other coach playing against the University of Georgia, anything about the detailed play of Rissmiller.

Q. All right, sir. Let's pass on to the next one. I will read it; it's on Page 2. "Rakestraw to right", and there is a line drawn under that, and under the line is written, "optional left pass, if can block man on corner, keeps running". Now, I don't know whether the author or authors of these notes meant for that to be two separate entries or not, so I am going to ask you, first, to discuss the language above the line separately from that below the line, and then ask you to discuss the entry below the line; and, third, then discuss them as if they all meant the same thing. Now, "Rakestraw to right" means to you, if anything? Go ahead.

A. Mr. Schroder, that does not mean anything to me. I would like to say that I have never told any coach that Rakestraw goes to the right or left or forward or backward. I hope he will go forward in the football games next fall.

Q. Next entry reads: "optional left pass"—entry below that line to which I was referring a moment ago—"optional left pass, if can block man on corner, keeps running". What, if anything, does that mean to you, is my first question; and my second question is, whether or not you have ever discussed with Coach Paul Bryant information con- [fol. 662] tained in the quotation which I just read, to the best of your knowledge?

A. I would like to take the bottom part of that statement first.

Q. Do it as you wish, sir.

A. I think it would be true that every offensive plan, almost every offensive plan in football, as related to the passing game, has three types of passes, a drop-back pass, which the quarterback, for example, would drop straight back to the center approximately seven yards and set up to throw. A pass called a roll-out pass in which he would be

required to fake usually to the fullback and the offensive set. And a sprint-out pass in which the quarterback would simply take the ball and sprint as fast as he could to the corner of his offensive man, watching for indications, reading the defensive plan.

Coach Paul Bryant, at times, however, has played entire football games without ever using—without ever using a drop-back type pass. He is an expert on the roll-out type pass, and it might be that since he has Joe Namath, that he is going to drop-back type pass. Coach Paul Bryant and Coach Bud Wilkinson are two of the best exponents of that type of football I know. I have learned a lot of football from them on an option pass, which in the case of Bud Wilkinson I am sure instructions are to the quarterback, sprint to the corner, and any time you can gain three yards, take the three yards and never throw, never throw until the receiver is wide open. That would mean the option pass I have described.

This "option left pass" to me describes the pass route which either originated with me or Coach Frank Leyhe of Notre Dame. We called it the same thing. We have had about ten coaching clinics at the University of Georgia dur- [fol. 663] ing my coaching time. This expression has been used, I am sure, that in the State of Georgia today there are fifty, a minimum of fifty high school coaches that would know exactly what you are talking about when you mention that pass route. Since I have lectured on the subject of football all over the United States, I am sure there are people all over the United States. If you would like for me to, sir, I will take the blackboard and show you the original plan which was completed seventy per cent of the time when we were employing the single wing offense, if that will—

Q. Seventy per cent of the time?

A. Well, if we threw it a hundred times, we complete seventy.

Q. Is that considered fairly good?

A. Mr. Schroder, we never thought we were doing very well unless we completed better than fifty per cent, but we have had a lot of passes that we had to drop because our percentage was very bad.

Q. You mentioned the fact that optional left pass was something that, I believe you said, you and Frank Leyhe of Notre Dame devised?

A. To my knowledge we were the first coaches that took advantage of the possibility of the same.

Q. Do you know whether or not the University of Georgia now uses that terminology?

A. I heard Coach Johnny Griffith testify that this pass was used in 1961 in the University of Georgia vs. the University of Florida football game at Jacksonville.

Q. Wasn't that the Miami game he was testifying about?

A. Well, you are right; it was Miami.

[fol. 664] Q. And it was called optional left pass? All right, sir, will you please show the Court and Jury what it is that we are talking about when you talk about optional left pass.

A. As I said, this was used first from the single wing. This is a tight line which is something you gentlemen studying football haven't seen much of.

Q. On the blackboard?

A. On the blackboard. Now, the halfback and the linebacker are the two men that we worked on on this offensive plan. First of all, it was our objective to keep the linebacker out of the pass defense so the ball was snapped directly to the fullback who executed a full spin, handing off to the tail back or left half who stepped in to take the ball from the quarterback, and then was back in passing position seven yards deep. The left end ran what we call a deep route, running to the inside of the halfback playing this position, and then heading for the flag. That, of course, is in the corner of the field. The onside end ran what we call a hidden route so that he would be in position either to con-

tinue that route or fake a block on the linebacker. And then he is usually about twelve yards deep. The safety man here had to be occupied because with this plan we were isolating the right defensive side back. The wing back was through the safety man. The tail back dropped back in passing position, and then we told him—of course, we were not always right in what we told him—the defensive man could not be right. As soon as you set up, you look for the defensive man playing that position. There would be a man in front of him and a man behind him. You know that your pass receivers are disciplined. They will be on the right. You throw to the man that is open. I imagine that Van Davis, [fol. 665] who was then playing the right end at the University of Georgia, caught more passes in one season than any football player has ever caught in the history of Southeastern competition, so that is what opticnal left means, to apply it to the T-formation.

Q. Don't go through—it is the same pattern in that T-formation?

A. Same pattern.

Q. All right, sir. Coach Butts, my second question relating to that entry, or those two entries is this: Do you have any recollection of ever having discussed that with Coach Paul Bryant before Georgia played Alabama in 1962?

A. Absolutely not, in regard to the University of Georgia. The University of Georgia had optional passes. I have never studied them or relayed this information to anyone going to play the University of Georgia.

Q. The next entry reads, "well disciplined ball club, added two coaches". What is your testimony, Coach Butts, with reference to whether or not you have ever discussed that topic with Coach Bryant before the University of Georgia and Alabama met in 1962, in September of that year.

A. Mr. Schroder, before the game between the University of Georgia and University of Alabama, I had never

seen the University of Alabama—University of Georgia scrimmage the first team against the second team. I would have no idea how well disciplined the University of Georgia was under real competitive conditions that could be compared to game conditions. I thought the University of Georgia had a well organized team in that I thought in their group work they moved smartly and quickly to their different groups. They did not have lost motion on the field. I [fol. 666] had no way to know what kind of discipline they had, and I would like, if you will give me permission—

Q. Let me get an answer to my question, Did you discuss the discipline of the University of Georgia Football team with Paul Bryant at any time before they met in September, 1962?

A. Not that I know of. I can go to the blackboard and show you the application of discipline, and frankly under game conditions, although I do not care to criticize anyone. I can show you what lack of discipline under game conditions can do in a football game, and the reason I'd like to do that, I have been accused of rigging and fixing a football game, and I can show you where Alabama got easy touchdowns, and in so doing I will not blame any coach, I will not blame any players, because I understand that the University of Georgia had a number of sophomores, and I don't know any worse sentence you can put on anyone than to have them introduced into Southeastern Conference football in a game against the University of Alabama.

Q. When you say "going to the blackboard" you are referring to showing something that was on the film demonstrating what was done at the game; is that what you mean?

A. The gentlemen of the Jury have seen the pictures, but I doubt seriously if they have had enough experience with football to realize some of the things that happened.

Q. All right, sir, go ahead.

A. That is an offensive set which I would call slot left, right end split, called by the University, as I have learned

since this case has been in progress, pro left. The first touchdown scored in the football game on September the [fol. 667] 22nd, 1962, in—first, I'd like to say to you that—would it be all right for me to tell them, sir, that I told the Georgia coaching staff about the fact that the University of Alabama was going to use this formation, or is that irrelevant?

The Court: I don't see any objection to it.

Mr. Schroder: You have already told them.

The Marshal: Let's have order, please.

The Witness: I went to the defensive coach in the presence of a boy named Virgil Peavy, whose job it was—

By Mr. Schroder:

Q. That is all right; go ahead.

A. All right. In other words, I showed on the blackboard head defensive coaches at the University of Georgia that this formation, told them that Paul Bryant would major in it against the University of Georgia. The first touchdown came from this thing, this formation, and the reason this formation is used, they've got the running strength, and they have got a defensive man isolated out here, and there cannot be but one man on the field that can possibly cover this man if he goes deep, the only man that can cover him is the man playing defensive position. So, early in the game this Williamson, playing right end for Alabama, did a right; that is what it is called. The defensive man playing for the University of Georgia had been coached [fol. 668] and coached everyday by the defensive backfield coach, a man towards him to the right, he is supposed to back up and make the pass receiver come to him, and if a pass is completed, make it happen in front. That is the rule we all go by. Instead of that, he moved with the fake, and it was a touchdown. That is an example of the lack of discipline as applied in football. You cannot blame this football player; he was a sophomore. It has happened to the best of them. That is an easy touchdown. There is not

any way that could be arranged, but I was up in the press box.

Now, the second touchdown—I will not take them in chronological order or the way they happened in the game. As a result of a lack of discipline, self discipline and carrying out a plan, another touchdown was scored when this man went down on a deep in the end and this halfback was with him. The end was playing—was playing the triangle here off the line of scrimmage, approximately four yards.

Q. Are you referring to the defensive end?

A. The defensive end. The defensive end must cover the next man in the flat or deep flat because he is the only one that can. So the right halfback went out into the deep flat. The sophomore here can't be blamed, but football and football reaction must be a part of the football player. It's got to be instilled by discipline and coaching. This boy playing this position hesitated, and it was a touchdown for the University of Alabama. Georgia, all the time, was playing touch, hard-nosed football, in the line. They were covering kicks well; they were fighting to win. Two touchdowns were scored on that same plan that I have drawn right there, gentlemen.

[fol. 669] Now, we put Williamson out on the other side which would be, from the terminology that you should be familiar with now, at least in part, Williamson is out here, and we have the same setup, a defensive end off the line of scrimmage in a triangle. The University of Alabama employed a play that is used by Georgia; it is used by Georgia Tech; it is used by everybody, the outside belly play. A quarterback—all these men blocked away. The quarterback stepped back, placed the ball into the belly of the fullback, and faked to the fullback, faked in here. The right halfback was on a fly, and he had a wide position. Williamson, the split end, went backfield and carried this right side back of the University of Georgia absolutely out of the play. This end is the only man now who can take care of the pitch man in the event the quarterback keeps

the ball, does not give it to the fullback, keeps the ball and pitches. Absolutely this end here, still a sophomore, and I have emphasized the fact that Georgia was handicapped because of this sophomore material, he went in for the fullback. The right halfback for the University of Georgia could have run a hundred yards. But there wasn't a soul on this side of the field, and that is the application of discipline on a football field under game conditions.

Q. Coach, we will pass on to the following or the next note at the top of Page 3 which reads, and I quote "onside guard, pulls on sweep." First I want to ask you, did you or not ever discuss with Coach Bryant prior to the Alabama-Georgia Football game any such thing as is in that note.

A. Mr. Schroder, the answer is "no"; I never discussed any type of guard play with him. I do not know of but two teams in America that pull onside guard on sweeps against [fol. 670] the type of defense that Alabama is known to employ, the two teams being the University of Missouri and the University of Delaware, and in the Southeastern Conference, I think if you pull the onside guard against a wide tackle six, a loose six defense, you will have extreme difficulty getting back to the line of scrimmage.

Q. All right, sir: Now, the next entry, reading "don't overshift." I will ask you the same question I have asked you or intended to ask you with reference to the other notes or other entries; did you on September the 13th or at any time prior to the Alabama-Georgia game discuss that entry with Coach Bryant as it related the the University of Georgia?

A. Mr. Schroder, that could not be possible. I do not know of any offensive plan that I could tell any coach any time that he would not overshift against that offensive set or that plan. The first—

The Court: What do you mean by "overshifting"? I am not clear on that.

Mr. Schroder: The lad from Alabama attempted to do it yesterday.

The Court: That overshifting has been in the testimony several different times.

The Witness: Well, Your Honor, sometimes when they don't overshift you can get into a lot of trouble; I can tell you that.

[fol. 671] The Court: Does that refer to the defense?

The Witness: Defense; yes, sir; it refers to the defense. Usually, if there was a normal defense, balanced defense, the guards would be somewhere in here, the tackle would be in the normal position, with the ends out in their position, but when you overshift, you would find usually—this is done different ways, but to make it as simple as possible, there would usually be a man here on the center, the guard would be overshifting, the tackle would be overshifting, and the end would be out there, and this man would be tight, this man would be tight, and you would compensate for the overshifting by moving your linebackers back to the other side. That is a simple picture of an overshift.

By Mr. Schroder:

Q. Wait a minute, whoa, whoa. In effect, what you are saying when you say "overshift" is related to defensive techniques, and it could only apply to a defensive technique?

A. Yes, sir.

Q. —the defensive line, instead of playing in the regular—

Mr. Cody: Let him testify, Mr. Schroder.

Mr. Schroder: Thank you, sir.

[fol. 672] The Court: I didn't understand your question. I don't know whether it would be—let him ask this question.

The Witness: Yes, sir.

The Court: Young Mr. Pell uses a term "eye-to-eye"; when overshifting, you wouldn't be eye-to-eye; is that correct?

The Witness: No, sir. It would be eye-to-eye on this position here. This man playing head on the center, it would be looking right in the eye, would be eye-to-eye on him, but this football is so technical at times you line up on one eye and at times on the other eye, and it doesn't seem very significant, but it makes a lot of difference.

By Mr. Schroder:

Q. The next entry reads, "Woodward commits fast-safety man." My first question is, Coach Butts, did you at any time discuss that entry or the contents of that entry with Coach Bryant before the Alabama game in 1962 in September?

A. Mr. Schroder, I do not even remember mentioning Woodward's name. Woodward—Brigham Woodward is a personal friend of mine.

Q. My question—answer my question first, and you can explain it. Did you or not discuss with Coach Bryant before the Alabama-Georgia game in 1962?

A. I don't remember ever discussing it with him any time.

[fol. 673] Q. All right, sir. Now, you can explain what it is that that means to you.

A. I would like to show you by demonstration my mental picture of Woodward, which I can do easily.

Q. Doing what?

A. I would like to show you—give me a ball carrier.

Mr. Lockerman: You have got a mighty poor one.

The Witness: Give me one young enough to run, the boy.

The Marshal: Let's have order, please.

The Witness: Will you stand there, please. Woodward is back, the distance will vary according to the situation, say, that he is back twelve yards. I would like to say to you, I have never thought of Woodward as being weak on pass defense. I have worried about him, however, with some of the things he does. He is very aggressive. He wants to make every tackle, and when he approaches the

line of scrimmage, he is in an upright position. I am sure his coaches work on him all the time. I have seen them do it. In my opinion every football player playing the defense should be in a crouch. Now, the danger—first, I'd like to say in defensive football, all defensive football players play ankles. If I come in from this position, the play goes wide. It is possible for me to make tackles on or near the line of scrimmage without too much danger, because pursuit will be coming in that direction, to help [fol. 674] take care of the situation, but when a play breaks through the middle of the line of scrimmage, it is dangerous for any man playing safety man to take a chance, as pointed out by Coach Pierce. The safety man is supposed to prevent touchdowns being scored. So, when Woodward comes up fast, and a block approaches him—come on up, please, sir—and the ball carrier is coming; if the man in the safety position should commit to one side or the other, the ball carrier will certainly take advantage of it. So, what worried me about Woodward was the way he approached the line of scrimmage. I thought he should approach from the front and hold him off and hold up the play so that pursuit could help him. In the picture of the Alabama game, Georgia vs. Alabama, if it had not been for a great tackle by a linebacker—here is Woodward back here. The linebacker, Woodward came up, committed too fast, and went around a block. The Alabama ball carrier would have gone for a seventy-five yard run right down the middle if this linebacker hadn't made a great tackle. Now, that is the only picture I have of Woodward. I have never thought of him as being weak on pass defense. In fact, what he did last year I shall never forget in the homecoming game vs. the University of Kentucky. He came up with an interception which tied the game.

By Mr. Schroder:

Q. Now, would the fact that the safety man committed himself too fast or committed himself fast, would that fact

be of any interest to someone who was preparing to play that team?

A. I can say this, that the offensive set over there, there is not any play that any coach could plan to take advantage [fol. 675] of a man playing the position as I described. Any plan he might overcommit, and frankly I always worry about it, but there wouldn't be any particular play that could take advantage of Woodward in his style of play. It might happen on any play.

Q. How about a—if he did that as a rule, how about a pass play; would that affect him or affect the success of the team playing against the team that Woodward was playing for?

A. Mr. Schroder, I have never suggested a pass play that I think would beat Woodward to anyone, but I think the thing that would beat him or any other player who plays it like he does would be to simulate a running play, make a play look exactly like a running play, and have one man fake a block on him, and get into a pass route.

Q. Well, that, in your opinion, would be the only way that this—

A. That would be the only way, and I know, of course, that at Georgia we have a safety man like that a few years back, and Red Phillips, who now plays right end for L. A. in the National Pro League, was one man out to pass, the first play of the game; it embarrassed us very much; he went eighty yards.

Q. Well, now, you saw the movies yesterday. Did you see at any time where Alabama passed in Woodward's zone where he was supposed to be defending?

A. I saw the picture of the Georgia-Alabama game yesterday, and I never saw a pass in his zone, and I'd like to repeat what I said a moment ago. I have never seen anyone take advantage of Brigham Woodward on pass defense, anyone.

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[fol. 676] JAMES WALLACE BUTTS having resumed the stand, testified further as follows:

Direct examination (continued).

By Mr. Schroder:

Q. The next note, Coach Butts, reads as follows, "Weak defense, anybody except Blackburn". With respect to that entry, I want to ask you, as I have before in connection with other entries, did you at any time before the University of Georgia played Alabama in September, 1962, say anything that I just—like I just read to you to Coach Bryant?

A. Emphatically no.

Q. What does that entry mean to you, if anything?

A. It doesn't mean anything to me.

Q. All right, sir.

A. However, I am sure any coach playing against the University of Georgia would assume that since Georgia unfortunately had to play so many sophomores in one season, that they would have a weak secondary defense.

Q. Passing on to the next note on the top of Page 4 which reads, and I quote, "Baer, split right, split right end out." Did you at any time before the date of September 22, 1962, give that information or state that to Coach Bryant?

A. No; I did not. And I would never use such language.

Q. Passing on to the next note, "Long count, left half in motion." Between September the 1st and September 22nd, 1962, in any conversation with Coach Bryant did you give that information?

A. No; I did not give him any information at any time [fol. 677] about the University of Georgia's offensive plan.

Q. The last note on that page, reading, "Best since Trippi, Porterfield"; between September 1st and September 22, 1962, did you give that information to Coach Paul Bryant of Alabama?

A. No; n-o. I would like to say that Porterfield or any other sophomore back I have seen in recent years has some

time to spend in developing before he will equal Charlie Trippi.

Q. The next note on top of Page 5, reading, "Bear on a hook on goal line." Did you at any time before September 22, 1962 give that information to Coach Paul Bryant of Alabama?

A. No, sir; I did not; but if Coach Bryant knew that, he would know that every team in America playing the defense—when playing a goal line defense has so small an area that any end or any back, for that matter, has very little room to maneuver. The pass route would have to be very simple against any goal line defensive plan.

Q. I was thinking about the pass pattern that Georgia used against Auburn when it was playing for the championship in 1960. That was on a goal line, was it not?

A. No, sir.

Q. Where was it?

A. It was too far out, about fifteen yards at that stage of the game. I was a little worried.

Q. Well, that was not a hook pass to Herring, was it?

A. All routes are named, Mr. Schroder, for every eligible receiver. The terminology that we used at the time—Bill Herring, playing the left end, in this particular pass pattern did a deep, which in simple language is down and out. [fol. 678] He faked the halfback and went for the flat, the corner of the field.

Q. And that is where Tarkington hit him?

A. That made me a better coach, Mr. Schroder.

Q. Next entry reads, "Slot to right, ends normal (three yards)"; did you at any time before the game in September, 1962, give that information to Coach Bryant of Alabama?

A. No, sir; I did not. In fact, I haven't seen that formation used in years, and I believe the last time we played against the University of Alabama with the University of Georgia, Paul Bryant used it.

Q. What's that, a double slot?

A. A double slot with the ends out, the halfbacks in position to get out and at the same time do a good job of block-

ing. Some people think it is superior in potential to a plain double wing where the ends are in normal position and the halfbacks outside.

Q. The next note or the next entry in the notes, reading, "right halfback, left guard pulling, blocks on corner"; before September 22, 1962, did you give that information to Coach Paul Bryant?

A. I did not, Mr. Schroder. Any left halfback that was given that ball by the quarterback would be unfortunate. They have enough men left for the men to fly to block the defense.

Q. Top of Page 6, entry reading, "Slot or wide slot 'till goal line"; did you at any time before September 22, 1962, give that information to Coach Bryant of Alabama?

A. I did not.

Q. The next entry reads, "Can't quick kick"; did you at any time before the Alabama-Georgia game in 1962, give that information to Coach Paul Bryant?

[fol. 679] A. No. And I'd like to say this, that the quick kicking plan at the University of Georgia at the first glance —if a football coach studied the position of it at first, he would not think it was very good, but I have watched the University of Georgia use it as copied from the University of Texas. It's been very effective, but if I had known that the University of Georgia had a man who played in normal position, left half or right half or fullback, and quick kiek, I certainly would not have given it to Paul Bryant, because in my opinion, that definitely affects the play of the safety man in a three-deep defense.

Q. Next entry, "Slot right, right half from fly, screen to him," before the Alabama and Georgia game in 1962, did you give that information to Coach Paul Bryant?

A. I did not, and I would like to say that all screen passes come off of pass protection action. A man who receives a screen must have an inside-out blocking punt. If a man called a screen like this, he would be definitely covered and

it would be a very dangerous plan. I have never seen it used.

Q. Next entry, "29-0 series, Baer catches every game in 1962, did you give that information to Coach Bryant at any time, either in person or by phone?

A. I do not know—no; the answer is "no".

Q. I did not understand.

A. My answer is "No"; I did not give this information.

Q. Oh, yes.

A. But I do not know of any series of that kind. I have never heard of any series called that by any coach.

Q. The entry on the top of the last page reading "slot right, left end out, fifteen yards"; did you give that in-
[fol. 680] formation to Coach Bryant before Georgia played Alabama in 1962?

A. No. I would have to explain, again, as I showed at the blackboard, Coach Bryant showed me the formation and the potential of the formation, and that is the only discussion that I have had about it.

Q. Is that the one that you in turn discussed with the University of Georgia head defensive coach?

A. Yes. I showed him the strength of it running, the strength of it passing.

Q. The next note, "drop end off, contain with tackle"; before the game in 1962, at any time before that game, did you give that information to Coach Bryant?

A. No. And I'd like to explain that. When Coach Bryant returned to Tuscaloosa, Alabama, as the head football coach five seasons ago, six coming up, we played them in Tuscaloosa, and it was just like running signals out in the middle of the field, because he was dropping the ends off. But he would not cooperate with us down near the goal line, and we failed inside the ten yard line at least eight or ten times, we failed to score.

Q. In the conversation—I mean, in the article the Saturday Evening Post indicates that its informer says that you and Coach Bryant, in your alleged telephone conversation, said something about there being a phone call to be made

on Sunday. In any conversation you might have had or that you did have with Coach Bryant before the game or after the game, I will restrict it to before the game, was there any mention about calling back on Sunday?

A. No; to me, no. I have known of Paul Bryant to set up a future telephone call to me.

Q. All right. That completes the notes, but before we pass your copy back to the Clerk's desk, we have been over [fol. 681] those notes in detail, and I want to put this question to you, and I am directing it to each entry individually in those notes. Did you at any time before the University of Georgia met Alabama in Birmingham on September the 22nd, 1962 to play football, did you at any time before that game give Coach Bryant any of the information contained in these seven pages of notes?

A. No; absolutely not. I haven't talked to him about any Georgia football plan at any time since I retired as head coach.

Q. Have you at any time talked to any other coach and given any other coach any information relating to the University of Georgia's football plan before the two schools were to meet?

A. No.

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By Mr. Schroder:

Q. Coach Butts, before the University of Georgia played Alabama on September 22, 1962, were you or were you not familiar with the University of Georgia game plan?

A. No. And I would like to enlarge on that. I have never seen a game plan to be used by the University of Georgia since I retired as head football coach.

Q. Before the game in September, 1962, did you or not know what formations the University of Georgia was going to use or planned to use in that game?

A. No. I did not know what formations they planned to use. I know something about almost every formation that has ever been used in football, but—

Q. My question, though, is: Did you know what formations Georgia had planned to use in that game?

[fol. 682] A. No; I did not, and I would like to add to that, I was amazed and surprised that they did not do some other things that they had done well, perhaps the reason being that they always got the ball or almost always got the ball in the Georgia-Alabama game in a very poor field position.

Q. Because of Alabama's kicking game?

A. Alabama always has a great kicking game, and I was proud of the Georgia kicking game. I have never seen better coverage of kicks than Georgia showed in that game.

Q. Before the game in 1962, did you know anything about what plays Georgia planned to use against Alabama?

A. The answer is "no"; I did not know any specific play they would use. I know their outside belly series. I know—I think I know that after thirty-two years as head coach I could take any formation and develop an offense that would cover—hit every hole and take care of every situation.

Q. Did you, before Georgia and Alabama met in 1962, discuss with Paul Bryant anything relating to the way the game was to be played or who was going to do what in the game?

A. The answer is "no"; I had no idea about the game plan or the philosophy to be employed in the game. In other words, football coaches who have coached for a period of time usually develop a football philosophy. They believe in certain phases of the game, and they emphasize the same. I absolutely have no idea at the present time what the Georgia plan is. To be successful in football, one in coaching must establish, first of all, something they can do real well, and then when the defense meets that situation it [fol. 683] gives them the opportunity to put in other plays or other plans.

Q. Who is Wayne Routh?

A. Wayne Routh, the first time I knew him, was connected with Communications International, an advertising

firm, in some capacity. I think I saw him as a financial advisor.

Q. Have you had discussions with Mr. Routh in the offices of Communications International?

A. Yes, sir; Mr. Routh was trying to find the money—

Q. Well, have you had discussions with him?

A. I answer "yes".

Q. During the fall of 1962?

A. Yes, and later.

Q. All right, sir. Now, have you during your tenure as coach or as athletic director at the University of Georgia ever given any coach any information relating to what Georgia planned to do in a forthcoming game against that coach?

A. No. I have talked to a lot of coaches about coaching techniques, coach points.

Q. As related to the plans to be used by Georgia in a forthcoming game?

A. Absolutely no.

Mr. Schroder: Wait a minute. I have got to confer here. Mr. Cody, will you approach the bench with me, please? May we approach the Bench?

The Court: Yes, sir.

(Whereupon a conference was held at the Bench between the Court, Mr. Schroder and Mr. Cody.)

[fol. 684] Cross examination.

By Mr. Cody:

Q. Coach Butts, were you in the courtroom when Mr. J. D. Bolton testified?

A. Yes.

Q. Do you recall the evidence he gave as to the meeting you had in Mr. Cook Barwick's office on February the 22nd when you and certain University officials were present?

A. Yes, sir, I heard what he said, sir.

Q. Is there any error or correction in Mr. Bolton's testimony that you would like to point to?

A. Mr. Cody, I am not sure that I am qualified to correct Mr. Bolton. I would like to say, however, that in my opinion he, not deliberately I am sure, but he said something that I do not agree with, that being—should I tell you?

Q. Go ahead.

A. —that being when after the notes had been handed to me in Mr. Cook Barwick's office, he said that he quoted me as saying that the information in those notes was basically true. I have never said that. I said such a telephone call might have been overheard. I did not say—I did not evaluate the notes.

Q. Do you recall he asked you to sign an affidavit on that occasion?

A. You are referring to Mr. Cook Barwick?

Q. Anybody in that meeting.

A. Mr. Cook Barwick never, never asked me to sign an affidavit.

Q. Well, who did?

A. Not anyone in the room asked me to sign an affidavit. [fol. 685] They asked me to do something else.

Q. Was that take a lie detector test?

A. That is true, sir.

Q. And is it your evidence now, under oath, that no one in that meeting asked you to sign an affidavit?

A. Not to my knowledge.

Q. But you did hear Mr. Bolton testify to the fact that that request was made, and you take issue with him on that statement?

A. I do, sir. According to my knowledge I would like to—I would like to ask for permission to explain.

The Court: Yes, sir; you explain any answer you want to.

A. (By the witness) There was a little bit of pressure on me, Mr. Cody, when I walked in to that arrangement. I didn't know what they had—what the meeting was all about.

Q. You were among friends, though, weren't you?

The Court: Just—all right.

The Marshal: Let's have order, please.

A. (By the witness) You want me to answer that?

Q. Haven't you known Mr. Bolton and those University officials for many years?

A. Yes, sir; yes, sir.

Q. Coach Butts, hasn't the University of Georgia been pretty good to you over the years?

A. Yes, sir; they have given me a wonderful opportunity, and I appreciate it very much, and I might add, I will [fol. 686] always be loyal to the University of Georgia, regardless.

Q. Was it the next day that you resigned as athletic director?

A. Yes, sir.

Q. Do you recall Mr. Bolton's testimony to the effect that you resigned in January previous to this particular resignation?

A. I recall that, Mr. Cody, but I would like to say the only official resignation, which is what I thought you were referring to, came Saturday following meeting in Mr. Cook Barwick's office.

Q. That would be February 23rd?

A. I will take your word for it, sir.

Q. Thank you. Now, what—why did you resign back in January?

A. I—I went to Dr. O. C. Aderhold, President of the University of Georgia, and told him that I would like to be retired as athletic director in June, I wanted to do some other things and get out of the job as athletic director.

Q. Well, now, tell us what the other things, Coach, are. That is important in connection with this case. What business were you going into?

A. Sir, it was my plan at the time to hold the interests I had, not particularly to enter into them. For example, I owned stock in a corporation known as Instant Loan Company. I have never had anything to do with operating that company, but I had planned to back them to great extent.

What I expected to and planned to do was to get a connection with a professional football team.

Q. Let's back up to the Instant Loan Company, now, just a minute. Who was it you went in business with in that company?

[fol. 687] A. Mr. Cody, originally I went into the business with Frank Childs of Gray, Georgia and Carl Westmoreland of Macon, Georgia.

Q. Was that a partnership?

A. It was—I heard that it was a partnership, but it was incorporated from the beginning, that is, in my opinion at this time.

Q. Isn't it true, though, Coach Butts, that when the Instant Loan Company was started, you and Frank Childs were partners?

A. We collaborated in the planning to get the loan licenses, but when the business started operating, Mr. Cody, Mr. Westmoreland was in it with one-third interest and it was a corporation. To my knowledge there's never been a partnership. Frankly, I don't know too much about the difference. But officially, when Instant Loan Company was started, it was a corporation, and I have named to you the owners of the stock, one-third interest each.

Q. It started out as a corporation?

A. Yes, sir.

Q. And that—and that company operated in various cities over the State of Georgia?

A. Yes, sir. The home office is in Macon, Georgia. We have an office in Blackshear, Georgia; Ocilla, Georgia; Dawson, Forest Park, and Jonesboro.

Mr. Schroder: If the Court please, could I inquire as to the relevancy of all this testimony?

The Court: What is your—

[fol. 688] Mr. Cody: I want to show, Your Honor, that he was devoting his entire time practically to outside interests other than athletic director, and that is the reason—that is the reason he resigned.

Mr. Schroder: I think he ought to just ask him that, about—

Mr. Cody: That is what we are talking about.

Mr. Schroder: Whether it was a partnership, a corporation, where they had offices, who the people were; just ask him what part he devoted to athletic director.

The Court: I will let you continue the line within limits.

By Mr. Cody:

Q. You didn't name Blackshear.

The Court: Yes, sir; he named Blackshear.

The Witness: Yes, sir; I meant to.

The Court: He named Blackshear.

By Mr. Cody:

Q. How about Conyers?

[fol. 689] A. I don't have one at Conyers, but it is a good place, though.

Q. Ocilla?

A. A license was issued for Ocilla, Mr. Cody, but it was exchanged for another location; I believe, Jonesboro.

Mr. Cody: Will you identify this, please?

The Clerk: Yes, sir.

Mr. Cody: That may have been identified once before.

The Clerk: It doesn't have a number—yes, it is; Defendant's Exhibit No. 10. It's been marked.

By Mr. Cody:

Q. Coach Butts, I show you what has been identified as Defendant's Exhibit No. 10.

Mr. Schroder: May I look at it, Mr. Cody? I don't believe I have ever seen it. I don't know what you are talking about.

By Mr. Cody:

Q. Do you know what that is?

A. Yes, sir.

Q. Did you—will you look on there and tell who—whether or not that is the business that we are taken about the Instant Loan Company?

A. Yes, sir; it is.

[fol. 690] Q. Does it show what type of business it is, that is, whether it is a corporation or partnership?

A. I don't know. You will have to show me. I am not very wise in business transactions. I can give evidence to that effect.

Q. You see question number 6 that you and Frank Childs are named as partners?

The Court: What is the purpose of this?

The Witness: Mr. Cody—

The Court: What is the purpose in whether it is a partnership or—of course, I don't know what your—

Mr. Cody: Your Honor, there will be some evidence about Mr. Childs.

The Witness: Mr. Cody, will you please consider the answer I gave you. When these licenses were issued, I am not sure, but when the business started operating Mr. Carl Westmoreland was a third owner in a corporation which was formed in Macon, Georgia, Bibb County.

By Mr. Cody:

Q. Do you know if, Coach Butts, if your resignation in January of 1963, that the acceptance of it was held up because of all these business interests that the University—

[fol. 691] Mr. Lockerman: Your Honor, I don't think that is a proper question at all, does he know whether or not he was held up because of that.

The Court: What would be the relevancy, even if it was?

Mr. Lockerman: Yes; that is a further objection.

Mr. Cody: I withdraw it.

The Court: All right, sir.

By Mr. Cody:

Q. It is your testimony now that effective February 28, that is, the resignation you made on February 23rd, effective February 28, that following that date, February 28, you were neither coach nor athletic director at the University?

A. That is true, sir.

Q. Coach Butts, do you remember giving your deposition in Mr. Schroder's office prior to the trial of this case?

A. Yes, sir.

Q. That was on May the 3rd?

A. Well, I—I'll take your word for that, sir.

Mr. Schroder: If the Court please, and while counsel was looking there, the witness has testified he did resign, but I don't believe he testified why he resigned on February 23.

[fol. 692] The Court: Well, you can bring that back out on redirect-examination; I will permit you to do so. All right, sir, go ahead with the Coach.

By Mr. Cody:

Q. Coach Butts, do you recall a statement that you made over television on March the 29th, 1963, as follows:

"Gentlemen, I came over here today to see the Attorney General of the State of Georgia, Mr. Gene Cook. My express purpose was to check with him things that I had read in the papers and heard on T. V., that in some respects might imply that I had at some time or another been connected with gambling interests. I assured Mr. Cook that I never had been interested in gambling. I have never been interested in associating with people that were known gamblers, and that I would like to repeat what I have said many times before. My greatest love of all and interest is in the University of Georgia, and I would never at any time and never have done anything that would injure the University of Georgia, and that is all I have to say."

Did you make that statement?

A. Mr. Cody, I have heard so many statements, and been around you lawyers so much, might be a few words out of line there, but I made a statement to that effect. I would like to say that as far as my services at the University of Georgia are concerned, that represents only my opinion.

Mr. Schroder: If the Court please, this is about the second or third time that reference has been made in this [fol. 693] trial to the Attorney General. Now, I think that the Jury ought to be instructed that whatever happened at the Attorney General's Office, or before the Attorney General, doesn't have any bearing whatever on the issue being tried here today and cannot influence their deliberations in any way. That's been referred to yesterday in a statement, referred to again in this—in the testimony today.

Mr. Cody: We are not getting in to the results of that.

Mr. Schroder: I believe the Jury would be—ever the results of any other body might have been is not—should have no sway or bearing on your determination of the issue in this case.

By Mr. Cody:

Q. Coach Butts, you refreshed your recollection earlier in the morning about some telephone calls that Mr. Schroder asked you about. Will you take a look at that document, which is—which has been identified as Defendant's Exhibit No. 17.

Mr. Schroder: May Mr. Cody and I approach the Bench, Your Honor?

The Court: Yes, sir.

(Whereupon there was a conference at the Bench between The Court, Mr. Cody, and Mr. Schroder.)

[fol. 694] The Court: All right, sir.

By Mr. Cody:

Q. Now, you may refresh your recollection at any point in this testimony that you wish, Coach Butts, so I am going to ask you, first, to turn to such part of that list as discloses some calls in September of 1962, and ask you if it doesn't disclose—

A. Wait a minute, please, sir. May I ask a question, sir? Do they start on Page 22?

Q. They are in several different places, but I don't think you will have any trouble locating them.

A. What do you want me to do, sir?

Q. I want to ask you if that document refreshes your recollection with respect to ten or eleven calls that you made to a man named Frank Scoby, in Chicago. This is in September, 1962.

A. Without looking at the document, Mr. Cody, I will say that I have called him at least eleven times.

Q. During September?

A. Yes, sir.

Q. Do you recall particularly calling him on September 21, 1962 on two separate calls?

A. No; I do not, sir.

Q. That would have been the day before the Georgia-Alabama game?

A. Yes, sir.

Q. Do you recall—can you refresh your recollection from that document and tell me whether or not you called him on September 22, which was the day of the game?

A. I would not have remembered it exactly, sir, except that the gentleman that I called Mr. Scoby for read this in a newspaper and told me about it, said this call was made [fol. 695] to Mr. Scoby on the day of the Georgia-Alabama game for Mr. Joe Sargent, Lakeland, Florida, and I simply put him on the phone, and he talked to him.

Q. Did you know Mr. Frank Scoby was a pretty big gambler?

A. I did not.

Q. Have you found out since?

A. Well, they said you couldn't mention the Eugene Cook investigation; is that right? That's the first time I knew about it, sir.

Mr. Schroder: I understood the question was that he was not his—what is the question?

The Court: I believe he asked Coach Butts did he know that Frank Scoby was—

Mr. Schrober: Was—

The Court: —was a big gambler.

By Mr. Cody:

Q. How long have you known Frank Scoby?

A. I have known of him since, perhaps the early '40s. I met him following the 1946 football season in the summer of '47, when I was a member of the College All-Star coaching staff in Chicago. I met—

Q. Have you—

[fol. 696] Mr. Schroder: Let him finish.

Q. Go ahead.

A. I met him through Coach Frank Leyhe, then the coach of Notre Dame.

Q. Have you known him closely since then?

A. He is a real good friend.

Q. Has he visited you in Athens?

A. No, sir.

Q. Have you seen him in Atlanta?

A. I recall seeing him twice in Atlanta; once when he came to the Georgia versus Georgia Tech game played in Atlanta in 1959, and I believe he has been in Atlanta at least once, or maybe twice on business.

Q. Have you ever seen him in Athens?

A. I have never seen him in Athens.

Q. On how many occasions have you met him in Chicago?

A. Many times; he's a good friend of mine.

Q. Have you met him in New York on a number of occasions?

A. On several occasions. Mr. Scoby not only was a distributor for the Miller High Life distributorship in Chicago, but he is the distributor of Miller High Life in New York City.

Q. When you visited him in New York City, were you up there at his invitation?

A. The answer is "No".

Q. Did he pay your expenses?

Mr. Lockerman: I think he wanted to explain something, Mr. Cody.

[fol. 697] By Mr. Cody:

Q. Go ahead.

A. Mr. Scoby has never paid my expenses to New York City.

Q. Has he paid them while you were there?

A. Yes; and I would like to explain, and I am not trying to—

The Court: You go ahead and explain.

A. —be funny at all, but Mr. Scoby is what people call a check-grabber, and with my financial setup, sometimes I have a hard time getting my hand out of my pocket.

Q. Did he arrange a loan for you in Chicago?

A. Yes, sir.

Q. Did he endorse your note?

Mr. Schroder: Please—let the witness be instructed he's got the right to explain any answer.

The Court: Yes, sir; yes, sir.

By Mr. Cody:

Q. Go ahead.

A. Yes, Mr. Cody.

The Court: Any answer, Coach Butts, that you want to explain, you just say "I want to explain it", and then go ahead and explain it.

[fol. 698] The Witness: Thank you, Your Honor. You will understand, this is the first trial I have ever seen, much less been in. Would you please ask your question, sir?

The Court: He asked the question, did you borrow some money from Mr. Scoby.

By the Witness:

A. The answer is, I did not borrow money from Mr. Scoby, but through Mr. Scoby's influence at the Exchange National Bank in Chicago with a gentleman named Ralph Miller handling the negotiations I borrowed six thousand dollars, and at the present time I owe fifteen hundred dollars on it.

Q. When was that loan made?

A. I do not know, sir.

Q. Were you in Chicago when the deposition of Mr. Scoby was taken?

A. Yes, sir.

Q. Did you see him on that occasion?

A. I saw him for lunch, sir.

Q. Are you familiar with his testimony as to the number of telephone calls that he has made to you?

A. I have never seen that information; I have never been interested in it.

Q. Have you ever been off on any trips down into Florida with Mr. Scoby?

A. I think I have one time, sir.

Q. Where was that?

A. Miami, Florida.

Q. Have you entered into any business negotiations with Mr. Scoby?

A. I have never been in business with Mr. Scoby. Mr. Scoby has tried to help me with several projections I hoped to put over.

[fol. 699] Q. What's that?

A. I requested that he help me find money, if he could, for the loan companies, the reason being a loan company can afford to pay eight per cent for such loans, such mon-

ies. He also, when I was in the Orange River Groves, Inc., a corporation, he checked it out, thinking maybe it might be a good investment. His decision was that it was not a good investment.

Q. Well, it didn't take him long to decide that, did it?

A. No, sir.

Q. As a matter of fact, you have lost a lot of money in that business, haven't you?

Q. Go ahead and answer it any way you want.

A. The amount of money that I will eventually lose in Orange River Groves, Incorporated, which still is operating, will depend on the honesty of two individuals that owe me some money in connection with that deal.

Q. Are you active now in the operation of that business?

A. No, sir.

Q. Well, now, are there any other areas in which you have been negotiating with Mr. Scoby, any business negotiations in connection with any partieular business?

A. I—there is a concentrate plant at Lakeland, Florida, called Universal Foods, Incorporated. They were looking for some money because they wanted—they were underfinanced. I don't think Mr. Scoby ever took any particular interest in it.

Q. Is there any other business that you haven't mentioned that you have been discussing with Mr. Scoby that you both might be interested in?

[fol. 700] A. Mr. Cody, at one time when I was thinking about retiring from the University of Georgia as the athletic director, Mr. Scoby mentioned to me that he was introducing a new scotch whiskey into the country. I think the name of it was "James Douglas". He mentioned the fact that if I got a connection with a professional football team he might be able to work out something where I could get an override on all of the products sold in the South.

Q. For that particular brand of scotch whiskey?

A. Which he is planning to introduce into the country.

Q. What is the status of that negotiation now?

A. Mr. Cody, since the Saturday Evening Post story, I haven't had too many people talk to me about jobs.

Q. We are talking about Scoby now.

A. All right, sir.

He hasn't mentioned and I have not mentioned it sir.

Q. Could you refresh your recollection, Coach Butts—you can use that memorandum that you had a moment ago—and tell me about how many telephone calls you have exchanged with Mr. Frank Childs down at Gray, Georgia?

A. No, sir. If you will pardon me, I don't think that is necessary. I am willing to admit that I have had many calls from him and to him.

Q. Would it be several hundred?

Q. Have you ever been off on any trips with Mr. Childs?

A. Yes, sir.

Q. Approximately how many?

[fol. 701] The Court: You going to connect all this up, Mr. Cody?

Mr. Cody: Yes, sir.

A. (By the witness) One time I went to New York with him to see a World Series game, and I have been several times to Miami with him in regard to the Orange Grove—Orange River Groves, Incorporated, business.

Q. Did you know that Mr. Frank Childs owned a part interest in a gambling casino?

A. Absolutely not.

Q. Do you know now whether he—

A. I have never known of Mr. Childs having any interest in any gambling casino.

Mr. Cody: I want the deposition—I think I have got a copy here.

Mr. Schroder: If the Court please, I do anticipate counsel being able to prove what he is stating there as a matter of fact, that is, as to who or who is not a gambler, and who or who is not an owner of a casino. I mean, I am not—I don't know anything about it, but counsel is stating that as a fact, did he know that Mr. Childs was half-owner of a casino, and I think—I am just assuming he is going to be able to establish it. The witness said he didn't know.

The Court: I have to let him prove his case it is not ob-
[fol. 702] jectionable, and you can come back and clear it up on direct.

Mr. Schroder: That is not my point. My point is, even on cross-examination, Mr. Cody can't state something for a fact something that has not been introduced in evidence.

The Court: I overrule the objection.

Mr. Schroder: All right.

By Mr. Cody:

Q. You say you remember the deposition which you gave before a court reporter on May 3rd, 1963 in Mr. Schroder's office?

A. Yes, sir.

Q. Do you remember this question and this answer: "Did you ever know that Frank Childs had a part interest in a gambling casino down near Gray, Georgia?" Answer: "No, sir; I read about it." Is that correct?

A. Mr. Cody—

Q. Just answer my question, and I will let you explain it later.

A. Okay.

Q. I want to ask you several questions and you make whatever explanation you want to.

A. My explanation for that is that I read about a raid on a gambling casino in the county in which Gray—I believe it's Greene County, but I did not read about Mr. Childs being connected with it in any way, but I do know, as a [fol. 703] matter of fact, that they had Mr. Childs up before a Grand Jury later in regard to the case but that does not prove to me that he was a part owner of a gambling casino.

Q. Well, Coach Butts, let's get back to the questions and the answers I put to you on Page 41 of your deposition given on the date which I mentioned. I want to ask you to state whether or not his question and this answer is correct that you gave on that occasion. I have several to ask you about. "Did you ever know that Frank Childs had a part interest in a gambling casino down near Gray, Georgia?

A. No.

Q. Your answer was, "No, sir; I read about it." Is that a correct statement of the question and answer?

Mr. Schroder: I think he has explained that, Your Honor.

By Mr. Cody:

Q. Let's pass on to the next one, then. When was it—is this question correct that was submitted to you on that occasion: "When was it you read about—"

Mr. Schroder: I think it is not a question of whether the question is correct, but the answer.

Mr. Cody: It's both.

The Court: I think it is a proper way. Mr. Cody can ask Coach Butts on such and such a day, when you took his [fol. 704] deposition in Mr. Schroder's office, "did I ask you this question and did you answer accordingly, 1, 2, 3," whatever the questions were, and then at that conclusion Coach Butts should be permitted to explain why he answered that question in those depositions that way on that particular day. Do we understand each other?

Mr. Cody: I think, sir.

Mr. Lockerman: Your Honor, wouldn't that be for the purpose of showing some contradictory statements, and there is no contradiction here.

The Court: I don't know whether there is or not. I don't know what Mr. Frank Childs or Mr. Scoby, I mean, I don't know what the nature of this testimony is, and if you recall I previously asked Mr. Cody was he going to be able to connect it up. Otherwise, I don't think it is admissible. But go ahead.

By Mr. Cody:

Q. Reading further, and I will just read two or three questions and two or three answers, and you make whatever explanation you want. I am trying to establish, Coach Butts, that these questions and answers were submitted to you on that occasion. "When was it you read about it?"

Answer: "I read about it in one of the Macon papers. I don't know when." Let me finish.

[fol. 705] The Court: Yes, sir; go ahead.

By Mr. Cody:

Q. "Could you say approximately when?" Answer: "No, sir; I would not attempt to do that." Question: "Would it be in the year of 1963?" Answer: "I read about it, and I will not try to remember the date." Question: "Could it have been in the year 1962?" Answer: "I don't know. You have got me on that one." Do you recall now whether or not that is a correct transcript of what you said?

A. That is exactly right. May I explain?

Q. Yes, sir.

The Court: Go ahead and explain.

A. (By the witness) When you refer to "it", I was referring to an article about a raid on some kind of a gambling establishment near Gray, Georgia. That still does not mean to me that I at any time thought that Mr. Frank Childs, or that I knew or even thought that he had anything to do with it.

Q. All right, sir; very well. Do you recall in that deposition that I asked you this series of questions and you gave the answers: "Coach, did you resign as athletic director?" Answer: "Yes; I resigned as athletic director." Question: Effective when?" Answer: "Effective at the end of March." Do you recall giving those answers?

A. The answer is "yes", but I will tell you this, and you know it, at the next deposition I corrected that; I phoned my attorneys right after I thought about it. I got the months mixed up, and I resigned effective at the end of February, and, Mr. Cody, you know that, and you know [fol. 706] that I corrected it.

Q. But it was in—

Mr. Schroder: I might say that is absolutely correct and I think it is unfair.

The Court: Well, let's don't have comments there. I think you can clarify all this by direct examination. I will certainly let Coach Butts explain it as he goes along.

The Witness: Your Honor, sir, though, I don't want it implied that I lied deliberately in a deposition.

By Mr. Cody:

Q. You know, of course, that—

Mr. Schroder: Wait, I didn't hear that?

By Mr. Cody:

Q. —the date does have some bearing in this case?
A. State that again.

Mr. Schroder: What's that?
The Witness: I didn't understand that.
Mr. Cody: I will withdraw the question.
[fol. 707] The Witness: To answer that—
Mr. Schroder: Wait a minute; wait a minute. The question has been withdrawn.
The Witness: I'm sorry.

* * * * * * *

LeRoy Jordan called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. State your full name for the records, please, sir?
A. LeRoy Jordan.
Q. Where is your home, Mr. Jordan?
A. Excel, Alabama.
Q. Is that E-x-c-e-l?
A. Yes, sir.
Q. Excel, Alabama?
A. That's correct.

Q. What is your present occupation?

A. I am employed by the Dallas Cowboys, professional football.

Q. Speak up, please, sir, where we can hear you.

A. Dallas Cowboys, professional football.

Q. Where did you attend high school, Mr. Jordan?

[fol. 708] A. At Excel High School.

Q. Did you or not play football at Excel High School?

A. Yes, sir, four years.

Q. From Excel High School where did you then take up your education?

A. The University of Alabama.

Q. What year did you enter the University of Alabama?

A. In '59.

Q. How old are you, Mr. Jordan?

A. Twenty-two.

Q. At the University of Alabama, did you also or not participate in football?

A. Yes, sir.

Q. How many years?

A. Freshman year and three varsity years.

Q. During the season of 1962, you completed your eligibility at the University of Alabama?

A. Yes, sir.

Q. In order to familiarize the Court and Jury with your accomplishments, could you tell us what honors, if any, you received in football at the University of Alabama in your senior year?

A. I was selected on some All-American teams.

Q. Some?

A. Yes, sir.

Q. Don't be modest.

A. Well, I was selected on some All-American teams, and I was chosen as lineman of the year by the Ohio Quarterback Club and SEC; I was on the SEC team.

Q. Who was captain of the Alabama football team?

A. I was captain.

Q. During the summer, this past summer, 1963, Mr. Jordan, did you play in any All-Star games?

A. Yes, sir; I played in two of them.

[fol. 709] Q. Were these college All-Star games?

A. Yes, sir.

Q. Name the two of them, please, sir?

A. One was the East-West All-Star game in Buffalo.

Q. Now, what personnel were playing on those two teams?

A. Well, it was East-West All-Stars, I mean, college All-Stars.

Q. College?

A. Yes, sir.

Q. Were you or not a part of the East All-Stars?

A. Yes; I was.

Q. Did you play any other all-star game during this past summer?

A. Yes, sir; I played in the All-Star game against the Green Bay Packers August 2nd.

Q. Was that game in Chicago?

A. Yes, sir.

Q. Were you or not co-captain of the college All-Stars in that game?

A. Yes, sir; I was.

Q. How did you all come out with the Green Bay Packers?

A. We won 20 to 17.

Q. Mr. Jordan, how long have you known Wallace Butts?

A. Well, I have been knowing him in football since my freshman year.

Q. Speak up, please.

A. Knowing him in football since my freshman year.

Q. At Alabama?

A. Yes, sir; at Alabama.

Q. Have you ever met or talked with him?

A. Well, I saw him last night for the first time and was introduced.

[fol. 710] Q. Last night is the first time you have ever been introduced to him?

A. Yes, sir.

Q. How long have you known Paul Bryant?

A. Well, since I came to the University my senior year in high school and met him there.

Q. You are here today, having traveled from where?

A. Los Angeles.

Q. And when did you arrive?

A. Last night.

Q. Your plans call for you to return to Los Angeles when?

A. Tonight.

Q. During the fall practice at Tuscaloosa prior to the game between the University of Georgia and Alabama, what particular offensive formations, if any, was the Alabama team coached to expect?

A. Well, I think it was four formations that Georgia has used in the previous years that we had played them and we had seen films. They were slot formations and an unbalanced line formation, and a regular "T" formation, and slot with motion formation.

Q. Were those or not the four formations that you were coached or the team was coached to expect the University of Georgia to specialize in?

A. Yes, sir.

Q. What special defense or what defense, if any, was the Alabama team put in, so to speak, that might be different from their regular defenses in order to make preparations for that game?

A. Well, we had put in what we call a rover defense which we had used before, and the only difference was we had moved me to the side away from the formation where we thought I'd go in on more plays that way.

Q. You were playing in what position as defender?

[fol. 711] A. I was linebacker, and was playing guard sometimes, and we had a defense we called a 'Bama defense. It was the same thing, only we would move the tackle in and I move outside further.

Q. Do you understand the formation—I may not describe it in the parlance that you might use—known as the pro-

seat, or let me more or less try it this way. Does the regular slot formation with the weak end out, the end away from the slot out fifteen yards, mean anything to you?

A. Yes, sir; that is our formation we run.

Q. Was that formation employed by the University of Georgia against the University of Alabama in Birmingham on September 22, 1962?

A. Yes, sir; it was.

Q. What effect, if any, upon the defenses that Alabama had prepared did the use of Georgia of that formation have?

A. Well, the defenses we had prepared when they went into this formation, it took me completely out of where the action would be, the running plays, because the way we had to adjust for the split end was I would have to move completely out on him, and therefore trying to play for the pass, and it took me out of their running game or any plays that I usually play, because I play that better than I do the pass.

Q. Was it or not to you a surprise when the University of Georgia went into the formation, regular slot with the left end out fifteen yards?

A. Yes, sir; it was.

Q. What success, if any, did the University of Georgia have with that formation before Alabama adjusted its defenses, if Alabama did adjust its defenses?

A. Well, we had some good success. I think they had a penalty one time. It brought back a real good game that they had against us, and again they completed a couple of [fol. 712] passes. I know one of them was better than ten or twelve yards or more, and they ran that, I think, I don't know how many times they ran the first half, but they used that with their regular slot formation.

Q. During the halftime when the players went to their respective—excuse me—dressing rooms, was there or not any adjustment made in the Alabama defenses against that formation known as the regular slot with the weak end out fifteen yards?

A. Yes, sir. We used a type—a split six defense, we called it. It is a six-man line with the two linebackers more or less in the middle, and therefore we could adjust with our ends going out to the split end, and it would not take our linebackers out of place.

Q. The effect of the adjustment then was to bring you where, or to put you where?

A. Back in the middle of the formation.

Q. And instead of having you out defending or—defending against or guarding the split end, who, during the second half, was assigned to that function?

A. Well, it was the end to the way he was split, I mean, if he was split left, it would be the end to his side that would be covering.

Q. In your opinion, or do you have any opinion, as to the reasons for the thirty to nothing score of the Alabama-Georgia game?

A. Well, yes, sir. I think our passing game was a success. I mean we didn't know how good our quarterback was, and I don't think Georgia did either.

Q. The passes that were thrown in that game by Alabama were thrown in what area of the football field?

A. You mean where we were located on the field when we started out?

[fol. 713] Q. No, sir. Were they thrown side line passes or down-the-center passes—

A. Well, as I remember—

Q. —over the flat, I mean, rather than sidelines; excuse me.

A. As I remember, our first touchdown came on long pass down the side line and our end ran a pass down the side line, and it was completed for a touchdown.

Q. In your opinion, having played the game of football as long as you have testified you have played, in preparing to play a given game, would it mean anything to you as the coach to know what formations were going to be employed by the offensive team?

A. No, sir; I don't think so; because we always have the films, and we always see what every person does, I mean, all the formations used in the past.

Q. What is the type of information which the coach of the defensive team wants to know from scouting reports, from films, from watching the team he is going to play in previous games, what is it he is looking for primarily?

A. When he is going to run a play.

Q. Looking for what, sir?

A. Well, say the tendencies of a team on third down they are going to run so-and-so. They run it in every film we see. That is the only thing a defensive coach, I think, really looks for and works toward, is finding the trend of a team, and then you more or less have to go with what they have been doing.

Q. Is what you are saying that what the defensive coach wants to know is when the team he is going to play uses a particular play for formation?

A. That's right.

[fol. 714] Q. And that is established by the defensive coach from what information?

A. From scouting reports and films, breakdown of films.

Q. What was your weight when you started the Alabama-Georgia game that night?

Mr. Cody: Your Honor, I don't see what that's got to do with it.

The Court: No, sir; that is getting far afield. Let's get down to the issues. I sustain the objection to the question.

Mr. Schroder: Hand the witness the notes, please.

The Clerk: I will have to get it.

Mr. Schroder: I can use these copies; that's all right.

By Mr. Schroder:

Q. Mr. Jordan, have you reviewed before now the so-called Burnett notes?

A. Yes, sir; I have seen quite a bit in the paper.

Mr. Cody: May I see what you are showing him?

Mr. Schroder: I am showing him a copy of them, because we do not have the originals. The Clerk has gone to get them.

[fol. 715] Mr. Cody: Do you mind using a copy without your memo on it? I think it would be better, because it might suggest things to the witness, Your Honor.

The Court: Yes, sir. Where are the originals?

Mr. Schroder: The Clerk went to get them.

Mr. Cody: I see voluminous notes on them somebody has made.

The Court: I sustain your objection; I sustain your objection. Could you go on with him until the Clerk returns with the original notes?

By Mr. Schroder:

Q. Have you reviewed the notes which I have shown you here or other copies that you saw? I haven't gone over these notes with you, have I?

A. No, sir.

Q. All right, sir. Will you take a few minutes and thumb through those notes, and I believe I can save time in going over them note by note. Now, Mr. Witness, you have reviewed the original to the document to which I—or documents to which I have just referred?

A. Yes, sir.

Q. Will you please state to the Court and Jury whether there is anything in those notes which the University of [fol. 716] Alabama specialized in before its game with the University of Georgia in defending?

A. No; there is nothing there.

Q. Is there or not anything in those notes other than the names of players that would remind you of the University of Alabama?

A. Well, it only has "slot"; it has "slot" in here several times, and that is what we used, and everybody else, I guess.

Q. What sort of a slot does Alabama use?

A. Well, we use a slot with the end out on the other side.

Q. That is the pro formation we are talking about?

A. Yes, sir.

Q. How about your regular slot or your normal slot?

A. We use the normal slot with the end in tight.

Q. During the week of the game that was played on September 22, were there any changes in the defenses which the coaching staff at the University of Alabama had prepared for the Georgia game?

A. No, sir.

Q. During the week preceding or during which the game in Birmingham was to play against the University of Georgia, were any of the names that you see on those notes emphasized with respect to Alabama defensive.

A. No, sir; no more than we emphasize anybody else on the team.

Q. In your opinion, as a football player during the years —I mean, during the years that you have played, is there any way in which the outcome of a football game can be rigged or fixed without participation of the football players themselves in it?

A. No, sir. It couldn't be done.

[fol. 717] Q. In your opinion, is there any way that two coaches could rig or fix the outcome of a football game without the players' knowledge?

A. No, sir.

Mr. Schroder: Just a moment, Your Honor, let me confer. That's all, your Honor.

Cross examination.

By Mr. Cody:

Q. Mr. Jordan, are you familiar with the statistics of this game?

A. No, sir; I am not; I don't remember them.

Q. If the statistics should show that Georgia gained only thirty-seven yards on the ground, that is, running with the ball, would you, as an expert, say that that indicated any surprise to Alabama?

A. Well, it surprised us on the part that they didn't make good against the first of the ball game until we adjusted.

Q. If the total gains were thirty-seven yards, the surprise would be that they didn't gain, wouldn't it?

A. Well, I believe that their gains were of somewhat a passing nature the first of the game.

The Court: That was thirty-seven yards total offense?

Mr. Cody: Total offense on the ground. That is not the —not the—

[fol. 718] Mr. Schroder: There is a difference in total offense and total offense on the ground.

The Court: Offense on the ground; that is what I was asking.

By Mr. Cody:

Q. Do you know what the statistics show as to the gains made by Georgia on passes?

A. No, sir; I don't.

Q. I see. Do you know—do you know the personnel, entire personnel of the Alabama coaching staff now?

A. Yes, sir; I think so.

Q. Could you name those for us? I'd like to get it in the record in this case.

A. Well—

Q. If you don't want to trust your memory—

A. As it stands now?

Q. —you might want to use this. Read those names. Start with Coach Bryant's. I just want to get those names in the record.

A. Head coach, Paul Bryant.

Q. Speak out loud where we can hear you.

A. Paul Bryant, Pat James, Sam Bailey, Carney "Dude" Hennessey, Jim Blevens, Ken Myer, Clem Grisco, D. Powell, Jimmy Sharp, Charles Pell.

Q. Last two are Sharp and Pell?

A. They were guard and tackle on our 1962 team.

Mr. Cody: You can come down.

[fol. 719] Mr. Schroder: Just a minute.

The Court: Just a moment. I think Mr. Schroder wanted to ask you some more questions.

Mr. Schroder: If the Court please, there was a question I overlooked on direct.

The Court: All right, sir, go ahead, sir.

Redirect examination.

By Mr. Schroder:

Q. Mr. Jordan, it is stated in the Saturday Evening Post article published March 23rd, 1963, that the University of Georgia football players were complaining or stating that it looked like the Alabama team knew their plays. Let me ask you in connection with that, when a team is losing and the players are not carrying out their assignments, is that or not a common thing in football?

A. Yes, sir; that is real common. I know we had several in the Georgia Tech game last year.

* * * * * * *

CHARLES LOUIS TRIPPI called as a witness by the Plaintiff, after having first been duly sworn, testified as follows:

[fol. 720] Direct examination.

By Mr. Schroder:

Q. For the record, will you please state your full name.
A. Charles Louis Trippi.
Q. Where is your home?
A. Athens, Georgia.
Q. Where did you receive your education, Mr. Trippi?
A. At the University of Georgia.
Q. What year did you finish at the University of Georgia?
A. 1947.

Q. While at the University of Georgia did you play football?

A. I hope I did; yes, sir.

Q. Since your—did you receive any honors upon your graduation from the University of Georgia, in football?

A. That, I did.

Q. Would you, without being too modest, explain or describe for the Jury that, in order to prove your qualifications?

A. Well, I received several honors, I guess. I was an All-American, I guess, in 1946; made All-Southeastern Conference '45-'46 received the Maxwell Award in, I believe it was in Philadelphia, and I received an award in Washington as the Outstanding Ball Player in the country that year; and a few other things I don't believe it's important to mention.

Q. All right, sir. Upon your graduation from the University of Georgia, did you continue your football playing? [fol. 721] A. Yes, sir; I played for nine years with the Chicago Cardinals.

Q. During that nine-year period, did you receive any distinctions as a football player?

A. That, I did.

Q. Just name a few of them for me.

A. Well, I was selected to the All-Pro team my first two years with the Cardinals.

Q. Now, in 19—did you subsequently—did you ultimately retire as a player in pro football?

A. Yes, sir; I retired in the year 1955, and the following year I was an assistant coach with the same organization for two years.

Q. Did you subsequently return to the University of Georgia?

A. That, I did. I returned in the year '59, and worked there until recently, when I accepted a new position with the St. Louis Football—St. Louis Cardinals.

Q. Well, the St. Louis Cardinals is the same organization that you have the franchise with?

A. Yes, it is; formerly the Chicago Cardinals.

Q. And you are now employed in a coaching capacity?

A. Yes, I am; I am offensive backfield coach with the St. Louis Cardinals football team.

Q. Mr. Trippi, you were on the coaching staff at the University of Georgia during the football year of 1962?

A. Yes; I was.

Q. In what capacity?

A. As offensive backfield coach in charge of offensive planning.

Q. In 1961 were you also with Georgia in the same capacity?

[fol. 722] A. Yes, I was.

Q. During the Alabama-Georgia game in 1962, did you attend the game?

A. Yes, I did.

Q. What was your function, if any, during the game?

A. Of course, I was in charge of offensive operation. I sat in the press box and called the action from there; whatever was necessary to be done offensively.

Q. What are the mechanics in calling whatever needs to be done offensively from the press box?

A. Well, many things determine what you do up there. Of course, position, field position determines a great deal; the hash mark; and the score.

Q. How do you get that information relayed to the football team?

A. How do I get it relayed to them?

Q. Yes, sir.

A. I phone it down on the field, and in turn they send it in to the quarterback.

Q. In the Alabama-Georgia game that we are discussing, about how many plays did you call offensively, using the system that you have just described?

A. Well, I would say that I called in the area of ninety per cent of the plays that were used against Alabama in 1962 from the press box.

Q. Who was the chief defensive coach at the University of Georgia during that game?

A. Coach John Gregory.

Q. And he remained in that capacity throughout the year?

A. Yes; he did.

Q. Is he still the chief defensive coach at Georgia?

A. Well, as of the day I left, he was.

[fol. 723] Mr. Schroder: The notes again, please.

The Clerk: All right, sir.

Mr. Schroder: Thank you. Let the record show, please, I am handing Defendant's Exhibit No. 12 to the witness.

By Mr. Schroder:

Q. Coach Trippi, will you please examine the document which I have just shown to you?

Mr. Schroder: And in order to conserve time, Your Honor, I don't plan to go over it one-by-one. I think we have done enough of that, but I want him to take his time and examine it and be prepared to answer some questions.

The Court: All right, sir.

By Mr. Schroder:

Q. Just go through it, please, sir, those sheets, and I want to ask you a couple of questions after you have finished with them.

A. Mr. Schroder, I am well aware of these notes, so ask any question you may.

Q. All right. Coach Trippi, if, as a coach, you had to formulate your offense or defense from the information contained in those notes, assuming that those notes had to do with a team you were preparing to play, what, in effect, would you do or where would you start?

[fol. 724] A. Well, speaking offensively, the first thing I would do is tear them up because they are baseless; there is nothing in here that indicates any tendencies. When I

coach offensive football, I have to know tendencies. By that, I have got to know what a team does on first down and short yardage, or first down and long yardage; I've got to know second down and short yardage, or second down and long yardage; and I've got to know the same thing on third down. That is what indicates to me my offensive planning.

Q. Ordinarily, would that information be sought by teams scouting others and exchanging film?

A. Will you rephrase that question again?

Q. How is that information ordinarily made available to opposing coaches?

A. Of course, we exchange films, and we get all that from films, and scouting, prior to playing the team, and a lot of times we are not quite sure. We watch who plays a football game; we watch films to find out and be exact what's going on because the action happens so fast.

Q. In the plans being formulated by the University of Georgia in the days preceding the Alabama game, what particular offensive formations were being stressed, if any?

A. Of course, we have always been a slot team. We have used that for five years at Georgia, and we, seems like we have got the best out of our football from the slot. You don't like to change your formations too much, because it changes responsibilities, and once a team learns to block a slot offense and has confidence in it, which you have got to put into a football team, you have got to make them believe that is the best thing for them, and when that [fol. 725] occurs, you had better stick with it, and what you can do the best.

Q. It has been testified here that in the Alabama game, in addition to the slot, which you say Georgia had been using for years, Georgia employed a formation described as normal slot with weak side end out fifteen yards. Now, was that anything—was that formation new for the University of Georgia, or had it used it before?

A. Oh, I'm sure it's been used before, and I have used it before with the University of Georgia, and it's been one of our basic offensive sets, especially when we like to throw the football.

Q. You say you were at the game in Birmingham when the University of Georgia went into that formation during that time, that game, during the first half. Was it or not successfully employed?

A. Yes, it was.

Q. During the second half of that game, you being in the press box, again charged with the responsibility of watching the Alabama defenses, did you notice changes being made, or having been made in the Alabama defenses when that formation was employed?

A. Yes, they did. They changed their defensive structure; they came out with an entirely different defense to defend the split inside.

Q. When you refer to Georgia being a slot formation team, would you please describe to the Jury and the Court what distance you coached the ends to play from the tackle?

A. Well, we have coached them to play different distances from the tackle. It all depends on who we are playing, and we have always told our ends, you might go into a game maybe with a two-three yard split, and a lot of [fol. 726] times we have trouble getting out, and we always tell them to take the split that is necessary to get the job done, whatever split is necessary to take you to get the job done.

Q. Then the end is not always told to go just three yards from the tackle?

A. No, sir. Our whole backfield plan is that way. We tell our boys to line up and chest forward, and wherever the game is going, and take advantage of the situation. We cheat them over on wide plays.

Q. I don't like that—what do you mean "cheat"?

A. I mean, if they ordinarily line up four yards on certain plays, we tell them to move up to three and a half

yards; or if they line up behind their tackles, if they are going to sweep to the left half, we tell them to split the tackle. We always tell them to get in a position where you are at the advantage. That's football.

Q. What, if anything, do situations have to do with determining how wide the end is to play?

A. Well, I believe the type of play you are calling a lot of times determines the split.

Q. And what you have just said a moment ago was, I believe, that you leave that up to the ends—

A. Ends—

Q. —discretion.

A. They use their own discretion to play their position, because they are coached that way.

Q. In the Alabama-Georgia game that we are talking about, state whether or not there was anything that you saw that indicated that Alabama knew anything about what Georgia was going to do that had been prepared solely for that game?

A. There was nothing to indicate that. The only thing that was indicated to me was that Alabama blocked, tackled and ran harder than we did.

[fol. 727] Q. What effect, if any, do those basic fundamentals have upon the outcome of a football game?

A. Well, unless you do those things, you don't win in football.

Mr. Schroder: Let me check a minute, Your Honor.

By Mr. Schroder:

Q. Coach Trippi, based upon your experience as a college football player, as well as a professional football player, and also upon your experience as a college football coach and a professional football coach, I have this question to ask you: applying that experience and knowledge to the question, in your opinion can the outcome of a college football game be pre-arranged, fixed, or rigged with-

out the participation of the players, or some of the players, themselves?

A. Definitely not. I do think any fix has got to be occurred by the participants, and if it can't be fixed in any other way, we are in serious trouble in football.

Q. I didn't—I didn't understand.

A. I said, if it could be fixed any other way, I think football is in serious trouble.

Q. What is that?

A. I think if you can pick up a telephone and call somebody and express an opinion about somebody and say it's a fix, I think we are in serious trouble; because I think we express opinions every day. We give more information to the press every week to promote the game than is being expressed in these notes right here.

Q. My second question; based upon the experience that you have had as a player and coach, which I just related [fol. 728] and will not repeat, is there any way, in your opinion, that the outcome of a football game can be prearranged, fixed, or rigged without the players' knowledge?

A. I believe they do have to have some knowledge of it. I don't believe that I, as a coach, on the same football team, can give an adverse offensive plan and still fix a game, because basically football is surrounded with blocks, tackling and running with the football.

Q. Therefore, your answer is that it would require prior player knowledge and participation knowledge in order to—

A. Fix a football game; that's correct.

Q. In your opinion as a former player and a present coach, is there anything in that exhibit which you are now holding in your hand which, in any way, could be used to affect or have influence upon the outcome of a football game?

A. I have studied these notes, and I believe I expressed my opinion of these notes when they first were announced; and I still contend there's nothing in here to substantiate anything of value in football planning.

Q. You, at present, are where? You came here from where?

A. I came here from our training camp in Lake Forrest, Illinois.

Q. And you plan—you came in yesterday?

A. I came in Saturday evening.

Q. And you plan to return—

A. I am returning this afternoon, if I can get away.

* * * * * * *

[fol. 729] (Whereupon a conference was held at the Bench between the Court, Mr. Schroder and Mr. Cody.)

* * * * * * *

RAYMOND W. CLARK called as a witness on behalf of the Plaintiff, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. State your name for the record.

A. Raymond W. Clark.

Q. Speak up so everyone can hear you, Mr. Clark. In 1962, where were you in school?

A. I was a senior at University of Georgia.

Q. Were you, in 1962, a member of the Georgia football team?

A. I was captain of the team in 1962.

Q. You were captain of the 1962 team that played Alabama in Birmingham?

A. Yes, sir.

Q. What is your position or what position were you assigned to?

A. I was left end on the University of Georgia team.

Q. I believe the testimony is that you were injured and unable to play in the game?

A. Yes, sir; I was injured Thursday night before the game.

Q. Was that during a scrimmage, I believe you said?
[fol. 730] A. Yes, sir; we had a full scrimmage without tackling the night before the game in the stadium.

Q. Did you attend the game?

A. Yes, sir; I dressed out for the game, but I was unable to walk.

Q. Did you sit on the side lines there?

A. I stood on the side lines; yes, sir.

Q. You were how close, now, to the boys as they would be substituted for other players and as they came off the field?

A. I would talk to them as they came off the field, and more or less watching them. I was watching the ends pretty close. Barry Wilson had taken my place, and I was watching them and telling them what I could tell them what I could tell them to do to better themselves, and I was right there on the side lines as they came off the field.

Q. Was or not there anything said by any of those boys to whom you talked indicating that anything was wrong on the field?

A. No, sir; none that I heard on the side lines.

Q. Did you or not hear any of the Georgia boys come off the field complain that Alabama had an advantage over them—

A. No, sir.

Q. —because of knowing the plays or something?

A. No, sir.

Q. Were you out for the rest of the season? Did you play any more?

A. Yes, sir; my leg was broken.

Q. It was broken?

A. Yes, sir.

Q. Prior to the game played on September 22, 1962, you were, I assume, a regular participant in the practices until you injured yourself on Thursday night?
[fol. 731] A. Yes, sir; that's right.

Q. Mr. Clark, during that—strike that, please. Mr. Clark, when—as captain of the team I am asking you this

question, when is the plan, the offensive plan that the University of Georgia was going to use against Alabama on February—on September 22, given to the team?

A. You mean our plan, to Georgia, when it was given to us?

Q. Yes.

A. We usually start running against the Alabama defenses on Monday. We will start running them on Monday. We will take offense for half the practice and defense for the rest.

Q. The plays and formations then that Georgia is going to specialize in against Alabama that year were finalized in the week of the game?

A. Yes, sir; we—see, we usually have the two weeks before our Alabama game each year, and the first week is more or less conditioning, strictly conditioning. We do sprints, and we scrimmage quite a bit, and the Monday of the week we start preparing ourselves for the game.

Q. Reference has been made to the pass pattern known as, in Georgia jargon, as optional left; does that mean anything to you—

A. Yes, sir.

Q. —as an end?

A. Yes, sir. That tells us our pass pattern.

Q. Did you have such a play or not in the game plan for the Alabama '62 game?

A. An optional left?

Q. Yes, sir.

A. We had the play, but we didn't run it, I don't believe, in the game.

[fol. 732] Q. Had you used it in 1961?

A. Yes, sir; we used it, I believe, if I am not mistaken, against Florida, optional left and right.

Q. How long, to your knowledge, had that been one of the pass patterns for the University of Georgia?

A. I believe we have been running it ever since I have been at Georgia. It's been five years, I mean, the name

may have changed, but it was always basically optional left and right.

Q. Who played quarterback for Georgia? Who was the first string quarterback in that game against Alabama?

A. Larry Rakestraw.

Q. Was he or not injured before the game also?

A. Yes, sir; his ankle was injured. He had it taped up during the game.

Q. Did that have any effect upon his ability to play during that game?

A. I believe it hindered him quite a bit. He could roll out, but it hindered him a lot, and he was confined on how far he could run.

Q. Were any of the other first string members of the Georgia team also in a hampered physical condition?

A. Well, were all leg weary. You also get leg weary with two a day, you are pretty tired, and we were all leg weary and just worn out.

Q. Who was your first string defensive center?

A. I believe it was Len Hauss.

Q. Was Hauss—did he have any injury before the game?

A. Yes, sir. He had torn ligaments in his leg, and he—he had to wear a steel brace on his leg during—

[fol. 733] Q. Did he play during the game, too?

A. Yes, sir; he played.

* * * * * * *

ROBERT WALLACE WILLIAMSON called as a witness on behalf of the Plaintiff, after having first been sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. For the record, will you please state your full name?

A. Robert Wallace Williamson.

Q. To shorten this, are you a member or were you a member of the University of Georgia football team in 1962?

A. Yes, sir.

Q. State what position you played and what string it was.

A. Right guard on the first team.

Q. All right, sir. Did you play in the Alabama-Georgia game in Birmingham, September 22, 1962?

A. Yes, sir.

Q. About how long did you play in that game?

A. Approximately forty or forty-five minutes.

Q. Mr. Williamson, was it your brother Willie Williamson—

A. Yes, sir.

Q. —that went to Georgia Tech?

A. Went to Georgia Tech.

Q. During the game, did Georgia or not run any sweeps?

A. Yes, sir; we ran some sweeps.

[fol. 734] Q. What is a "sweep"?

A. Well, that is—

Q. Speak up, please, sir.

A. Well, the backfield motion it would be to the right or left with certain interference, the halfbacks leading.

Q. During the Alabama-Georgia game of 1962, did you, playing guard, ever pull on a sweep when you were the onside guard?

A. No, sir; I didn't.

Q. Does Georgia have any play where the onside guard pulls on a sweep?

A. No, sir; I don't believe so.

Q. Was or not that in the game plan for the Alabama-Georgia game?

A. No; it wasn't.

Q. You have been playing varsity ball at Georgia how long?

A. Past three years.

Q. During the time that you were on the field, I believe you estimated it as having been forty to forty-five minutes?

A. Yes, sir.

Q. The length of a game in actual playing time is sixty minutes?

A. Yes, sir.

Q. During the time that you were on the field as a player, will you please tell the Court and Jury if there was anything done or said by the Alabama players which indicated they might know what Georgia was going to do?

A. No, sir; not a thing.

Q. And a guard plays where with reference to where all the plays are?

[fol. 735] A. Well, center plays in the middle of the lane and a guard plays on either side.

Q. You are right in the middle of where all the players are?

A. Yes, sir.

Q. What was the, in your opinion, physical condition of the Georgia football team before the Alabama game in 1962?

A. Before, I don't think it was real good. I think a lot of the boys were pretty worn down; at least, I was. I don't know how the other boys were; a little bit weary.

Q. The Saturday Evening Post in its issue of March 23, 1963, in a story captioned "The Story of a College Football Fix" has this to say on Page 81, Column 3, and I quote, "The Georgia players their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating". I want to ask you two questions about that quotation. Number one, at any time during that football game did you, who played forty to forty-five minutes in that game, ever feel that the moves of the Georgia team were analyzed and forecast as described in that part I read you?

A. No, sir.

Q. After the game was over, and I will read this part again, it says the Georgia players "took a frightful physi-

cal beating"; in your opinion, I will ask you after the game was over, had the Georgians taken a frightful physical beating?

A. I don't believe so. I know I didn't, and I played right in the middle of it.

Q. Were there any games other than this one in which the players took worse beatings physically?

A. Yes, sir.

Q. How about Georgia Tech?

[fol. 736] A. We did by them.

Q. South Carolina?

A. South Carolina.

Q. What sort of team is Alabama insofar as—well, you describe it to me in relation to the others that you played; how do they play?

A. Their lineman is about my size—I am fairly small for a college lineman and real agile and quick and they pursue real well.

The Court: Any questions, Mr. Cody?

Mr. Cody: I don't believe he is through, Your Honor.

The Court: I understood he was.

Mr. Schroder: Yes, sir.

Cross examination.

By Mr. Cody:

Q. Mr. Williamson, who was your best running back?

The Court: You referring to Georgia?

Mr. Cody: Georgia.

A. (By the witness) Well, we didn't have too many really good ones. Don Porterfield was a good one; Leon Arm-

[fol. 737] brester, our fullback, was good. I thought Leon Armbrester played the best offense game since—

The Court: Are you referring to the Alabama and Georgia game—

The Witness: Yes, sir.

The Court: —or all season?

The Witness: Well, all season; he is the best back.

The Court: Armbrester?

The Witness: He picked up more yards, I believe.

By Mr. Cody:

Q. Who was your best pass receiver?

A. I would say Ray Clark was before he got hurt, but I guess Mickey Babb was after that.

Q. Without being too modest, other than yourself, who was the best lineman you had?

A. I'd say Paul Holmes.

Q. Holmes?

A. He is up with the pros now. Len Hauss, before he was hurt bad, I thought he would be an outstanding linebacker.

[fol. 738] Q. Mr. Williamson, in acquainting the players with the game plan for this Alabama game, don't you know that the players themselves were not informed by the coaches of the game plan itself but only their particular assignments for particular plays?

A. I don't quite follow you.

Q. Prior—let's put it this way. Prior to the Alabama game, did you see any layouts of the game plan?

A. There was a layout for my group, the guards; we had our assignments.

Q. It is limited to that, isn't it?

A. There is an overall plan, too, they run.

Q. You didn't get a hold of that?

A. I don't pay attention to what the backs do.

Q. The coaches didn't tell you what the game plan for the backs were?

A. They didn't tell me.

Q. Well, that is what I'm asking you?

A. No, sir.

Q. And they didn't tell you what the game plan for the fullback was?

A. No. I knew the players that I was supposed to block for the fullback and halfbacks.

Q. And the game plan, so far as you were concerned, the only part that you were informed about was the part that you were to play in it; is that right?

A. That's right.

Mr. Cody: That's right.

The Court: All right, sir.

[fol. 739] Redirect examination.

By Mr. Schroder:

Q. And that would be made clear to the team what—how long before the game, the game plan itself; when was it finalized?

A. Usually the Monday before—I mean, the Monday before the Saturday ball game.

Mr. Schroder: All right, sir. Come down.

Mr. Cody: One more question.

The Witness: Yes, sir.

Recross examination.

By Mr. Cody:

Q. Mr. Williamson, you started on Monday of the week of the game to specifically put into operation whatever your assignment was, and that is practice for the particular plays for that game, right?

A. Right.

Q. So that necessarily those plays had to be formulated the previous week; is that right?

A. Yes, sir; I imagine they were.

* * * * * * *

MICKEY BABB called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

[fol. 740] Direct examination.

By Mr. Schroder:

Q. Would you kindly state your name for the record?
A. Mickey Babb.
Q. Where is your home, Mr. Babb?
A. Atlanta, Georgia.
Q. Where are you now in school?
A. Athens, Georgia, University of Georgia.
Q. In 1962, were you a member of the University of Georgia varsity football team?
A. Yes, sir.
Q. What position did you play?
A. Right end.
Q. Do you have or not another year of eligibility?
A. Yes, sir.
Q. You will, therefore, be on the varsity team this coming fall?
A. Yes, sir.
Q. Mr. Babb, prior to the Alabama-Georgia game in Birmingham, in September, 1962, what coaching was given you with respect to where you should play on Georgia's offensive formation known as the pro-set?
A. If I was going to swing or not?
Q. Yes, sir.
A. It was—the week prior to the game I was told that I was going to be the wide man on the pro-set every time; I would be the wide man.
Q. You use the word "swing" in describing your coaching or what was coached you. Would you please describe to the Court and Jury what "swinging" means?
[fol. 741] A. Well, we would run a pro-set, and if we say "pro-right", we'd use a slot formation to the right and send a left end out between and eight and fifteen yards; they told me the week prior to the game I would be the wide

man on all the pro-sets. On pro left, I would be wide man right, and on pro right I would be the wide man left.

Q. When you say "the week prior to the game," will you tell us what you mean by that?

A. It was on a Wednesday that I was informed that I would be the swing man.

Q. How many days before the game was that Wednesday?

A. Three; it was Thursday, Friday and we played on Saturday.

Q. During the game that the University of Georgia had with Alabama on the evening of September 22, was that formation that you have just described used or not used by the University of Georgia?

A. It has been used in the past, and we used it prior to the game.

Q. Was it used or not used during the game?

A. Yes, sir; it was used during the game.

Q. And as I understand your testimony you were the end that was out, you say, eight to fifteen yards?

A. Yes, sir.

Q. Why do you say eight to fifteen yards? Is there any discretion to you in your hands?

A. Well, it is according to the field position where we have the ball. If we are near the side line, I can't split out as far as I could if we were in the middle of the field. It is according to how the field position is.

Q. When Georgia was in the normal slot formation and you were playing the slot end, how far from the tackle would you place yourself?

[fol. 742] A. Well, you vary it sort of how the defensive man plays. I would say between three and five yards.

Q. During the Alabama-Georgia game that we are talking about did you do what you have just described?

A. Yes, sir; I played according to how the defensive man played me.

Q. The pro-set that we talked about before we talked about the normal slot, do you recall about how many times

Georgia employed that formation during the first half against the University of Alabama?

A. It wasn't—I can't remember exactly how many times we run it. It wasn't too many times as I can recall, but I am not too definite on that.

Q. Do you recall with what success the University of Georgia employed that formation during the first half?

A. It was about the only way we were moving the ball against Alabama at the time. We had gone into a pro formation and had some gains off of that.

Q. During the second half of the same game, did or not the University of Georgia use the same formation?

A. Yes; we used the pro-set in the second half too.

Q. Compare for the Court and Jury, please, sir, the success that Georgia had in the first half and the success, if any, that Georgia had in the second half when employing that pro-set formation?

A. In the first half the pro-set was successful for us, but in the second half Alabama switched their defense around, and then kind of checked our defensive formation then.

Q. Mr. Babb, are you familiar with the pass formation described as optional left in the Georgia series of plays [fol. 743] that had been used by Georgia for—in the past?

A. Yes, sir.

Q. Was that formation known as optional left in the game plan for the Alabama game of 1962?

A. No, sir.

Q. During the game in Birmingham were you in the position that you have stated you were in when Georgia was using the pro-set? Was the ball thrown to you on passes?

A. Yes, sir.

Q. During the first half of that game would you relate to the Court and Jury whether or not you were in the open, so to speak, during the first half?

A. Yes, sir; I broke an open on a number of occasions during the game, but the ball was never thrown to me.

Q. During that game, without regard to what formation Georgia was in, did you, Mr. Babb, or not, catch everything that was thrown to you?

A. I didn't catch everything that was thrown to me; that is almost impossible.

Q. Was there or not anything, in your opinion, wrong with the physical condition of your quarterback, Mr. Rakestraw, during that game?

A. Larry's ankle was broken during the summer, and he was handicapped by his ankle.

Q. Did, in your opinion, that, plus pass protection, have anything to do with Georgia's passing in that game?

A. Well, our pass protection, our linemen just didn't block too well; they just seemed to fall down on their protection blocking. Larry was rushed, and he had to throw off balance a lot of times.

[fol. 744] Q. Mr. Babb, as a member of the Georgia varsity football preparing for the Alabama game, when was the final game plan formalized?

A. We put in our game plan the Monday before the game on Saturday. We diagram all the plays on the chalkboard, and that is when we get our game plan.

Q. Are all of the members of the squad present when that is done for the players?

A. Yes, sir; yes, sir.

Q. In the Saturday Evening Post article appearing in its issue of March 23, 1963, appears this, and I will read it. "The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating." Now, how many minutes, roughly, did you play in that ball game?

A. I played approximately fifty minutes.

Q. Out of sixty minutes taken to play the entire game?

A. Yes, sir.

Q. In your opinion, were the moves of the Georgia players analyzed and forecast as described in that quotation I just read you?

A. No, sir. We didn't take a physical beating from Alabama. They don't play that type of ball game. They play

a hit-and-run defense. They analyze your plays as quick as possible, and they are gone; they hit you and are gone.

Q. How does that compare with other teams that Georgia played during the season?

A. Well, other teams, like South Carolina, they play an entirely different ball game. They will stand there on the line and fight you. They don't hit you and go; they stand right there and fight you. Clemson does the same thing, and Tech plays on that type.

[fol. 745] Q. In the Georgia-Alabama game did you as a player feel that your move was being—each move was being analyzed?

A. No, sir.

Q. In that same article, and in that same column, Page 81, Column 3,—will you step down here or can you read this from there—reading in the lower part of that column, sir, and I am quoting directly from the column, "Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta Journal, 'the Alabama players taunted us,' end Mickey Babb told him. 'You can't run eight-eight pop, a key Georgia play on up, they'd yell. They knew just what we were going to run and just what we called it.'" You have heard me read that portion, and you have stood here while I read it. Did I read it correctly?

A. Yes, sir.

Q. I want to ask you, Mr. Babb, is that an accurate quotation from you?

A. That is inaccurate.

Q. Will you please use this mark and draw a sort of a parenthesis there and initial it, please, sir?

A. Right there?

Q. Yes, sir.

The Court: What page was that on? What column?

Mr. Schroder: Page 81, Your Honor, Column 3. It is the third from the last paragraph. You see it, Your Honor?

The Court: Yes.

[fol. 746] Mr. Schroder: All right.

By Mr. Schroder:

Q. You were, evidently, interviewed by the party named as quoting you at some time about that game, were you not?

A. Yes, sir.

Q. When were you—

The Court: What party is that? Mr. Bisher?

Mr. Schroder: Yes, sir.

By Mr. Schroder:

Q. When were you so interviewed?

A. It was the Friday before we had our G-Day game, spring practice. I don't recall the day. It was the Friday before the game.

Q. Would that have been some time in the spring?

A. It was—we had—

Q. February?

A. I believe it was March the 4th; I don't recall the date, but I believe—

Q. Now, in your conversation with the gentleman named, did you refer to the 1962 or the 1961 game, and, if so, what was there discussed?

A. That was the 1961 game I discussed with Mr. Bisher: What I said was not related any at all to the 1962 game.

Q. Did the University of Georgia in 1962 or 1961 have a play called "Eight-eight Pop"?

A. No.

[fol. 747] Q. Is it or not common, in your opinion, for a football player or players, when they are on the wrong end of the score, to complain a little bit about how they are being triple-teamed or double-teamed, or something like that?

A. Everybody likes to make up excuses when you lose.

Q. That is common practice; you do it yourself?

A. Yes, sir. We kind of get around and talk about the game, talking about why we lost, or something.

Q. That excuse will last about how long?

A. Until the next game. We, you know, talk about it.

Q. You see the movies after that?

A. Yes, sir. We see the movies on the Sunday afternoon after the game.

Q. What, in your opinion, was the physical condition of the Georgia team just before the Alabama game?

A. We were sort of run down. We had had two weeks of hard practice; our legs were tired, and I don't think we were physically able to play on that day.

Mr. Schroder: You may examine.

Cross examination.

By Mr. Cody:

Q. Mr. Babb, when Georgia had the ball in the middle of the field, that is, the middle of the field from the standpoint of the side lines, what instructions had you received [fol. 748] from the coaches as to how far out to go on this split end?

A. On the pro-set?

Q. Yes.

A. I split out fifteen yards.

Q. And then the only reason for you not going out that distance of fifteen yards would be on account of that ball being on the side line and not being able to go out that far?

A. We have a certain amount of yards that we can get to the side lines; six or eight yards. We just leave that line open, because you can't operate in that small a distance.

Q. Is it true, Mr. Babb, that you only receive your assignment for that particular game without knowing what the assignment of the other players were?

A. Well, we have meetings the week prior to the game, and the whole team splits up. The ends go in one room and the backs in another and the linemen in another room, and we receive our own instructions there.

Q. The ends know what they are supposed to do?

A. We know what we are supposed to do, and in a general form we know what everybody is supposed to do.

Q. They have the tackles in another room?

A. They have the tackles, guards and centers in another room.

Q. And you don't know what their instructions are?

A. I do in a round-about way.

Q. But indirectly they are not permitted to disclose that to you, are they?

A. Yes, sir.

[fol. 749] Q. Do you know what the assignment the halfback is?

A. I know in a general way.

Q. But not specifically?

A. I wouldn't know specifically because I am not a halfback.

Q. As a matter of fact, isn't it true that the—that the game plan itself is something that is within the knowledge of the coaches and not the players?

A. They diagram every play we will run on the chalkboard in front of the whole team. We watch what every man is supposed to do.

Q. When do they do that?

A. Monday prior to the game.

Q. So that is formulated prior to Monday?

A. I don't know when the coaches formulate theirs.

Q. Don't they draw up a—what is known as a game plan?

A. Yes, sir.

Q. And put it on paper?

A. Uh huh; yes, sir.

Q. Did you see that before the Alabama game?

A. Yes, sir; they gave us a game plan.

Q. A complete copy?

A. Yes, sir.

Q. What day was it that you say you talked to Furman Bisher?

A. It was on a Friday prior to our spring day game.

Q. That would be about the first of February?

A. I can't remember.

The Court: He said the first of March.

[fol. 750] The Witness: I believe we had our spring practice in February.

Examination.

By the Court:

Q. What conversation did you have with him? You said in regard to the '61 Georgia game?

A. Yes, sir.

Q. You didn't discuss the '62 Alabama game?

A. No, sir. What I said to him was in regard to the 1961 game. I made it specific to him that is what I was talking about.

Q. What did you say in regard to the '61 Alabama game?

A. He said to me, he said, "I want to ask you a question. Did the—" he said, "Did the Alabama team seem to know your plays?" I said, "Not last year. If they did, it would have been more obvious in the 1961 game, if they did." One of the boys after the game—we have got friends on all the teams. One of my friends said, "You can't run this play." You know, just general football talk.

Q. That was in the 1961 Alabama game?

A. The 1961 Alabama game.

Q. Which was played in Athens?

A. Sanford Stadium.

Q. First game of the year?

A. Yes, sir.

Q. And you were a sophomore at that time?

A. Yes, sir.

Q. That was your first game?

A. Yes, sir.

Q. Your discussion did not center on the '62 game?

[fol. 751] A. I told him I didn't know if there was any talk on the line in the 1962 game.

Q. You didn't hear any talk, if there was any?

A. No, sir, I did not.

Q. Go back to the '61 game. What is that you said about the '61 game, that it was—if it happened at all, it would have been in '61?

A. I said it would have been more obvious in the '61 game if it had happened.

Q. You mean taunting back and forth?

A. I didn't hear—I just heard from a boy, it was a halfback—

The Court: That would be hearsay.

Cross examination (continued).

By Mr. Cody:

Q. Did you have any play at all in your series that had a number "eight-eight" on it?

A. Eighty-eight, yes, sir. We had an eight-eight and a ninety-nine.

Mr. Cody: That's all.

The Court: Any further question of Mr. Babb?

Redirect examination.

By Mr. Schroder:

Q. Can you pop off of eight-eight or eighty-nine?

[fol. 752] A. No, sir; that is two entirely different plays. The blocking is different and everything.

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SAMUEL RICHWINE, called as a witness on behalf of the Plaintiff, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. For the record, will you kindly state your full name?
A. Samuel Richwine.
Q. Where do you live, Mr. Richwine?
A. I live in Athens, Georgia.
Q. What is your occupation, Mr. Richwine?
A. I am the athletic trainer for the athletic teams at the University.
Q. In 1962 were you the trainer for the University of Georgia football team?
A. Yes, sir.
Q. Mr. Richwine, on March 23, 1963, the Saturday Evening Post published an article entitled "The Story of a College Football Fix." On page 81, in column 3, that article reads as follows: "And Sam Richwine, the squad's trainer, told Bisher, 'They played just like they knew what we were going to do, and it seemed to me a lot like things were when they played us in 1961 too.'" Mr. Richwine, is that an accurate or an inaccurate quotation?
A. Inaccurate.
Q. You evidently did have—before I do that, will you come down here, please, sir; I didn't read that from the [fol. 753] board. What I just read, Mr. Richwine, is right here, and you can check it again to make sure I read it right.
A. Uh huh; yes.
Q. You say that is an inaccurate quotation?
A. Yes, sir.
Q. Will you please make one of these marks there and put your initials out there? Go back to the stand.

Mr. Schroder: You may examine.

Cross examination.

By Mr. Cody:

Q. Mr. Richwine, when you were talking to Mr. Bisher, what game were you referring to, what game were you discussing?

A. The Alabama game of 1962.

Q. Did you get into any discussion of the 1961 game?

A. I made a comment about the '61 game.

Q. What was the comment?

A. I commented about what wonderful physical condition I thought they were in.

Q. Did you say anything to him about—about what knowledge the Alabama team had of the plays that Georgia was running?

A. No, sir.

Q. You were on the side line as these players came out of the game?

A. Yes, sir.

Q. Did you personally hear any comment made by any of the Georgia players about what was going on in the game?

[fol. 754] A. Well, they make all kinds of comments about "this fellow hitting me" or something like that.

Q. Was any comment made about what Alabama knew about the plays they were running?

A. No, sir.

Q. Did you have any other subject matter that you discussed with Mr. Bisher?

A. No, sir. He just came over and talked to me the one day when I was in the training room working. He asked me—I made a comment I thought they were in wonderful physical condition in '62, and I said I thought they were in better shape in '61.

Q. Georgia?

A. No; I am talking about the Alabama team.

Examination.

By the Court:

Q. What was—does he usually come over and talk to you, Mr. Richwine?

A. Oh, he comes over a lot to talk to the coaches and watch practice.

Q. What question did he propound to you when you said the Alabama team was in wonderful physical condition?

A. He asked me what I thought about the game.

Q. And that is all he asked you?

A. Made a statement like, "didn't"—something to the effect "didn't you get the opinion that they knew everything that we were going to do?" When he said "we", he meant "us".

Q. Yes, sir. What was your answer to that?

A. I told him I didn't know; I don't know one play from the other, no way for me to know that. I take care of the [fol. 755] physical conditions; I don't do anything.

Q. No semblance of anything told to Mr. Bisher in—didn't resemble this statement in any way?

A. Well, the resemblance—I referred to the physical condition of the men.

Q. Yes, sir.

A. But, in the article there, the statement, there is nothing about physical condition. That is what I said.

Q. You mentioned nothing to him in any way about any plays?

A. No, sir; I don't know—I don't know a play when I see one.

Q. The '61 game, did you discuss that?

A. I discussed the physical condition. I said I thought they were in better shape in '61 than in '62.

Q. And that's all?

A. Yes, sir.

Q. That was the only fact that you stated to him, they were in better physical condition in '61 than in '62?

A. Stated that they were in—they were in good physical shape in '62, and I thought they were in better shape in '61 than in '62.

The Court: All right, sir.

Mr. Cody: Come down.

The Court: You may step—are you through with him?

[fol. 756] Mr. Schroder: No, sir.

Redirect examination.

By Mr. Schroder:

Q. Shortly after the appearance of this article published by the Saturday Evening Post, did you discuss what you—the quotation that was in there by you with Johnny Griffith?

A. I discussed it with him the next morning; yes, sir.

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Brigham Everett Woodward, called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. Will you please state your full name?

A. Brigham Everett Woodward.

Q. Where is your home, Mr. Woodward?

A. Augusta.

Q. Augusta, Georgia?

A. Yes, sir.

Q. You attend the University of Georgia?

A. Yes, sir.

Q. Speak up, please, sir. You play football at the University of Georgia?

A. Yes, sir.

Q. During 1962 were you a member of the varsity football team?

[fol. 757] A. Yes, sir.

Q. Do you still have another year of eligibility?
A. Yes, sir.
Q. You will play this fall, then?
A. Yes, sir.
Q. Did you play in the University of Georgia-University of Alabama game in Birmingham in September, 1962?
A. Yes, sir.
Q. What position did you play in that game, Mr. Woodward?
A. Safety man.
Q. That is on defense?
A. Yes, sir.
Q. You did not play on offense?
A. No, sir.
Q. Were you in that game as the Georgia safety man every time that Georgia was on defense?
A. Yes, sir; as far as I know. We have to get in when we can.
Q. Sir?
A. We have to get in when we can. I usually get in first play on defense, most of the time.
Q. During the 1962 University of Georgia-Alabama game, state to the Court and Jury whether or not there were any forward passes thrown by Alabama in your zone?
A. There weren't any thrown in my zone at all that night. They were all thrown in the flat or to the halfback's zone.
Q. On March 23, 1963, the Saturday Evening Post published an article entitled "The Story of a College Football Fix", and in that article it states that "the Georgia players, their moves analyzed and forecast like those of rats in a maze, to a frightful physical beating." Now, with re- [fol. 758] gard to that statement—I am going to break it down in two portions. I want to ask you this question, first. In your opinion, were the moves of the University of Georgia players, did they appear to be analyzed and forecast by the University of Alabama players?
A. Well, defensively I would say "no", that would be the only thing I can answer, because I don't play offense.

Q. The second part of that portion reads, "the players took a frightful physical beating". You were with the players after the game in the lockerroom, were you not?

A. Yes, sir.

Q. In your opinion, did the University of Georgia players take a frightful physical beating in that game?

A. No, sir; I wouldn't say so.

Q. Would you, as a defensive player, Mr. Woodward, be on the side line when substitutions were made on Georgia's offensive team?

A. Yes, sir.

Q. While on the side lines did you or not hear players running off the field stating that Alabama knew their plays and that they had been sold out?

A. No, sir; I never heard anybody say anything.

Q. What was the, in your opinion, physical condition of the University of Georgia football team before it went into the game in Birmingham?

A. We were all pretty tired. Most of us were leg weary. We had been practicing pretty hard before the game.

Q. Do you or not feel that the University of Georgia was ready for that game?

[fol. 759] A. No, sir; I don't think we were ready.

* * * * * * *

JAMES WALLACE BUTTS having resumed the stand, testified further as follows:

Cross-examination (continued).

By Mr. Cody:

Q. Coach Butts, when we adjourned and you left the witness stand, we were talking about four specific calls among other that you made to Frank Scoby in Chicago in September of 1962. You remember our discussion about those calls?

A. Yes, sir.

Q. Two of the calls that we had—that we were discussing were, I believe, one the day before the Georgia-Alabama game?

A. Yes, sir.

Q. One call on the day of the game, and one call the day after the game; you remember that?

A. I remember you discussing the call on the day of the game, sir, but I do not remember the call that you mentioned the day after the game.

Q. Well, do you remember that I gave you access to this Defendant's Exhibit No. 17, which you may refresh your recollection from. I will leave it here where you can hold it if you want to.

A. All right, sir.

Q. Do you recall the nature of any of those four particular calls?

A. Yes, sir. The one that stands out in my mind is the one that was made somewhere around the middle of the [fol. 760] day on September 22nd, on the day of the Georgia-Alabama, the reason being already stated to you, sir.

Mr. Schroder: Let's go ahead—

A. (The witness) All the calls that I have made, Mr. Cody, to Mr. Scoby of Chicago have been for business reasons.

By Mr. Cody:

Q. Well, if so, why did you charge those calls to the University?

A. Mr. Cody, I think you know that—I'm sure it has been reported to you that I thought when I made the charges to my credit card that I was charging them to my home. I explained that to Mr. J. D. Bolton, the Comptroller of the University of Georgia.

Q. But that was in April of this year you made that explanation, wasn't it?

A. Mr. Cody, it doesn't matter when it was made, it's the truth.

* * * * * * *

By Mr. Cody:

Q. Did you ever discuss with Mr. Scoby this Continental Enterprises?

A. Yes, sir.

Q. Did he have some money tied up in that company?

A. Well, I would put it this way, sir; he bought some stock in that corporation.

Q. Do you—

[fol. 761] Examination.

By the Court:

Q. Is Continental Enterprises the one you and Coach Bryant had, and Mr. Wolfson, Sam Wolfson, is that the same corporation?

A. Yes, sir.

Q. Continental Enterprises?

A. Yes, sir, Your Honor.

The Court: All right.

Cross examination (continued).

By Mr. Cody:

Q. Do you know what the outstanding capital stock of that company was?

A. No, sir; I'm not a good businessman, sir.

Q. Do you know the par value of the stock?

A. Well, Mr. Cody, I have been a little afraid to check it lately; it's so low.

Q. Do you know what business that company is in?

A. Yes, sir; I know that the main thing they were trying to do was sell throughout America a projection type

cap on a can that projected all kinds of fruit juices, chocolate and so forth.

Q. When you and Coach Bryant got into this particular company, did you—did you know whether or not it had a surplus or big deficit; did you know anything about the financial condition of the company?

A. I had a statement, but I'm not sure that I paid any attention to it, sir.

Q. What I'm trying to find out, Coach Butts, is whether [fol. 762] or not these telephone conversations which you had with Mr. Frank Scoby in September of 1962, whether or not that—the affairs of that particular company could have taken up a big part of these telephone conversations?

A. No, sir.

Q. I see.

A. I can explain, sir, that the businesses that did take up the telephone calls were loan companies which I did not operate in any way, but which I was trying to help and Universal Food Products of Lakeland, Florida, and also, as I explained to you once before, Mr. Scoby at one time checked out Orange River Groves, Incorporated, and as I told you, he did not think it was a good investment.

Q. And you also told me it didn't take him long to make that decision, didn't you?

A. Yes, sir.

Q. Now, getting back to this relationship with Mr. Scoby where you were to get a cut on the sale of scotch whiskey, what territory was that designed to cover, this arrangement, Mr. Butts?

A. Mr. Cody, this proposition never got past the talking stage, but we did discuss the Southeast, an override on all of the products sold in the Southeast.

Q. When did you begin your discussions with him on that subject?

A. Mr. Cody, I'm very sorry, I cannot give you an answer to that question.

Q. That's all right. Were you to pay him anything for this concession?

A. No, sir; he doesn't need it, Mr. Cody, he's a wealthy man.

Q. Did you talk about what your cut would be on this deal?

[fol. 763] A. No, sir.

Q. Did you discuss what your duties were to be?

A. Yes, sir.

Q. What were they?

A. The main duties I would have would be more or less a goodwill man, furnish the name. Of course, this could not possibly have happened if I hadn't also been able, at the same time, to line up a job with a professional football team.

Examination.

By the Court:

Q. Mr. Scoby make it contingent on your getting a connection with a professional football team before he would give you this override on the scotch whiskey?

A. Your Honor, he did not, but that was—

Q. The understanding?

A. No, sir; in my own thinking.

Q. Oh, yes, sir.

Cross examination (continued).

By Mr. Cody:

Q. Well, Coach Butts, do you—do you see any inconsistency in being in that type of business, and also being connected with a professional athletic team?

A. No, sir. President Kennedy's father made two hundred million out of scotch, sir.

The Marshal: Let's have orc , please.

[fol. 764] By Mr. Cody:

Q. You are not attempting to recommend him to us, are you?

A. No, sir.

Q. At the time that you were talking to him about this arrangement, were you then athletic director at the University of Georgia?

A. Yes, sir.

Q. Then, can you give us any reasonable estimate as to the time when you first began to talk to him on this subject?

A. No, sir; but I'd like to explain to you one thing. There's not anyone any place that ever accused me of being lazy, and I was perfectly able to do everything that I was supposed to do at the University of Georgia and make some telephone calls.

Q. Let me ask you this question, Coach Butts. If it can be shown in this case by proper evidence that Mr. Scoby was a man who bet as much as forty to fifty thousand dollars on football games in one season, mostly college football games, do you think—do you see any inconsistency, as an athletic director of the University, in associating with a man of that type? I'm asking you to assume that he did?

A. Mr. Cody, I do not condone betting in any way, and in that direction you are picking the wrong man. I have never even played poker, and never even done what perhaps you and a lot of people have, bet on my golf game. I don't play golf.

Q. You talking about me and Mr. Schroder, now, aren't you?

A. Yes, sir.

Q. Let's go back and answer—

[fol. 765] The Court: All right; we're going to have order in this audience back here or we're going to clear the room, and I mean it. These outbursts—the next outburst, that's it.

By Mr. Cody:

Q. Suppose you answer my question, though, Coach Butts. If it can be shown by evidence in this case that this man bet on football games in one season between forty and fifty thousand dollars, mostly college football games, do you think it inconsistent for an athletic director to associate with a man of that type?

A. Mr. Cody, if the athletic director knew that, I will agree.

Q. Now, if that were the case, and if it can be shown that such a man did the thing which I described to you, don't you think that would hurt the University?

Mr. Schroder: If the Court please, I don't think that is properly phrased. If the man did it, it wouldn't hurt the University, unless the man connected with the University knew. That's what the man just testified to. I don't understand the question, and I don't know whether the witness did.

The Court: Would you repeat your question, Mr. Cody?

By Mr. Cody:

Q. If such were the case, that is, the case which I described in the previous question, don't you think that it would hurt the university for that situation to be known?

[fol. 766] The Court: What is your objection?

Mr. Schroder: I still don't know what situation he's talking about. Is he assuming the athletic director associated with a man he knew did that, or is he assuming the director associated with him without knowing that.

The Court: Yes, sir; I think you ought to clarify that.

By Mr. Cody:

Q. Suppose it were not known to you, Coach Butts, but suppose it was known to the public, don't you think it would hurt the University?

A. Yes, sir; but I don't think I could take responsibility for that, Mr. Cody, because I might have lunch any day at a table with people that I have no idea—

Q. I understand.

A. That's my point.

Q. Coach Butts, I'd like to pass on to another subject, just a moment. I'd like to find out from you if, since January the 6th, 1961, at various meetings which you attended as athletic director, if you have ever openly criticized the coaching staff, or the athletic board at the University?

A. I have never been conscious of doing that, sir, and I would like to add to that that I would like for my—the things that I have done to stand on record to show my regard for Coach Johnny Griffith over the years.

Q. Isn't it true that—isn't it true that before this Bryant affair came up that a representative of the athletic board [fol. 767] of the University notified you that they wanted your resignation?

A. No, sir; that's not exactly true.

Q. Well, what's the story on that?

Mr. Schroder: If the Court please, I inquire as to the relevancy of this.

The Court: Yes, sir; I think it would probably be relevant on the question of general damages, Mr. Schroder; I will let him go into that.

Mr. Schroder: As to mitigation, not as to whether there was a liable committed. I assume all of this is on mitigation of damages.

By Mr. Cody:

A. Ask your question again, please, sir, if you will?

Mr. Cody: You want it read back?

The Court: Yes; read that back, Mr. Court Reporter.

(Whereupon the Court Reporter read aloud the question.)

A. (By the witness) The answer to that is no member of the athletic board has told me they wanted my resignation.

[fol. 768] Q. What was it you wanted to explain about that subject matter?

A. What I wanted to explain was that on an occasion, the day I do not know, about the time the Atlanta Touchdown Club meets every year, Mr. Cook Harwick invited me to come by his office and he said something along that line, but at the same time he intimated he would never vote against me.

Q. But he said he was the only one—

A. No; he—

Q. —that wouldn't vote against you?

A. No, he did not, sir.

Q. Well, did he tell you that the rest of the members of the board had that attitude?

A. No, he did not, sir.

Q. Well, didn't you resign at that time?

A. I went to see the President of the University of Georgia, and told him that I would like to retire as athletic director the last day of June.

Q. Now, can you pin-point the date of that conversation?

A. I have told you, sir, it was at the time that the Touchdown Club meets in Atlanta.

Q. Wasn't that about the 15th?

A. If you say so, I'll agree that's it.

Q. What I'm trying to straighten out, Coach Butts, is that this resignation as of February 23, subsequent to the one we are talking about now, was for a different reason. State to the Court if that is the letter you wrote President Aderhold, or a copy of it, on February 23?

A. One minute, please, sir. Yes, sir; I wrote this to the President of the University of Georgia, and I'd like to explain.

The Court: You go ahead and explain.

[fol. 769] By Mr. Cody:

Q. Go ahead; you can make any explanation you wish.

A. On Friday, I believe it was February the 22nd, and I do not—I don't want to be held strictly to the date, I attended a meeting in Mr. Cook Barwick's office here in Atlanta, and for the first time—

Q. This is a different meeting from the previous one you had in Cook's—

A. Yes, sir.

Q. Go ahead.

A. For the first time—I rode over to that meeting with President Aderhold and Mr. J. D. Bolton. They did not mention anything that was to take place in the meeting. I thought it was to talk about a retirement plan, and in that meeting the so-called Butts-Bryan incident was discussed. The following day, Saturday—or let me go back to Friday night, please, sir. Friday night I received a call from Mr. Furman Bisher, sports editor of the Atlanta Journal, and he said: "I understand you are going to resign next week instead of June." I changed the subject, saying that "perhaps will see you at the Georgia Tech versus Georgia basketball game in Atlanta." But Mr. Bisher is a very persistent gentleman, and he asked me if I would be interested in professional football. I did not discuss it with him. The next morning, being Saturday, I think February the 23rd, I received a call from Mr. J. D. Bolton, comptroller of the University, and he said that he received a call from Atlanta, and: "I understand that Mr. Furman Bisher, in the Saturday afternoon Journal, will state that you are resigning at the University of Georgia." He said: "This will be embarrassing to the President." I then went to the President of the University of Georgia's office, and because I knew of the rumors related to the so-called Bear Bryant-Butts things as advertised around the country by [fol. 770] rumors, in order not to embarrass the University of Georgia I resigned, sir.

Q. Effective February 28?

A. Yes, sir.

Examination.

By the Court:

Q. Let me get this straight. I think the Jury might want to get it straight, too. You had previously resigned, Coach Butts, effective June 30?

A. Yes, sir; I had requested that they release me from my duties as of—

Q. June 30?

A. With retirement, sir.

Q. And this second resignation is another resignation which just brings it up—up-dates it?

A. That was the official resignation.

Q. All right. You had already resigned effective June the 30th, or something like that?

A. Yes, sir; yes, sir.

Q. That's what I didn't understand.

The Court: You were talking about two different resignations.

Mr. Cody: That's right.

The Court: All right, sir.

[fol. 771] Cross examination (continued).

By Mr. Cody:

Q. In this letter of resignation dated February 23rd, you state that: "During the past two years I have developed business interests. I find that I am having to devote more time to these interests. It is for this reason that I submit my resignation as athletic director of the University of Georgia effective February 28, 1963."

A. Yes, sir.

Q. Now, that is somewhat different from the explanation you just gave. Now, what is it?

A. That was very well written, sir, by the Assistant to the President, Mr. Louie Griffith.

Q. He wrote the letter, not you?

A. That's right; and it was written in his office.

Q. You signed it?

A. I signed it.

Q. Will you describe for us, Coach Butts, what these business interests were at that time and how long they had been going on?

A. Mr. Cody, I had one-third interest, stock only, in six loan offices, the location has already been described to you.

Q. I remember that.

A. Yes, sir. I had offers from at least one insurance company, and I, of course, had been involved in the Orange River Groves, Inc., which, of course, I was out of at that time.

Q. Do you have any others you want to describe to us?

A. No, sir.

Q. Were you devoting much time to this Continental Enterprises?

A. No, sir. All I did was about once a week call up and see how much it had dropped on the market.

[fol. 772] Q. Is that the company in which you lost a lot of money?

A. Well, Mr. Cody, it remains to be seen how much money I will lose. It hasn't been sold to date.

Q. Did you take part in the organization of the corporation known as the B. E. M. Corporation? Wasn't that a real estate venture?

A. No, sir. I have never taken part in the organization of a real estate organization.

Q. What was the B. E. M. Corporation; do you remember that?

A. No, sir; there—

Q. Did you have a company by the name of Coffee Break Sales?

A. No, sir. I had some stock in a corporation called Coffee Quick.

Q. You don't remember anything about the Coffee Break Sales and Service Company?

A. I think at one time, sir, I bought some stock in it, but I am not sure of the name, and I think my money was returned to me at a later date.

Q. What is the name of this other company, the Coffee Break Distributing Company, wasn't it?

A. The name of it was—please don't—

Q. Go ahead.

A. Coffee Break, Incorporated, I think, sir.

Q. Were you devoting much time to that, sir?

A. Not any, sir.

Q. What about that Universal Food Products thing?

A. I did not devote any time to that, sir, except making some telephone calls in that connection.

Q. What about that Orange River Grove?

A. Mr. Cody, I had a clear understanding when I went into that corporation that I would not spend any of my time, but I became alarmed because I was afraid some of the people who had purchased the contracts in this corpora-
[fol. 773] tion would lose their money, and I did put some time into it for that reason and that reason only.

Q. Getting back, Coach Butts, for the moment when we were talking about resignations when you resigned as coach following the 1960 season, did you intend, at that time, to ever get back in the coaching of any athletic team?

A. Mr. Cody, as I told you in my deposition, which you have—

Q. That is not in evidence yet. Let's keep it on the evidence in the courtroom.

A. Yes. I intended to try professional football if given the opportunity, sir. May I explain? Professional football is different from college football in that it is not necessary to teach positional play, and you can recruit the material in a much different manner.

Q. You mean by that, it is not as strenuous?

A. I believe, sir, while the game is going on, all football games are strenuous, but the college coaching game is about a twenty-four hour a day job.

Q. What did you tell the University officials when you resigned at that time?

A. Mr. Cody, I did not talk to but one official, that official being President O. C. Aderhold.

Q. What did you tell him?

A. I told him that my blood pressure was very high, and that I had a very hard time making it through the last two games of the season, and I thought because of my health that I should drop out of the picture as a football coach.

Q. Just wasn't physically up to it?

A. I told you exactly what I said, sir.

Q. Did you have anything to do—getting back now to these businesses you said you had developed over this two-year period, the two-year period mentioned in this letter, [fol. 774] did you have anything to do with a concern called the Trans-America Securities Corporation?

A. Mr. Cody, I was on the board at that company, Trans-American, and I attended only two meetings of the board, and I have to confess to you, I didn't know what the business was all about when I did attend the meeting.

Q. What about this—you had, previous to that, a few years ago, operated a restaurant in Athens, hadn't you?

A. Yes, sir; and I didn't have anyone to watch the cash register.

Q. You lost a lot of money in that?

A. I lost some.

Q. Was that the Huddle, what they call the Huddle?

A. Yes, sir.

Q. What about the Frost Free Groves, Coach Butts? Were you interested in that company?

A. I never heard of that, sir.

Q. Didn't you have an interest in a lumber business?

A. No, sir.

Q. What about a trucking concern up in Philadelphia; didn't you have an interest in that business?

A. No, sir. The way you might—I don't think I need any explanation, unless you want it, but I have two friends

there. One of them is deceased, Lewis and Leonard Tose had a very large trucking business, but I had no interest in it at all.

Q. What is this insurance business you said you were trying to develop?

A. Sir, I have not tried to develop an insurance business, but there was an insurance company started in Birmingham, Alabama, the home office is now in Dallas, Texas, that since the Saturday Evening Post story broke, they invited me out for a conference, but I wasn't able to make the connection, and so that is the status of that at this time.

Q. You are trying to get an agency in Georgia?

[fol. 775] A. That was the talk under consideration, sir.

Q. Coach Butts, weren't you, at the time you wrote this letter, interested in a couple of housing developments, one in Athens and one in St. Simons?

A. No, sir; absolutely not.

Q. Well, these businesses that you were devoting some attention to, do you see any inconsistency in that and trying to be athletic director at the University?

A. Well, Mr. Cody, you can make a case against anyone, but I would like for you to investigate of the members the faculty of the University of Georgia. And you would find that some of them own stock in different corporations.

Q. But not—not trying to run a business?

A. I have not tried to run a business, sir.

Q. Well, if you—if you devoted a lot of your time in the running of any of these businesses, don't you think that would have hurt the University of Georgia?

A. Well, to my way of thinking it did not, sir. That is my opinion, and it could—someone else could have another opinion.

Q. Coach Butts, let me ask you a few questions about where you made your headquarters when you came to Atlanta and made business calls. What—what offices did you use?

A. Well, the Rhodes—in the Rhodes-Haverty Building there was an office called Communications International.

It was convenient, and I used it at times to make calls. I think that is what you're referring to.

Q. That is the business that this fellow Werbell (?) had in Atlanta?

A. Yes, sir; it was an advertising agency, so to speak.

Q. You did make a good many trips to Atlanta during the year, is that true?

[fol. 776] A. Yes, sir; I made quite a few trips, and I made a lot of speeches all over the South.

Q. When you—when you had a lot of telephoning to do, did you use the office of this Communications International?

A. At times I did, sir.

Q. How many trips would you say you made to that office during the year 1962?

A. Mr. Cody, I have no idea.

Q. They were numerous, weren't they?

A. Several.

Q. Well, they were numerous?

A. Well—

Q. If you have no accurate idea about it, I don't insist.

A. I do not have an accurate idea about it, sir.

Q. All right, sir. Do you remember going to the office of Communications International, that is, here in Atlanta, on September 13, 1962?

A. No, sir; I do not.

Q. Do you remember being in Atlanta on that date?

A. Mr. Cody, as you know, I had a desk record, and I thought I was in Atlanta, as I told you. It doesn't show on the record. However, the telephone company's records show I was in Atlanta and did make a telephone call on that day.

Q. Do you have any independent recollection yourself—

A. No, sir; I do not.

Q. Do you remember receiving a telephone call from Coach Bear Bryant on September the 16th, 1962?

A. No, sir; I have received many calls from him, but I don't remember any particular call any time.

Q. You have no such memory, even though that call came to you at your home?

A. No, sir; I have had a lot of calls at my home.

[fol. 777] Q. Have you had a lot of calls that lasted an hour and seven mintues?

A. The amount of time on such a call doesn't impress me very much, because I have made many calls, long calls.

Q. But you remember nothing about this one?

A. No, sir.

Q. Do you recall that on May 3rd, 1963, I took your deposition in your attorney's office before a Court Reporter for the purpose of obtaining evidence to be used in the trial of this case?

A. I did not remember the date until you questioned me Friday, and you told me that.

Q. You remember the occasion, though?

A. Yes, sir.

Q. And you remember being under oath at the time to tell the truth?

A. Yes, sir; and I am under oath now.

Q. I'd like to read to you, Coach Butts—

The Court: What page are you reading from in the deposition?

Mr. Cody: I can't give you the page at the moment, but I want to quote it.

Mr. Schroder: I would like to have it so I can check it. Maybe one of his associates here can tell me.

The Court: Yes, sir. I think he is entitled to the page.

Mr. Cody: I don't believe I have the page before me at the moment.

[fol. 778] The Witness: Your Honor, may I get a drink of water?

The Court: Yes, sir. Bring Coach Butts a drink of water, Mr. Marshal.

The Witness: That is all right; I don't want to delay—

The Court: You are entitled to a drink of water anytime. You can just sit up there. Can you find the page number?

Mr. Cody: I can't.

The Court: Go ahead and ask him the question. If Coach Butts remembers the questions, we will save time.

Mr. Cody: These are the questions which appear in the pleadings under the motion to compel. It is a part of the record in this case.

The Court: All right, sir. Mr. Schroder can remember the questions. We will save time on it.

Mr. Schroder: May I just have the question—it is voluminous. May we see what the question is?

The Court: I think he said they were in the motion to compel.

[fol. 779] Mr. Cody: It is in the motion to compel.

Mr. Schroder: Wouldn't that have been in July, a different deposition?

Mr. Cody: No; it would have been in May.

The Court: All right, sir. Go ahead.

By Mr. Cody:

Q. I want to read to you about eight or ten questions that were propounded to you at that time by me, and when I have finished I'd like for you to state whether or not you refused to answer those questions.

The Court: Let the Jury go—

Mr. Schroder: Wait a minute.

The Court: Let the Jury go to the Jury room.

Mr. Schroder: Yes, sir.

Mr. Cody: This is not—

(Whereupon the Jury retired from the courtroom at 2:45 p. m.)

[fol. 780] Mr. Schroder: May I be heard on this, whatever is going on?

(Whereupon a conference was held at the Bench between the Court, Mr. Schroder and Mr. Cody.)

* * * * * * *

By Mr. Cody:

Q. Coach Butts, in football parlance, does the term "split end" refer to a formation?

A. The answer is 'no'. An end may be split from any formation used in football, and I'd like to call your attention to the fact, Mr. Cody, that when my first deposition was continued I corrected that in my continued deposition. In other words, Mr. Cody, to explain, you can have what they call a full set; every back in his normal position, just three men back, the normal T and split either end way out. You can split him out from a slot, from a wingback formation, from almost any formation used in offensive football today.

Q. Is the term "slot", does that refer to a formation?

A. Slot formation, if nothing else is added, refers to a simply slot formation with an end on one side moving out creating a slot with a halfback on the inside.

Q. What you are saying though, it would be variations?

A. Oh, yes, sir.

Q. In this deposition that we—that you gave on July—in July, I'd like to read from one page there.

Mr. Schroder: May I again ask counsel—

Mr. Cody: 147.

[fol. 781] Mr. Schroder: Sir?

The Court: I assume we have an original here.

The Clerk: Yes, sir.

The Court: Open the original.

The Clerk: All right, sir.

Mr. Cody: I don't need the original; it's on Page 147.

By Mr. Cody:

Q. I will ask you, Coach Butts, if you didn't make this statement, referring to a quick kicker.

Mr. Schroder: If the Court please, I don't think it is proper to read him that now until he asks him the question first, and if he testified to something different, then he can

attempt to contradict him, but he can't proceed to read all the way through from his deposition.

The Court: I think he can ask him did he testify as to a quick kicker on such and such a date, and is that his opinion now.

Mr. Schroder: Yes, sir.

[fol. 782] The Court: All right; I think he can proceed that way.

By Mr. Cody:

Q. Getting back to these Burnett notes and that particular phrase "can't quick kick", question—let me ask you if this is your evidence, Coach Butts. It is on Page 146 and 147. "Coach Butts isn't the main effectiveness of a quick kick, doesn't it lie in the surprise of the defensive team with the kick?" Answer: "Well, I don't see any need of quick kicking as Georgia used it as surprise, if that's the question you want, because they line up in a kicking formation. It would be stupid. What made it good at the University of Georgia was the fact that the safety man had to be worried about passing with Jake Saye in it."

Question: "Because Saye might pass?"

Answer: "Saye might pass, see. Well, when a team lines up in a kicking formation you have to be pretty dumb not to anticipate a kick. Now, Paul Bryant and Bobby Dodd are the two best proponents of the quick kicking game that I know of. And in a quick kicking game with a man in a normal position, lefthalf is in front of fullback quick kicks ahead of time, is very disconcerting. But we just haven't had that man."

That a correct transcript of your testimony?

A. I made that statement, sir, and I ask for the blackboard. I want to show exactly what I said.

Q. I am reading what you said.

A. I know, but I want to show this Jury—I am not worried about what you are reading.

Q. I am not asking you to use the blackboard.

The Court: You answer the question, and Mr. Schroder have you explain it on redirect.

[fol. 783] The Witness: I am not ashamed of that statement at all; I am proud of it; nothing wrong with it.

Mr. Schroder: I think perhaps Mr. Cody ought to complete the reading of the answer which he stopped in the middle of.

By Mr. Cody:

Q. That part of your answer is correct; is that right?

A. Yes, sir.

Q. That was your testimony?

A. If I made it, that is what I thought.

Q. Does Georgia belong to the National Collegiate Athletic Association?

A. Yes, sir.

Q. Has the Southeastern Conference, of which Georgia is a member, have they adopted the By-Laws and Constitution of the National Collegiate Athletic Association?

A. Yes, sir. The University of Georgia operates under the organization that you are speaking of.

The Court: You mean they operate under the Southeastern conference, or the N.C.A.A.?

The Witness: The Southeast, sir, they operate under the Southeastern Conference, but the Southeastern Conference operates—

[fol. 784] The Court: Under the N.C.A.A.?

The Witness: —Under the National Collegiate Athletic Association.

By Mr. Cody:

Q. Let me ask you if you are familiar with this paragraph in the Constitution and By-Laws of the National Inter-collegiate Association?

Mr. Cody: It is on Page 5. I furnished you with a copy of this.

Mr. Schroder: Did you?
Mr. Lockerman: Just a moment.
Mr. Cody: On Page 5, Section 6.
Mr. Lockerman: Just one minute.

By Mr. Cody:

Q. Are you familiar with this particular part of Section 6?

A. I haven't read it, sir.

Q. I am going to read it to you. "Individuals employed by or associated with member institutions for the administration the conduct or the coaching of Intercollegiate Athletics and students competing in Intercollegiate [fol. 785] Athletics, shall report themselves with honesty and sportsmanship at all times to the ends that Intercollegiate Athletics as a whole, their institutions, and they as individuals shall stand for the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports." You familiar with that section?

A. I haven't read it, sir, but I think it is a good—

Q. Let me read you this paragraph on Page 6, which is a part of the official enforcement program. "Individuals employed by or associated member institutions for the administration, conduct or the coaching on intercollegiate athletics are in the final analysis teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or personable acts. Their own moral values must be certain and positive, that those younger and more pliable will be influenced by their example. Much more is expected of them than the less critically placed citizen." Are you familiar with that section?

A. No, sir; I have never read it, sir.

Q. Coach Butts, in order to establish the date of your approval of this list of calls that we referred to, will you state whether or not that is the letter you wrote to Mr. Bolton on the date mentioned?

Mr. Schroder: I don't believe any point has been raised as to the lack of authenticity of this.

The Witness: Yes, sir; I wrote the letter.

[fol. 786] Mr. Cody: I see.

The Court: I don't—I don't know exactly what you all are proving or disproving.

Mr. Cody: That is the date, I am trying to get the date straightened out.

The Court: All right, sir.

Mr. Cody: I believe that's all.

The Court: All right, sir.

Mr. Cody: This has been identified as Defendant's Exhibit No. 18.

* * * * * * *

Redirect examination.

By Mr. Schroder:

Q. At the close of the hearing on Friday Mr. Cody at that time was asking you had you not, when your deposition was first taken, testified that the resignation tendered by you on February the 23rd, was to become effective in March rather than in February, and I believe you pointed [fol. 787] out to Mr. Cody that you had made a correction of that when your deposition was resumed later?

A. Yes, sir.

Q. Will you read from your deposition the portion where that was corrected when Mr. Dody was present there in my office and asking those questions?

A. Are you sure, sir, that you have given me the right page?

Q. Is that Page 153?

A. No, sir; 152; excuse me. The part of my deposition that Mr. Schroder is referring to reads like this, quoting Mr. Schroder: "There are one or two things, Mr. Cody, that Coach Butts called to my attention that he would like to correct in connection with his previous deposition that

he had reflected upon since it was taken in May, one of which had to do with the effective date of his resignation as athletic director."

Quoting Mr. Cody: "Well, let him state for the record what corrections he wants to make."

"Mr. Schroder: 'If you did say it was in March, what did you mean to say?'

"The Witness: 'Mr. Cody asked me the question in the previous deposition when my resignation was effective as athletic director. I think I gave the answer 'at the end of March.' The correct answer should be the end of February.'"

"Mr. Cody: 'Go ahead and state whatever corrections you have to make. I don't care to ask any questions about it.'"

• • • • • • •

[fol. 788] JAMES WALLACE BUTTS having resumed the stand, testified further as follows:

Redirect examination (continued).

By Mr. Schroder:

Q. Mr. Butts, on cross-examination, you were questioned about a business association you had with a gentleman named Frank Childs. When you were discussing this business connection with Frank Childs, what was he at the time, and what business was he in?

A. He was vice-president of the Bank of Gray, sir.

Q. And you mentioned the name of Westmoreland; what is his first name?

A. Carl Westmoreland.

Q. What is he?

A. He is a lawyer in Macon, Georgia.

Q. On cross-examination you were asked about a telephone call made by you from Birmingham on September 22 to Frank Scoby in Chicago, and you stated that you did

recall that telephone call. Did you explain how you happened to remember that call?

A. I am not sure, sir, but the reason—

Q. You are not sure you explained it, or you are not sure of what?

A. I am not sure I explained it.

Q. All right, sir, would you please explain it?

A. Well, Mr. Schroder, it seems that an article occurred in a Tampa newspaper about this matter, and I received a call from Mr. Joe Sargeant, who lives at Lakeland, Florida, not too far away. He was—in explaining, I'd like to say Mr. Joe Sargeant has a dairy at Coleanor, Alabama, [fol. 789] which is sixteen or eighteen miles out of Birmingham. He met me for lunch the day of the Georgia-Alabama game, and he wanted me to speak to Mr. Frank Scoby about some business negotiations that he had, so I called Mr. Scoby and put Mr. Joe Sargeant on the telephone, and he talked to him at that time. That is the reason I can identify the call, because Mr. Joe Sargeant reminded me of the same.

Q. Within the past couple of months?

A. Well, it would have to be since the article was written about Mr. Frank Scoby.

Q. After this publication, after the March 23 issue of Post?

A. Mr. Schroder, I am not sure that it came after that time—yes; I am sure it was. I was confused with another investigation that went on here in Atlanta; yes, sir; it came after the Saturday Evening Post, sir.

Q. All right, sir. Now, much was asked you on cross-examination about investments that you had made. Would you please now describe to the Jury and Court just what your present financial situation is?

A. Mr. Schroder, the best to describe it and get to the point, I am insolvent at this time.

Q. What is your income?

A. I have no income.

Q. On cross-examination it was pointed out to you that in the Saturday Evening Post article that you had been requested to submit yourself to a lie detector machine examination, and that you at that time refused to do so. Now, will you please inform the Court and Jury what your reasons were for so declining?

[fol. 790] A. Mr. Schroder, at that time I considered it, more or less, an insult, and that was my reason for not taking the lie detector test.

Q. Have you since taken one at my insistence?

A. Mr. Schroder, you know that you insisted on me taking a lie detector test.

Q. All right, sir. Now, before the issue came out in question, I believe you were testifying the other day that prior to that time that you were engaged in negotiations with the National Football League team known as the Dallas Cowboys; is that true or not true?

A. That is true.

Q. I am just going to ask you this: Since the date of the publication of the article in question, have you heard further from the Dallas Cowboys?

A. No, sir.

Mr. Cody: He has already testified to that, Your Honor. He is just repeating what's already been said.

The Court: I believe you brought it out on cross-examination. I will let Mr. Schroder ask him about that. I will overrule the objection.

By Mr. Schroder:

Q. In checking through these toll tickets, telephone toll tickets which were brought into Court by Mr. Fleming, have you been able to tell the Court and Jury where you were on September the 11th, two days before the so-called telephone conversation?

A. Mr. Schroder, in checking my record of speeches I [fol. 791] made, I find that I was in Cullman, Alabama, at that time.

Q. On September the 7th?

A. Yes, sir.

Q. In the State of Alabama?

A. Yes, sir. I made more than ten speeches in Alabama during the last season.

Q. All right, sir. On September the 11th, two days before this so-called interception, while you were in Alabama, did you at that time get in touch with Coach Bryant and meet him anywhere to discuss anything about the game?

A. No, sir.

Q. On the first page of the Saturday Evening Post article in question the editors of the Saturday Evening Post had written this, and I want to read it to you. "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football. Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul 'Bear' Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed. The corrupt here were not professional ball players gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men, Butts and Bryant, employed to educate and to guide young men. How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know yet. For now we can only be appalled." Does that editorial con- [fol. 792] tain any truth insofar as you, Coach Wallace Butts, the Plaintiff in this lawsuit, is concerned?

A. No. And I would like to explain that for a time I hid from people, but not any more. I am looking them in the eye, because it is not true.

* * * * * * *

JAMES WALLACE BUTTS having resumed the stand, testified as follows:

Recross examination.

By Mr. Cody:

Q. Coach Butts, are you sure you feel like continuing with this examination?

A. Yes, sir.

Q. I show you, Coach Butts, what appears to be a certified copy of a financial statement which you furnished to the Comptroller General of the State of Georgia, in July, 19[illegible]. Do you remember preparing that statement or having your auditor do so?

A. No, sir; I do not remember the details of it, sir.

Q. You have testified a few minutes ago, though, that you are now insolvent?

A. I am insolvent.

Q. Did you sign that statement?

A. That is my signature.

Q. Take a look at this statement and see if it doesn't show that you have a net worth in excess of two hundred thousands dollars as of that date?

A. I have never been worth a hundred thousand dollars.

[fol. 793] Q. You mean by that, that that is a false financial statement?

A. Mr. Cody, this statement was filled in. I signed it. I didn't know anything about what was in it.

Q. Let me have it a minute.

A. All right.

Q. Why did you sign it? What was the purpose of the instrument?

A. I don't know what the purpose was, because such a statement was not required of any such amount.

Q. Well, I mean, what were you driving at when you signed this statement and turned it over to the comptroller General of the State of Georgia? What were you after?

A. We had some applications for loan licenses, sir.

Q. Was that these small loan businesses that you had throughout the state, sir, the Instant Loan Company?

A. Yes, sir; they were small loan licenses that I had some stock in?

Q. You don't deny that this statement shows you have a net worth of two hundred five thousand nine hundred eighty-eight dollars?

A. Mr. Cody, there's been a big change in my financial status since that time, and I do not know exactly what I was worth at the time.

Q. This is July the 17th, 1961. If you had—if you had a net worth of two hundred five thousand nine hundred eighty-eight dollars as to that time, what has happened to it?

A. Mr. Cody—

[fol. 794] Mr. Schroder: I suggest that counsel—

A. (The witness)—I spent—

Mr. Schroder: Wait. May I suggest that counsel let the witness see the statement so he can see what is listed on there as assets.

The Court: I presume a financial statement would be broken down in to "real estate," "insurance policies," "liabilities," whatever it might be.

The Witness: Mr. Cody, for example, my residence and furniture is rated at ninety thousand, ninety thousand dollars. When the property was sold it brought forty-one or forty-two; I am not sure of the exact amount. Let me ask you this question.

Mr. Schroder: Let him go on with the assets.

The Court: Let him go on with it.

The Witness: Since that time my stock values have gone down to—quite a bit, and I do not know exactly how much. What else you want to know, sir?

By Mr. Cody:

Q. What stock values were you talking about?

[fol. 795] A. Well, Continental Enterprises has gone

down from six to less than a dollar a share. I had to drop some other things—

Q. Let me have that back when you get through.

A. All right, sir.

Q. That is the company that you and Wolfson and Coach Bear Bryant were involved in?

A. Mr. Cody, I was not involved with anyone in the company, I owned some stock in the company, and so do many other people.

Q. Did you see—

Mr. Schroder: Whoa, whoa; let him finish.

The Witness: Many people own stock in that company.

By Mr. Cody:

Q. Did you notice this instrument was signed by Thomas L. Williams, A. C. P. A.?

A. Yes, sir.

Q. Is he your auditor?

A. Yes, sir.

Q. Does he handle the preparation of your tax returns and instruments of that nature?

A. Yes; he does, sir. But I might add, my income tax has been checked very carefully for years.

Q. I am not asking you that. Just answer my questions, Coach Butts.

A. All right, sir.

Q. But it is your testimony that at the time you signed this, you didn't know what you were signing; is that, in [fol. 796] substance, what you are undertaking to tell this Court?

A. Yes, sir.

The Court: What is the purpose in filing a statement with the Comptroller General? Does he handle small loan licenses?

Mr. Cody: Yes, sir. He has control over it under the law of Georgia. It is a discretionary matter as to the issu-

ance of those licenses. Also has supervision over the operation of them after they are granted.

By Mr. Cody:

Q. Do you still have your interest in these small loan businesses?

A. It is in my name, Mr. Cody, but it is used as collateral; it is being used as collateral at this time.

Q. Do you know, Coach Butts, whether or not the Comptroller General of the State of Georgia has withdrawn several of those licenses that were heretofore issued?

A. The Comptroller General of Georgia—at the present time?

Q. Yes.

A. Mr. Cody, I prefer, if the Court will permit, this as an answer and you will accept it, I prefer that you consult with Mr. James Bentley, Comptroller General.

Q. Well, don't you know? Can't you answer my question?

A. I can answer the question that he has never taken one away from me.

[fol. 797] Q. Well, had—

A. If that is the answer to your question.

Q. Well, have any of the licenses to operate this business been cancelled by him, that is, licenses heretofore issued to the Instant Loan Company?

A. Well, I—

Q. You would know that, wouldn't you, Coach Butts?

A. I can answer your question, Mr. Cody.

Q. What is it?

A. I turned in one, but I had a clear understanding as to the future status of this company.

Q. Is that the only license that's been withdrawn?

A. Yes, sir.

Q. Now, Coach Butts, you have explained some of the things—some of the nature of the telephone conversations with this Mr. Scoby. Now, do you—I assume you have had

an opportunity to analyze some of these telephone calls just like I have or at least your counsel has; he's had a copy of this list?

A. Yes, sir.

Q. You and your secretary, Mrs. Malcolm, actually helped in the preparations of that list, didn't you?

A. Yes, sir.

Q. With Mr. Bolton?

A. Yes, sir.

Q. And when it was finished you approved it in every respect, didn't you?

A. Yes, sir.

Q. You found no error in it?

A. No, sir.

Q. Now, did you know that—let's just take the month of April 1962, that there—did you know that there were no calls to Scoby by you? Have you checked that? Let me [fol. 798] point out to you what I have found, and you and your counsel can correct me if I am wrong, and it will give you an opportunity later to do it. Did you know that there were no calls in April and May of 1962?

A. Mr. Cody, that is of no significance to me.

Q. Well, it might be to me or to the Court. Let me give you my summary, and see if you have any contest about it. No calls in April or May, five in June, two in July, four in August, and then fourteen in September. Why the difference?

A. I might point out, Mr. Cody, if you check you won't find any since that Saturday Evening Post story broke.

Q. I am not asking you about that, Coach. Suppose you just answer the question instead of arguing with counsel about it.

That is all I am trying to do is solicit some answers from you.

A. Mr. Cody, my answer is this. By your implication you are implying that I have called him in relation to gambling. I have never—

The Court: No, sir.

Mr. Cody: I am not implying anything. I am asking you a fact.

The Court: Probably we'd move faster if you will answer or not, and your counsel can—

The Witness: Ask me the question, please, sir.

[fol. 799] By Mr. Cody:

Q. You find anything wrong with the tabulation that I just related about these calls?

A. No, sir.

Q. Now, did you know that—aren't you familiar with the deposition that has been taken which indicates—

Mr. Schroder: I don't believe counsel can state what a deposition indicates. If he wants to read it, he is at perfect liberty to read it.

The Court: Yes, sir; I sustain the objection.

By Mr. Cody:

Q. Do you remember approximately how many calls Mr. Scoby made to you in 1962?

A. Mr. Cody, I have never read his deposition.

Q. I see. That is all right; that answers my questions. I have one or two more questions to ask you, Coach.

A. All right, sir.

Q. Do you remember that on October the 20th of 1962 that Georgia played Florida State College down in Florida?

A. Yes, sir.

Q. Do you remember that two days before the game, namely, on October the 18th, that you telephoned Coach Peterson from Atlanta and talked to him for a period of fifty-seven minutes?

A. I am not sure where the call was made, sir, but I remember making the call, and I want to explain.

[fol. 800] The Court: All right, sir, go ahead and explain.

A. (By the Witness) I made the call in behalf of the University of Georgia. The head defensive coach came to

me and he had seen pictures of the University of Miami versus L. S. U. football game, and in this picture L. S. U. was using what is called a crack block; in other words, putting a flanger out what we call opposite, a counter flanger. This flanger was going in motion and hitting the Miami ends from the rear. L. S. U. furnished Coach Peterson, the coach of F. S. U., Florida State University, and I called him in behalf of the University of Georgia, and I did a good job, because I talked him out of using this crack block in the football game to be played with the University of Georgia.

Q. Well, let me ask you this question. Do you remember mentioning to him that in that coming game two days later that Georgia might use the Utah pass?

A. No, sir; I don't remember that.

Q. You know what I am talking about in calling it a Utah pass; that is the shovel pass, isn't it?

A. I was the first one put it in in the South, so I know it; yes, sir.

Q. Did you know that Georgia hadn't used that pass up until that time in the 1962 season?

A. No, sir.

Mr. Cody: I believe that's all.

[fol. 801] Examination.

By the Court:

Q. I am confused. What is the relationship between L. S. U. and F. S. U.? I mean, I am not—

A. Your Honor, sir, L. S. U. employs the same type of attack as does F. S. U., because Coach Peterson was a member of the Paul Dietzel coaching staff at L. S. U., and of course, evidently I didn't know it, but the members of the coaching staff at the University of Georgia knew that F. S. U. had this crack back block which injured two or three men in the L. S. U. versus Miami football game, and they were concerned about it, and I want to explain further

that I did not call as an interim member of the Rules Committee at Large; I called them simply to help the University of Georgia, which I did.

By Mr. Schroder:

Q. Is the block to which you are referring to a crippling block?

A. Well, Mr. Schroder, if you want to be the end, I can demonstrate.

Q. No, sir; I don't care about that.

The Marshal: You will have to remain quiet in the courtroom, please.

By Mr. Schroder:

Q. Did the chief defensive coach at the University of Georgia tell you in connection with that call—

[fol. 802] Mr. Cody: Your Honor, I object to that for two or three reasons. It is leading, it—

The Court: I think, Mr. Schroder, it is leading.

Mr. Schroder: Sir?

The Court: It is leading.

Mr. Schroder: I will withdraw it and rephrase it.

The Court: All right, sir.

By Mr. Schroder:

Q. What did the University of Georgia chief defensive coach tell you that he was teaching his boys in connection with that game if that block was used on Georgia?

A. He advised me that the University of Georgia had put in the same plan, and that if Georgia—Florida State University used it against the University of Georgia, the University of Georgia would in turn use it against Florida State University.

Q. With the results being what, in your opinion?

A. In my opinion the sort of fiasco was pending with penalties, and another thing, I wanted Georgia to win the

football game, and I knew that if Georgia started into a new plan of this kind they'd be awkward in carrying out the [fol. 803] plan and would have a better chance to get penalties in using that plan.

Q. State whether or not—did you say you were successful in keeping Florida State from using that against Georgia?

A. It was not used in the game, sir.

Q. All right, sir. Let me turn to this statement, financial statement that was—that you were being questioned about under the heading of "Assets" is listed four thousand eight hundred dollars in the bank. Under "Marketable Securities" is listed fifty-two thousand six hundred sixty-two dollars, which includes a footnote, seven thousand shares of Continental Enterprises stock. Now, your testimony is that when that statement was prepared by an accountant in July, 1961, the market value of that stock was what, approximately?

A. About six dollars per share, I think.

Q. And today, the market value of that—of that seven thousand shares of stock is approximately what?

A. Less than one dollar, sir.

Q. Also included in that item is thirteen hundred shares of Georgia International Life Insurance Company stock. Where is that stock or shares of that stock?

A. Mr. Schroder, I had to sell that stock because of recent events.

Q. What events?

A. Well, right now I am unemployed.

Q. Under the item "Investments in Closely Held Corporations" is listed ninety-three thousand five hundred dollars, footnoting that, Orange River Groves, Inc., seventy-eight thousand five hundred dollars. What is that worth today?

[fol. 804] A. Mr. Schroder, that stock is not worth anything, and the value as shows in this statement was estimated on the value of the receivables held by Orange River Groves, Inc., at that time.

Q. Under the same caption "Investments in Closely Held Corporations" ninety-three thousand five hundred dollars is listed, Hollywood Estates, Inc., fifteen thousand dollars. Where is your equity in that investment today?

A. Mr. Schroder, the way that figure was arrived at, someone in my office called the President of Hollywood Estates, Charlie Evans—

Q. That is not my question. My question is: Where today is your investment in that corporation?

A. The stock was sold to pay a loan and was paid on a loan at the Hubert State Bank.

Q. Well, you don't have that anymore?

A. I do not have it.

Q. All right, sir.

A. No, sir.

Q. Eighty thousand dollars under "Assets" is listed as cash surrender value of life insurance, approximately; it says eighty thousand. What has happened to that asset?

A. Mr. Schroder, since that time I have had to borrow all I could on my insurance.

Q. Then there is quite a difference in your financial picture then and your financial picture since the Saturday Evening Post article came out?

A. Yes, sir; there is quite a bit of difference in my financial status.

Mr. Schroder: Let me check, Mr. Cody, and see if I have another question here.

[fol. 805] The Court: Just a moment. I think he wanted to confer with them.

Mr. Cody: Okay.

Mr. Schroder: I don't think I said I was through, yet. Just a minute.

The Court: Just a moment; he is not through yet.

By Mr. Schroder:

Q. This so-called crack block that you were describing, what is the present situation of that so-called block insofar as it being legal or illegal today is concerned?

A. Mr. Schroder, I would never have made the call to Florida State except for the benefit of the University of Georgia, because—

Q. That is not my question. Is that block today legal or illegal?

A. It is legal if the blocker has his head in front of the man he is blocking. Therefore, in explanation, Mr. Schroder, I would like to say I kindly felt I was fooling with someone else's business, namely, Florida State's, and I did it for the University of Georgia.

Q. In any conversation, without regard to what month it took place in, that you have ever had with Frank Scoby, has there ever been discussed between you and him betting or gambling or anything to do with the outcome of any contest involving the University of Georgia?

[fol. 806] A. Absolutely not.

Q. To your knowledge has Frank Scoby, without regard to what year it might be, ever placed any money on the outcome of the game engaged in by the University of Georgia?

A. I am sure he has not.

Q. To your knowledge has he ever bet any money on the outcome of any game, no matter whether Georgia was in it or not?

A. Not to my knowledge.

Mr. Schroder: You can examine.

Recross examination.

By Mr. Cody:

Q. Coach Butts, you referred a moment ago to this Georgia International Life Insurance Company Stock.

A. Yes, sir.

Q. Did you know that at the date of that statement that stock was worth seven dollars a share?

A. No, sir; I did not know that.

Q. Did you know what it was worth?

A. No, sir. I know what I paid for it, sir.

Q. What?

A. Five dollars a share.

Q. Did you know that it is worth thirteen dollars a share now?

Mr. Schroder: If the Court please, it is worth more than that.

[fol. 807] The Court: It's twenty-two dollars a share today.

By Mr. Cody:

Q. When did you sell it?

A. I don't know, sir. It was sold by Goodbody and Company in Athens, Georgia, I think.

Q. When?

A. It was—when, I don't know the date, sir.

Q. You made a nice profit on that, didn't you?

A. Yes, sir; bought it at five and sold it at something; I don't know what it was.

Q. You sold it around thirteen, didn't you?

A. I am not sure, Mr. Cody.

Q. Well, now, Mr. Schroder was trying to illustrate to the Court that by selling this stock you hurt your financial statement, but on the contrary, you helped it, didn't you?

Mr. Schroder: I don't believe counsel has stated what I was demonstrating.

The Court: Let's don't put it in that way. I think he can ask him questions, not in the form in which he asked it; I agree with you, Mr. Schroder.

By Mr. Cody:

Q. Well, if the sale of that stock changed your financial condition, it bettered it; isn't that true?

A. Yes, sir; Mr. Cody,—

Q. That is all I wanted.

[fol. 808] Mr. Schroder: Let him answer your question.

The Witness: If you are trying to prove I am a poor business man, I am with you a hundred per cent.

By Mr. Cody:

Q. Well, that is not exactly what I am trying to prove, Coach Butts.

A. Well—

Q. You said—you said on the witness stand that you are now insolvent.

A. That is not hard to find out, sir.

Q. Who was it that got you in this Orange River Groves deal?

A. Mr. Cody, the Orange River Groves, Incorporated, was started by a building corporation called Jones and Frederick in Coral Gables, Florida. I thought it was a good opportunity, and I would have to be frank with you in telling you that I put more into it then I expected in trying to protect people who had bought contracts in that company. I was unselfish in that.

Q. Now, when you—when you signed this financial statement that we are discussing you named four banks that you owed money to. You left out the Bank in Chicago. Was that Mr. Williams' mistake or yours?

A. Mr. Cody, I cannot be sure, but at that time I do not believe I owed the Bank in Chicago.

Q. What about—what about a bank in Knoxville? You left that out.

A. Mr. Cody, that loan was effected at a more or less [fol. 809] recent date and endorsed by a wealthy gentleman living in Knoxville, Tennessee.

Q. What about this bank loan at Bridgeport, Pennsylvania? You left that out. Is that Mr. Williams' mistake or yours?

Mr. Schroder: Is there any evidence that that was a loan outstanding at that time, or is Mr. Cody testifying again?

The Court: I will let him ask that, Mr. Cody; I will let him ask him if it wasn't outstanding, and Mr. Butts can say yes or no or he doesn't remember.

The Witness: Mr. Cody, I don't know why, but I will try to explain. This—I have a contract with a canning company in Bridgeport, Pennsylvania.

By Mr. Cody:

Q. For what purpose?

A. For the purpose of canning Coco-Colas in the Philadelphia area, and this loan, when arranged, was supposed to be paid from the income from the royalties that I would receive on each case of canned Coca-Colas, and I think it is one penny per case.

Q. But you did sign the Bridgeport loan?

A. Yes, sir; endorsed by Mr. Lewis Tose, T-o-s-e.

Q. Coach Butts, haven't you had a loan outstanding for several years and prior to the time this statement was prepared that was payable to the Northside Bank at Jacksonville, Florida?

A. That loan, Mr. Cody, is less—I don't know the date of the loan.

[fol. 810] Q. But it was prior to this financial statement, wasn't it?

A. I do not know, sir.

Q. Well if—can I ask you who endorsed that loan?

A. Mr. Lewis E. Wolfson.

Q. Don't you know that that loan had been outstanding for about a year before this financial statement was prepared?

A. Mr. Cody, I am not sure about date.

Q. As a matter of fact, Coach Butts, you owed considerable more money than is disclosed by this financial statement as of the date of that statement; isn't that true?

A. I am not sure. You seem to know more about it than I do, sir.

Q. Well, you should know more about it, though, shouldn't you?

A. Yes, sir.

Q. Now, since the date of this financial statement, which is July 17, 1961, you drew your salary from the University

up until the time you resigned, they have paid you that, haven't they?

A. Yes, sir; they paid me through February of this year.

* * * * * * *

JOHN CARMICHAEL called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Lockerman:

Q. Will you state your name please, sir?

A. John Carmichael.

[fol. 811] Q. Where do you live.

A. 4392 East Brookhaven Drive, Atlanta.

Q. Speak as loud as you can so that counsel back here can hear you.

A. All right, sir.

Q. How long have you lived in Atlanta?

A. All my life; I was born in Atlanta, sir.

Q. What business are you in?

A. I am in the real estate, insurance and sales promotion business.

Q. Mr. Carmichael, do you know George Burnett?

A. Yes, sir.

Q. How long have you known him?

A. Since 1960.

Q. Have you had any business connections or dealings with him?

A. Yes, sir.

Q. Directing your attention to the period back to the time of September 13, 1962, were you and George Burnett connected in in any kind of business together?

A. Yes, sir.

Q. Will you state briefly what that type of business was?

A. It was a business that I owned. The name of the business was the Institute of Oral Hygiene. It was—

Q. Did that have to do with toothbrushes and—

A. It was a sales agency for the sale of a toothbrush sterilizer.

Q. Did you have an office for use in connection with that business?

A. Yes, sir.

Q. And where was it located?

[fol. 812] A. At Number 72 Eleventh Street.

Q. That was here in Atlanta?

A. Yes, sir.

Q. Prior to that particular association, had you been in any business association with George Burnett?

A. Yes; he had been working for me for about a year.

Q. In some other business connection?

A. Yes, sir. He had been working for me as an insurance agent for Foundation Life Insurance Company, which I was district manager for Foundation Life.

Q. You were the district manager for Foundation Life, and he worked for you?

A. Yes, sir.

Q. Did you get a leave of absence or something?

A. Yes, sir; and in the last part of June of '62, we both got a leave of absence from the company.

Q. Now, this Institute of Oral Hygiene, was that your company?

A. Yes, sir.

Q. Directing your attention further to the date of September 13, of 1962, do you happen to remember that date?

A. Yes, sir.

Q. Do you recall approximately what time you arrived at your office on that date?

A. Well, I was a little late getting there that morning, usually got there about 9:00 o'clock, but that morning I had a dental appointment and I got there about 10:30.

Q. About 10:30?

[fol. 813] A. 10:30 or 10:35; somewhere right in there.

Q. Did you have in your offices there that you have referred to, an office that was more or less your office?

A. Yes, sir; I had an office.

Q. Private office?

A. Yes, sir; private office.

Q. With a desk and phone on it?

A. Right, sir.

Q. When you went into the office that morning, was George Burnett there?

A. Yes, sir.

Q. Will you state to the Court and Jury just what you found with reference to George Burnett when you arrived at your office that morning?

A. Well, when I went in the reception room our secretary hadn't come to work, and she didn't come to work all day that day, but I walked on in the reception into my office, and Mr. Burnett was sitting at my desk, and he had the telephone to his ear, and when I walked in he put his finger to his mouth like this, and I turned around and walked out.

Q. Will you turn to the Jury so they can see?

A. I turned directly around and walked out.

Q. Will you show the Jury what you meant by the motion of your hand?

A. Well, he had the phone to his ear, and when I walked in, he took his finger and put it to his mouth like this, and I turned right around and walked outside the door, and I sat—there's a little secretary's desk right outside the door, —I had a seat there and started looking through the morning mail.

Q. Now, the secretary's desk that was just outside the door, I assume you mean the door of the office where he was seated at your desk?

[fol. 814] A. That's correct, sir.

Q. Approximately how far, now, from the desk where he was seated, was the secretary's desk where you went and sat down?

A. Well, it was about—actually two desks, wasn't over three feet apart, if you got down to measuring the distance between the desks, but there was a wall separating them and a door in the corner, so I guess if you had to walk

around it, it would be six feet from one desk to the next desk.

Q. The door, then—

A. Six or eight feet.

Q. —was open in to the office where he was seated?

A. Yes, sir.

Q. And so you were about six feet from—six or eight feet, walking through that door, to where he was seated?

A. Yes, sir.

Q. I believe you stated there was no secretary there. Was anyone else in the office?

A. No, sir; not that day, no. She didn't work that day.

Q. Was there any sort of commotion or noise or disturbance going on?

A. No, sir; not at all.

Q. Now, approximately how long after you walked to the door where he was seated in the office and then turned and went back to the secretary's desk, about how long was it before anything happened with reference to you and George Burnett?

A. Well, I would say approximately five or six minutes.

Q. During that five or six minutes, was there any con-
[fol. 815] versation by George Burnett over the phone that he was listening in on?

A. No, sir.

Q. Was there anything said by George Burnett to anyone into the receiver of that phone?

A. No, sir.

Q. While—after you got there?

A. No, sir.

Q. What was the first thing, then, that was said by George Burnett after you sat down to that desk, and after you had gotten there?

A. Well, he called my name.

Q. And when he called your name, what did you do?

A. I got up and went into my office.

Q. Relate to the Jury what George Burnett said to you after you went into the office and the desk where he was seated?

A. He said: "John?"—and he called my name,—"John?" I said, "Yes". And I got up and went into the office. I said, "What is it, George?" And he just said, "I heard a conversation between Coach Wally Butts and Coach 'Bear' Bryant." He says, "Seems funny to me that one coach or athletic director would be calling another one before game time." And he said, "I made some notes about it." And he had these notes in his hand, and he proceeded to tell me a little bit about the conversation.

Q. All right, sir. Now Mr. Carmichael, were you in a position to where you could have heard anything that George Burnett would have said to, into that phone receiver, had he said anything?

A. Yes, sir; if he had said anything at all I would have heard it.

[fol. 816] Q. Now, this article of the Saturday Evening Post of March 23 states this, and I quote, with reference to what Burnett is supposed to have heard. Let me show you, Mr. Carmichael, this reproduction of the Saturday Evening Post article which states in the second column, on Page 81. "Suddenly,"—talking about Burnett—"he heard an operator's voice. 'Have you completed your call, sir?' Burnett stated. 'Yes, operator. By the way, can you give me the number I was connected with?'" Did you hear George Burnett make any such statement to any operator on the phone at that time?

A. No, sir; and he didn't make it.

Q. If he had, you could have heard it?

A. That's right, sir.

Q. The next thing I read from here is: "The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified. Burnett—" Then, going on down—"Burnett then dialed Jackson 5-3536, the number he originally wanted. This time the call went through normally, and he reached a close friend and former business asso-

ciate named Milton Flack." And it quotes Burnett as saying: "Is Wally Butts in your office now, Milt?" Burnett asked, and it quotes Flack as saying: "Well, he's in the back office making a phone call, I think. Here he comes now." Did George Burnett make any statement over that phone to Milton Flack, or anyone else, as stated in this Post article?

A. No, sir; he did not.

Q. If he had, could you have heard him?

A. Yes, sir.

Q. This article comes down—no, it's on the first column, Mr. Carmichael, on Page 81 of this article, and states here, after referring to the claim that Burnett heard the oper- [fol. 817] ator say Coach Bryant was on the phone ready to speak to Coach Butts, th n— "Hello, Bear," Butts said." Then it goes down to say, "As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later." After you started to talking with George Burnett, when he called you into the desk there where he was seated, did he tell you at that time, which was moments after it—after he had listened on this conversation, that Butts had given to Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later?

Mr. Cody: Your Honor, I am going to object to this form of questioning. I think he can ask the witness what Burnett said, what he heard.

The Court: Yes, sir; I agree with you. I think you are leading your witness, Mr. Lockerman. I think you can ask him what was said, but you can't suggest to him what his answer might be. I sustain the objection.

Mr. Lockerman: All right, sir.

By Mr. Lockerman:

Q. Will you state to the Jury just what George Burnett said to you as to what he had heard in the conversation that he claimed to be listening to?

A. Well, he said that Coach Wally Butts had called Coach Bear Bryant and that he had got hooked up in the conversation and that in the conversation Coach Butts [fol. 818] had said that some football player, and I have forgotten the name of the player because it didn't—don't strike a bell with me, was a great football player; and also the statement he made to me was that Coach Butts said that Georgia had two new coaches, and the Coach Bryant —they talked a few minutes, and Coach Bryant asked him if he was going to be home Sunday. Now, outside of that, there was nothing else particularly involved in it, except the general conversation which he admitted to me between the two coaches.

Q. General conversation about what?

A. About football in general.

Q. Yes, sir. And was that what Mr. Burnett told you at that time, moments after the conversation?

A. That's right, sir, except he did add a little bit more than that. He says: "It seems funny to me that an athletic director from one school would be calling another school before a football game." And he said, "You think we should bet anything on this game?"

Q. Who? Was that Burnett said that to you?

A. Yes, sir.

Q. Whether you thought that the two of you should bet anything on that game?

A. That's right, sir.

Q. That was his statement?

A. That was his statement to me.

Q. All right, sir; what did you say with reference to that?

A. I said: "Well, George, from what you tell me, it's nothing there to lead me to believe you would know who to bet on. Do you know who you'd bet on? Was there anything said to lead you to believe that there would be some favorite in the game?" And he said, "No". I said, "Well, [fol. 819] from what you tell me, I can't judge that either, so I think the best thing we should do is forget it."

Q. Was anything else said about that conversation until sometime, say, later in the afternoon of that day?

A. Not after that. There was nothing else said about it until about, oh, I guess roughly about 2:00 o'clock that afternoon.

Q. Were you still at the office about 2:00 o'clock, or 2:30 that afternoon.

A. Yes, sir.

Q. What brought about something else being said about it, about 2:00 or 2:30 that afternoon?

A. Mr. Milton Flack came by the office.

Q. Let me ask you there, who is Milton Flack?

A. Well, he's a gentleman that was the President of Sterilray, and at one time Mr. Burnett had worked for him in the capacity of sales agent for Sterilray, for this same toothbrush sterilizer.

Q. Had you been—did you have some previous business connection with Mr. Flack, also?

A. Well, the only other business I had had with Mr. Flack was when Mr. Flack was hired in the Public Relations Department, United American Life Insurance Company while I was on the Board of Directors of that company.

Q. You were on the Board of Directors of United American Life Insurance Company?

A. Yes, sir.

Q. Yes, sir.

A. And he was hired as a public relations man for the company.

Q. All right, sir. Going back to that afternoon, then, on September the 13th, you indicated that Milton Flack [fol. 820] came to the office of Oral Hygiene. Relate what took place when he arrived.

A. Well, we talked for a moment or two, and then George, Mr. Burnett, rather, proceeded to tell Mr. Flack about the same thing he had told me that morning in regard to the conversation that he said he had heard between Coach Butts and Coach "Bear" Bryant, and he asked Mr. Flack the same question that he had asked me earlier in

the morning. He say, "What do you think about putting a bet on the game?" Mr. Flack asked him about the same thing that I did, too, and told him that he didn't think there was anything to it, and that—he asked him if he knew which side to bet on, and he said, "No." And he said, "Well, I don't know either." And he told him just about the same thing I did, and told him he didn't see any way to bet on it, or wouldn't know which way to bet on it, and told him that he thought the best thing to do was to forget about it.

Q. And as far as you are concerned—

A. But—excuse me. He had also told him this, though, Mr. Flack told him that—he said, "What time was that call?" And he told him it was about 10:30 in the morning, and he said, "Well Coach Wally Butts was up at the office of Communications International this morning."

Q. Is the Milton Flack telling George Burnett that Coach Butts was at the office of Communications International that morning?

A. That's right, sir.

Q. Had—up to that moment, had George Burnett said anything to you or to Milton Flack indicating that he had any idea—

[fol. 821] Mr. Cody: Your Honor, that is the same objection. Now, Mr.—

The Court: Yes, sir; I think you are leading your witness, Mr. Lockerman. I sustain the objection.

Mr. Lockerman: All right, sir.

By Mr. Lockerman:

Q. Had George Burnett—will you state whether or not George Burnett had said anything to you or to Milton Flack—

Mr. Cody: Same objection, Your Honor; I think—

The Court: Yes, sir.

By Mr. Lockerman:

Q. What, if anything, did George Burnett say to you or Milton Flack concerning where Wally Butts was?

A. Well, he didn't know where Wally Butts was, I don't believe; if he did, he didn't say anything to either one of us about it, and, in fact, Mr. Flack is the one that told him where Coach Wally Butts was that morning.

Q. All right, sir.

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[fol. 822] (Atlanta, Georgia; Tuesday, August 13, 1963, 9:30 a. m., in Chambers.)

EXCEPTIONS AND RULINGS THEREON

The Court: Mr. Cody, I believe you stated you wanted to make certain exceptions in the record, and I think it would be better to make them outside, and I want you to preserve every right you have got, and I thought this would be the proper time.

Mr. Cody: I have understood from the very start, the way it should be done so as not to ask any questions that prejudicial to this Plaintiff, I mean, the question, the answer to which would be inadmissible.

The Court: All right sir; you just proceed where we can get it on the record.

Mr. Cody: We wanted to show, Number one, by Mr. Bolton, J. D. Bolton, that telephone calls to the extent of twenty-eight hundred dollars were made by the Plaintiff and charged to the University of Georgia, which calls were made between October, 1961, and February 1, 1963.

The Court: Is that—

Mr. Cody: That these telephone calls which were charged to the University were not known to the University until an investigation was begun in the latter part of 1962, that [fol. 823] these calls involved people of questionable character, one of which was a woman by the name of Evelyn

Lindsay, and that in excess of three hundred of these calls were to her.

The Court: Well, now, are you through?

Mr. Cody: That is one time; yes, sir.

The Court: All right, sir; the Court feels that, and it is the ruling of the Court, that the fact that these calls were charged to the University are irrelevant to the issue at hand. Now, I have permitted you to— The Court has permitted you to ask questions in regard to Mr. Scoby.

Mr. Cody: Yes, sir.

The Court: I can see no relevancy in the calls to E. C. Lindsay.

Mr. Cody: Judge, I didn't think this morning we were going to get into a discussion of—

The Court: I was just making the ruling for the record. I thought it would be for the record, the Court's ruling would be on the record.

[fol. 824] Mr. Schroder: May I make a comment?

The Court: Let me get cleared up with Mr. Cody. What are you attempting to show here, Mr. Cody?

Mr. Cody: That none of these telephone calls were in connection with University business, and to charge these calls to the University—

The Court: You are simply attempting to show that the calls were charged to the University which were personal calls?

Mr. Cody: Right.

The Court: Well, I don't think that is relevant to the issue, and I rule it out.

Mr. Cody: All right, sir.

The Court: Go ahead.

Mr. Schroder: Your Honor—

Mr. Cody: Then, in that—

[fol. 825] Mr. Lockerman: May I make this statement for the record also, that if you have any names of suspicious characters, as you refer to, other than Evelyn Lindsay and Mr. Scoby, that I think the record ought to show who you have reference to other than those.

The Court: That is the reason I asked him the question, the basis of his contention that they were admissible and he said they were charged as calls to the University, personal calls, and I put my ruling on that basis. Now, if you have got another basis for them, let me hear from you.

Mr. Cody: Now, with respect to all of these matters which I am about to mention, I take the position that I have a right to cross-examine the Plaintiff on this subject in order to develop other evidence along the same lines and to substantiate the correctness of the records. Now, Number—maybe I should go into a little more detail.

The Court: All right, sir; go back to whatever detail you want.

Mr. Cody: —into the discussion of the admissibility.

The Court: Go into anything you want to.

[fol. 826] Mr. Cody: I want to prove by Evelyn Lindsay that she has traveled with Coach Butts on numerous occasions, some of which are to football games made by the University of Georgia, that he visited her in her room, that on two occasions he was seen drunk, that he paid her expenses on these trips and exhibited her to members of the football team, associating with her in their presence. I want to offer proof that on the night of Tech-Georgia, the Georgia-Georgia Tech game, 1961, in Atlanta, following that game Coach Butts had dinner with this woman and spent the night with her at the residence of Mr. Leon Froshin here in Atlanta.

The Court: Well, I would say on that point, I don't think specific acts of misconduct are admissible, entirely disconnected with the libel action. I don't believe that a man has to come in and defend every act that he has ever committed during his whole life.

Mr. Cody: I think I understand that.

The Court: And for that reason I exclude the evidence and rule it out.

Mr. Lockerman: And, Your Honor, for the sake of the record, let me say this also in behalf of Mr. Butts.

[fol. 827] The Court: I don't want to defend every act I have ever done.

Mr. Lockerman: According to the testimony given by Evelyn Lindsay that he referred to, in each instance she said that whenever Coach Butts visited her in her room at any hotel or any other place, there was someone else present. Also, with reference to the—

Mr. Cody: Judge, let me interrupt him just a minute.

The Court: I am assuming everything he says is correct or could be correct, and I still think it is inadmissible and I rule it out.

Mr. Cody: I don't think we ought to get into a discussion in the brief time we have allotted here in the brief time—

The Court: I am letting you get your record for any appeal.

Mr. Lockerman: I do want the record to show that we take the position that the factual statements that he is making, that are incorrect in a number of instances as indicated, I know that he is not deliberately making incorrect statements, but I think if he checked the depositions carefully he would find that some of these statements of what he expects to prove are incorrect.

[fol. 828] Mr. Cody: I don't want to get into a discussion with him about what his position is.

The Court: That's all right. I want you to get your record straight, and I will rule on it.

Mr. Cody: I want to show that—

The Court: I might state this, that under the case of Kessler versus Best, which is a New York case which you cited, I read numerous cases which hold to the contra, and I believe that the majority of the cases, and also the case of Cox versus Strickland in the 101 Georgia is authority for my ruling.

Mr. Cody: I am not going to touch on the reasons for admissibility until I get through with these instances.

The Court: Go ahead.

Mr. Cody: I think I should state on this last point that we would undertake to prove by Mr. Hendry Ogdon the fact that Coach Butts did get drunk on the evening of the Tech-Georgia game in 1961 and spent the night with Evelyn Lindsay at this place. He, as well as Evelyn Lindsay, would be witnesses in that respect.

[fol. 829] The Court: All right, sir. I overrule—I exclude the evidence as being irrelevant and immaterial.

Mr. Lockerman: Let me say this; we take exception to that statement.

Mr. Cody: I understand you—

The Court: You don't need to take exception if I am ruling on it.

Mr. Lockerman: All right.

Mr. Cody: We expect to—we want to be permitted to prove that Coach Butts on a number of occasions during the time he was coach or athletic director visited the Domino Lounge in Atlanta in company with Evelyn Lindsay and several others, and also another nightspot called the Copa Cabana, at which places liquor was served and floor shows were put on, including—which shows included the so-called strip tease artists.

The Court: I rule that evidence out for the same reason as being irrelevant and immaterial to the issue involved.

[fol. 830] Mr. Cody: We expect to prove not only by the records of the airlines but the records of the University of Georgia that Coach Butts traveled with Evelyn Lindsay to various places, Birmingham, Miami, Nassau, Chicago, Los Angeles, Lexington, Kentucky, one or two where they did not travel together there but on some traveled back together, that he bought her ticket and paid for it, and paid her expenses, and in most of those cases charged the airline transportation charges to the University of Georgia.

Mr. Lockerman: Your Honor, Mr. Butts is here, and I think he can state into the record—

The Court: I don't think he need state anything. Let's just rule on the facts.

Mr. Lockerman: That is not a true statement of fact.

The Court: Are you through?

Mr. Cody: No, sir. In connection with those—several of those trips, the airline tickets which were charged to the University of Georgia are under a fictitious name, an assumed name was used for Evelyn Lindsay, namely, E. C. Smith and E. Smith, and subsequently when he was confronted by one of the University officials with respect to these particular transactions he admitted his indiscreetness, that one of those trips was to Nassau with Evelyn [fol. 831] Lindsay, he and Evelyn Lindsay alone, and that he paid the entire expenses of that trip, and in connection with one of those trips he put Evelyn Lindsay up at the Phoenix Hotel in Lexington, Kentucky, arranged for her to be registered under the name of E. C. Lindsay and wife, and that the University of Georgia, all of that was put on University of Georgia bill and paid by the University of Georgia without knowing what it was for, who it was, that Coach Butts subsequently paid that bill and admitted that this involved Evelyn Lindsay, stating also that he, having already testified in this case by deposition, he doesn't know anybody by that name, E. C. Lindsay. We would expect to show by Dr. Bolton—by J. D. Bolton that previous to that he had instructed Mr. Bolton when confronted with this bill to send the bill to E. C. Lindsay at 50 Biscayne Drive, Northwest, Atlanta—Northeast, which is the address, the address of Evelyn Lindsay. I believe that's all on that point.

The Court: All right, sir. I rule that that evidence is irrelevant and immaterial to the issues involved.

Mr. Cody: I think I should mention for the record, Your Honor, that we would expect to prove those facts by the airline records. I don't think I mentioned that, by the hotel records themselves, two witnesses for the—two employees of the hotel having given their depositions and identifying the records, and we would also prove a part of those statements, records, by Mr. J. D. Bolton and also by the cross-[fol. 832] examination of Mr. Butts. If Your Honor thinks

I should at this time name the two employees, the employees of the Phoenix Hotel, I will put that in.

The Court: You do what you want to.

Mr. Cody: One of them is named Anderson, Mr. Anderson, and Mr. Bachelor, who have testified by deposition in this case and have identified these records. And by Mr. Tracy of the Delta Airlines who identified the transportation tickets and has also testified by deposition.

The Court: All right, sir. You ready? Is that all?

Mr. Cody: Yes.

The Court: All right, sir, I rule that evidence irrelevant and immaterial to the issues involved.

Mr. Cody: We expect to show by Evelyn Lindsay that she sent to California by plane in 1960 to the Georgia-California game, and that Butts paid for that trip, and visited her in her room while she was there at the hotel. We expect likewise to show by her that the Georgia-Auburn game in 1962, Butts paid her expenses to Columbus, Georgia, where she stayed at the Royston Hotel, and he paid her expenses there and transportation expenses. We expect to show by her that in Jacksonville in November, [fol. 833] 1962, at the Georgia-Florida game she stayed at the Robert Myers Hotel, and Butts paid her expenses there, and that he visited her in her room during her stay there, and also that he was—he was on one occasion doing that weekend drinking heavily. We expect to show by two of the University officials that Coach Butts bought from Boomershine Motor Company in Atlanta a new Pontiac and gave it to Evelyn Lindsay, which incidently embarrassed some of the University officials in that the retention title contract on that car was recorded in Athens, and a record of it published in one of the publications that are issued in Athens. I don't know the name of that publication; I don't have it at the moment now, but it was published, and we would expect to show he was confronted by one of the University officials about his indiscreetness in doing that, and that he told that official that he did not buy this car for Evelyn Lindsay but simply helped finance it tempo-

rarily for her brother. In that connection we would expect to show that insofar as we have been able to ascertain that she has no brother. We expect to show you—prove that Evelyn Lindsay has a private unlisted telephone number which Coach Butts has called on many occasions in excess of a hundred times during the period I mentioned heretofore, all of which calls were charged to the University and included in this twenty-eight hundred dollars. We also expect to show that Coach Butts has visited many times in Evelyn Lindsay's apartment on Biscayne Drive while he was coach and while he was athletic director at the University of Georgia, and made this known to others who talked about it, and caused common gossip to be spread about it, which has embarrassed the University of Georgia.

[fol. 834] The Court: All right, sir, is that all?

Mr. Cody: I believe that's all.

The Court: All right, sir, I rule that evidence is irrelevant and immaterial to the issues involved. All right, sir, anything further?

Mr. Cody: Let me see. I think I have—like also, in connection with this trip to Lexington, Kentucky, I expect to show that on the return to Atlanta from that city that Coach Butts was with Evelyn Lindsay and also on that plane were five football players on the University of Georgia team, and on that visit none of Coach Butts family was on that trip. We would expect to show by Coach Butts and by Evelyn Lindsay that in the purchase of the Pontiac, in addition to the Pontiac automobile he purchased for her he bought her a mink stole. Now, I want to—I want to perfect the record, Judge, if such need be done, with reference to these seven or eight questions I wanted to ask Coach Butts yesterday.

The Court: Let me rule on that. I rule on that last statement, what you intend to prove, that it is irrelevant, and immaterial to the issues involved. All right, sir, go ahead.

Mr. Cody: With reference to these several questions?

[fol. 835] The Court: No, sir; I haven't heard those.

Mr. Cody: I wanted to prove yesterday with Coach Butts on cross examination that he refused to answer these seven or eight questions, I may be wrong in the number, which I showed to Your Honor yesterday and which had to do with the time when he was in Atlanta round September 13th or whether or not he made any calls to Coach Bryant, undertaking, of course, to show by this evidence that he was evasive and—

The Court: I think I am familiar with the questions, and I—

Mr. Cody: That's right; you looked at them.

The Court: —informed you at that time you could ask him those questions. My recollection was that you stated that you wanted to show he would not answer the questions at the time the deposition was taken—

Mr. Cody: That's right.

The Court: —and my recollection was that he was advised by his attorney not to answer the questions—

Mr. Cody: That's right.

[fol. 836] The Court: And I couldn't see where any benefit would be derived. I assumed that if a party is represented by counsel, and those questions were not answered at that time, but I told—I informed you on yesterday that you could ask the questions again. If you are making any real issue on the point, I will permit you to ask Coach Butts why he didn't answer the questions or refused to answer them, and I think it comes back to the same thing.

Mr. Lockerman: Your Honor, let me make this statement into the record. The questions that Mr. Cody is stating that Coach Butts refused to answer, in which he did refuse to answer, were questions that were put to him on May 3, 1963 where there was pending before Your Honor certain motions—

The Court: Some interrogatories.

Mr. Lockerman: —with respect to the admissibility of the questions that he was seeking the answer to. Thereafter the Court ruled—

The Court: That he did have to answer.

Mr. Lockerman: —that he did have to answer, and that I have in my hand here the deposition that Mr. Cody resumed of Coach Butts on July 16th, 1963, at which time he put those questions to Coach Butts, and Coach Butts did [fol. 837] answer those questions, after Your Honor had ruled that he should answer them, and for him to come back now and seek to ask him questions, and he refused to answer on advise of counsel on May 3rd, but which he did answer on July the 16th, certainly doesn't illustrate anything.

The Court: Yes, sir. That was a disputed legal point, and I can't see how you could impeach your witness when the matter was—the matter was to be determined by the Court and was later determined by the Court, and thereafter the questions were answered.

Mr. Joiner: Of course, even if their legal position was correct—

The Court: Yes, sir.

Mr. Joiner: —Plaintiff had his right to waive the benefit and give the whole truth of the circumstances.

The Court: Mr. Joiner, if it was a legal question that had to be determined, I would certainly think witness should follow the advice of his counsel.

Mr. Cody: It is still a question for the Jury to determine whether or not it is trying to be evasive.

The Court: No; no, sir.

[fol. 838] Mr. Lockerman: That's right.

The Court: I don't think that is a proper method of impeachment or discrediting.

Mr. Cody: It is not under impeachment.

The Court: What is it under? What is the reason for asking it?

Mr. Cody: His demeanor on the witness stand. The Jury has a right to consider the trustworthiness of a witness.

The Court: That is what you are getting back to.

Mr. Cody: That's right.

The Court: Same thing that I said. I don't think that is proper, and I rule that out.

Mr. Cody: All right. We expect to—we will expect to prove by Coach Butts that he has testified that he does not know any person by the name of E. C. Lindsay. This, of course, comes under the heading of impeachment.

Coach Butts: Your Honor, I didn't say anything—

[fol. 839] The Court: We are just on a legal issue, Coach. Haven't we been over—didn't you go over that when we first started? Didn't you make—

Mr. Cody: We discussed it privately in front of Your Honor at the Bench.

The Court: I thought you started on that today.

Mr. Cody: No, sir.

The Court: All right, sir, anything further?

Mr. Cody: I would—I would propose to ask Coach Butts if he—if he is acquainted with—with his own reputation.

The Court: No; that is not the proper way to prove reputation.

Mr. Cody: Well, I believe that covers it.

The Court: The law sets out how you can prove reputation, and there are three specific questions—three specific questions, yes, and that is the way you can prove it, and that is the only way. I will let you prove it that way as the law provides, but you can't ask of the party, nor can [fol. 840] the party testify to his own good reputation.

Mr. Cody: Well, in order to perfect the record I would like to be permitted to ask him the further questions as to whether or not his reputation is good or bad. That is in the same category.

The Court: Well, I exclude that as being an improper question.

Mr. Cody: That's all I have.

The Court: All right, sir, anything further?

Mr. Cody: No, sir.

* * * * * * * *

JOHN CARMICHAEL, having resumed the stand, testified further as follows:

Direct examination (continued).

By Mr. Lockerman:

Q. Mr. Carmichael, when Court adjourned yesterday, I believe we were discussing the events of the afternoon of September the 13th, that took place in your office, the Institute of Oral Hygiene, after Mr. Flack arrived. I believe you had stated to the Jury that Mr. Flack told Mr. Burnett [fol. 841] about the fact that Wally Butts had been in the office of the Communications International that morning; is that correct? Have I stated that approximately correct?

A. That's correct, sir.

Q. All right, sir. Now, I believe you had also testified Mr. Burnett went over with Mr. Flack the same things that he had told you immediately after he had hung up the receiver from listening in on that conversation he claimed he heard; is that correct?

A. That's correct.

Q. Did he tell Mr. Flack substantially the same thing that he told you—had previously told you?

A. That is correct, sir.

Q. And what was the decision made, if any was made, about what to do, if anything, about that matter?

A. Well, Mr. Lockerman, I don't know whether you'd call it a decision was being made or not, but Mr. Burnett asked Mr. Flack approximately the same thing he had asked me in regards to betting on the game.

Q. Speak so counsel can hear you.

A. He asked Mr. Flack what he thought about placing a bet on the game, and Mr. Flack said, in brief, "Well, there's nothing there that would lead me to believe which side to bet on, and I think we had better not make a bet on either," or words to that effect, which is about the same thing I told him.

Q. Was that, in substance, what took place about the matter after Mr. Flack arrived?

A. That's right, sir.

Q. Of course, as you have stated, that was on September the 13th. Now, directing your attention to the date of [fol. 842] September the—the Monday morning following the game on September the 22nd, was anything said between you and Mr. Burnett on that day concerning this matter, and if so, what?

A. Well, on Monday morning I think that Mr. Burnett, to the best of my recollection, about the only thing was said was he said: "Well, John if we had bet on Alabama Saturday, we'd have won." That was Monday after the game had been played, now.

Q. Yes, sir. Now, from that date, the Monday following the game on the 22nd, did anything else occur about that matter between you and Burnett, or you and Flack, or you and anyone else until the date of January 30, of this year, 1963?

A. No, sir.

Q. Will you please relate to the Jury what occurred concerning this matter, if anything, on that date?

A. On January 30?

Q. Yes, sir.

A. Well, let me back up just a minute, Mr. Lockerman, with your permission, and say—

Q. All right, sir.

A. —we closed this business of the Institute of Oral Hygiene the latter part of October, and in November Mr. Burnett went back to work for the insurance company, and in December I went back to work for the insurance company, but Mr. Burnett was not working for me at this time. He had been put in another district before I went back, and I went back in December, and I didn't see too much of Mr. Burnett during the month of January because he wasn't working for me, but on the morning of January the 30th I went into the office of Foundation Life Insurance Company and I walked into the agency room

[fol. 843] and Mr. Burnett was in the agency room on telephone by himself. When he hung up the telephone he turned to me and he said, "John," he said, "I have got myself in an awful trap, and I don't know what to do about it." I said, "What do you mean?" He said, "Well, a few weeks ago I was talking to Bob Edwards,"—Bob Edwards is the Division Manager for South Georgia for Foundation Life, and he says, "I was talking to Bob Edwards, and I happened to mention to him that I heard a conversation back in September between Coach Wally Butts and 'Bear' Bryant, and he said he's a good friend of Johnny Griffith, or Coach Griffith, and I didn't know that he was going to run over there and talk to him, but," says, "he's went over there and talked to him about it, and next thing I know," he said, "They had me down talking to some of the Georgia officials, including an attorney and President of the college," and he says, "I've got myself in a trap here, and I don't know what to do about it."

Q. Now, following that conversation on that date with George Burnett, did you, yourself, do anything about this matter that day or that evening?

A. Well, I asked George that morning, I said, "George," when I was talking to him, "I don't know what you have told these people, but I want to ask you a question." I said, "did you say that I was there when you were supposed to have heard the conversation, or did I listen in on the telephone in the conversation?" And he said, "No, I did not". I said, "Well, I'm glad of that, because if you said I listened to the conversation, I'd have to say it's a lie." And that was, in essence, about all that was said about it there.

Q. Well, let me ask you this. Then, just to get down to the question that I have in mind, did you communicate [fol. 844] with Wally Butts at any time that day or that evening about the matter?

A. Well, that night I went home, and I told my wife about what had happened, and I says, "I just don't think it's right—"

Q. Well, now, don't go into conversation with your wife.

A. Okay. Well, anyway, the facts of the case is that I decided to call Coach Wally Butts and tell him about it.

Q. Well, let me interrupt you about it and ask, did you know Coach Wally Butts?

A. I have been an acquaintance of the Coach. I have never been a friend of the Coach, but I have known Coach in a casual way for about fifteen years.

Q. Who introduced you to Coach Wally Butts?

A. To the best of my recollection it was Coach Frank Leyhe from Notre Dame.

Q. About fifteen years ago?

A. Yes, sir; about fifteen years ago.

Q. All right, sir. Now did you—did you reach Coach Butts on the telephone on the evening of January 30, or any time during that night?

A. Yes, sir; I did.

Q. Where did you reach him? Where was he?

A. Well, I called his home in Athens and he wasn't there, and I finally, you know, they told me Coach was off on a trip, and he was in Philadelphia, I believe he was in Philadelphia, Pennsylvania, and I called Philadelphia, and he was in a hotel in Philadelphia but he wasn't in when I called, and I left my number for him to call me back, and he did that night.

Q. He called you back that night?

A. Yes, sir.

[fol. 845] Q. What conversation took place between you and Coach Butts when he called you back?

A. Well, I didn't know whether Coach Butts would know who I was or not, at first, so I told him over the phone who I was, and I asked him if he remembered me, and he said: "Yes, I do, John." And so then I told the Coach what Mr. Burnett had told to me on the morning of September the 13th, when he received the telephone call, and I told the Coach what Mr. Burnett had told me that morning on January 30th, what he had done, and the Coach said to me, he said: "Well, John, I appreciate you calling me,

but," he said. "I'll tell you this," he said: "I am sure there is nothing to it, because I don't know whether I called Coach Bryant or not, but I will tell you this," he said, "I talk to a lot of coaches, and I don't remember making a call on that particular day, but if I did," he says, "I will assure you there was nothing to it, because I would never do anything to hurt Georgia." And he thanked me for calling him, and it was a very short conversation. It only lasted three or four minutes at the most, and that was all there was to that conversation.

Q. Had you previously, at any time, said anything to Coach Butts about this matter prior to that time?

A. I hadn't even seen Coach Butts prior to that time.

Q. As a matter of fact, did you know Coach Butts socially, or did you ever visit his home, or he in yours?

A. I have never been to his home in my life, never met any members of the family in my life; he has never been to my home, and I have never been out with him socially. [fol. 846] Q. Have you ever had any business transactions with Coach Butts?

A. One time in my life.

Q. Will you state what that was?

A. I believe it was in 1958, I organized a company, a corporation, rather, in the State of Georgia, known as the Coffee-Break Sales & Service Company. I believe it was a corporation; I believe that was the name of it. It was a business that was—it was organized for the purpose of selling coffee and hot chocolate out of vending machines in small locations, and I went to about twenty people who were prominent people, and I got these people to put two thousand dollars or fifteen hundred dollars apiece into this corporation to buy stock into it.

Q. Will you name some of the people?

A. Well,—

Mr. Cody: I don't think that is relevant, Your Honor.

The Court: Yes, sir; someone brought out about the Coffee-Break Company yesterday; I will let him go into it.

Mr. Cody: All right, sir.
The Court: Go ahead.

A. (By the witness) Dr. Chris. McLoughlin, who was killed in the Paris crash, was one of the people.

Q. Was he a practicing M. D. in Atlanta?

A. He was a practicing physician here in Atlanta. He was also, I believe, President of either the National Asso-
[fol. 847] ciation of Georgia Doctors' or an association of some kind. Mr. Wylie Moore, Jr. was one of the people in this. I was in Athens; I went to see Coach Butts, and Coach—I explained the situation to Coach Butts, and he said: "This sounds like a very good idea," and I says, "Of course, we'd love to have you come in. We believe it will make some money, and we believe that you could probably help us up this way, if we come up this way to distribute our machine." And he purchased some stock in the company. Another gentleman was Mr. Robert Hogg. I don't remember all the people, but I will tell you it was a pretty good bunch of people we had in it.

Q. I see, and he put some stock in it?

A. He bought some stock in this corporation.

Q. I believe there's been some testimony about a refunding of the money to Coach Butts reference to that stock; will you state what that is?

A. That's correct.

Q. What did you have to do with that?

A. Well, I was President of the corporation, and, of course, the people that put their money in this corporation, they didn't know anything about the machines. They put it in there because I told them it was a good deal, I believed, and I had a contract with a company that was manufacturing these machines, and they guaranteed to me to do certain things, and they did not live up to the specifications they were guaranteed to me for, so I broke my contract with the manufacturer on the machines after about three months' operation. I saw it wasn't going to do the job, and I called the stockholders' meeting, and I refunded

every penny of money to every stockholder that had purchased stock in this corporation, even though we had spent some of the money. I personally refunded every penny [fol. 848] of the money to every stockholder in the corporation that had put a penny in it, and gave Coach Butts and everybody else involved in it a check for the full amount they had put in the corporation.

Q. Now, that was some personal loss to yourself?

A. Yes, sir.

Q. All right, sir. That included, of course, as you say, Coach Butts?

A. Yes, sir.

Q. Now, you testified a moment ago that you were introduced to Coach Butts about fifteen years ago by Coach Frank Leyhe of Notre Dame. Will you explain to the Jury how Coach Leyhe happened to introduce you to Coach Butts?

A. Well, at this time I was operating a restaurant on West Peachtree about a block from the Biltmore Hotel, and Coach Rupp and Coach Leyhe and a lot of other coaches who brought their teams to Atlanta, needed a good place for these people to eat, for the players to eat, and I was feeding quite a few football teams, and as a matter of fact, I was feeding most all the high school teams when they had their tournaments here in Atlanta. Some of the personnel I knew. Sid Scarborough, who was Director of Athletics, I believe, for the City of Atlanta, and a lot of these people eat with me, and I would feed the whole teams, and it happened that Coach Frank Leyhe and some of his players there, and I was feeding them dinner or lunch, I don't remember whether it was dinner or lunch, but anyway, I think I had met Coach Frank Leyhe, of course, when he came in and made arrangements for it, and we were serving these players a meal and Coach Butts came in and Coach Leyhe asked me if I knew Coach Butts. I said, "I have never had the pleasure." I shook [fol. 849] hands with him, and if I remember right, Coach Butts sat down and had dinner with them.

Q. All right, sir. Now, you have read the article in the Saturday Evening Post that is the subject matter of this law suit, haven't you?

A. Yes, sir.

Q. Will you state to the Jury whether or not there is anything in that article that George Burnett told you he had overheard during the conversation with—that he listened in on, which he claims he listened on?

A. Well, the only thing that I can see in that article that even comes close to what Mr. Burnett told me was he did mention the fact, of course, that he had heard the call. He did mention the fact that—there was a mention that he made to me that some football player was a great football player. I do not remember the name of this player, however. And also the fact that Coach Bryant asked Coach Butts if he was going to be home on Sunday. And outside those three things, there is nothing in that article that appears—pertains to the conversation that Mr. Burnett had with me that morning.

Q. I believe you stated that all that Burnett said about the—about Sunday, the Sunday matter, was that Coach Bryant asked Wally if he was going to be home on Sunday?

A. That's correct, sir.

Q. And is that the extent of what he said about that?

A. That is exactly it and nothing more.

Q. All right, sir. Speaking of people that you have discussed this matter with, have you at any time ever [fol. 850] discussed this matter with a lawyer here in Atlanta by the name of Pierre Howard?

A. No, sir; I have not.

Q. You know Mr. Howard?

A. Yes, sir; very well.

Q. But you have never discussed this matter with him?

A. No, sir.

Q. Mr. Carmichael, going back to the date of September the 13th when George Burnett called and asked you to come to the desk where he was seated where he had been listening in on this phone, I believe you testified yesterday

that he had some notes on the desk there in front of the two of you; is that correct?

A. That's correct. I sat down beside the desk and he had some notes he had in his hand.

Q. Did you see those notes?

A. Yes; I did.

Q. Do you think you would recognize those notes if you saw them again?

A. I believe I would, sir.

Mr. Lockerman: May I have the notes that were introduced as Defendant's Exhibit No. 12?

By Mr. Lockerman:

Q. I hand you what has been represented in this case by Mr. George Burnett to be the notes that he claims that he made during that telephone conversation while he was actually engaged in listening to it. Now, they have been put into evidence by the Defendant and marked as Defendant's Exhibit No. 12. I ask you, please, sir, to look at them [fol. 851] carefully and state whether or not those are the notes that George Burnett had immediately following the telephone conversation when he called and asked you to come in and you discussed the matter with him?

A. No, sir; these are not the same notes that Mr. Burnett handed me.

Mr. Lockerman: All right, sir; you may cross-examine.

Cross examination.

By Mr. Cody:

Q. Mr. Carmichael, I believe you started out our testimony by saying you were in the real estate insurance business?

A. That's correct, sir.

Q. You don't have a license issued by the Georgia Real Estate Board, do you?

A. No, sir; But I own twenty percent of the stock in a real estate development company and I am vice-president of the company. It is well rated in Dun & Bradstreet.

Q. Well, answer my question.

A. I believe that puts me in the real estate business.

Q. Answer my question, then, without arguing.

A. I do not have a real estate license.

Q. You don't have an insurance license, do you?

A. Yes; I do.

Q. Issued by the—

A. State of Georgia.

Q. Insurance Commissioner?

A. Yes, sir.

Q. When was that issued to you?

[fol. 852] A. It was issued January of this year, sir. It's signed by Mr. Bentley; I don't remember the exact date.

Q. Do you remember when your deposition was taken?

A. I don't remember the date; no, sir.

Q. About in June of this year?

A. Yes, sir.

Q. Will you state whether or not this is a correct transcript of the question and answer that was transcribed in this deposition?

Mr. Schroder: What page are you reading from?

Mr. Cody: Page 8.

Mr. Schroder: Sir?

Mr. Cody: Page 8.

By Mr. Cody:

Q. "Did you see the notes which Burnett said he made of the conversation?" Answer: "Yes, sir." Question: "Did you examine them?" Answer: "I did not take them in my hand, no, sir. He sat back down at my desk and I sat down in a chair next to it, and he was telling me—he laid these notes out and he was telling me the things I

just mentioned. He laid the notes down on the desk. They were laying there and I did see them, but I did not pick them up and look at them."

[fol. 853] A. That's true, sir.

Q. Well, if you didn't look at them—

A. I did look at them.

Q. You testified you—

A. I said I didn't take them in my hand. I saw the notes, sir.

Q. But you said; in answer to the question that I just read you, that "I did not pick them up and look at them."

A. I also said—

Mr. Schroder: That is what he's saying now.

The Court: That's all right; you can bring it out on redirect examination.

A. (By the witness) I also said I saw them in the deposition, sir, but I didn't say I picked them up in my hand and looked at them.

Q. What was the name of this business you had on Peachtree?

A. It was Peach Blossom Inn, sir.

Q. Did you even operate a business known as "The Gypsy Room?"

A. Yes, sir.

Q. Where was that?

A. It was at two locations. When I originally opened it, it was on the Clermont Hotel.

Q. On Ponce DeLeon Avenue?

A. Yes, sir. And then I closed the business in the Clermont hotel, and I moved to Pine Street, to Number 26 Pine Street.

Q. Well, now, let's back up just a minute. What sort of a business was that?

[fol. 854] A. It was a supper club, sir.

Q. Where you served liquor?

A. Well, we served whiskey; yes, sir.

Mr. Schroder: If the Court please, what relevancy could that have to this case, whether he operated a supper club, or whether or not he did or did not sell whiskey.

The Court: Well, he went in, Mr. Schroder, to the type of businesses he operated, and the fact—if he had certain football—I will let him continue with that line, if he can connect it up.

By Mr. Cody:

Q. Did you have a floor show in that business?

A. Yes, sir; I did.

Q. Coach Butts ever visit you at that place of business?

A. I don't believe he did; no, sir.

Q. You are not sure?

A. Well, I couldn't swear to everybody that's ever been in there, but I never saw him there.

Q. You don't remember seeing him there?

A. No, sir.

Q. Where was it you said you moved that business to?

A. I moved to Number 26 Pine Street, between the Peachtrees, but I kept the same name. The business operated under the same name.

Q. Did you ever operate a business by the name of The Circus Lounge?

A. Yes, sir; I did.

Q. Where was that?

[fol. 855] A. It was at the same location. The building caught on fire at The Gypsy Room, and we remodeled the business, remodeled the building, and when we did we put a different motif in it and called it The Circus Lounge.

Q. Is that the business on Pine Street between the two Peachtrees?

A. That's correct, sir.

Q. Is that business in operation now?

A. I believe somebody is operating it; I don't know who.

Q. You don't have anything to do with it now?

A. No, sir; I never have been in it since I left.

Q. Did you ever operate the Wieuca Inn?

A. Yes, sir.

Q. Was that your business?

A. Yes, sir; I owned it.

Q. Did you ever operate a business on the Marietta Highway known as the Casa Rio?

A. On the old Marietta Highway. Yes, sir.

Q. That in business now?

A. No, sir; I don't believe it is.

Q. Did you ever operate a business known as the Rhythm Ranch?

A. No, sir; I did not.

Q. You ever heard of Rhythm Ranch?

A. Vaguely. I have heard the name; I don't even know where it's at.

Q. You say it was about fifteen years ago that you met Coach Butts?

A. I would estimate it to be about that; yes, sir.

Q. Have you ever— Did you ever get in any trouble, Mr. Carmichael?

[fol. 856] Mr. Lockerman: If Your Honor please—

The Court: That is not the proper way to prove that, Mr. Cody.

By Mr. Cody:

Q. Have you ever been convicted of a crime?

Mr. Lockerman: Your Honor, please, I don't think that is the proper way.

The Court: No, sir. Let the Jury go out.

(Whereupon the Jury retired from the court room at 10:44 a.m.)

The Court: Mr. Cody, my recollection of the law in regard to impeachment, I think you can ask him whether he's ever been convicted of a crime involving moral turpitude—

Mr. Cody: Yes, sir.

The Court: —and if he admits he has, then you can, or whatever the particular crime, you can refer to the particular crime. I don't know what the nature of your ques-

tion is, what crime you are talking about, and then if he admits it, then there is nothing further; if he denies it, you can introduce a certified copy, if such is in existence.

[fol. 857] The Witness: Your Honor, may I ask a question?

The Court: No, sir. May I see that when—

Mr. Schroder: I have never seen it before either, Your Honor.

The Court: But a nolo contendere is not admissible.

Mr. Cody: It is not a nolo contendere, Your Honor.

The Court: And it has to be a crime involving moral turpitude, which would be a crime charged for more than a year and a day.

Mr. Cody: It involves moral turpitude.

The Court: I don't know what the law of Ohio is in regard to this particular crime which he was charged with.

Mr. Lockerman: He'd have to prove that.

Mr. Cody: It's a charge—it's a charge of larceny. Our courts have held that it involves moral turpitude, a charge of larceny.

[fol. 858] The Court: Well, under the Ohio statute, did —was it a misdemeanor or was it a felony?

Mr. Cody: Well, there are—we can furnish you some Ohio authorities on the subject.

The Court: Well, it's difficult for me to keep up, certainly, with the Ohio law.

Mr. Cody: I understand that.

The Court: I just don't know. Until I am convinced—you know the rule; it's got to be a crime which would involve more than a year and a day.

The Witness: It wasn't, Your Honor.

Mr. Cody: Doesn't have to be a felony, Your Honor. Your Honor is mistaken about the length of time of the service of a sentence as having any connection with moral turpitude. The question—the question involved is simply one of whether it does involve moral turpuitude, and according to the decisions in Georgia, larceny is—

The Court: The crime with which he is charged has got to be a crime which involves a sentence of more than a

[fol. 859] year and a day. Now, if there is a plea of guilty, or if there is a conviction, then it is admissible. I agree with you.

Mr. Cody: Well, there is a conviction, as Your Honor will see by that record, but not a sentence of a year and a day. I think Your Honor is mistaken.

The Court: You don't have to have a sentence, but the crime with which he is charged must have been a crime which was punishable by more than a year and a day.

Mr. Cody: I have an Ohio decision, Your Honor, if you'd like to take a look at it.

The Court: Let me hear it.

Mr. Lockerman: Your Honor, may I be heard on that just a moment?

The Court: Yes, sir; I will let you be heard on it, too.

Mr. Lockerman: The only way he can prove a statute of Ohio is to have a certified copy of it, properly certified, of the law.

The Court: I know that. I don't know whether he is required to go that far or not on proving statutes. If he was proving the statute which he was suing on, I agree with [fol. 860] you, but what I am concerned with is whether or not this particular crime involves—was a crime involving moral turpitude.

Mr. Cody: Under the Georgia law, Your Honor, it would be, and we—

The Court: We don't have such a law under the Georgia law. We have petty and grand; this is petty.

Mr. Cody: Well, it's larceny under our law. This is where he is giving evidence, and this is where the Courts of this State have to decide whether it involves moral turpitude or not. I offer it for that.

The Court: What I want to know, is the Ohio statute of this crime which is charged here, did it involve—could he have been sentenced to more than a year and a day under that crime. That's all I want to know.

Mr. Cody: That's not the—that is not the purpose of offering the evidence in this respect.

The Court: What is it?

Mr. Cody: We say under Georgia law it involves moral turpitude.

[fol. 861] The Court: Sir?

Mr. Cody: We say that under the Georgia law it involves moral turpitude, in which event he can be impeached on proof of conviction. Now, that is the purpose for which we are offering it.

The Court: I agree, if you can show that it involves—it was a crime involving moral turpitude, under the law of Ohio, it would be impeachive.

Mr. Lockerman: Yes, sir.

Mr. Cody: You can prove—you can prove the law of Ohio by the decisions of the Ohio Courts.

The Court: Read me what the Ohio Courts say.

Mr. Cody: In the case of Burch, in re Burch, which is in the 54 Northeastern 2d., at Page 803. "If a crime is one involving moral turpitude, it is because the act announced by the statute offends the generally accepted moral code of mankind."

And here is the definition under Ohio law of moral turpitude, in the Bostwick case, quoted in the 181 Northeastern 1095. "Moral turpitude is defined as an act of baseness, violence or depravity in the private social duties which man owes to his fellowman or to society in general, con-

[fol. 862] trary to the accepted and customary rule of right and duty between man and man."

Moral turpitude is otherwise defined by another court as "Anything done contrary to justice, honesty, principle and good morals."

The Court: Well, a misdemeanor could be that, but it's still got to be a felony.

Mr. Cody: It could be but I think Your Honor is wrong about the felony. If Your Honor should be right on that question, then it wouldn't be—then it wouldn't be admissible.

The Court: That's right; that is the point I am raising.

Mr. Cody: But I think Your Honor is mistaken about the distinction between a felony and a misdemeanor because a misdemeanor could involve moral turpitude.

The Court: No, sir; not under the Georgia law.

Mr. Cody: I think this does involve moral turpitude.

The Court: That is what I want to know, what is the statute; what is the statute of Ohio? How much could one who was convicted of that crime in Ohio? What was the [fol. 863] maximum sentence which such violator would have received.

Mr. Cody: I can't answer that question. I don't have the statute before me, but I take the position that under the Georgia law that the conviction of this crime involves moral turpitude, which conforms to our impeachment statute. That is the position that I take. It is the Georgia law that prevails, and not the Ohio law, on what is moral turpitude.

The Court: You are bringing in a certified copy of a conviction in Ohio—

Mr. Cody: Yes, sir.

The Court: —for larceny, for a particular kind of larceny. In Georgia, if that had been simple larceny, if I recollect my criminal law correctly, it would be a misdemeanor, but it would not be a method of proving moral turpitude, it would not be admissible. But if it had been grand larceny, it would be admissible. The question I am asking is, this particular crime to which this certified copy of the Cincinnati statute, I mean, Ohio, in Cincinnati, was that a crime for which the violator could have received more than a year and a day?

Mr. Cody: I am not prepared to say.

[fol. 864] The Court: Well, that is the controlling point to me, and until it is cleared up, I—

Mr. Cody: May I take a look at the 94 Georgia Reports, Your Honor?

The Court: Yes, sir.

Mr. Cody: Do you have 94 Georgia Reports here? Do we have a Georgia Reports up here?

The Court: There is a particular charge, Mr. Cody, that quite often we give in the case. I have given it many times. The Code Section provides how you may impeach a wit-

ness. That is one of the methods, but it's got to be a crime involving moral turpitude; it can't be a misdemeanor,—

Mr. Cody: That's right.

The Court: —and I believe under the full faith and credit clause we do have to recognize what the Ohio State —Ohio Courts held was a crime involving moral turpitude. We have no such crime by this particular name in Georgia, if I remember my Georgia criminal law correctly.

[fol. 865] Mr. Cody: This is the case of Coleman against the State in 94 Georgia, Page 85, which holds that a conviction of a witness of larceny is admissible in evidence to impeach him.

The Court: Yes, sir.

Mr. Cody: Doesn't make any difference where the conviction was. That is our position. Now—

The Court: Which larceny?

Mr. Cody: It doesn't matter. Our position is that it doesn't matter.

The Court: Well, I have got to be convinced that the Ohio statute under which the violator was charged would have to be a crime involving moral turpitude; otherwise, I think it would be reversible error, serious error.

Mr. Cody: I understand Your Honor's ruling about—

The Court: If you can show me what the Ohio statute is—I understand I'm supposed to take judicial cognizance, but I will be frank, I don't know what the Ohio law is on this point. If you can aid me in knowing what the law is [fol. 866] in Ohio—I assume that, I don't know whether Martindale or some of the—I know the statutes of Ohio are available at the State Capitol.

Mr. Cody: We will take an opportunity to look at it so as to be on the safe side.

The Court: I will let you put this witness back up if you can show me some authority during the noon hour; otherwise—

Mr. Cody: I have one other question to ask this witness after the Jury gets back.

The Court: Let the Jury be brought back in.

Mr. Lockerman: Your Honor, before the Jury come in, will you instruct the Jury to disregard the question he asked about conviction?

(Whereupon the Jury returned to the courtroom at 10:59 a.m.)

The Court: Members of the Jury, just prior to the time you were directed to leave the courtroom certain questions were propounded in regard, on cross-examination, as to whether or not the witness had ever been in trouble or had ever been convicted. At this time I would direct that you disregard any such statement, or any such evi- [fol. 867] dence, completely from your mind until such time —until a later date.

Mr. Cody: May I proceed, Your Honor?

The Court: Sir?

Mr. Cody: May I proceed?

The Court: Yes, sir.

By Mr. Cody:

Q. Mr. Carmichael, did I understand you, in your direct testimony, to say that you have never discussed this so-called Butts-Bryant affair with Mr. Pierre Howard?

A. That is correct, sir; I have never discussed it with him. I know—

Q. Did you ever—did you ever tell him that you bet some money on the Georgia-Alabama game of 1962?

A. I never told him, or nobody that, because I didn't bet any money on it.

Q. I see.

The Court: Any further questions?

Mr. Cody: That's all.

[fol. 868] Redirect examination.

By Mr. Lockerman:

Q. Mr. Carmichael, do you have any interest one way or the other in this law suit?

A. No, sir; not at all, sir.

Mr. Lockerman: You may come down.

The Court: Any further questions of Mr. Carmichael?

Mr. Cody: No further questions.

The Court: You may step down.

(Whereupon the witness was excused from the stand.)

The Court: Mr. Carmichael, do not leave, you will be required, probably, to come back on the stand, so remain in the anterooms.

Mr. Carmichael: Thank you, sir.

The Court: All right, sir.

Mr. Schroder: If it please the Court, we have perhaps [fol. 869] two witnesses whose testimony we plan to introduce from the stand in the event it might become necessary after the rebuttal, so, with that in mind, I will not call them at this time but will proceed with the reading of the deposition which we started last Wednesday, I think.

The Court: Now, I believe, Mr. Schroder, under the Rules, that if you—if they are to contradict some evidence which has been presented now, you will be required to put them up now.

Mr. Schroder: I understand, but they have the rebuttal. I don't know what they are going to put up in the way of rebuttal—

The Court: Yes, sir.

Mr. Schroder: —but I may have witnesses that may rebut their rebuttal, in other words, surrebuttal.

The Court: Yes, sir.

Mr. Schroder: So that is the reason I am not putting them up at this time. Of course, if there is nothing for them to surrebut, they won't have to go on at all.

The Court: It's got to be strictly in rebuttal.

[fol. 870] Mr. Schroder: Exactly.

The Court: All right, sir.

Mr. Schroder: If the Court please, we will resume reading the deposition of Frank Graham, Jr., the author of the article in the May 23 issue of the Saturday Evening Post. Of course, Mr. Graham's deposition was being taken for discovery and/or use as evidence by us, but we are not adopting him, of course; he is an agent of the opposite party.

The Court: He is an adverse witness.

Mr. Schroder: Adverse witness; yes, sir.

The Court: All right, sir.

Mr. Schroder: I have forgotten where I stopped. Do you have any idea?

Mr. Lockerman: I think it is Page 55.

Mr. Schroder: Sir?

[fol. 871] Mr. Lockerman: 55.

Mr. Schroder: Well, I will ask a couple of questions so we can get back in the middle of the stream where we were when we reached last Wednesday. The question at the top of Page 55, Mr. Cody, Line 5.

FRANK GRAHAM, JR. testified further by deposition as follows:

Cross examination (continued).

By Mr. Schroder:

Q. What do you have in your notes pertaining to that sentence that I have just read?

A. I just have—I asked him about that and he didn't elaborate. There was nothing more for me to add, so I just said "No quick kickers," and referred back to the affidavit.

Q. Skipping on down to the third from the last paragraph in that first column, there is a quotation which reads:

"'Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. . . .'" What is the source of that quotation?

A. That did not come from Burnett. Burnett was trying to recall other things that had happened and Flack and Howard told me the first morning one of the things they thought they remembered him saying was something about Rakestraw, and this was it.

[fol. 872] Mr. Schroder: Of course, the article itself, Your Honor, says that Burnett said that. Now, the point here was that he now says it didn't come from Burnett; that was after the thing was published.

By Mr. Schroder:

Q. Will you please refer to your notes and read me what you have in your notes pertaining to that which I have just read?

A. Yes. George Burnett later said, when the article came out, that he had not recalled overhearing this remark.

Oh, he mentioned in there—he did mention that there was reference to what he called pass patterns or the passing game, was discussed by Wally Butts.

Q. Well, I am—

A. I have no specific thing on Rakestraw. This was told to me by Flack and Howard in the office that morning, and it was to be checked against the notes, if we got them.

But Burnett heard something about Rakestraw, but he does not recall this exact—but he does not recall the phrase as Flack and Howard mentioned the details.

Q. When did you discover that Burnett denied making that quotation or denied overhearing that?

A. He said he did not recall overhearing this. I learned that after the article was published.

Q. What was the source of that information?

A. The source of that information was a reporter for the Post named Oberdorfer, who was a native of Georgia, and who talked to Burnett after the article came out, who [fol. 873] was down there in Georgia at the time the article was published.

Q. Oberdorfer says that he talked to Burnett after the article was published?

A. Yes.

Q. And Burnett says that that quotation, insofar as his recollection is concerned, was erroneous?

A. So far as—he could not recall having heard that.

Q. Was there anything else that Oberdorfer told you that he learned from Burnett after—

A. No, I didn't speak to Oberdorfer directly. This came through Davis Thomas, the managing editor, who talked to Oberdorfer.

Q. Did Mr. Thomas indicate to you that Oberdorfer had told him anything else pertaining to his conversation with Burnett after the article was published?

A. Yes, that—there was a—he said that during the conference in the room when he disclosed this information to Johnny Griffith, he had remembered Johnny Griffith saying, "We knew somebody had given our plays to Alabama, but we had no idea it was Wally Butts."

Q. Will you pinpoint that for me in the article?

A. Yes, it is on Page 82. There is a heading there that says "Suspicions Confirmed."

Q. In the right-hand column at the bottom?

A. Yes, lower right-hand column, and it is in that second paragraph, where he said, "But we had no idea it was Wally Butts."

He said later that he had thought that Griffith had said that, and Griffith denied having said this sentence and Burnett said, on recollection, it was—he believed it to be

Edwards, the other man in the room at that time, who [fol. 874] was very close to Johnny Griffith.

Q. So that Burnett has, in effect, denied that quotation, on further recollection?

A. That's right, on further recollection he thinks that Edwards actually said that.

Q. Who was Edwards?

A. He was the friend of Johnny Griffith who took Burnett to see Griffith.

Q. Did you meet Edwards when you were in Atlanta?

A. No.

Q. Had you ever met him?

A. No, I haven't.

Q. Have you ever talked to him?

A. No, I haven't.

Q. Going back to Mr. Oberdorfer again, did Mr. Thomas indicate to you that Oberdorfer, after talking to Burnett, since the article was published, had Burnett told Oberdorfer anything else was incorrect in the article?

A. No, not that I know of.

Mr. Schroder: Passing on, Mr. Cody, to the bottom of Page 62, Line—

Mr. Cody: Why not read what is in between.

Mr. Schroder: I will pick what I want to read, and—please the Court, I understand I have a right to read what I want to read and he can read whatever he wants to read. [fol. 875] Mr. Cody: Well, I think the rule—

The Court: Sir?

Mr. Cody: I think the rule requires him to read it, read all the evidence on a particular point.

The Court: No, sir; that is not the law. Many times in patent cases we have certain parties that will read the other party's depositions, and they can just read what they want. It is available to you.

Mr. Cody: May I show the Court one rule on this subject?

The Court: Yes, sir. Let the Jury go to the Jury room. Just let them go to the Jury room.

(Whereupon the Jury retired from the courtroom at 11:10 a. m.)

Mr. Cody: I think it is rule 26 (d) (4), Your Honor, which provides that if only part of the deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced.

The Court: Yes, sir. Well, you can read—you can read [fol. 876] any part of the deposition that you want to that he omits to read.

Mr. Cody: I realize that—

The Court: Yes, sir.

Mr. Cody: —but I was relying on this rule.

The Court: What rule?

Mr. Cody: 26 (d) (4) which requires that we can require him to read it.

The Court: What rule are you citing?

Mr. Cody: Rule 26 (d) (4) under the use of depositions. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced and any party may introduce any other part. We have both.

The Court: Yes, sir.

Mr. Cody: We can require him to do it or we can use it ourselves, but on this particular point he's left out—

[fol. 877] The Court: I think you can come back and read it yourself, Mr. Cody.

Mr. Cody: All right, sir.

The Court: Let the jury be brought back in.

(Whereupon the Jury returned to the courtroom at 11:14 a. m.)

Mr. Schroder: Passing on, Mr. Cody, to Page 62, at Line 22.

By Mr. Schroder:

Q. In the next sentence you have written, "But he recorded all that he heard." Is that what Burnett told you?

A. He said he made constant notes. After he—he had listened for several minutes to this and he said he was amazed as it went on and finally he pulled over a note pad which was on the desk, took out a pencil and began to make notes. But for several minutes he had not been making any notes.

Q. My question is related to the language that you have used, sir, that I have just read, "But he recorded all that he had heard." Is that what he told you or is that your own language?

A. That is my own language.

Q. He gave you the impression, though, that he recorded everything that seemed important?

A. Well, he recorded—

[fol. 878] Q. He recorded in writing everything that he considered to be important?

A. After he started to jot down notes, yes.

Mr. Schroder: Mr. Cody and Mr. Lockerman, I am passing to Page 66, Line 4.

By Mr. Schroder:

Q. Below the caption "Putting the pieces together," in the second column of Page 81, what was the source of your information for that full paragraph, beginning, "In the next few hours . . ." and ending " . . . from the field"?

A. Part of it was Furman Bisher. I would say most of the paragraph is based on information given me by Furman Bisher, and the last sentence was " . . . outspokenly bitter about his removal from the field."

Q. What were you saying about that, sir?

A. That came from both Bisher and from Pierre Howard, talking about Georgia football.

Q. Was that information given to you—at least that part of the information which you say Bisher gave you—was

that given to you at the meeting with Bisher in the Manhattan Hotel in New York?

A. Yes.

Q. Did you make notes of it?

A. No, I was just told that by Bisher.

Q. The way the paragraph reads, it would indicate that this was coming from Burnett, because the lead sentence says:

"In the next few hours Burnett tried to piece together what he knew of Georgia football." But that is not what he knew of Georgia football, was it?

[fol. 879] A. That was to fill the reader in on the background.

Q. But that is not what he knew of Georgia football, what follows—

A. I assume that he knew that, too, because in various conversations in the presence of Pierre Howard and Milton Flack, et cetera, this information was mentioned several times. I believe it was mentioned in the Heart of Atlanta Motel, a little bit of the background of Wally Butts, et cetera.

Q. I understood you to say that much of that was given by Furman Bisher.

A. But this was checked, too. I checked the "native of Milledgeville," et cetera. On that, also, there was a story which appeared in the Atlanta Journal on Saturday, which was the 23rd, written by Furman Bisher, headlined "Butts to Resign At Once, Hopes For Job With Pros." And this information was also in here, about Bisher—

Q. When did you get that?

A. On the Saturday that I was in Atlanta.

Q. In that paragraph that I have just referred to, there appears this language:

"Then prominent University of Georgia Alumni abruptly soured on him, . . ." Who gave you that information?

A. Howard.

Q. Did he say what prominent University of Georgia Alumni he had in mind?

A. No.

Q. Did he use the word "sour" or was that your language?

A. The word may be mine, "soured," but it was substantially that, that they had begun to think that he should be removed.

Q. And Bisher—

[fol. 880] A. Yes, and Bisher told me that.

Q. He confirmed that when he was in New York?

A. Yes.

Q. Who did you say it was that told you about Mr. Butts being outspokenly bitter?

A. First it was Howard and then Bisher.

Q. Did you make any notes of your conversation with Pierre Howard?

A. No, just casually I jotted down a name.

Q. Do you have anything in your notes which would indicate the information that is contained in that paragraph which I have just read?

A. About him being replaced?

Q. The whole paragraph.

A. The whole paragraph?

Q. Yes.

A. I have it in this clipping here, some of that information.

Q. Will you let me see the clipping, please?

A. Yes, sir.

Q. Well, there is nothing in that article about his being bitter or about his being—

A. No, I said some of the information which is contained in this paragraph is in that clipping.

Q. Let's pass on to the next paragraph, please, Mr. Graham, which refers to a speculation in Florida orange groves.

A. Yes, sir.

Q. Wherein it is stated, "Butts had lost over seventy thousand dollars." What is the source of that information?

A. The first—first, I was told in the room by Howard and Flack, who were talking about this. They told me they believed it was over eighty thousand dollars. Later, I asked [fol. 881] Bisher on that, about that, and Bisher gave me this figure.

Q. That that amount of cash had actually been lost?

A. That is what he said, yes.

Q. You didn't investigate it any further?

A. No.

Q. Passing on to the next paragraph, beginning "That afternoon Burnett told Flack what he had overheard." Do you have a note on that?

A. I don't know. No, just from talking to Flack and Burnett.

Q. You mentioned—

A. I think that is—

Q. You mentioned the name Carmichael earlier in your testimony, in connection with Burnett and Flack. Did they tell you that Carmichael was also aware of this alleged overheard conversation?

A. They did, and they said he wanted absolutely nothing to do with it, and that he was angry that they had reported the conversation; that they thought—Mr. Carmichael thought the conversation should have been kept secret.

Q. What do you have in your notes supporting what you have just testified to?

A. Nothing. I made no notes on that.

Q. You made no notes on Carmichael at all?

A. No.

Q. Sir?

A. No.

Q. In that same—but you did know that Carmichael had been present—

A. Yes.

Q. (Continuing) —at the time this conversation was intercepted?

[fol. 882] A. I had heard that, and they didn't want to talk about it. They said, "We don't want to mention Carmichael."

Q. No, sir, my question is this: Burnett and Flack told you that Carmichael had been present?

A. I asked them if he was present.

Q. At the time of the conversation?

A. At the time of the conversation. And they said, "John Carmichael does not want anything to do with this. In fact, he is angry that George told Edwards about this."

Q. Did they tell you that he was present at the time it was overheard?

A. No.

Q. Did they tell you that he knew anything about it?

A. They told me about this—I believe Howard mentioned it once, that—he said that—I think it was Pierre Howard who told me that Carmichael had called Wally Butts about this later on.

Q. I am speaking about the time of the interception or so-called interception of the telephone call. Flack and Burnett discussed Carmichael with you?

A. I brought up the name.

Q. Yes, sir.

A. The name of Carmichael, because Flack told me before that these three men had been friends for some time, Flack and Carmichael, Burnett, they knew each other, and so on, and I said, "What about John Carmichael, did he overhear any conversation? Was he in the room?" And they both said that Carmichael didn't want to be brought in on this, and so—and he was angry at Burnett.

Q. Well, he mentions Carmichael in his affidavit, does he not?

[fol. 883] A. He does.

Q. That he told Carmichael about the contents of the so-called intercepted conversation?

A. Right.

Q. When you asked them had Carmichael been present when the conversation was overhead, they didn't deny that he had been present?

A. They didn't deny it.

Mr. Schroder: Page 77, Line 22.

By Mr. Schroder:

Q. Now, you, having known, as you have testified to, that Mr. Carmichael was in on this at the beginning, and that it has been included also in Burnett's affidavit, that he discussed this with Flack and Carmichael together, and you also having been informed that Carmichael, I believe you said, was mad about it—

A. Yes.

Q. It didn't occur to you to check this story out with Carmichael?

A. No, I didn't want to talk to Carmichael.

Q. Why?

A. They said he didn't want to be brought into it and wouldn't talk about it.

Q. You made no effort to contact him at all, even though you had reason to believe that he might disagree with the whole thing?

A. There was no reason for me to think he would disagree with what he overheard. He was supporting a man that he knew.

Q. But you didn't consider that for the Curtis Publishing [fol. 884] Company's good you ought to interview him, too, just to check it out?

A. No, I didn't think it was necessary, because according to what they told me, he would have denied it—

Q. And you knew that when you wrote the article, that he would have denied it?

A. I knew he would not talk to me.

Q. You said he denied—

A. No, I corrected the word "denied." I said he didn't want to talk about it.

Q. And you made no effort to get in touch with him?

A. No. I came back after I had gotten the affidavit.

Q. That was on a Saturday that you came back?

A. Yes.

Q. You arrived in Atlanta when?

A. On a Wednesday evening.

Q. So that you were there for two and half days?

A. Yes.

Q. And you knew about Carmichael on the first day that you had the meeting in Howard's office?

A. I knew the name Carmichael.

Q. You knew the name John Carmichael when you took the affidavit from Burnett?

A. Yes.

Q. Until this day you have never checked him out?

A. Never have.

Q. Did you tell the people with Curtis when you came back to New York about Carmichael?

A. I showed them the affidavit and I said that Carmichael didn't want to play any part in this.

Q. Did you indicate to them that you learned that from Carmichael?

[fol. 885] A. No, no: I told them that Burnett told me.

Q. Did they agree with you that Carmichael shouldn't be interviewed before the article was written and published?

A. They didn't ask me to.

Q. But you told them about him?

A. Yes, I told them—the name Carmichael had originally been mentioned by Dave Thomas to me.

Q. As being with both Flack and Burnett on the day that the conversation was supposed to have been overheard?

A. As being with them.

Q. And that you had been told by Flack and Burnett that he would not in effect go along with them?

A. Right, that he wanted no part of this and insisted on being left out of it.

Q. They knew that before the story was published, the Post, you told them about that?

A. Yes, sir.

Q. On the top of column 3, or the third column on that page, there is the sentence reading:

"The Georgia team was composed chiefly of unsensational sophomores."

What is the source of your making that statement?

A. I wrote "The Georgia team is composed chiefly of sophomores." One of the editors put in that word and apparently it is in reference to the previous sentence," " . . . with an effective attack built around a sensational sophomore quarterback named Joe Namath." And there was no player on the Georgia team that could be described in any sense as sensational, as this Joe Namath of Alabama was.

Q. Who was the editor who inserted and used that word in the article?

[fol. 886] A. Either Roger Kahn or Davis Thomas.

Q. The next sentence:

"Various betting lines showed Alabama favored by from 14 to 17 points." What do you mean by "betting lines"? Was that your language?

A. Yes, the odds which were in the newspapers before the game.

Q. Did the newspapers refer to them as betting lines?

A. Yes, I have been—often seen that in connection with football games.

Q. In connection with this article, I mean, sir. Do you have any notes on that?

A. Well, I have the fact that it was favored. Yes, I have here 11 to 17-point underdogs. I later checked—

Q. Do you mind if I see that note?

A. Yes, it is on the very top right-hand side.

Q. Where is it?

A. On the top left-hand side.

Q. I am sorry. You have written here, "11-17 point underdog."

A. Yes.

Q. Did you get that out of a newspaper?

A. Yes, I got it from various newspapers, I checked it out, and I asked down there before—I believe I asked Howard about the odds, and he thought 11 would be a little understating it. It wasn't that close. He thought 14. Then I had seen 14 in another paper. So I used 14 to 17 points.

Q. But you have referred in your article to that being a betting line.

A. Yes, that is what it is.

Q. Well, is it in the paper that way?

A. I believe it was.

Q. Sir?

[fol. 887] A. I believe it was.

Q. But you don't have any note to substantiate that?

A. No. That is what the papers generally refer to it as.

Q. The next sentence in that same paragraph:

"If a man were to bet on Alabama he would want to be pretty sure that his team could win by more than 17 points, a very uncertain wager when two major colleges are opening the season together and supposedly have no reliable line on the other's strengths and weaknesses."

Is that your language?

A. That is my language.

Q. What do you mean by it? What is the significance of that?

A. The significance is that, just as it says—

Q. Well, what are you suggesting there?

A. I am suggesting that George Burnett overheard a rather extraordinary and unethical conversation, and certainly there would be—in such a story you could suggest certain motives.

Q. Go ahead. What motive are you suggesting here?

A. I am suggesting here that somebody bet on the game, I don't know who. But people won money on the game, people lost money on it.

Q. Let's get down to brass tacks. Are you suggesting that either Butts or Bryant bet on the game?

A. I have no means of knowing whether they did or not.

Q. That is not my question. Are you suggesting that?

A. No—

[fol. 888] Q. Are you attempting to suggest to the reader that this was a reason for this or motive—

A. No, I am not suggesting that. I am just taking into consideration motives which could lead to the passing of information.

Q. Motives as applied to whom?

A. Anyone. I have no idea. I mean if I were writing this story, this would be one of the questions which would be asked, what a person reading the story about passing information would want to know about all the background on the game, and this certainly belongs in a story of a game about which there was a very questionable conversation.

Q. Well, it is your thinking, of course, because it is your language, and it was backed up by your thinking when you wrote it.

Now, is it your position that you didn't mean to suggest or indicate that either Butts or Bryant was betting on this game?

A. I didn't mean to accuse. I am just putting in this information. And this is background on the game. If a man were to bet on Alabama—

Q. Without using the word "accuse," just "suggest." Were you suggesting to your readers that maybe that was the motive behind this telephone call?

A. I am suggesting that this could be.

Q. Are you suggesting that it is?

A. No. I have no idea what the definite motives for these men were behind the telephone conversation.

Q. Obviously, you do not. But are you suggesting what they might be?

A. I am putting forth one of the suggestions of—

[fol. 889] Mr. Lockerman: Line 14.

Mr. Schroder: Go ahead; I don't have to say "Sir."

A. (by the witness) I am putting forth one of the—a suggestion as to what could be one of the motives, for anyone passing or getting information on a football game.

Q. So that you are suggesting—

A. I am not suggesting—

Q. This is a motive?

A. Or even a motive.

* * * * * * *

FRANK GRAHAM, JR., testified further by deposition as follows:

Cross examination (continued).

By Mr. Schroder:

Q. The quotation further down in the column which you attribute to Bryant, "The only chance," et cetera, what is your source of that information?

A. That was a newspaper article in an Atlanta paper which I found in the library.

Q. Do you have that quoted in your notes?

A. Yes.

Q. May I see it, please?

A. It is on the upper left-hand page.

Q. You don't remember what paper it was?

A. No.

Q. I don't believe you refer to it there in your notes.

A. No.

[fol. 890] Q. And the next paragraph, you use the language—

A. It would be in the Atlanta Constitution.

Q. Are you through?

A. Yes.

Q. In the next paragraph you have written:

"Coach Bryant (he neglected to wear a black hood) snapped every trap."

Is that your language?

A. Yes.

Q. What did you mean by it?

A. I meant that he had information which gave him an advantage and these boys were in a sense walking right into a trap. A coach with a strong team—which a coach with a strong team had set.

Q. What does the "black hood" refer to?

A. I said the game itself would have been enjoyed most by a man who gets kicks from attending executions. It

was the kind of a game which for instance in boxing would be referred to as a pig-sticking, a one-sided game in which one team had no real chance.

Q. Did you see the game?

A. No.

Q. Where did you get your information about it?

A. I read the Atlanta Journal and Constitution in the days before and after the game.

Q. Did you read the quotation from Coach Griffith to the effect that Georgia lost the game because they didn't block and didn't tackle?

A. Yes, I did.

Q. Where is that in the article?

A. I don't believe it is in the article. I remember reading that. That was a very typical coach's statement after the game.

Q. You didn't think of putting that in and acquainting [fol. 891] your readers with what the coach thought about losing the game?

A. Oh, here, I put—

"Asked about the game by reporter Jim Minter, he said: 'I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football.'"

Q. Did you read the quote I just gave you?

A. No, I think this was the one. I may have, but I don't recall it. This is the one that I—

Q. And you have a quotation from Jesse Outlar of the Atlanta Constitution:

"Every time Rakestraw got the ball he was surrounded," etc., et al.

You have here that Jesse Outlar was the—I mean that he wrote in the Sunday Journal?

A. He writes generally for the Constitution, but on Sunday the Constitution is not printed.

Q. What do they call the Sunday paper?

A. The Journal, that is what I saw.

Q. That is what you saw?

A. Yes.

Q. Was that taken out of context or do you have his full quote? Do you have his full quote in your notes?

A. I have the quote. I wrote it down—

Q. Let's put it this way: Did the Curtis representative named—I believe you said Oberdorfer.

A. Oberdorfer, yes.

Q. Did he interview Jesse Outlar after this article was published?

A. I don't know.

Q. Do you know whether he told the representative of the Post that Outlar says he was misquoted?

[fol. 892] A. No, I don't.

Q. The next—

A. Let me—I will try to come across that.

Q. I will wait on you.

A. Yes, I have it here.

Q. What does it say?

A. Jesse Outlar in the Sunday Journal. It is on the top left-hand side there.

Q. Mr. Oberdorfer, to your knowledge, hasn't talked to Outlar?

A. No.

Q. At least it hasn't been related to you?

A. Not to me, no.

Q. The next full paragraph, there is this sentence:

"Georgia could do nothing right, and Alabama nothing wrong."

Where did you get that information?

A. Well—

Q. Was that your own language?

A. That is my own language.

Q. Where did you get the information?

A. From talking to—from reading the account of the game and from talking to Pierre Howard, who saw the game—heard of the game—from Mr. Beddow, because

he and Howard were talking about the game when I was in the office and I asked them what had happened in the game.

Q. We have already discussed the interview or the quotation from Jim Minter and Coach Griffith in the next paragraph:

"I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

[fol. 893] A. Right.

Q. Did it ever occur to you that that might be the reason for the score?

A. I would say that is a typical coach's statement after a game.

Q. I say did it ever occur to you that that might have been the reason for the thirty-five to nothing score?

A. It might have been, but the other information that I had here tended to discount that.

Mr. Schroder: Dropping to the bottom of Page 91, Mr. Cody, at Line 24.

By Mr. Schroder:

Q. The next paragraph, Furman Bisher is quoting End Mickey Babb as follows:

"'The Alabama players taunted us,' end Mickey Babb told him. 'You can't run eighty-eight Pop (a key Georgia play) on us,' they'd yell. They knew just what we were going to run, and just what we called it.'"

Was that taken from an article in the paper by Bisher?

A. No, he gave that to me in a telephone conversation.

Q. He did?

A. Yes.

Q. Do you have a note of that telephone conversation?

A. Yes.

Q. What was the date of it, please?

A. That was on Friday, the—it was the Friday after [fol. 894] Washington's Birthday, exactly a week later, which should be March—

Mr. Strubing: February 29th—.

The Witness: Yes—no, it would have to be March 1st, wouldn't it?

Mr. Strubing: Yes, that's right, March 1st. The 28th was Thursday. There were only 28 days this time.

By Mr. Schroder:

Q. Mr. Bisher called you in New York and I assume that he was in Atlanta.

A. Yes, he was.

Q. He told you that he had interviewed Babb since he had seen you in New York?

A. Yes.

Q. And this is what Babb told him?

A. Yes.

Q. You made this note, which I will read:

"They taunted us, you can't run eighty-eight Pop on us, they would yell. They knew just what we were going to run and just what we called it."

Q. In your notes you have underscored "Eighty-eight Pop." What significance does that have?

A. It was the name of a play which should go in quotation marks or in italics in the article.

Q. And this is word-for-word what Bisher gave you over the telephone?

A. That's right.

Q. He didn't say Babb said anything else other than [fol. 895] what you have put down?

A. Not that I recall.

Q. You would have recorded it, if he had told you?

A. Yes. I didn't write down everything he said to me—

Q. I know, but when he was quoting from someone you wrote that down?

A. When he was quoting, that is what I wrote down.

Q. The next paragraph includes a quotation from Sam Richwine, the trainer.

A. Right.

Q. "And Sam Richwine, the squad's trainer, told Bisher: 'They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too.'"

That is exactly as Mr. Bisher gave you over the telephone from Atlanta on Friday, March 1st?

A. That is what I have written.

Q. You have that written down the same way that you have the other?

A. Yes.

Q. May I see it, please?

A. Yes.

Mr. Schroder: Passing over to Page 96, Line 21.

By Mr. Schroder:

Q. What is the significance of the quotation John Logue got from Wally Butts, "Potential is the word for what I saw"?

A. Wally Butts was involved in this and the only quote that I can find in a newspaper after the game from Wally Butts was this one, because the story concerned Wally Butts, and I wanted a remark from him about this game, [fol. 896] whatever he said, and this was the—

Q. But you used the language preceding that quote:

"Only one man in the Georgia camp did not despair that day."

What did you mean by that?

A. Everybody else seemed pretty down about what happened. Wally Butts was looking to the future.

Q. You indicated that you did want a quotation from Wally Butts as to his feelings after the game?

A. Right.

Q. You knew where he lived, didn't you? You knew he lived in Athens?

A. I knew he lived in Athens. I quoted these players right after the game, themselves, and I wanted a quote, and this was the one that was in the newspaper.

Q. Say that again. You did what?

A. I said I wanted a quote from Wally Butts, who was obviously implicated in something which we considered to be an amazing and, let's say, unethical conversation, and I wanted to know what he said about the game directly afterwards, and I found it.

Q. You said you took these quotes from football players right after, but Babb didn't give you a quote—

A. No, not Babb. I wanted Butts.

Q. Richwine didn't give you one right after?

A. No, he didn't.

Mr. Schroder: Dropping down to Line 13.

[fol. 897] By Mr. Schroder:

Q. All right, sir. Have you ever talked to Wally Butts about this whole thing?

A. No, I haven't.

Q. Have you ever talked to Mr. Bryant about it?

A. No.

Q. So far as you know, has Curtis Publishing Company ever had either one of these gentlemen interviewed as to whether this was all true?

A. No, because obviously we knew if this information was brought to them, they would immediately deny it, and, of course, they subsequently have.

Q. Just as in the case of Carmichael?

A. Well, Carmichael plays no part in this thing in the sense that Butts and Bryant do.

Q. You mean as to the truthfulness of the whole thing?

A. You just asked me a question about Butts and Bryant.

Q. Yes, sir.

A. And I said to ask them about this was immediately to get a denial, and, of course, they have.

Q. But before you published this story, or the Post published the story, it didn't interview either of these men, so far as you know?

A. No.

Q. And didn't interview Carmichael?

A. No,

Q. The next paragraph has to do with the whole matter weighing heavily on George Burnett. Do you have notes covering that?

A. I have notes on George Burnett, who told me the matter has been—had weighed heavily on him for a long time and he was worried and upset about it and that is [fol. 898] why he originally told his story to Edwards.

Q. Will you find that in your notes for us, please?

A. No, this was just from what he told me in the time I spent with him.

Q. You gave a quotation in that article directly from Burnett. Do you have a note on that?

A. No. He had mentioned this, I believe, in the room at the Heart of Atlanta Motel. He brought up the—

Q. But you have no note to back up that quotation?

A. No, I don't take notes as a rule on things like that. I don't take notes on general conversations.

Q. You quote directly from conversations?

A. No. I say an exact quote, which I would want to be precise, I take notes on that. On the other, I make a mental note, jot down a word or two, from which I remember.

Q. But this is a direct quote?

A. A direct quote, which is common practice in journalism, to recreate what this man said to me.

Q. On a direct quote?

A. Yes. I didn't make it up. I recreated it from what he told me. These are approximately his words.

Q. Your next paragraph reads:

"On one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against

the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities."

Is that your language?

[fol. 899] A. I don't believe I wrote this sentence.

Q. Sir?

A. I don't remember writing this sentence. I believe it was put in by the editor.

Q. The first sentence or the whole paragraph?

A. I would say none of that paragraph was mine, as I recall it.

Q. Do you know who wrote it?

A. I believe either Mr. Kahn or Mr. Thomas.

Q. Do you have with you there a copy of what you did submit to the Curtis Publishing Company?

A. No, I haven't. No, I brought—

Q. Do you have one anywhere?

A. Yes, I do. I believe it is back in Mr. Kahn's or Mr. Thomas'—either Mr. Kahn or Mr. Thomas would have it.

Mr. Schroder: Turn to Page 104, Line 7.

By Mr. Schroder:

Q. The next paragraph, was that yours, beginning:

"On January 4 of this year he sat in his office with Bob Edwards . . . "?

Was that yours?

A. Yes, he gave me that.

Q. The paragraph following that:

" 'You know, Bob,' . . . "

That was also given you by Burnett?

A. Yes.

Q. That was your language?

A. This is what he told me. This is almost exactly as he told me. He said:

"This has been eating me up for a long while," and then he told me the rest of this.

[fol. 900] Q. Do you have notes to support that—both of those paragraphs?

A. Part of it comes from the affidavit, and the rest is from my memory of what he gave me, what he told me the conversation had been like.

Q. You don't have any notes?

A. No, because he could not remember the exact words himself.

Q. In the next column on that page, there appears in the second paragraph this sentence:

"Griffith pressed to meet him, . . ."

Where did you get the information about Griffith pressing to meet him?

A. From Burnett. Burnett said that he had asked Edwards to keep him out of it, but Griffith said he wanted very much to talk to him.

Q. In your next paragraph you refer to the Georgia Tech-Alabama game in Atlanta and in the paragraph following that the same topic is discussed. What is the significance of that?

A. The significance is that this was a popular topic of conversation, which—at the time. Burnett recalled hearing talk of it around the hotel and Howard said there was talk of it, too, that he knew it.

Q. What did you mean to imply when you put that in there? How is that connected with the so-called telephone conversation?

A. It connects because the name of Bryant is involved in both the telephone conversation and in this talk which was around at the time.

Q. I will put it to you directly: Did you intend to imply by that that Bryant had a bet on the Georgia Tech-Alabama game?

A. No, I just wanted to imply that there was this talk around. I will not imply it because I didn't know, but it

[fol. 901] was a curious coincidence that there was talk about the strange finish of this game going around at the end of the season.

Q. You did attach, shall I say, some suspicions about the outcome of the Tech-Alabama game, insofar as Bryant was concerned?

A. I am just reporting what happened in the game and mentioning that there was talk about this, that there was talk, and apparently suspicions, about this, and I thought that had a place in the article.

Q. So that you intended to indicate to your readers that there was something suspicious about the way the Alabama-Tech game ended?

A. Just that people were suspicious. I don't know that there—

Q. That was why you put it in the article?

A. Yes.

Q. It related to suspicions?

A. Yes.

Q. Further on down in that column you quote Burnett:

"'I didn't believe you until just this minute,' . . ." I don't mean quote Burnett—excuse me—you say Burnett told you that Griffith told him this, and I am quoting:

"'I didn't believe you until just this minute,' he told Burnett. 'But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts. When I became coach, and I gave it a different name. Nobody used the old name for this pattern but one man. Wally Butts.'"

Your obvious source for that was Burnett?

A. Burnett.

Q. Do you have some notes to support it?

[fol. 902] A. Yes, this brief mention down here on the bottom. It says, "Up until this minute." The bottom left —bottom right, I am sorry.

Q. I will quote from your notes:

"Up until this minute I didn't believe you, but only Butts called . . . "

A. Called it by this name.

Q. Sir?

A. It refers to the fact that only Butts called the play by that name.

Q. You have used in your quotes, though, from Johnny Griffith, "pass patterns." What pass patterns did Burnett indicate to you that Griffith had in mind or referred to in his conversation with Burnett?

A. I have no—I got no specific information on plays.

Q. Your notes don't refer to pass patterns. At least not the part that you gave me.

A. That information came from—here, in this conversation with Bisher, he referred to pass patterns.

Q. Well, I quote from your notes—this is from Bisher?

A. Bisher.

Q. "Nobody ever used that name for that play but one man."

Is that the part of your notes that you are relating to this quotation from the article that I just read?

A. Yes, I put that together from that phrase from both Bisher's remembrance and Burnett's recollection.

Q. Where did Bisher tell you that he got that information?

A. From Griffith.

Q. Sir?

[fol. 903] A. From Griffith.

Q. He told you that Griffith told him that is what he, Griffith, told Burnett at the Biltmore Hotel?

A. Yes, he said: "Burnett's notes were read to me and I knew that he knew what we were going to do against Alabama." That is what Griffith told Bisher.

Q. Bisher has called you on the telephone and quoted Coach Johnny Griffith as having told him, Furman Bisher, —say that again, please, sir—the following—and you read—

A. "As Burnett's notes were read to me, I knew that he knew what we were going to do against Alabama."

Q. Unquote?

A. That's right.

Q. Now, did he say whom he meant by "he"?

A. Burnett.

Q. He said that Burnett knew what Georgia was going to do against Alabama?

A. He said that the man who had these notes, Burnett —that is what he—

Q. That the man who had these notes, meaning George Burnett?

A. Yes.

Q. Knew what he, Johnny Griffith, was going to do—

A. Yes, he said "what we were going to do against Alabama."

Q. In short, Bisher called you and told you that he had interviewed Johnny Griffith?

A. Yes.

Q. And Johnny Griffith had told him, Furman Bisher, that when he, Johnny Griffith, read Burnett's notes, that George Burnett knew what Georgia was going to do against Alabama?

[fol. 904] A. He said the man who had these notes could —as Burnett did—knew "what we were going to do against Alabama." The man—now, I don't know—this was just what he said.

Q. All right.

A. And I didn't use this because it was a little vague as to whether he meant Burnett himself or Wally Butts, who gave the information. But is as I got it.

Mr. Schroder: Page 113, Line 17.

By Mr. Schroder:

Q. The next paragraph says: "Griffith has since spoken of his feelings when he had finished reading Burnett's notes. . . ." What is your source for that?

A. Bisher.

Q. When did Bisher give you that information?

A. On that Friday.

Q. That was a telephone conversation he made to you on March 1, 1963?

A. Right.

Q. The quotation is as—the quotation in the article as given to you by Bisher, which reads: "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

A. Yes?

Q. Do you have that quote as given to you direct by Furman Bisher?

A. Yes. It's at the bottom there.

Q. Where is the part about "Then I realized I didn't have any choice"?

A. He told me that on the phone.

[fol. 905] Q. You didn't make a note on that?

A. No, I just put that in to refresh my memory.

Q. Your next paragraph has to do with what Griffith did later. You said: "Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to remain in his job." What is the source of that information?

A. Burnett. Burnett told me that he was told that by Cook Barwick.

Mr. Schroder: Passing over to 116.

By Mr. Schroder:

Q. Mr. Graham, I hand you an exhibit identified by the Reporter as Plaintiff's Exhibit No. 1, and ask you to identify that, please, sir.

A. Yes, I wrote this. It is a carbon of my article.

Q. Is that a copy of the original manuscript that you submitted to the Curtis Publishing Company?

A. Yes.

Q. Of the article subsequently printed or published in the March 23rd issue?

A. That's right.

Q. Not that I have any doubt that anything might happen to this, but will you kindly, at your convenience, initial each page here, please, sir?

A. Right (complying). Incidentally, there is an error there in the first page of that story in print. George Burnett—do you want me to wait?

Q. I am listening.

A. George Burnett was still waiting to get his notes, and he had recalled the date of the conversation between Butts and Bryant as a Friday. When he got his notes [fol. 906] back, he saw that he had dated his notes the 13th.

Q. That explains the mistake in the very first sentence of the article?

A. Yes.

Q. Which in the article says Friday, the 14th?

A. Yes.

Q. Whereas, it was Thursday, the 13th?

A. Yes.

Q. Mr. Graham, you have demonstrated several pages of notes during the morning and used them to refresh your recollection with respect to various matters asked you.

Do you have any objection to my having reproductions made of those notes here today?

A. That is all right with me.

Mr. Schroder: Passing over to 118, Line 9.

Mr. Lockerman: Line what?

Mr. Schroder: Line 9, n-i-n-e.

By Mr. Schroder:

Q. Now, the remaining part of that paragraph, ending with: "Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game." Was furnished to you by whom?

A. Parts of this were furnished by Pierre Howard and Milton Flack, and I checked, for instance, the date—the

dates as January 28th and June 1st, with Furman Bisher.
[fol. 907] Q. Therefore, you are now testifying that the contents of that paragraph were furnished you by Furman Bisher, Pierre Howard and Milton Flack?

A. Yes.

Q. Do you have notes on that, sir?

A. No, I don't see the notes on that.

Q. What I have particular reference to is the so-called rumor that is referred to by you as being the wildest one, that being that Coach Butts was mysteriously and suddenly ill and had entered the State Hospital at Athens.

Do you know who it was that gave you that information, as to the substance of that rumor?

A. The rumor was given me by Howard and Flack before I met Burnett, but they said this rumor had been around town, they had heard it, but that Howard said that he had seen Wally Butts at a Georgia Tech basketball game and I later checked that with Furman Bisher, and he said that the rumor was false, that Butts may have had a physical examination in connection with his retirement some time during the winter, but that he was never a patient in the hospital or anything like that.

Q. Did any of your informants indicate that Coach Butts was to be placed upon a pension, as indicated by your article?

A. Yes, this story was—was a matter of fact, Bisher indicated that this physical examination had to do with his resignation and application for a pension.

Q. Did you look into that further by checking with the State Hospital at Athens?

A. No. When he told me there was no truth to this rumor, we dropped it.

[fol. 908] Q. Well, you didn't indicate in your article that there was no truth to the rumor.

A. Yes, I do—yes, "This was quickly scotched. . . ." I say that. They "maintained Butts merely went for the physical check-up."

Q. Required for his university records?

A. Yes.

Q. What official—

A. "Shortly afterward. . . ."

Q. That was given to you by Pierre Howard, who said he saw them?

A. Yes.

Q. What university official scotched the rumor immediately before that?

A. Apparently from Bisher through Cook Barwick.

Q. From Bisher through Cook Barwick?

A. Yes.

Q. The next paragraph, having to do with the meeting in Cook Barwick's office, what was the source of that information?

A. Let's see. This was Burnett.

Q. Reference is therein made to a lie—polygraph lie-detector test.

A. Yes.

Q. Do you know who authored the editorial in the Saturday Evening Post of May 4, 1963, entitled "The Polygraph-Happy Pentagon"—

A. No, I don't.

Q. (continuing) —in which four individuals were praised for declining to take the polygraph test?

When I say "were praised," I will read: "Only four persons (God bless them) declined to take the polygraph tests."

A. No.

Q. You don't know who authored that editorial?

[fol. 909] A. No.

Q. In your next paragraph under "Phone Company Check", the statement is made that: "Next an official of the Southern Bell Telephone Company checked and found . . ." et cetera, can you identify the official of the Southern Bell Telephone Company?

A. No, I can't.

Q. Can you tell me the source of that information?

A. It was Burnett and later Bisher who said that he had heard the same thing.

Q. From whom did Bisher say he had heard it?

A. I don't know. I didn't ask him.

Mr. Schroder: Turning to 123, Line 21.

By Mr. Schroder:

Q. The next paragraph begins: "February 21 was a painful day for George Burnett.", et cetera. What is your source for that information?

A. Burnett.

Q. Do you have any notes on that?

A. Yes, I have. Here, on this.

Q. Point it out to me, please.

A. Here. February 21. And this was some of the conversation.

Q. Your notes read: "Last meeting, February 21. You were on probation when you heard this conversation. Now I am on trial." Is that the part of your notes that you give as your source for the information in the paragraph beginning "February 21 was a painful day for George Burnett"?

A. Yes.

Q. In the next paragraph you wrote: "From the start, Burnett sensed a mood of hostility in the air." And I [fol. 910] emphasize the word "Hostility." Is that your language?

A. No. Burnett himself used the word "hostility."

Q. Is that in your notes?

A. No.

Q. And the remaining part—

A. But he could not pick out anyone who was actually hostile to him, but he was a little shaken up by the manner in which this hearing took place, particularly when they asked him, "is there anything else in your past you're trying to cover up?"

Q. But in his conversation with you he could not point out any particular party who attended that conference or that meeting as being hostile to him?

A. Well, he thought that this regent who sprang this question to him, who said, "Is there anything else in your past you're trying to cover up?", he thought that he was hostile. And there was a man there named Hartman and he didn't know who Hartman was, but he felt—

Q. What did he tell you specifically about Hartman and what Hartman had to say to him?

A. He said Hartman—there were no questions asked by Hartman. He just said that he had the feeling that Hartman was there as an observer, a friend of Wally Butts.

Q. Although nothing was said by Hartman, he had the feeling, however, that Hartman was hostile toward him?

A. Yes, unfriendly.

Q. Just by being there?

A. Yes, he sensed this mood in the air. In connection with Hartman or anyone, he didn't say it was hostile, but he said the whole atmosphere was hostile and he mentioned that Hartman, he had the feeling, was there as a [fol. 911] friend and—an observer and friend of Wally Butts, and he said Bernie Moore, after shaking hands with him, didn't look at him for the rest of the meeting.

Q. Did he tell you that anyone at the meeting told him in what capacity Hartman was there?

A. No.

Q. It was just a feeling on his part?

A. Yes.

Q. Now, you mentioned in that article that Burnett was confronted "with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant."

Didn't that alert you to look into further such incidents on the part of Burnett?

A. We understood later, when I came back here and made my report, we understood later from Furman Bisher

that this full investigation had taken place with the university.

Q. I am talking about you, sir, not the university.

A. By the time I came back here I was out of the actual investigating and so on. I came back here, made my report, on these men I talked to, and on the affidavit that I brought back. Then it was shown to the editors and they were to decide whether or not to go ahead with the article.

Q. So that you put that information before the Curtis Publishing Company editors about Burnett having been arrested two years before for writing bad checks and left it to them to decide, after investigation, whether there were other such incidents?

A. Yes, and then through Bisher we had corroborating evidence that a full investigation had been made.

[fol. 912] Q. Did you ask Bisher whether the university looked into the question of whether or not there were other such incidents?

A. None had come to light—

Q. I said did you ask him—

A. I asked him to get all the information that he could.

Q. About bad checks?

A. About Burnett.

Q. About bad checks on the part of Burnett?

A. Well, it would include bad checks.

Q. Did you include bad checks—

A. Yes, we mentioned bad checks and anything else that would be of interest.

Q. You and Mr. Kahn, representing the Post, at this meeting with Bisher, asked him to look into the matter of whether or not there had been other incidents of bad check-writing on the part of Burnett?

A. Not specifically, no.

Q. Well, generally?

A. Well, generally—

Q. Tell me how it was brought up and talked about.

A. I can't remember that.

Q. Generally. You have remembered a lot today.

A. We just said that Bisher would go back down there and accumulate every other bit of information which would be useful to us in this, particularly in talking to the university authorities. Then there were no specific—he had no specific instructions.

Q. Did you and Mr. Kahn, when you met with Bisher and commissioned him to represent the Saturday Evening Post in its field research in connection with this story, ask him to look into the background or look any further into the background of Burnett?

A. No, that had been thoroughly gone into.

[fol. 913] Q. I am asking the question. Did you?

A. I didn't.

Q. Did Mr. Kahn ask Mr. Bisher to look any further into the background of Mr. Burnett?

A. I don't know.

Q. You were present, were you not?

A. Not when I was present. He had other conversations with him.

Q. You were present in the conference in the Manhattan Hotel with Mr. Kahn and Mr. Bisher. Did you hear Mr. Kahn ask Mr. Bisher to look into any background of Mr. Burnett with respect to his bad checkwriting?

A. I didn't hear anything specific.

Q. Did you hear anything generally?

A. Bisher was to talk to Cook Barwick. Anything of interest was to be reported back to me.

Mr. Schroder: Passing on to 131, Line 9.

By Mr. Schroder:

Q. Now, in your third beginning paragraph on the last column of your article, you say: "Burnett was frightened and angry" when the matter of his bad checkwriting came up before the meeting.

Did he indicate to you why he was scared and why he was angry?

A. No. He said he wasn't—he was not angry at that having been brought up, but he was frightened and angry at the manner it was brought up, particularly, "Is there anything else in your past you're trying to cover up?"

Q. But your article does not state that he was frightened and angry at the manner. It just says—

[fol. 914] A. It follows up the quote, yes.

Q. Is that what he told you, that he was frightened and angry?

A. Yes, that is what he said.

Q. Insofar as you know, because you have not checked into it, the only two bad checks that he admits having written and being convicted of are those included in the fourth paragraph in the last column, which say, "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced." Those are the only two that you know about?

A. Those are the only two I know about.

Q. And you haven't looked into the question of whether there were any more?

A. No.

Q. In the next paragraph, the next to last sentence reads: "He cared about his reputation." Is that Burnett?

A. Burnett.

Q. Did he indicate to you that he cared about anybody else's reputation, other than his own?

A. That is my sentence.

Q. That is your sentence?

A. Yes.

Q. He didn't tell you that?

A. No.

Q. The next paragraph, what is your source for the quotation attributed to Burnett there, "Doctor Aderhold was always very kind . . . " et cetera?

A. It was Burnett, the day he came back to the Heart of Atlanta Motel in the afternoon, after the meeting.

Q. You have no notes to support that?

A. No, I don't find any here. He told me that then and [fol. 915] he repeated it, as I remember, on the way to the airport on the Saturday that we—that he took me out there.

Mr. Schroder: Over to Page 134, Line 19.

By Mr. Schroder:

Q. My question is much simpler than that. It simply is this: do you, representing the Post, attach any significance to the refusal by Coach Butts to take a lie-detector test?

A. As I, representing the Post, no. Individually, I attach some significance to it.

Mr. Schroder: Turning to Page 137, Line 16.

By Mr. Schroder:

Q. Now, in the third from last paragraph in the article you say: "The chances are that Wally Butts will never help any football team again." Is that your language?

A. That is mine.

Q. Is that your opinion?

A. That is my opinion.

Mr. Schroder: Page 138, Line 17.

By Mr. Schroder:

Q. You felt, and the Post felt, or Curtis Publishing Company felt, that when this article was published that was the death of Wally Butts in his chosen profession?

[fol. 916] A. I would say that it would be very difficult for him—

Q. That is your opinion?

A. That is my opinion.

Q. The next to the last sentence of that same paragraph, you say: "But careers will be ruined, that is sure." Is that your language?

A. That is my language.

Q. Whose career were you referring to?

A. To Wally Butts.

Q. You knew and the Curtis Publishing Company knew that when that article was published it would ruin Coach Butts' career?

A. Yes, we did.

Q. I see.

A. Because the conversation took place—if the conversation took place as Mr. Burnett said it did, I don't think there was any university that would hire him.

Q. How about professional football, is that a career? You meant to include that, too?

A. I was thinking of colleges here, but—

Q. You didn't limit it to colleges, though, did you?

A. I don't think I thought about it.

Q. Well, read it, sir: "Careers will be ruined, that is sure."

A. I don't think there is any reference to professional football here, no.

Q. Well, you meant careers as coaches in the profession, did you not?

A. I am talking here only about college football. I don't know what professional hiring standards are or anything. I say: "A great sport will be permanently damaged. For many people the bloom must pass forever from college [fol. 917] football." That is all that I was thinking of.

Q. But you just said, sir, at the beginning of that paragraph: "The chances are that Wally Butts will never help any football team again." And that would apply to any football team?

A. I said "the chances are."

Q. So that you were not limiting—

A. I wasn't thinking of that. I was thinking of college football.

Q. Your article did not mention that?

A. It only says college football.

Q. Does it say "any"?

A. The first sentence, yes.

Q. Does that include pro?
A. Yes.

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(In chambers)

The Court: What I got you in here for was on the question of impeachment of Mr. Carmichael. I think probably I was in error in regard to larceny not being a crime involving moral turpitude. After looking at the charge, I think it is a crime involving moral turpitude, but the period of time of 30 years, I feel, renders that testimony inadmissible, and I will be glad to cite you some cases on that. The Fifth Circuit says—

Mr. Cody: I think it is largely a discretion—in the discretion of the Court, isn't it?

[fol. 918] The Court: If it had been in the last five years, I'd have no hesitancy, but that boy was 18, according to the thing, he was 18 years old, and that was—occurred in 1933, September of '33, almost 30 years ago. There are some Supreme Court decisions on that, and my ruling on that would be that the crime for which—charged against Mr. Carmichael to which he entered a plea of guilty does involve moral turpitude, but the lapse of time which shows by the record that he entered a plea or was tried, convicted, I don't remember which, was in September, 1933, and being so remote, I do not feel that it would be proper to impeach him by a crime of such—which occurred over such a long period of time ago. The law, I think, permits a man to make amends at some time. If you have got anything in the last five or ten years, I will let you—

Mr. Cody: I haven't.

The Court: All right, sir. But I think I placed my ruling on the wrong ground. I was almost sure it was a year and a day, but larceny is not such a crime, and it would be proper if it is that period of time. I'd like the record to show that.

Mr. Schroder: I don't know that there is any place in the record for what I am going to say, but Mr.—

The Court: All right. What did you want to say?

[fol. 919] Mr. Schroder: Mr. Cody just indicated before we discussed the point that you just completed that some, if not all of his rebuttal evidence would be to the effect that the Plaintiff—I mean, would go to the Plaintiff's—character witnesses against the Plaintiff, and I don't think that would be proper rebuttal testimony.

The Court: I do, Mr. Schroder, for this reason, that the burden is on Mr. Schroder to establish the truth.

Mr. Schroder: No, sir; "Cody."

The Court: Mr. Cody, I beg your pardon, I was looking at him and—

Mr. Schroder: The record wouldn't show it.

The Court: And then the burden is on you to show damages.

Mr. Schroder: Yes, sir.

The Court: Punitive damages and general, and I think properly in mitigation of damages character evidence would be admissible.

Mr. Schroder: Would that be made clear, of course, to the Jury?

[fol. 920] The Court: I am going to charge them.

Mr. Cody: You can't offer character evidence, Your Honor, against the Plaintiff until he testified.

Mr. Strubin: It goes to credibility.

Mr. Cody: It goes to credibility too. If you made a charge to the Jury that such as that is in mitigation of damages, I think you would be committing an error.

Mr. Lockerman: Of course, when you—

The Court: What I was advancing was a theory, I don't recall exactly—

Mr. Cody: There is—

The Court: My charge to the Jury is going to be to the effect that a man with a good character is entitled to recover more than a man with a bad character. That is my theory.

Mr. Strubin: That is all right.

[fol. 921] Mr. Schroder: No, no.

Mr. Cody: That is different from what we are talking about.

Mr. Joiner: Impeachment.

Mr. Cody: It also comes under impeachment, and the Jury has got a right, if they think he has been successfully impeached, not to believe him at all.

The Court: Well, what is going to be the nature of your impeachment? There is two different—you can ask one question: Do you know the Plaintiff? How long a period have you known him? Do you know the character and reputation which he bears in the community in which he lives? Is that good or bad? And that is it.

Mr. Joiner: Would you believe him under oath?

The Court: And you can proceed on the other: Do you know the Plaintiff? How long have you known him? Do you know his reputation of truthfulness or truthfulness and veracity? Would you believe him under oath? I don't know which one you intend to proceed under.

Mr. Cody: That might vary, depending on the witness.

[fol. 922] The Court: We will have to get to that bridge when we—cross that bridge when we get to it. You have got me talking—

Mr. Cody: You can never offer evidence of that type regarding the Plaintiff until he has already testified in the case.

Mr. Lockerman: Except in the case where the issue is reputation, such as this, and you carrying the burden.

The Court: Well, I don't believe that is the burden he carries under a plea of justification. I don't believe he gets into character. I think it is admissible.

Mr. Schroder: Well, we may have—

Mr. Cody: I have nothing else.

Mr. Schroder: We may have a discussion as to whether or not the character is being—character evidence is being offered to impeach him as a witness or to go to mitigation.

Mr. Cody: I don't think I have to commit myself on that.

The Court: I don't think so, Mr. Schroder.

[fol. 923] Mr. Schroder: Just let it be known sometime before the charge to the Jury.

The Court: I believe he—I believe my charge will cover that point. If it doesn't, you call it to my attention and except to it.

Mr. Schroder: I have to—

The Court: This is not on the record.

* * * * * * * *

FRANK GRAHAM, JR., testified further by deposition as follows:

Cross examination (continued).

By Mr. Schroder:

Q. In the paragraph I just finished when I was discussing the careers of Wally Butts, or the career; there is this statement about two-thirds of the way down: ". . . Motion pictures of other games are being scrutinized." What is the source of that information?

A. Furman Bisher.

Q. Is that your language?

A. Yes. I don't remember the words—writing the word "scrutinized." I might have.

Q. Do you know what other games motion pictures of were being scrutinized?

[fol. 924] A. No, we just heard that pictures of all Georgia games—

Q. "We heard"?

A. Yes, I got that.

Q. Who heard?

A. I heard it from Bisher.

Mr. Schroder: Page 144, Line 14.

By Mr. Schroder:

Q. Have you looked into whether or not the so-called betting line changed in any degree before the game?

A. I heard it did not.

Q. From whom did you hear that?

A. From Pierre Howard and also by checking the newspapers. There was no indication that the betting line had wavered on that—

Q. Do you know what effect upon the betting line a substantial bet one way or the other will have?

A. A very large bet in a national game might have some effect on it or it might—a very large bet might even prompt some of the bookmakers to take the game off their boards.

Q. Was this game taken off the boards?

A. No, it wasn't.

Q. According to the information that you have there—strike that, please. According to the information that you have there was no change in the betting line prior to the Alabama game?

A. As far as I know there was no change. I mentioned in here there was 14 to 17 points. It may have fluctuated slightly. I saw it at different times, at different points, [fol. 925] but so far as I know there was no major significant shift in the betting spread.

Q. Let me ask you this: Was there, according to your information, any shift, and if so, when did it occur?

A. None whatsoever.

Q. Now, before you wrote your article for the Curtis Publishing Company, also at the time you were writing it, and furthermore, at the time that you had completed it and submitted it to Curtis Publishing Company, you had told them and they knew that you did not have available to you at any time the so-called notes that were taken by Burnett during this conversation?

A. That's right. We kept trying right up until the last moment to get them.

Q. Before you wrote your article, at the time you were writing it, and after you had completed it and delivered it to the Curtis Publishing Company, they knew about John Carmichael and they knew that he had not been interviewed by you or anyone else for them?

A. They did. Carmichael was mentioned in the affidavit.

Q. They knew what I just said?

A. Yes.

Q. That you had not interviewed him, nor anyone else for them?

A. That's right.

Q. Is that correct?

A. That's right, so far as I know.

Mr. Schroder: Page 148, Line 9.

Q. Mr. Graham, in researching this article before you [fol. 926] wrote it, did you review any articles written about the games played by the University of Georgia in the year 1961?

A. No, I didn't. I stayed with 1962.

Q. When they telephoned you from Curtis Publishing Company, when they first contacted you to come in, that they had an assignment for you, did I understand it correctly when you testified this morning that you were to go to Atlanta and to make negotiations or to negotiate for Curtis regarding the acquisition for them of the exclusive right to publish this story and also to undertake whatever research down there was necessary to substantiate it?

A. Chiefly I was told to go there, hear what the story was about, and if necessary get an affidavit, which was set up for me between Mr. Beddow and Mr. Howard, and then to come back to New York after talking to all of these principals originally named, Howard, Flack and Burnett, and let them—let the Post see what I had.

Then at the same time when I was down there, I was told to offer this money to Burnett or Howard.

Q. In other words, your mission to Georgia was not only to negotiate for the—shall we call it purchase of the story, but also to verify it through talking to these other people?

A. Yes, to talk to them.

Q. And to check it out with them?

A. Yes.

Mr. Schroder: Dropping down to Line 24.

[fol. 927] By Mr. Schroder:

Q. Have you written any articles in the past on football and, if so, what are they?

A. I have never written a major article on football. When I was at—at Sport Magazine, I was assistant managing editor, and I covered various events and talked to football players and coaches, as part of my duties. But I never—

Q. How long ago was that?

A. That was from 1955 through 1958, the beginning of 1958.

Q. Can you identify for the record any football coaches and football players that you interviewed at that time?

A. I can't at the moment.

Q. Sir?

A. I can't at the moment. I am trying to think.

Q. Have you ever authored any article that might deal with a so-called fixed or rigged athletic event?

A. No, I haven't.

Mr. Schroder: Page 153, Line 10.

By Mr. Schroder:

Q. Have you ever in your history as a sportswriter, ever heard of a football game even attempted to be fixed by coaches and not players?

A. I have never heard of it. This is the first—

Mr. Schroder: Page 154, Line 19.

By Mr. Schroder:

Q. One more question, Mr. Graham. What have you [fol. 928] been paid by the Curtis Publishing Company in connection with your services in writing this article?

A. Two thousand dollars.

Q. Their agreement was contingent upon your furnishing a story that fitted in with their policy—

A. I was told—I have been working regularly on repeated assignments for the Post since December. In fact, I now have a contract which guarantees me so much a year from the Post, and I was told to go down and investigate this story and I would be paid whether or not the story was published.

Q. But the amount would be contingent upon the type of story that you ended up with?

A. We didn't discuss that. They just told me that I would be paid, but it would be no money out of my pocket, because if this story didn't work out, I would be immediately assigned to another one, which I was right after this.

By the time the story came out, I was in Florida working on an auto racing story.

Mr. Schroder: Page 156. Mr. Cody asked a couple of questions which I want to read. This question is by Mr. Cody.

The Court: I believe Mr. Cody probably should ask his own question; I mean, any that you want to omit, I will let Mr. Cody ask, but any question Mr. Cody asked, I think it would be proper for him to read it.

Mr. Schroder: Every one I have read up to now is by me. If he doesn't read it I will have the chance?

[fol. 929] The Court: You will have the privilege of coming back; yes, sir.

Mr. Schroder: All right, sir.

The Court: Mr. Cody, did you wish to read part of the deposition at this time?

Mr. Cody: Just a moment, Your Honor.

The Court: All right.

Mr. Cody: I don't believe so at this time, Your Honor.

The Court: You don't care to read any of it? All right, Mr. Schroder, I will let you read those two questions.

Mr. Schroder: "By Mr. Cody."

Mr. Lockerman: What page?

Mr. Schroder: 156.

[fol. 930] By Mr. Schroder:

Q. I have one or two questions to ask you, Mr. Graham.
A. Yes, sir.
Q. In your direct examination by Mr. Schroder you mentioned that you had access to the Atlanta newspaper in preparing some portions of the article. Where did you go to get access to those papers?
A. To the public library.
Q. In Atlanta?
A. In Atlanta.
Q. In this article that you wrote, did you intend in any way to suggest that Coach Butts or Coach Bryant bet on any particular game or any game?
A. Not after looking over all the information. I had—of course, this was in my mind at all times. When I got through with the article, when I had gone over all the information and had re-read the article and brought it in here, I didn't intend to—I certainly—there was no idea of making an accusation.
Q. Did you make any such intimation in the article?
A. No, I don't believe I did, because I don't know that these two men bet on the game.

* * * * * * *

Clay D. Blair, Jr. called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified by deposition as follows:

[fol. 931] Cross examination.

By Mr. Smith:

Q. State your name, please, sir?
A. Clay D. Blair, Jr.
Q. Are you employed by the Curtis Publishing Company?
A. That's right.

Q. In what capacity?

A. I am editor-in-chief of the Curtis Publishing Company, sometimes called editorial director, also.

Q. How long have you been with Curtis, Mr. Blair?

A. Since March of 1957.

Q. What was your job—what were you employed as, that is, what position did you occupy, when you were first employed?

A. I was first—I was a staff writer in the Washington office.

Q. Who was editor of the Saturday Evening Post at that time?

A. Mr. Ben Hibbs.

Q. Who was president of Curtis?

A. Robert E. MacNeal.

Q. Mr. Culligan is presently president of Curtis?

A. Mr. Matthew J. Culligan, I believe—I believe the Board of Directors made him Chairman of the Board this week. I think Chairman of the Board is his correct title.

Q. Who is President of Curtis?

A. I think he is President and Chairman of the Board.

Q. When did Mr. Culligan first come with Curtis as President?

A. July 9, 1962.

[fol. 932] Q. And he replaced—

A. Mr. Robert MacNeal.

Q. Was there also an editorial change made at the time Culligan came with the Post, or who was out at that time?

A. The editor of the Post at the time Mr. Culligan came to Curtis was Mr. Robert Lee Sherrod, born in Georgia.

Q. Mr. Sherrod is no longer with the Post.

A. Yes, he is. He is the editor-at-large of the Post.

Q. Editor of what?

A. Editor-at-large. He is a roving editor, around the world.

Q. Who is presently editor of the Saturday Evening Post?

A. I am.

Q. How long have you been editor?

A. Well—

Q. Of the Post, that is.

A. Well, let me see. I have to think a minute. In March of 1962, I was made managing editor of the Saturday Evening Post, and in June of 1962, I was promoted to Vice-President and Editorial Director of Curtis, and on or about October 24th, when Mr. Sherrod began his travels. I assumed the responsibility as the chief executive of the Saturday Evening Post, editorial executive. So that in effect I have been the editor since October of 1962, although it really doesn't show in the masthead that way.

Q. Are you also editor of the other four publications or any one of the other four Curtis publications?

A. No, I am not. I am editorial director and, as such, I have responsibilities for the editorial content of the other Curtis publications, but I am not a day-by-day editor of [fol. 933] the other four magazines, as I am on the Post.

Mr. Smith: Go to Page 11, line 17.

By Mr. Smith:

Q. Were you directly involved in the employment of Mr. Graham to write this Butts story, this Butts-Bryant story, in his selection as a writer?

A. No.

Q. You were not?

A. No.

Q. Who—

A. Let me make this clear. As Chief executive officer of the Saturday Evening Post I bear the responsibility for what is published in the magazine. I do not—I cannot, on a day-to-day basis, make assignment of articles or editors and so on.

Q. I can appreciate that.

A. Yes.

Q. What I want to know is who was directly in charge of that particular piece of writing?

A. That particular project?

Q. For you or for the magazine?

A. For me?

Q. Yes.

A. Well, directly responsible to me would be Davis Thomas, who is the managing editor of the magazine.

Q. Was he more or less in touch with this particular article, in making the decisions concerning the article, for you and thus for the magazine?

A. Yes.

Q. Was Roger Kahn working with him in that direction? [fol. 934] A. For him. Roger Kahn is a sports editor who works under Thomas, and, of course, Graham was working for Kahn, in effect.

Q. Did you have anything to do with the decision, the final decision to publish the article?

A. Yes, I did. Before the article was committed to—irrevocably committed to press, I read it, all of it, and at that time I could have made the decision to pull it out, but you might say by not making the decision to pull it out, it had my approval.

Q. In other words, Davis Thomas made the decision to publish it and you didn't veto it; is that right?

A. That's about it.

Mr. Smith: All right. Page 17, Line 4.

By Mr. Smith:

Q. Will you list the five magazines that the Curtis Publishing Company publishes?

A. Yes. The Saturday Evening Post, The Ladies Home Journal, the American Home, Holiday and Jack and Jill, a children's publication.

Q. Are any of these five magazines what you might call showing a profit at this present time, operating in the black?

A. However, I will answer the question this way: that for the first quarter of 1963, Curtis Publishing Company

showed a loss of about $1.1 million, compared to a loss in 1962 for the same quarter of $4.7 million.

Mr. Smith: On Page 20, Line 9—Line 8.

[fol. 935] By Mr. Smith:

Q. From 1962 to 1961, there was a decline of approximately eighteen million in advertising revenues. Is that true?

A. In the 1961, by the same PIB figures, I believe the figure was eighty-six million.

Q. Do you also recall what it was for 1960?

A. I think it was one hundred, six million.

Q. One hundred, six million?

A. Yes.

Q. I believe you said that Mr. Culligan came in as President of Curtis in March of 1962?

A. No, in July.

Q. In July of 1962?

A. Yes.

Q. Now, you were made a vice-president in June of 1962?

A. That's right.

Mr. Smith: Go to Page 29, Line 4.

By Mr. Smith:

Q. Now, what connection is there between circulation and the amount of lineage and the revenue that you can expect from advertisers? What importance is placed on circulation by advertisers?

A. Well—

Q. Is this not one of the factors that affects advertising revenue?

A. In marketing advertising?

Q. Yes.

A. Definitely so. Your demography, the profile of your subscriber, where he is, who he is, whether or not he lives in a metropolitan or rural area, the very size and numbers; [fol. 936] and also part of the demography would be the

income level, education level, et cetera, et cetera. The size of your circulation. The entire advertising rate structure is based on how big your circulation is. In other words, if you have a circulation of three million, then an ad might cost fifteen thousand dollars in your magazine. But if you have a circulation of six million, it costs thirty thousand dollars. So that it is absolutely vital. Together with the demography, I mean. I mean, all circulation in Russia would not be appealing to General Motors.

Mr. Smith: Page 31, Line 10.

By Mr. Smith:

Q. Well, your advertising revenue has fallen considerably, as you testified, since 1960, to a—from an all-time high?

A. No. One hundred six million to, 1960—fell to eight-six in 1961 and about sixty-six or sixty-eight or sixty-nine in 1962. That is revenue.

Q. So that you aren't satisfied with that trend, are you, Mr. Blair?

A. I mostly certainly am not, no.

Q. And were you—

A. Would you be, if you were a responsible—

Q. No, sir, I would be most unhappy, as I am sure you are. Is that not a fair statement?

A. Right.

Q. I mean, this is an integral part of running a profitable operation, is it not?

A. Absolutely. Let me say that I am not unhappy, but I would be hopeful we could have more advertising revenue in the Post.

[fol. 937] Mr. Smith: Page 40, Line 13.

By Mr. Smith:

Q. There is one further statement I wish to ask you about, and that is in the March 29, 1963 issue of Time. You were quoted as saying:

"'The final yardstick,' said Blair, in a memo to this staff, 'is the fact that we have about six lawsuits pending, meaning that we are hitting them where it hurts . . .'" Did you make such a statement?

A. I didn't make the statement, but I wrote a memo—

Q. I am sorry, you did or didn't make it?

A. I wrote a memo. I didn't make the statement. I wrote a memo. But that statement is not accurate. The quote is not correct.

Q. Was the statement taken from a memorandum?

A. Yes.

Q. Was the memorandum in writing?

A. Yes.

Q. Do you have a copy of the memorandum?

A. I could get you one. I don't carry it around with me.

Q. Sir?

A. I could get you one. I don't carry it around with me.

Q. All right, sir, will you make that available to us?

Mr. Smith: Mr. Strubing said "Yes".

A. (By the witness) Yes, surely.

"The final yardstick is the fact that we have about six [fol. 938] lawsuits pending, meaning that we are hitting them where it hurts . . ."

Now, where is that incorrect? How is it inaccurate?

A. I think—I would have to get the memorandum, but I think the sentence goes on to say:

"". . . with solid, meaningful journalism."

Q. Well, who is them, "hitting them"?

A. "Them" is the general phrase to refer to the whole United States of America.

Q. Hitting everybody in America where it hurts? Is that the meaning that you intended to convey?

A. Not quite so literally as this: You are really asking me now about the whole philosophy of this magazine when

you ask a question like that. I can't answer without telling you what my philosophy is.

Q. Is the quote about the number of lawsuits incorrect?

A. Yes.

Q. There are more than that?

A. Less.

Q. Less than that?

A. Yes.

Q. All of these are libel suits?

A. Yes.

Q. Sir?

A. Yes. But I mean the figures aren't accurate.

Q. Among them is the one Wally Butts filed against the Post—

A. No, no.

Mr. Smith: Page 43, Line 10.

[fol. 939] By Mr. Smith:

Q. Do you recall the writer that interviewed you for that article or that quotation?

A. No one interviewed me.

Q. No one interviewed you?

A. No.

Q. You made the memorandum available?

A. I certainly did not. Somehow the memorandum found its way to Newsweek.

Q. It wasn't intended, really, for publication?

A. Absolutely not. The entire memorandum, if you read it, as I assume you will in time, was meant to be a laudatory, congratulatory memorandum to the staff on the magazine that they were putting out, and the lawsuits, I think that was actually a facetious—to tell you the truth, I think that was actually facetious.

Mr. Smith: Next page, Line 17.

By Mr. Smith:

Q. And you were not being facetious when you used the phrase, "sophisticated muckracking"?

A. No.
Q. You meant it then?
A. Yes.
Q. And you mean it now?
A. I mean it now.

Mr. Smith: Page 48, Line 11.

By Mr. Smith:

Q. To get away from muckraking, sophisticated or otherwise, you have been quoted as being concerned with the [fol. 940] image of the Post and in trying to get a new image, portray a different type of magazine; is that correct?

A. Very definitely, yes.

Q. Generally speaking, you want to change the image of the Post?

A. I did change the image of the Post.

Q. All right.

A. "Image" is very bad. It is worse than "muckraking."

Q. I agree. Is the March 23, 1963 issue of the Post representative of the new type magazine that Curtis is interested in publishing, that is, the history—

A. Could I refresh my memory by looking at it?

Q. Yes.

A. Does this contain an article of some interest to you?

Q. This is the Butts issue.

A. Oh, yes. I would say that we have perhaps come perhaps 25 per cent of the way with this issue.

Q. This is not representative of the "image" that you are trying to—

A. I would say we have gone 25 per cent toward the goal of the magazine that I envision.

Q. In other words, this issue is a step in the right direction, in your opinion?

A. Yes, along the way, yes.

Mr. Smith: Page 53, Line 8.

By Mr. Smith:

Q. I am reading now from—I think it is one edition of Webster's Dictionary, in which it is stated:

[fol. 941] "The original allusion . . ." and this is "muckraking" ". . . was to a character in Bunyan's Pilgrim's Progress so intent on raking up muck that he could not see a celestial crown held above him." I believe you alluded to that yesterday, did you not?

A. Yes.

Q. You have no quarrel with that particular statement?

A. No. That is the origin of that.

I am not sure. It might have been in Shakespeare prior to that; I don't know.

Q. The dictionary states further,

"On April 14, 1906, President Roosevelt delivered a speech in which he used the term 'muckraking' in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations, after which the term obtained wide currency." Do you have any quarrel with that particular definition of muckrake," or the use of the term "muckrake"?

A. No. I mean that was the way Roosevelt used it. I am pretty sure of that. I have never read the speech or anything.

Q. You were acquainted with the term, were you not, Mr. Blair, prior to using it in the interview which led to the article in Newsweek on November 19, 1962? You were acquainted with the term? The most common usage of the term "muckrake" at that time?

A. I was, yes.

Q. And this you testified yesterday, by adding to the term the word "sophisticated" you sought to alter the most common usage of the term "muckrake"; is that correct?

A. That is really correct, yes.

Q. Now, let me ask you if you agree with this. I am [fol. 942] reading from the same dictionary, which, as I

said, is an edition of Webster's. Here the term "sophisticated" is defined, one, as follows:

"Not in its natural, pure or original state, adulterated, amended unwarrantedly." Do you have any quarrel with that particular definition of "sophisticated"?

A. Well, let me say this, that the word "sophisticated" has many connotations, and very definitely I won't prolong this with argument and semantics here, but as for that definition that was not the definition I had in mind when I used the word "sophisticated."

I was thinking in terms, for example, you would talk about the Nike Zeus or the Skybolt as being a very sophisticated weapons system. By that I meant to imply complex, high order of development, rather than that.

I believe the word "sophisticate"—the origin of that word must be sophistry, is it not?

Q. Let me read this. "Sophistication" is defined:

"1. sophistry; sophistical reasoning; misrepresentation or falsification and argument, also a quibble; a sophism."

Do you adopt that definition of the term "sophistication"?

A. Well, I know that is—I mean, I can't quarrel with the dictionary, but very definitely, you must know that in common usage in our language, if you talk about a sophisticated person or a sophisticated society or a sophisticated weapons system, as I was with the Newsweek people, and I went on in this quote as to what I meant by "sophisticated," I was talking about something else, which is, you know, not quite—

Q. Well, you were speaking in the sense of expose, were you not, and in the sense of provocation?

[fol. 943] A. I was speaking in the sense of—if you want to use the word "expose", I want to look that up.

Q. Did you use the word yourself in this interview?

A. "Expose"?

Q. Yes.

A. I probably did.

Q. I am reading from the Newsweek article and I have written it down in longhand and I think it is accurate—this is from Newsweek, November 19, 1962:

"Blair says he intends to 'restore the crusading spirit. . . .'"

A. Right.

Q. (continuing) "'. . . the sophisticated muckraking, the expose in the mass magazines . . .'"

A. Yes.

Q. Is that accurate as far as you can recall?

A. I am sure it is. The interview was an hour and a half or something like that, and I certainly would not quarrel with the fact that I said that during the course of it.

Mr. Smith: Go to the bottom of that page, Line 22.

By Mr. Smith:

Q. In the same sentence with "sophisticated muckraking," the term "expose in mass magazines" was used?

A. Right.

Q. And these were used in aid of one another; is that right? "Expose" is a further amplification of your use of the term "sophisticated muckraking"; isn't that true?

[fol. 944] A. Talking precisely to the point here, yes, but I think in all fairness, we are just dealing with words, and you have to—maybe that is what you lawyers do. I am sure you do.

Q. You are very much concerned with words yourself, are you not?

A. Yes, but I am also concerned with the development of what are we talking about, rather than just the words themselves.

Mr. Smith: All right; go to Page 59, Line 10.

By Mr. Smith:

Q. Further quoting from this same Newsweek article of November 19, 1962, the writer says, and I quote directly from the article, which is quoting you:

"We are going to provoke people, make them mad.'"

A. Yes.

Q. Did you make such a statement?

A. I am sure I did. I would not quarrel with that.

Q. You don't quarrel with the statement now, do you?

A. No.

Mr. Smith: Page 70, Line 5.

By Mr. Smith:

Q. A statement is contained in the Butts' article:

"But careers will be ruined, that is sure." You have already testified that you read the article prior to publication.

A. Yes.

[fol. 945] Q. Do you have any quarrel with that statement?

A. May I see the statement?

Q. Right here.

A. Oh, I see, it is the windup, yes.

Q. Right here?

A. Well, I have no quarrel with that.

Q. Is there any question in your mind but that careers have been ruined as a result of this article?

A. Well, I really don't know, because I don't know the status of the employment—career—here I use the term "career" to apply to employment—I don't know the status of all these people.

Q. This statement says, " . . . careers will be ruined, that is sure," and it can't apply but to two people, and that is Wally Butts and Bear Bryant. Would you not agree with that?

A. Well, I would say that they were the principal figures in this story and I can't quarrel with that, no.

Q. Butts' career is one of the careers that reference is made to in that statement, isn't that correct?

A. I think so.

Q. Is there any question in your mind about that?
A. I don't think so.

Mr. Smith: Page 73, Line 8.

By Mr. Smith:

Q. Were you also concerned that this matter be checked out thoroughly?
A. Absolutely.
Q. As to the truth of the article, prior to publication?
A. Absolutely, as we do with every article.
Q. Did you impress this on your staff, that they must [fol. 946] be absolutely certain of what they published in this Butts article, to satisfy you as to the truthfulness and accuracy of it?
A. Absolutely, as we do with every article.

Mr. Smith: 75, Line 14.

By Mr. Smith:

Q. Yesterday I asked you about an inter-office memo which was reported in one of these national publications, a quotation from you, and you have been kind enough to supply that to me today, which I have identified as Exhibit P-2. Is that the memorandum?
A. Yes, it is.
Q. Is that your memorandum?
A. That is my memorandum.
Q. These are your words?
A. My words.
Q. This is the entire memorandum?
A. My words, not very brilliant, but mine.
Q. This was not prepared for publication, but in some fashion it leaked or got out of the office here; is that right?
A. That's right, yes—no, it was strictly a strictly inter-office—I believe I started the memo by saying "I wish I had time to visit each one individually," but I didn't.
Q. One statement in the memo which we discussed yesterday, and I don't recall just what you said, but it is my im-

pression that there was some question as to whether or not it was accurate.

A. Yes.

Q. Here is the statement. Let me read it again:

"The final yardstick: We have about six lawsuits pend-
[fol. 947] ing, meaning we are hitting them where it hurts, with solid meaningful journalism."

A. Yes.

Q. Now, that is an accurate quotation, is it not?

A. That is exactly what I wrote, yes. What I guess is inaccurate about it, I guess, is the number of lawsuits.

Mr. Smith: 81, top of the page.

By Mr. Smith:

Q. Do you remember a phone call from Wally Butts' daughter? Did you have a phone conversation with Jean Butts?

A. Yes, I did.

Q. Do you remember about when that was?

A. This is the girl that lives in Mississippi?

Q. Yes.

A. Yes. I really don't remember when that was. It was —I have a recollection it might have been like a Thursday or sort of in the middle of the week, like.

Q. Was it prior to the publication of the Butts' story?

A. Yes, it had to be, yes.

Q. What was—

A. She wanted—she was trying to find out if we were doing the story, I think, or if we were, when it would be out, something like that. It was a very incoherent conversation because she was very emotional and crying, and I had a hard time determining exactly what her point was here.

Q. The substance of the conversation was a request on her part, was it not—

A. Well,—

[fol. 948] Q. (continuing) —direct to you?

A. Well, my impression was that she was trying to find out (a) if we were doing an article involving her father, and (b) if we were, when it was coming out. It seemed to me that was what she was trying to get at, but it would be presumptuous here or any other time for me to try to interpret what any woman is really getting at when she talks to you.

Q. Well, you told her (a) that you were going to do an article, and (b) that it was coming out soon, didn't you, or gave her the publication date, perhaps?

A. No, I don't think I did give her the publication date.

Q. Did you tell her an article was going to be published concerning her father?

A. I swear to you, I can't remember. I am not trying to dodge your question. I am—I get a hundred phone calls a day, you know, more or less, and it is hard to remember, but I—I don't know whether I told her specifically whether we were coming out with this article or not. Definitely, I know I would not have told her when, you know, if I said we were publishing it, because we don't ever give a release as to when we are going to publish something, to anyone. This was a strange and almost incoherent telephone conversation, where I couldn't really figure out what she was after. She was crying through the whole thing and—

Q. You got the impression that she was asking you not to publish the article?

A. Oh, beyond any doubt, that if we had any—I mean, her whole thing was to try to find out if we were, and certainly the undertones of the thing, all this weeping and crying was that if you—you know—"Please don't."

[fol. 949] Q. If you do publish—

A. "If you plan to, please don't."

I didn't make any notes on this conversation or anything else, I mean. And I don't know when the telephone conversation took place, and I am sure that you could look it up in the—I understand the Telephone company keeps very accurate records of the telephone conversations, long-distance calls.

• • • • • • •

ROGER KAHN, called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified by deposition as follows:

Cross examination.

By Mr. Lockerman:

Q. Will you state your full name, please?
A. Roger Kahn.
Q. How old are you?
A. 35.

Mr. Smith: Line 19.

By Mr. Lockerman:

Q. How long have you been with the Post?
A. Since January 1st of this year.
Q. What is your title with the Post?
A. On the masthead it is listed as senior editor and in my contract with the Post it is listed as sports editor. You can probably define it as senior editor in charge of sports.

[fol. 950] Mr. Smith: Page 7, Line 13.

By Mr. Lockerman:

Q. When did you first receive any information concerning the Wallace Butts-Paul Bryant matter that was the subject of the article in the Post of March 23rd of this year?
A. It was on a Tuesday. Without a calendar—
Q. Here is a calendar.
A. Thank you.
It would have been on Tuesday, February 19th.
Q. How did you receive the information that you did get on February 19th, concerning the matter?
A. I was about to go to lunch when Davis Thomas, the managing editor of the Saturday Evening Post, came to my office and reported to me that he had heard this—had

heard of the phone call, and that we were to talk after lunch, which I indeed agreed we ought to.

Mr. Smith: Line 16.

By Mr. Lockerman:

Q. Then I assume you did go to lunch and conferred with him again after lunch?

A. Yes, after lunch, Mr. Thomas, Mr. Don A. Schanche, who is the executive editor here—the three of us met, conferred, and discussed what we had and what we ought next to do.

Mr. Smith: Next page, Line 16.

[fol. 951] By Mr. Lockerman:

Q. Did Mr. Thomas tell you where he had gotten the information that he was then giving to you?

A. Yes, sir. From Mr. Strubing.

Q. Who is Mr. Strubing?

A. Mr. Strubing is an attorney for the Saturday Evening Post.

Q. Mr. Strubing wasn't present, was he?

A. No, he was not.

Q. What did Mr. Schanche have to say about the matter at that time?

A. Well, we all felt, each of us, that it was well to look into and it is hard to recreate what each of us said, but we did feel a certain skepticism about the story at that time, but it was a story that had to be checked out.

We realized that it was a very unusual story, not something that was in any way routine. But we did feel, the three of us discussing this, that we had indeed to proceed on investigating the story.

Q. But you were quite skeptical about it, the correctness of what had been told to you?

A. Not quite skeptical. Skeptical and surprised.

Q. On that date of February 19th, when you were conferring with Mr. Thomas and Mr. Schanche, were you aware of the lawsuit that was pending against the Saturday Evening Post and Furman Bisher, the sports editor of the Atlanta Journal, involving an alleged libelous matter at that time?

A. I was aware of it in broad outline. I had not been sports editor when Mr. Bisher's article appeared, so that I was not conversant with all the details. But I was aware that there was such a suit, yes.

[fol. 952] Mr. Smith: Page 12, Line 3.

Q. Had you discussed with Mr. Thomas and Mr. Schanche the fact that Frank Graham was your choice?

A. Yes, I did.

Mr. Smith: Page 14, Line 15.

By Mr. Lockerman:

Q. Had you ever used him on any assignment in which you anticipated or knew that by writing the type of story that would be involved, that careers and characters would be ruined?

A. I didn't really know what type of story Mr. Graham was going to write. Mr. Graham didn't have an assignment to write a story. Mr. Graham had an assignment to investigate as well as he could and if in his judgment there was a story, he was to proceed.

Mr. Smith: Page 17, Line 24.

By Mr. Lockerman:

Q. Did you instruct him that you wanted him to make a very thorough investigation of this matter?

A. As thorough as he could.

Q. As thorough as he could?

A. As thorough as he could make, yes.

Q. I believe you used the expression a moment ago, in speaking of what you wanted Mr. Graham to do, the term

that you wanted him to go down there and dig; is that correct?

[fol. 953] A. I don't know if I used that term, but that would be a fair paraphrase of what I meant, yes.

Q. By using that term, you meant to really dig into the story and find out all the facts about it?

A. All the facts that were available, yes, indeed.

Mr. Smith: Page 21, Line 21.

By Mr. Lockerman:

Q. Going on with that same discussion, what else was said by Mr. Thomas or Mr. Schanche to you and Mr. Graham about this matter?

A. It was general agreement that Frank's first course of investigation should be with Mr. Howard and with Mr. Burnett. There was probably some fee discussion for Mr. Graham.

Q. Give us your best recollection of that.

A. I said something like, "I won't give you a fee now. If the story does not work out, Frank, it will depend on how much time you spend and how hard it is."

It is standard in many magazine relationships that you don't have a contract. You have a handshake.

Q. A what?

A. Handshake. Agreement between writer and editor who have worked together before. You don't have a formal contract on most magazines.

There was some discussion about the fee to be paid Mr. Burnett. I believe that was handled by Mr. Thomas. Mr. Schanche was going to work on the contract which was to be made—drawn between Mr. Burnett and the Saturday Evening Post, and we told Frank that if the story seemed to be working out, not to worry about money, that that was [fol. 954] not his function. Not to worry about a rate for what Mr. Burnett would be paid. That was the Post's function and not his.

Q. Then it was your understanding at that time that the story was for sale to the Post; that is correct, is it not?

A. That Mr. Burnett's information was for sale, yes.

Q. By Mr. Burnett?

A. By Mr. Burnett or Mr. Howard.

Q. Or Mr. Howard?

A. Yes.

Q. And that was on February 20th?

A. That's right.

Mr. Smith: Page 28, Line 4.

By Mr. Lockerman:

Q. Now, what instructions did Mr. Thomas or Mr. Schanche give either you or Mr. Graham in that conference about what the two of you were to do on this very unusual matter?

A. Frank was to go to Atlanta. If an affidavit were obtainable from Mr. Burnett, he was to get the affidavit. He was to determine all of the circumstances that he could determine about the intercepted phone call. He was, if possible, to get a copy of Mr. Burnett's notes on the intercepted phone call. He was to check the library and the newspapers for information on the game; and he was, generally, while down there, since he had never covered SEC football, to familiarize himself with newspaper clips, through newspaper clips, as best he could with the teams.

[fol. 955] Mr. Smith: Page 30, Line 5.

By Mr. Lockerman:

Q. What, if any, instructions were given by either you or Mr. Thomas or Mr. Schanche as to whether or not Mr. Graham should refrain from interviewing Coach Bryant?

A. Well, at this point he was going only to Atlanta to see what he could get on the story in Atlanta. A trip to Alabama I don't believe was mentioned.

Q. You had previously already told Mr. Graham not to interview Coach Butts?

A. Yes.

Q. I believe you just stated that a moment ago.

A. Yes, that's right.

Q. Are you familiar with the geographical relationship of Birmingham with reference to the City of Atlanta, generally?

A. Yes.

Q. Were you familiar with the fact that either from Atlanta to Birmingham or to Montgomery is only a matter of about less than an hour's flight time by air?

A. I knew it was a short flight.

Q. You did know that?

A. Yes, I did.

Q. You were also familiar with the fact that telephone communications could be had from Atlanta to almost any point in Alabama?

A. Yes.

Q. That goes without saying, doesn't it?

A. Yes, indeed.

Q. And you were familiar also with the fact that the Town of Athens, Georgia, where the University of Georgia [fol. 956] is located, is also a very short distance from the City of Atlanta?

A. Yes.

Q. And that Tuscaloosa is a very short distance from Birmingham?

A. I don't know where Tuscaloosa is, but I will take your word for it.

Q. You knew it could be reached in a relatively short time?

A. I knew it was in the same state, yes.

Q. Did you specifically instruct Mr. Graham to go only to the City of Atlanta?

A. Only to the City of Atlanta? I believe I did, yes. Bearing in mind that this was in the nature of a preliminary—could have been a preliminary investigation. We

had no idea for sure what Mr. Graham would get. It's in the nature of journalism that you first familiarize yourself with as much background as you get before you make any decision on how you will finally handle the stories, so that these instructions were to go to Atlanta, see Mr. Howard, see Mr. Burnett and if Mr. Graham called and said, "I have to go somewhere else," that could have been changed.

Q. There would have been no objection to his going somewhere else?

A. No economic objections, no, it would depend on how the story developed.

Q. Of course, the story, as you already said, was a very unusual type of story, wasn't it?

A. I have never seen another story like it.

Q. Did you place any time limitation on how much time Mr. Graham was to spend in Atlanta or on this investigation?

A. On this story, I think we wanted him to move with all deliberate speed, and get back as quickly as possible [fol. 957] after doing as complete an investigation as he could. There was no specific date, no.

Q. But you wanted him to make a complete investigation?

A. Yes.

Q. Then he was not given any time limitation within which to do that, was he?

A. I don't believe he was, no.

Q. Now, have you told us all that was said by Mr. Thomas and Mr. Schanche or yourself to Mr. Graham on February 20th, when you were discussing this matter?

A. There was a little small talk—not small talk really: "Be careful, Frank, this is a big one." Which I said in more of an informal way to him. You know, "Be careful, do a good job and let me hear from you." That was about all.

Q. And to dig into the story and make a thorough investigation and get all the facts?

A. "Be careful, Frank, this is a pretty big story." I said something like that to him.

Q. And you had reference to making a careful investigation; is that right?

A. Oh, yes.

Q. Because you were interested in getting the truth of the entire matter, weren't you?

A. Yes, sir.

Q. What amount was discussed as to what would be paid for the facts that you understood at that time to be for sale by Mr. Burnett?

A. I believe Mr. Schanche drew the contract between—I don't know whether it was between Mr. Howard—I guess it was between Mr. Burnett and the Post—and the sum I think was $500—I am sorry—$5,000.

[fol. 958] Q. Was that contract drawn at that time for Mr. Graham to take along with him?

A. No, it was not.

Q. And that would have been on the 20th; is that right?

A. On February 26.

Q. Was there any breakdown of the five thousand dollars in any periodic payments or was it just a lump sum of five thousand dollars?

A. I believe really Mr. Schanche would be the best source because I believe he wrote the contract, but I believe that it was in two installments, one of which would be payable on the furnishing of information which in our editorial judgment constituted a story, a printable story, and the other sum would be paid on or about the publication date, when the story was exclusively in the Post.

Q. And of course it was—provision was made for it to be an exclusive matter, wasn't it?

A. We aren't against exclusives, no. Certainly we were not upset that the story wasn't everywhere else.

A. We would like it to be. We wanted to have it to ourselves, yes.

Q. And that is the way it turned out, wasn't it?

A. Yes, it was. Although there were numerous offers of "Please make a deal and let us have your story" before the story came out, from other magazines.

Q. Now, what discussion was had at that time, still talking about the 20th, about a party by the name of Milton Flack, in this matter? You remember his name, don't you?

A. Yes, indeed. It is a very unusual name for a publicity man. I know that the name amused us. Flack, in the show business argot, is a publicity man.

[fol. 959] Q. Is that why you say it was unusual?

A. Yes, it is kind of funny, because a move press agent is called a flack.

Q. What does that mean?

A. It is a press agent and not a public relations counselor. A flack is someone who comes around from the studio to push the picture. I am not sure—I guess it is spelled "f-l-a-c-k," too. It is a kind of Hollywood term.

Q. Does it have the same connotation as a promoter, so to speak?

Q. Works for a promoter?

A. A press agent.

Q. A press agent is more or less a promoter, too, is he not?

The Court: What is the purpose of going into what Mr. Flack's name means? We are wasting time here. Let's go on.

Mr. Smith: I think we have just about run out of that, Your Honor.

The Court: All right, sir.

Mr. Smith: Line 20.

By Mr. Lockerman:

Q. What was said about payments to be made to Mr. Flack for whatever part he played in this matter?

A. At that time there was no contemplation of paying Mr. Flack.

[fol. 960] Q. Well, when did the contemplation of paying him money in this matter come up?

A. Some time afterwards, and Mr. Thomas handled that particular payment, and you would have to get from him

exactly when. I am sure there is a record of when he was paid.

Q. But Mr. Flack was paid some amount of money?

A. I believe five hundred dollars eventually, yes.

Q. Your recollection is five hundred dollars?

A. Yes.

Q. Eventually?

A. Yes, sir.

Q. What is your understanding as to the purpose for paying him five hundred dollars?

A. Gosh, I think, you know, something would go with the check which would explain that. Payment for editorial services rendered, for helping.

Q. Did he render editorial services in connection with this matter?

A. I think, yes, he talked with Mr. Graham.

Q. He talked with Mr. Graham?

A. Yes.

Q. Do you call that editorial services?

A. Backgrounding is a service for which we will pay under many circumstances.

Q. Speaking of background, what did you know about the background of Mr. Milton Flack?

A. Personally, nothing, nothing about his background.

Q. What do you know about his background now?

A. Well, that he has been involved in a number of adventures, that germicidal venture of his—well, that he has been involved in a number of business ventures, that is all that I can really say.

[fol. 961] Q. But at that time you didn't know anything about Mr. Flack?

A. No.

Mr. Smith: Drop down to line 20.

By Mr. Lockerman:

Q. You knew at the time that you were having these discussions with Mr. Graham on the 19th and the 20th that

this alleged intercepted telephone conversation had arisen in a rather unusual manner, didn't you?

A. Yes.

Q. I assume, then, that you knew that Mr. Burnett was claiming that he had listened in on an alleged conversation between Coach Butts and Coach Bryant?

A. Yes. Now, at one point we had been told that the conversation was overheard, and I had the initial impression that it was a conversation overheard—I believe we were told "by a student, and—"

Q. By a student?

A. By a student at the University of Georgia. The initial report was not what the facts later brought out.

Mr. Smith: Next page, Line 3.

By Mr. Lockerman:

Q. When did you get the information about Mr. Burnett allegedly overhearing it?

A. I believe on the 20th.

Q. Where did you get that information from?

[fol. 962] A. I heard it from Mr. Thomas.

Q. Well, had you in the meantime talked with Mr. Howard?

A. No.

Q. Mr. Thomas was doing the talking?

A. Yes.

Q. During that period of time?

A. Yes.

Q. With Mr. Howard?

A. No. With Mr. Strübing.

Q. Mr. Thomas was calling Mr. Howard about this matter in Atlanta?

A. No.

Q. And then you learned, apparently, that one George Burnett had allegedly intercepted a telephone conversation between Coach Butts and Coach Bryant?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. When did you understand that the interception of the telephone conversation had taken place?

A. Eight days before the game, which I believe at that —at that point I don't believe I knew the date, any more than that it was several days in advance of the game.

Q. And you are now referring to the 1962 game between the University of Georgia and the University of Alabama?

A. Yes, sir.

Mr. Smith: Next page.

[fol. 963] By Mr. Lockerman:

Q. Now, knowing that Mr. Burnett occupied the status of an eavesdropper onto an alleged telephone conversation between two coaches in the Southeastern Conference, being made from one state to the other, what instructions did you give Mr. Graham about making a thorough and complete investigation of the eavesdropper?

A. I told him to—along the lines of—"check out Mr. Burnett."

Q. Is that about all you told him?

A. That's right.

Mr. Smith: All right, go to page 51, Line 11.

By Mr. Lockerman:

Q. I believe that you had something to do with the editorial that appeared in the April 27, 1963 issue of the Post entitled "The Name of the Game"?

The Court: Just a moment. Are we going into that editorial?

Mr. Lockerman: That is in the deposition, Your Honor.

The Court: All right, sir. I was under the impression that you were not going to get into that editorial.

Mr. Schroder: There were two of them.

[fol. 964] Mr. Smith: This will prove relevant.

The Court: I thought the editorial in the issue of April the 27th, that is the one I am referring to.

Mr. Schroder: The one we went into this morning was the other one.

Mr. Cody: My understanding is that that is out.

The Court: Sir?

Mr. Cody: My understanding is that that is out.

The Court: There was some discussion; I don't know which one it was. Could I see that one? I think it had some statements in there you wanted to exclude, but if it gets in there is going to be a wide door open.

Mr. Schroder: Probably still be here next week.

The Court: Yes, sir

Mr. Smith: Well, that covers only about one reference there which—

[fol. 965] Mr. Schroder: Pass on to the next one.

The Court: I would instruct the Jury to disregard the last question and answer propounded by Mr. Smith to Mr. Schroder who was reading the deposition in regard to any editorial later printed by the Saturday Evening Post.

Mr. Smith: We will go to Page 54, Line 11.

By Mr. Lockerman:

Q. After Mr. Graham got to Atlanta and undertook this investigation, when did you next hear from him?

A. There was a party in Brooklyn—as a matter of fact, it was for my sister's birthday, and I had said to Mr. Graham, "When you get back to New York, get in touch with me right away."

At this party, which was on the Saturday night which was the day after Washington's Birthday, February 23rd, I went to the party and Mr. Graham arrived presently and I said, still with a kind of journalistic skepticism, still with the skepticism of somebody who does indeed believe in football coaches and in integrity, I said, "Nothing much down there, Frank?"

And Frank said, "Nothing much except this affidavit," and he reached for it in his pocket as I am doing now, and held out a paper, and I said, "We will talk business on Monday."

Q. That was the first word that you had from Frank Graham from the time he left to go to Atlanta on this matter?

[fol. 966] A. Yes, myself, yes.

Mr. Smith: Page 56, top of the page.

By Mr. Lockerman:

Q. So that then he, so far as you know, was in Atlanta on the 21st?

A. Yes.

Q. The 22nd?

A. Yes.

Q. Of February?

A. Yes.

Q. And then he was back in New York, and at the party in your sister's house or for your sister on the 23rd?

A. On the evening of the 23rd, having, I believe, taken a late plane on the 23rd. By "late plane," I mean a plane at about the dinner hour.

Q. So that you didn't discuss the matter with him any further at the party and you told him that you would see him later?

A. That's right.

Q. When did you see him next?

A. Monday, on Monday, the 25th. He had been working through the weekend on a rough draft of his story. On this same Monday I received a call from Furman Bisher, who was known to me as a good reporter and a sports editor of the Atlanta Journal.

Mr. Bisher called. He was in town on some business. I don't remember exactly. He was in New York on some business, I don't remember exactly, and he called me and he mentioned vaguely a major story in the South involving

colossi of Southern Football, and did I know about it, and [fol. 967] was I interested in it? These were questions that Furman Bisher asked me.

Since at this time we were not certain what the story was or would be, and had decided on a policy of not discussing any of our reports with anybody, I said no, I didn't.

Mr. Smith: Go to Page 60, top of the page.

By Mr. Lockerman:

Q. Did Mr. Bisher name any names of the colossi that were involved?

A. No, sir.

Q. He didn't?

A. No. He just said he had a big story and I ought to know about it.

Mr. Smith: All right, sir, 63, Line 13.

By Mr. Lockerman:

Q. After talking with Mr. Thomas about your call from Furman Bisher, did you then call Bisher back that day and change the appointment that you had made for the 26th, or did you keep that appointment?

A. No, I changed it to the 25th.

* * * * * * *

Roger Kahn, testified further by deposition as follows:

[fol. 968] Cross examination (continued).

By Mr. Lockerman:

Q. Did you or did you not feel that quotes from Alabama players, would also be significant as a part of this story?

A. Yes, I did.

Mr. Smith: Page 81, Line 23.

By Mr. Lockerman:

Q. You also knew at that time that Mr. Graham had reported to you that a man by the name of John Carmichael was supposed to have been present when the alleged telephone conversation was intercepted. You knew that, didn't you?

A. Yes, sir.

Mr. Smith: Page 100, Line 22.

By Mr. Lockerman:

Q. What do you mean when you say he would talk with those players or those coaches that good journalism would indicate?

A. If we could get Alabama players to talk about the specific coaching that they were given in the days leading up to the game, that would be helpful, too.

Mr. Smith: Page 112, Line 11.

By Mr. Lockerman:

Q. To what extent did they tell you that it was a fact [fol. 969] that Georgia didn't have anyone who could quick kick?

A. This is Graham quoting George Burnett.

Q. That is Graham quoting George Burnett?

A. Yes.

Q. And beyond that you did not go in your investigation to determine whether or not it was, in fact, true, did you?

A. No, sir, we accepted the statement from Mr. Burnett.

Q. You accepted that from Mr. Burnett?

A. Yes.

Q. Dealing next with the second point that you made, upon which you based your conclusion to accuse him of fixing and rigging, I believe you stated that it was based on the statement, again presumably by Burnett, that,

"Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by

the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off."

That was very significant, I guess, from what you have said in convincing you that the game had been fixed and rigged?

A. It's one fact in many, is what it was.

Q. One fact in many?

A. One fact in many facts.

Q. It was one of the facts among those that you just named as having led you to this conclusion?

A. Yes, one of a half dozen facts.

Q. One of about a half dozen facts?

A. A half dozen or so, yes.

[fol. 970] Q. Did you check with Mr. Burnett any further to determine whether or not he had in fact heard Coach Butts make any such statements as that which I have just read and quoted from?

A. No, sir, I did not check any further.

Q. You now know, don't you, as a matter of fact, that no such statement was made by Mr. Burnett to Mr. Graham, don't you?

A. No, sir, I don't know that no such statement was made. I am under the impression that the statement, as published here, is incorrect, but I don't know whether it was an error by Mr. Graham, by Mr. Burnett. I understand, as I say, that this statement apparently is wrong.

Mr. Smith: Page 115, Line 17.

By Mr. Lockerman:

Q. Did you check to see whether or not in fact any passes were thrown to Woodward?

A. Into Woodward's zone?

Q. Into Woodward's zone.

A. No, sir.

Q. You didn't check on that?

A. No.

Q. Did you have anyone check on that?

A. No, sir.

Q. Did you, at any time before you made these charges for fixing and rigging against these two coaches, did you or did you have anyone review the films that were made of the game involved, to see actually what did happen?

A. I asked that that be done and I believe Mr. Bisher said they were unavailable.

[fol. 971] Q. But you did ask that that be done?

A. Yes.

Q. Who did you ask?

A. I think Mr. Bisher. I think on the Monday, the 25th, in that discussion, I think I asked Mr. Bisher to take a look at the movies.

Q, So you went ahead, though, and printed the story without having looked at the movies or without having had anyone look at them?

A. Yes, sir.

Mr. Smith: Page 118,—make that 121, Line 10.

By Mr. Lockerman:

Q. Then it is not unusual for one college football team to be defeated by another by such a lopsided score as thirty-five to nothing, is it?

A. No, it's not at all unusual.

Q. In the editorial block that you wrote for this story, on Page 80, to which we have referred, you meant by what you said there, did you not, to imply that this game had been fixed and rigged by these coaches because of some betting angle, betting by the coaches, didn't you?

A. No, I did not.

Mr. Smith: 129, top of the page.

By Mr. Lockerman:

Q. Did you have any information that there was any payment of any money or any other consideration that

passed between Coach Bryant and Coach Butts for the [fol. 972] fixing that you say that they entered into?

A. No, sir. No indication of any money changing hands.

Mr. Smith: Page 130, Line 13.

By Mr. Lockerman:

Q. Do you know now that since the publication of this article, that Coach Griffith has disclaimed having said that you quoted him as having said, that is:

"I never had a chance, did I? I never had a chance."?

A. I understand he has and I understand that Mr. Bisher, who was the source of that remark, affirms that it was said.

Q. But you do now understand that Coach Griffith denies that he made any such statement?

A. Yes, sir.

Mr. Smith: 134, Line 11.

By Mr. Lockerman:

Q. So the fact is that you had no evidence of any motive whatsoever for the fixing and rigging, as you claim, of the game?

A. No evidence of motive.

* * * * * * *

WILLIAM C. HARTMAN, JR. called as a witness on behalf of the Plaintiff after having first been duly sworn, testified as follows:

[fol. 973] Direct examination.

By Mr. Schroder:

Q. For the record will you please state your full name?

A. William C. Hartman, Jr.

Q. Where do you live, Mr. Hartman?

A. 342 Dearing Street, Athens, Georgia.

Q. Are you a graduate of the University of Georgia?

A. Yes; I am; Class of 1937, B. S. in Commerce.

Q. While at the University of Georgia did you play football?

A. Yes, sir; I did.

Q. What position did you play?

A. I played fullback most of the time. In my senior year, I played quarterback, halfback and fullback; not at the same time of course.

Q. You were the captain of the team in your senior year?

A. Yes, sir.

Q. And after you left the University of Georgia, did you play professional football?

A. Yes; I played tailback for the Washington Redskins in 1938.

Q. Where were you born, Mr. Hartman?

A. Thomaston, Georgia.

Q. You have been a Georgian most of your life?

A. Yes. I have lived in Thomaston, Madison, Milledgeville, and Athens.

Q. After you retired or left the pro ranks, did you then engage in coaching?

A. I became backfield coach at the University of Georgia January 1st, 1939.

[fol. 974] Q. How long were you on the University of Georgia coaching staff?

A. I was there from that date until January the 16th, 1942, when I was ordered to active duty as a Second Lieutenant in the Reserves. I returned about February 1st, 1946, and remained on the coaching staff until about December, 1956.

Q. And you then retired from the coaching profession?

A. Yes.

Q. And your business is now what?

A. I am a life insurance agent.

Q. And your headquarters are in Athens?

A. Right.

Q. How long have you known Coach Butts?

A. Since 1928.

Q. 1928. That was before he came to the University of Georgia?

A. Yes, sir. When I was playing high school football in Madison, why he was coaching at Madison A & M.

Q. When you were on the coaching staff there at the University, was Coach Butts at that time the head coach?

A. At Madison A & M. I did not go to Madison A & M.

Q. I don't believe you understood. When you returned from the Washington Redskins and joined the University coaching staff, who was the head coach at that time?

A. He had just been selected as head coach at the University of Georgia.

Q. Was Coach Butts the head coach during the entire period that you served on the staff?

A. Yes.

[fol. 975] Q. Did you—your name was mentioned here previously by Mr. Bolton, I believe, as being one that attended a meeting in the office of Mr. Barwick that was attended by Coach Butts?

A. Yes.

Q. Did you attend more than one meeting—

A. Yes.

Q. On this subject?

A. Yes.

Q. Now, Mr. Hartman, I think the meeting that was attended by Coach Butts, he only attended one meeting, did he not?

A. Coach Butts only attended one meeting.

Q. And that would be on Washington's Birthday, February 22?

A. It was Friday, February the 22nd.

Q. Will you, Mr. Hartman, tell us what was said by Coach Butts at that meeting as best you can recollect what it was.

A. Well, we started the meeting shortly after 10:00 o'clock, and we moved over from Cook's individual office

to Alexander Wilson's office across the hall, because it was a larger office. At the meeting, I was there, Cook was there, Dr. Aderhold was there, Mr. Bolton was there, Mr. Colwell was there, Jim Dunlap was there, Bernie Moore was there, and Coach Butts and myself.

Substantially what was said, Dr. Aderhold opened the meeting by stating to Coach Butts that they had had a very serious situation arise and he guessed that Coach Butts wondered why they had asked him to come over all the way from Athens to Atlanta to this meeting, and that Cook, as a law member or the only lawyer on the Athletic Board had done most of the investigation in this situation, that he [fol. 976] would ask Cook to state and give him some idea of what the meeting was about. And so, Cook took over and related to him that on such and such a date that a man had come forward named—no, he didn't call his name, I don't believe, at that moment—and stated that he had come forward with a story that he had overheard a telephone conversation between Coach Butts and Coach Bryant of Alabama, and that during the course of that conversation he had made certain notes on football terminology which he had brought forward to the University's attention, and that was the reason for this meeting.

Q. What did Coach Butts say when he was presented with that statement?

A. Well, actually, I believe, when Cook got to that point he either handed or handed the notes to someone and asked Coach Butts to look at them, and I was watching fairly closely at the time, because—if I may digress a moment, Coach Butts didn't have glasses, and he can't read that type of information without his glasses.

Q. How do you know that? Do you have some background?

A. Well, from 1950 to 1956 it was my duty in every game that we played to type on cards about that size—I don't know what dimension they would be, but cards that you could carry in your pocket, the offensive information and plays that we wanted to use in the game and the de-

fensive information and plays that we wanted to use in the game. This presented quite a problem, because if you were in San Francisco or Los Angeles, or wherever you might be, you had to look up a public stenographer, and it was always a real problem to get a public stenographer who had a typewriter with large enough type so that he [fol. 977] could see it, and we did type that information which is similar information to that contained in the notes on these cards, and we would give him a copy and he would keep them in his pocket, and we'd give a copy to several of the coaches, and the reason that, as I say, that I was wondering how he was going to read that, we had to double space the cards during the course of these ball games over a period of six years in the largest type available, and I was watching him at that point, and I believe, if I am not mistaken, that he borrowed J. D. Bolton's glasses to look at them, and my impression was that he looked at the front page and then he riffled through these succeeding pages, and I didn't think that he really had much knowledge of what information was contained in those notes at that point.

Q. What, if anything, did he say after he had, as you say, riffled through the notes or the sheets?

A. At about the time he got the notes and after he had looked at the front page, his remark was that he had talked with Bryant many times and that it was possible that a telephone conversation could have been overheard, and that he didn't even want to know the name of the individual concerned who overheard the conversation, but that it had been misconstrued, that he had—he had made many telephone conversations to Bryant, and I broke in at that time and I said I could—I knew from my own knowledge that since about 1948 or 1950 that Coach Butts had talked with Bryant many, many times and usually the football—the discussion was about football.

Back in, oh, the later 40's or the early 50's we had a play at Georgia called "37-H," which is a fullback off tackle with the right halfback diving into the line and blocking the de-

fensive guard. At that time it was a right unusual play, [fol. 978] because you didn't usually call on your halfbacks to block a big guard as he dove into the line. And Kentucky, when Bryant was in Kentucky in the late 40's, actually that was the first time I ever saw that play, and I saw it in the movies of the Kentucky games, and I remember specifically at that time we took the play from the movies and used it, and I know at that time they had some discussion about 37-H, and over a period of time and since that time to the present he has talked to Bryant many times on football terminology.

Q. You being a coach in the past and being associated with coaches in professional and college ranks, is there anything unusual about coaches talking at some length about football in general?

A. It has always been true, and since World War II, when the T-formation came into play in the American picture, 98 per cent of the teams used the T-formation. That is the first time they had a real common language, because most of all of your T-formation plays have common names. A 29-tear play is probably the 29-tear play at Wisconsin, and this T-formation terminology came into being shortly at the end of the War or after the War.

Now, before that you had your single wing back; you had your double wing back; you had your short front; you had your Notre Dame box. Those plays were not easy to relate to each other.

When I was at Georgia playing under the Notre Dame box, running off a tackle was a 21-1 play; at the same time Alabama using the Notre Dame box it might be a 38 play. There was no similarity at all. But since the advent of the T-formation, there is a common language, and I met a high school coach on the street today, the chances are be- [fol. 979] fore we had talked very long I would ask him how the 31 trap was doing this year, and he would say, "pretty good," or "we are not getting the timing on the guard pulling."

Q. Does the University of Georgia, like universities throughout the country, hold any clinics during the summer attended by these high school coaches and other coaches throughout the area?

A. Since about 1946 or '47 we always had a clinic at the University and used the Georgia coaching staff in the lectures. I think probably that has been discontinued about 1960, but certainly from the time, a period of ten or eleven years there, we did have a coaching clinic, and attendance would be anywhere from 150 to 200 coaches, mostly high school coaches, in some cases college coaches, and the Georgia staff would lecture.

For example, if it was my job to lecture on pass defense, I would get up and say, "Here we are using a 5-4 defense pass, and if you are going to stop a 29 tear pass, you have to do this." The exact terminology is used that we used at Georgia, and it was copied down in many instances, and in many instances by the coach attending the clinics.

Q. The effect of which would be that high school coaches throughout the State would know the designation of Georgia plays?

A. Without question. They would have that in their notebooks by name, number and terminology. I was curious about this about three weeks ago and was playing golf with a high school coach and asked him what the 29 tear pass meant, and he said, "Of course, I know. I have got it in my notebook from your clinics." And I said, "How many [fol. 980] high school coaches would know that?" And he said, "Everyone, practically, that ever went through your coaching clinic."

Q. In these clinics, do the high school coaches throughout the area, are they also taught about the various formations that are used by the University of Georgia?

A. They are given verbatim our complete offense and defense. At that time it was generally in the spring and summer. There are really no secrets in football or any more since the moving picture taking of the games have

come into play. I would be able to almost diagram a Tech off tackle play right now, having seen them in the Georgia Tech-Georgia game. It is all basic terminology.

Q. After Coach Butts borrowed from J. D. Bolton his spectacles or glasses, as you say, to take a look at the notes, what did he say?

A. He said—

Q. Or have I gone into that?

A. He said substantially that, "I have talked with Bryant many times, and it is possible that this gentleman, whoever he is, I don't want to know his name, could have overheard a telephone conversation and misconstrued the football language that was in the conversation."

Q. Was there any suggestion by anyone present at that meeting that Coach Butts sign an affidavit?

A. Absolutely not. There was never a mention made of an affidavit, except in one connection, and that was with the affidavit that Burnett had made me ten days or two weeks previously, and there was no mention of an affidavit being required of him by anyone in the room.

Q. You, or are you familiar with the notes which Mr. [fol. 981] Burnett said that he made at the time of the telephone conversation?

Mr. Schroder: And, Your Honor, I do not intend to go through them one by one. I think we have had enough of that. But I did want to ask him some general questions.

The Court: Let me ask him something.

Examination.

By the Court:

Q. Mr. Hartman, you said the only mention of an affidavit in that conference was with reference to an affidavit which this other party, Burnett had signed; that is the only time?

A. That is the only time the word "affidavit" was used in reference to Burnett's affidavit.

Q. I believe you said his name wasn't mentioned at that time?

A. His name was not mentioned at that time.

The Court: What was your question, Mr. Schroder?

Direct examination (continued).

By Mr. Schroder:

Q. Take a look at Defendant's Exhibit No. 12, please, sir, which you now hold in your hands, and tell me whether or not you are familiar with copies of those that you have seen?

[fol. 982] A. Well, I have seen these and also copies too. Of course, it's been some time since I have seen them. There are two items in this that are untrue. One is "can't quick kick." I assume they are talking about Georgia. Well, everybody knows that a T-formation quarterback from the T, lining up in the quarterback position, can't quick kick; he'd kick his center in the rear if he did, because there is only one foot behind; he is only one foot behind him, but everybody in the Southeastern Conference in the business of coaching football knows that the University of Georgia did quick kick, and they quick kicked by using that second string quarterback Saye, and they would put him about six to eight yards back of the center in a double wing formation or a shotgun formation or a short punt formation or some similar formation of that type where he would take the direct snap from the center and would have room to quick kick.

If I had been coaching Alabama and Coach Butts had told me that Georgia can't quick kick, I would have thought he was setting me up for a kill, because Georgia can quick kick and has done so in 1961.

Q. If you were, as you say, coaching the University of Alabama in preparation for a game to be played with the University of Georgia, and the information contained in those notes which you have there in your hands was given

to you nine days or eight days before the football game to be played, state to the Court and Jury what assistance that would be or would not be to you in preparing your team to play the University of Georgia?

A. Well, I don't think it would be of any significance at all, because most of the technical information in these notes are basic T-formation plays. The University of Alabama, LSU, or anybody else, anybody in the United [fol. 983] States, somewhere in their offense has all of these plays.

And Georgia, for example, there is a lot of reference in here to slot right and things of that type. Georgia, in 1961, did use a slot right, and Alabama must have seen at least three or four movies, if they follow standard procedure on scouting, they saw the spring practice game of Georgia in 1962, and Georgia, in 1961, did use a slot right, and Alabama opening game of the year, would have to use slot right in the practice or they would not have been prepared to play it the first game.

So that if I had been Bryant, and my assistant coach had been scouting Georgia through movies or through the spring practice game, by August the 15th or certainly August the 25th, I think I would have known that Georgia had been in a slot right so many times, had been in a slot left so many times, that from slot right they would run a 27 play so many times from slot right, they would run a 46 play so many times. That is the type of statistical information that you really need to know in order to know the pattern that your opposing team is going to take.

Another item in this thing is a well disciplined football team; a "well disciplined ball club" is the way it reads. That is not true, because Georgia was not a well disciplined ball club, and most of your references here to personnel would be a matter of opinion.

Now, here is one. I don't know whether they go together or not, but there is a line that says "29-0 series, Babb catches everything they throw." If that term "Babb catches everything they throw" is related to 29-0 series, it would

be impossible. 29-0 series is a series which means 29 over-
[fol. 984] pass. The 2 back, the halfback, that is part of the designation of the signal. The 9 means the hole, the widest hole to the right. It means the 2 back and the 9 hole is going to catch the overpass. I will coach it by going out and lining up as a flanker or they will put him in motion in the 9 hole. The 29-0 series, it would be very unlikely the end would catch the pass. It is designed to go to the man in motion or the man flanking.

Q. Then your testimony is, as I understand it, that if you were preparing to play the University of Georgia's football team, and that was given you, those notes were given you, you do not feel that you would make any use of them because they wouldn't be of any help to you?

A. No; I don't think it would be of any help to me. I would rely on my own scouting information I had gotten through statistical study.

Q. I forgot to ask you this a minute ago. Since your graduation from the University of Georgia, had you any connection with the Alumni Association?

A. Yes. I was President of the University of Georgia Alumni Society in two years and running; I think it was '51 or '52. I was President of the entire University of Georgia Alumni Society, and I am on the Board of Trustees now of the University of Georgia Foundation. I am at the present time Joint Chairman for the Georgia Side of the Joint Tech-Georgia Development Fund Drive over the State outside of the Atlanta area, and I did that job last year also, and I am repeating it this year.

Q. Since Coach Griffith became head coach at the University of Georgia, have you on occasion had the opportunity of discussing the team or the coaching staff with Coach Butts?

A. Yes, sir; I have.

[fol. 985] The Witness: Could I get a glass of water?

The Court: Sure. Bring Mr. Hartman a glass of water.

The Witness: You want me to go ahead and start answering or wait?

Mr. Schroder: You better wait.
The Witness: What was that question, now?
Mr. Schroder: Read it back.

(Whereupon the last propounded question was read aloud by the Reporter.)

A. (By the witness) Yes. Coach Butts and I, of course, have been talking about football for twenty years or more, and it is very seldom that we get together that the discussion doesn't get around to some sort of technical football discussion. Back when he resigned as head coach, whenever it was, '61, maybe, we were discussing the change in the coaching staff, and Johnny had just been made head coach at Georgia, and Coach Butts' statement to me at that time was that he thought Johnny was a conscientious young fellow who was a good organizer and who would do well in recruiting in his contacts with the Alumni, and [fol. 986] he thought the cause of his organization ability that he had a good chance of being successful. At the time I didn't agree with him, and we don't always agree on football, because I thought that he lacked—that he lacked Southeastern Conference experience, but he had mentioned to me a number of times since then that he thought that he would do a good job from the standpoint of being willing to work and having the organizational ability, and given time that he would be successful. And I always said, "I hope so." But I didn't know because the lack of coaching experience is a big factor when you get in the SEC.

Now, from time to time we have discussed the defensive and offensive plays of the football team from a professional objective standpoint. Most of the time Coach Butts would say, "Now, you can't talk about this to the man on the street because they wouldn't understand. It would have to be confidential." But we discussed the end play on the loose 6, the tackle play on the loose 6, the line backer play of the loose 6, and among other things, reference to defense, and we thought the tackle play was not good, that they were not getting across the line of scrimmage and

not making contact and were ending up in the defensive secondary lot. The linebacker in many instances was being caught on the inside on a lot of things, and it was that type of professional criticism. We do the same thing about Auburn. We do the same thing about Georgia Tech. Any good football teams in this area, when two coaches get together, you are bound to get into a professional critique, you might call it.

One of the last discussions we had was on Lotheridge at Tech, and we agreed he did a real good job when he im-
[fol. 987] provised and got to running around back there, but he probably ought to get back in the pocket quicker and stand up straighter and improve his basic techniques. That is not a criticism of Lotheridge; that is just us two football coaches talking.

Q. Making an observation?

A. Yes.

Q. When Coach Butts was head coach at the University of Georgia, who was his most severe critic?

A. He was. Also my most severe critic at times from a football standpoint.

Q. Well, you have, from what you have said, gathered the impression that Coach Butts was a supporter of Coach Griffith at the University?

A. In all my conversations with him he was—he has, certainly up until recently, he has said he still thought that the boys on the coaching staff were—would hustle enough and would be organized enough to come out on top, and certainly he—he made that statement many times in the face of much opposition from a lot of people.

Q. Coach Hartman, over the years has Coach Butts or not had, shall we say, clear sailing with some member of the Board?

A. Well, anytime you are trying to build a successful team in the Southeastern Conference, it is a terrific job, and I would say that over a period of time from 1939 until 1958 or '59, '60, along in there, it's been a terrific struggle because of the dollar problem. The University of Georgia

is not a rich school from the standpoint of the gate receipts, and we have had a problem for getting enough dollars for the number of scholarships permitted by the Southeastern Conference. The Southeastern Conference permits 140 scholarships, basketball, football. At Georgia I was chair- [fol. 988] man of the Scholarship Committee from '53 through '56, and in many instances we knew when we started the season that we could sign 140 boys, that we had sufficient dollars for that, and, of course, the SEC didn't mind how many you signed as long as you didn't sign over 140, but we also had to take into consideration our dollar problem, that we would set up definite schedules that if we signed up 140 and entered them in the fall quarter, we'd have to lose ten of them by January, the winter quarter, because we would not have the dollars to pay for 140 scholarships at the winter quarter registration, and we'd have to lose another ten by the spring quarter and get down to 120, so that we had the constant problem of trying to recruit and fit our personnel inside the dollar budget, whereas many schools in the Southeastern Conference had no dollar problem and simply got the 140 boys, and that was it.

Q. Did that result in some sort of feeling of some sort between Coach Butts and some of the faculty members?

A. Well, I think definitely he had a running battle over a period of years with them on this question of—he wanted to win football games, and, of course, they wanted to stay within the budget, and it was a problem, I think, between he and Mr. Hickman and J. D., and maybe one or two other members of the Athletic Board, the problem of trying to get enough football players on the dollars that you had.

Q. Did you find that you, as an assistant coach there, were also suffering from that same situation?

A. Well, I think anybody who was coaching at Georgia realized that they were competing with the giants of the SEC; they were suffering from the limited amount of dollars available.

[fol. 989] Q. And whose responsibility was it to put a winner on the field?

A. The head coach.

Q. Coach Butts?

A. That's right.

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Cross examination.

By Mr. Cody:

Q. Mr. Hartman, I understood you to—I understood you to say that Georgia had a play which you—which you called the 029, which is the one that you referred to?

A. I testified a moment ago about 29-0, which is a play enumerated.

Q. Did Georgia have an 029 play?

A. They have a current 029 play. It is a different play altogether. 29-0 is a pass, and 029 is the—

Q. There is a difference between the two?

A. Yes.

Q. Two different plays?

A. Two different plays altogether.

Q. You mentioned a moment ago something about Coach Butts' dissatisfaction with some of the coaches procedures down there. Did you ever hear him say they didn't have anybody on the coaching staff that was SEC material?

A. Not to me; no, sir. In fact, he was very emphatic, he thought they were good enough to succeed, given time.

Q. What was the nature of the criticism that you heard him make of Coach Griffith?

A. Well, his chief criticism was about the techniques. [fol. 990] It wasn't necessarily of Johnny; it was the whole coaching staff; and I think he felt like maybe Johnny, because of inexperience on the side line, was not able to recognize what was going on.

Q. Would that include Coach Trippi?

A. Yes. At times he was critical of me while I was coaching.

Q. You have been gone from there quite a while?

A. Several years; yes sir. But in football he is a perfectionist, and many a time he has told me to get the pass defense right, and I have heard him—

Q. But, as a—

Mr. Schroder: Let him finish the answer.

A. (By the witness) I have heard him say, I don't know how many times, from a technical, professional standpoint over there that he wasn't critical of it.

Q. Don't you know, Mr. Hartman, the extent of that criticism has been such that the Alumni of the University have been generally talking about it?

A. To my own knowledge I have never heard him say any critical—

Q. How about the Alumni?

A. People have told me; yes.

Q. Did you know Coach Butts had made speeches in which he openly was caustic about this entire coaching staff?

A. I have been told that.

Q. Haven't you been to two or three meetings yourself where that subject was discussed?

A. Mr. Cody, I don't ever recall going to a meeting and hearing Coach Butts talk, in the last two years, anyway; I don't ever remember attending a meeting in which he [fol. 991] had made a speech, except the Athens Touchdown Club in Athens, and he was not critical at that time.

Q. In the travels you make over the state in connection with your work for the University, and you do some Alumni work?

A. Yes. I don't do any paid work for the University.

Q. I understand. Isn't it true that there is hardly a place that you have been in in the last two or three years where this subject was not discussed?

A. No; that is not true. Hardly a place, I have been some places where it has been discussed.

Q. Well, how many places?

A. I couldn't say.

Q. But it is—

A. I go to many places every day.

Q. But it is a good many places, though, isn't it?

A. That is the report I have been told.

Q. Now, do you have any idea, Mr. Hartman, when this so-called criticism started, can you give us any date or an estimate of it? I am not trying to pin you to any exact date.

A. I really first heard about it seriously, in any quantity, probably last fall, late in the fall.

Q. That was after he became athletic director?

A. Yes, sir; about eighteen months after he became athletic director.

Q. In Mr. Barwick's office when you met there with these representatives of the University, is this a statement that was subsequently made by you concerning that meeting: "My comment after reading the notes—"

Mr. Schroder: Where are you reading from, please, sir?

[fol. 992] Mr. Cody: On Page 42.

Mr. Schroder: Thank you. Just a moment; let me catch up with you.

By Mr. Cody:

Q. "My comment after reading the notes was that I didn't see how a man could overhear this in a telephone conversation, not being familiar with football terminology, and be able to write such specifics down there."

A. I made that.

Q. Then by that you mean that these notes do not contain some reference to specifics?

A. They contain reference to specifics in all T-formation football that is played in the United States.

Q. Mr. Hartman, from your experience in football, haven't you found that the important—one of the important things about an opposing team is when they play to use a particular play or formation, not what the formation is but when they intend to use it; isn't that true?

A. Well, I would think prior to a ball game I would be more interested in their pattern which is established by review of movies and things of that nature; in other words, if Joe Doaks came to me and said, "Georgia Tech is going to shift on you in the first ball game," that would be interesting, but I do know that Georgia Tech's basic bread-and-butter plays are the sweep, the quick pass to the end, and four or five other things that I ascertained statistically.

Q. Isn't it true, Mr. Hartman, in modern football there [fol. 993] are only about eight or nine formations in all; isn't that true?

A. Are you sub-dividing the T-formations into the various slots, flankers and flys?

Q. That would be a various of each formation, but basically there are only about eight or nine formations.

A. As practiced in American football, there is not but one now, to any degree, and that is the—Tennessee is different—it is a single wing back. UCLA—

Q. I mean, formations used by different teams, basically, there are only about eight or nine?

A. I have never really counted up the number in the T-formation. If you are subdividing the T-formation, is that what you are doing?

Q. I can't testify. I am asking you. I can't help you on that.

A. Well, ask your question again.

Q. I am asking you if in modern football that there are only about eight or nine basic formations?

A. I would say there are not but about three.

Q. Now, when you—when you are training a team for the first game of the season, would it be helpful to an opponent to know what they were training for, which formations they were training for?

A. Well, if they had specific information on that it might be, although they would probably already know, because I would have to train them for the first game, the same stuff I used in the spring practice game. I can't teach them in two weeks—

Q. You wouldn't be able to teach a young team, by the first game of the season, all the formations that you intended to use during the entire season; is that a fair statement?

A. Now, you and I have got a different conception of [fol. 994] "formations." I would say that the T-formation is one formation, and that in spring practice you would install your basic task series your going to use, your basic slot series you are going to use, your basic trap series you are going to use, and your basic sweep series you are going to use, and your basic passes, so that the stuff you used in your spring game would be the stuff you'd have to use in the first game, especially when it was that close, that early.

Q. Now, Mr. Hartman, when Mr. Schroder went over with you the nature of the notes—

A. Uh huh.

Q. —which you have in your hand there, or a photostatic copy, sort of a blown up copy of them, did he go over in detail with you the testimony of Mr. Burnett which enlarges on the information in those notes?

A. I don't believe I have ever discussed with Mr. Schroder anything about the notes.

Q. Well, have you discussed it with anybody in his office?

A. I don't recall seeing any blown up things. I saw these, and I saw the photostatic copies.

Q. Who have you discussed these notes with?

A. With Mr. Bondurant, primarily.

Q. How about Mr. Schroder's office; who, in that office, have you talked to?

A. I think I talked with Mr. Smith and Mr.—

Q. Lockerman?

A. —Lockerman about several months ago but not in much detail.

Q. Did they show you the deposition that had been given by Mr. Burnett?

A. No.

Q. What was this you said a moment ago about the

[fol. 995] statements made by Coach Butts that were confidential? Will you repeat that? I didn't—

A. I said that in our many discussions about football, we discussed a lot of teams, and when he was talking about Georgia in recent months, he always said, "Now, of course, I couldn't go out and say this to the man on the street because they wouldn't—they don't know what we are talking about. They wouldn't realize the implications of this thing, and I would be severely criticized." That was his implication, that if he went out and told that to the man on the street—

Q. Do you—

A. It is a very technical discussion. You can't—all you have got, you look at a football team playing, you come back subconsciously with definite implications to you what that football team does well, and, naturally whether it be Georgia or Auburn, or whoever it may be. And I remarked to him on many times the way to beat Georgia was to run wide, run off into the flat. Nothing traitorous about that. I have spent a lot of time out there on the field for Georgia, but that is just a true thing. I think I told Dr. Aderhold that last fall. It is just a sad situation that is brought about by many things, but that is the type of criticism.

Q. When you were talking about that criticism you were discussing—you were discussing his resignation in the early part of 1961, were you not?

A. Coach Butts' resignation?

Q. Yes.

A. No. We were talking mainly about the '61 football season, during the course of the 1961 football season and during the course of the 1962 football season as they were played. You couldn't criticize in '61 the problems of the [fol. 996] football season of '61; it hasn't been played.

Q. Let me ask you this question, then. Do you recall when your deposition was given before a Court Reporter on June the 11th—

Mr. Schroder: Page, please.

Mr. Cody: On Page 29.

By Mr. Cody:

Q. —that this question was asked you, and I want to ask you if you gave this answer. "Did he indicate to you"—meaning Coach Butts—"any bitterness over his resignation or resentment about it?" And you gave this answer: "Well, I think he indicated that insofar as the four people that we have been discussing, that he felt like that they were pretty less than loyal to try to use those tactics to get him out." Was that your answer to that question?

Mr. Schroder: I don't remember the witness having testified to anything contrary to that today.

The Court: Wait just a moment; what is that, Mr. Schroder?

Mr. Schroder: I said I do not remember the witness having given any testimony in that area today. I don't know the purpose of reading the deposition to him. Ordinarily [fol. 997] it is to discredit the witness or prove contradictory statements previously made by him.

The Court: I think he had him on cross-examination, Mr. Schroder. I think he can go into statements he made previously concerning his termination as athletic director. I will let him answer.

The Witness: Mr. Cody, that is a true statement, but it didn't involve any members of the coaching staff or the university. They were four outside individuals.

Mr. Cody: I see.

By Mr. Cody:

Q. Coach Hartman, did you testify that while you were coach on Coach Butts staff at Georgia that you had a play described as the 29-0 series?

A. 29-0 was an abbreviation. It is 29 over; that is the 29-0 referred to here.

Q. Did you know that that name or description of that play is not being used by the present Georgia coaching staff, that is, was not used in 1962?

A. Are you asking me whether I knew that 29 over was used in 1962?

Q. Right.

A. I don't know. I don't recall seeing it, because it involves a man in motion, or it recalls a man stationed wide as a flanker where the quarterback—where the quarterback gets behind the center, takes the ball like that and [fol. 998] throws to a flanking back who is out about twelve yards or to a man in motion.

Q. Did you know that none of the coaches, present Georgia coaches who have testified in this case have recognized this description, but that now you recognize it as a play used by Coach Butts while he was the head coach at Georgia; is that your statement?

A. No; I didn't know that. All I know is what 29-0 means to me.

Q. I want to ask you this question now, Mr. Hartman. At this meeting that you attended in Mr. Barwick's office, did Mr. Barwick have with him at that time an affidavit signed by Mr. Burnett?

A. I would say if he did I don't remember seeing it.

Q. Do you know whether or not he acquainted those present at that meeting with the substance of that affidavit?

A. I believe he did, without revealing the name, but I don't think he ever showed it at that meeting.

Q. Will you state to the Court whether or not Coach Butts ever denied at that meeting that the conversation referred to in that affidavit did not take place?

A. The only thing I remember him saying about that at all was the fact that he had made many telephone calls to Bryant, and that if a person overheard a telephone conversation that he had made, that it could—he could have misconstrued some reference to football terminology. The only thing that he denied was that he had ever done anything to hurt Georgia, and he repeated that several times.

Mr. Cody: I believe that's all.

[fol. 999] Redirect examination.

By Mr. Schroder:

Q. He didn't deny that; he asserted it, did he not?

A. He asserted it.

Q. When Mr. Bondurant of Mr. Cody's office was over there discussing those notes with you, did he show you Mr. Burnett's deposition?

A. No. I don't recall ever seeing Burnett's deposition.

Q. Did you—the first time you saw those notes was sometime in January, 19—let me return those to the Court Reporter before we get them all soiled. The first time you saw these were in January, 1963?

A. Wednesday, February the 13th.

Q. You don't know when they were made?

A. Have no idea.

Q. Don't know who made them?

A. Nothing other than what they told me.

Q. Who said that, Burnett, the man who said he made them?

A. Who?

Q. Burnett?

A. I believe Burnett, when he came before us in a meeting that we had, did say he made the notes.

Q. That is all you know about it?

A. That is all I know about it.

Q. When Wallace Butts resigned as head coach, did he not recommend Johnny Griffith as the head coach?

A. That was my opinion.

Mr. Cody: That is not in rebuttal of anything, Your Honor.

[fol. 1000] Mr. Schroder: Rebuttal? I am putting up my case.

The Court: I think it is admissible. I will let him testify to it. I overrule the objection.

The Witness: I might qualify that. Dr. Aderhold told me that.

By Mr. Schroder:

Q. Dr. Aderhold told you Coach Butts had recommended Coach Griffith as the head coach to succeed him?

A. (witness nods affirmatively).

Q. Answer so the Court Reporter can get it down. Just say "yes".

A. Yes, yes.

* * * * * * *

WILLIAM C. HARTMAN having resumed the stand, testified further as follows:

By Mr. Cody:

Q. Mr. Hartman, you understand you are still under oath in this case as a witness?

A. Yes, sir; I do.

Q. Do you recall that following the 1960 football season that you had a conference—

A. Yes, sir; I recall.

Q. —with Mr. John Bailey, Mr. Hicks Mizell, Mr. Dan Whitmire, and Mr. Dan Spain?

Q. I don't believe it was following the 1960 football sea-
[fol. 1001] son; I think it was in late November of the 1960 football season.

Q. Was that conference in Atlanta?

A. Yes, sir.

Q. Where was it?

A. Capitol City Club.

Q. Was Mr. Harold Walker there?

A. I think he was; I am not sure.

The Court: Who are those parties you mentioned? I know Mr. Harold Walker. How about the other parties?

By Mr. Cody:

Q. Would you describe who they are?

A. You want me to name them?

Q. Who is Mr. John Bailey?

A. Mr. John Bailey is a boy—a graduate of the University of Georgia. I believe he is a native of Georgia who is in the insurance business now.

Q. Went to the University of Georgia?

A. Yes, sir.

Q. Was Mr. Dan Whitmire one of the recruiters for Georgia?

A. I would think you would class him as one of the alumni recruiters; yes, sir.

Q. By "recruiter" you mean one of the young men that contacted prospective players?

A. Right. He'd go out and—.

Q. Undertake—

A. He was not an official representative, of course, like the University, but like many of the supporters of the University of Georgia he would try to influence boys to come.

Q. More or less a voluntary assignment?

[fol. 1002] A. Right.

Q. Inducing young men to come to the University of Georgia that were athletes?

A. I wouldn't say "induced them"; try to get them to come to Georgia.

Q. And Mr. Hicks Mizell, who was he?

A. I didn't know Hicks too well until that meeting. Hicks, I believe, is a manufacturer's representative here in Atlanta, and I assume that he is a graduate of the University of Georgia.

Q. Well, what did you discuss at that meeting with—

Mr. Schroder: Your Honor, that is out of the presence of the plaintiff.

The Court: Yes, sir. I am not going—

Mr. Schroder: You said, what did he discuss.

The Court: I think he can ask what was discussed. That would be hearsay.

By Mr. Cody:

Q. Did—did the subject matter of Mr. Butts come up?
A. Yes, sir.

Mr. Schroder: Same objection.
[fol. 1003] The Court: I think that would be hearsay, Mr. Cody.

By Mr. Cody:

Q. Now, after that meeting did you have a conference with Coach Butts?
A. I went back and talked to him.
Q. Did you tell him what transpired at that meeting?
A. I did.

Mr. Cody: I think now, Your Honor—
The Court: That is not hearsay; that is in his presence.

By Mr. Cody:

Q. Will you tell the Court what transpired in that conversation with Coach Butts?
A. With Coach Butts?
Q. Yes.
A. I told him that these boys, young boys in Atlanta were extremely upset over the recruiting in this section, in the Atlanta area particularly, and they felt like that with him as the coach at the University of Georgia they could not do a good recruiting job.
Q. Why?
A. Because of their—what they told me—

Mr. Lockerman: Your Honor please, unless he went into that with Coach Butts, it would not be admissible.
[fol. 1004] The Court: I assume he went into this with Coach Butts. I understand this is a conversation between Mr. Hartman and Coach Butts; is that correct, Mr. Hartman?
The Witness: Yes, sir.
The Court: I overrule the objection.

By Mr. Cody:

Q. Tell us what that was.

A. They objected to his activities in what was referred to as the Night League.

Q. The Night League?

A. Yes, sir.

Q. What did you understand it to be?

A. I understand it—I understood it to be—

Mr. Schroder: I don't think it is important what this witness understood it to be but what Coach Butts might have thought it would be. What this witness understood somebody else to say and put his interpretation on it—

The Court: Yes, sir; I sustain the objection to that, but I will let him continue the conversation with Coach Butts.

Mr. Schroder: Yes, sir.

[fol. 1005] By Mr. Cody:

Q. Tell us the entire conversation you had with him.

A. Well, let's see; that was quite a while ago. In substance, it was mainly that these four boys—there was another gentleman there too, Frank Spain who was not a graduate of the University of Georgia, that these four boys objected to him as a head coach at the University of Georgia.

Q. Do you mean to tell the Court now that that is the full conversation you had with Coach Butts?

A. That is the sum and substance of it; yes, sir.

Q. Would you like to refresh your recollection by referring to the deposition which you gave several months ago?

A. Yes.

Mr. Cody: May I see his deposition?

Mr. Schroder: If the Court please, may I inquire as to the relevancy of this?

The Court: I believe Coach Butts testified under direct-examination, or he stated that he resigned in 1961 because of high blood pressure—

Mr. Schroder: Yes, sir.

The Court: —in the last two games.

[fol. 1006] Mr. Schroder: Yes, sir.

The Court: And I think it is relevant for the defendant to show, if he can, or if he cannot, that that was not a true statement. I presume that is what it is for.

Mr. Schroder: Is that what this is directed towards proving, that that was an untrue statement?

Mr. Cody: Right.

The Witness: You don't have this indexed, do you?

Mr. Cody: I will give you the page number.

By Mr. Cody:

Q. First look at Page 8, Mr. Hartman. Do you—can you now state whether or not Mr. Arthur Montgomery was the other gentleman you mentioned who did not attend the University of Georgia?

A. No, sir; I didn't say Mr. Arthur Montgomery didn't attend the University of Georgia. I said Mr. Frank Spain did not.

Q. Was Mr. Montgomery at this meeting?

A. Yes, sir; Mr. Montgomery was at the meeting.

Q. Now, first—the first reason that you gave which I believe, if you refer to Page 8, see if that refreshes your recollection.

A. Yes; I stated—I stated here, I imagine, it did say it [fol. 1007] was on account of Coach Butts' activities in the Night League in Atlanta. "What do you understand by activities in the Night League to mean? I would assume that would mean appearances in various nightclubs in Atlanta."

Q. Did you have any—did the conversation with Coach Butts include any discussion about who he was with at these nightclubs?

A. No.

Q. Did it include the subject matter of his—of his conduct at these nightclubs?

A. He never has discussed that with me.

Q. Was that any part of this conversation that you had with Coach Butts?

A. Mine with Coach Butts, no.

The Court: As I understand it, Mr. Hartman, or am I incorrect, Mr. Arthur Montgomery is a Georgia alumni?

The Witness: Yes, sir. Mr. Arthur Montgomery is a Georgia alumnus, and he is very active in alumni work.

By Mr. Cody:

Q. Look at Page 21, Mr. Hartman, and see if that refreshes your recollection to the extent of correcting any statement that you have just made. I want to know now if you informed Coach Butts of anything else which is the subject matter of this complaint by these Atlanta alumni.

A. I presume you have reference to this question: "Did you inform him of these rumors which are being referred to by this Atlanta group?" And I said, "Yes, sir, I did. [fol. 1008] What did you tell him the rumors were? The same as we have already discussed here, that these boys seemed to think that he was making appearances in public places over there, such as nightspots and so forth, with groups, girls, and so forth. Did you indicate to him there was any implication of an immoral relationship with any of the girls with whom he appeared in these nightspots?" And then there was some—my answer was: "Other than association I didn't tell him, I believe. I don't believe I had any specific immoral situations called to my attention in that connection other than just association."

Q. Now, in relating the substance of this conversation, Mr. Hartman, was there any other subject which you communicated to Coach Butts at that time other than what you have related?

A. No; nothing other than what I have related.

Mr. Cody: I believe that's all.

Redirect examination.

By Mr. Schroder:

Q. Mr. Hartman, Coach Butts did discuss with you about the plans he had to resign as head coach because of the last two games, that he had a condition on the side?

A. Coach Butts told me that it had been an uphill fight all the way, and with his high blood pressure and the flood of the heat he had had on the sidelines he didn't think the flutter he had was worth it.

The Court: The flutter he had?

[fol. 1009] The Witness: Yes, sir.

By Mr. Schroder:

Q. The four individuals you named that made, what you indicated a moment ago, complaints, did not include Arthur Montgomery?

A. They did not include Mr. Montgomery.

The Court: How did Mr. Montgomery—I am not sure; how did Mr. Montgomery get in?

Mr. Schroder: He was just at a meeting, that he and Mr. Hartman attended a meeting at these boys' request.

The Witness: Mr. Montgomery was vice-chairman of the Georgia Student Education Fund at the time, and I am the chairman, and in coming to Atlanta I contacted Mr. Montgomery and asked him to be with me.

Mr. Schroder: Just a moment, please.

Mr. Cody: I have a couple of other questions, Mr. Hartman, I want to ask you.

Recross examination.

By Mr. Cody:

Q. After you had this conference with the Atlanta alumni that you mentioned, did you then tell Coach Butts [fol. 1010] that if he didn't resign they were going to the Athletic Board about this subject.

A. I told him it was my opinion there was a probability of him going to the Athletic Board.

Q. Didn't they tell you that?

A. In the first part of the conversation, but in the latter stages of the conversation he indicated a weakening of that desire.

Q. You had something to back up your opinion, factual matter?

A. It was my opinion they might go to the Athletic Board.

Q. Let me ask you this question, Mr. Hartman. You, I believe, have already testified, and I want to go along with you one hundred per cent, but you are one of the prominent alumni of the University?

A. No, sir; I have not testified that I was a prominent alumnus of the University. I am an alumnus of the University of Georgia.

Q. I will concede to that. What—what is your opinion, if these factual matters that you have mentioned were true, what is your opinion with respect to whether or not it would hurt the University?

A. Insofar as my personal knowledge is concerned of these matters, I know of no situation that would hurt the University.

Q. Let's assume, for the sake of argument, that they are true; would they or not, in your opinion, hurt the University?

A. Well, I think you are asking me to make an assumption I never have made. I don't see any reason for me to make such an assumption.

The Court: I think Mr. Hartman can testify as an expert [fol. 1011] on football, but I don't think he can testify as an expert on assumption of hypothetical facts such as that.

By Mr. Cody:

Q. Can you pinpoint the dates of this conference you had with Coach Butts?

A. With Coach Butts?

Q. Yes.

A. In my opinion, it was after the Georgia-Auburn game of that year which would mean we have an off week there before the Tech game, so it must have been approximately the third week in November of that year.

Q. When did he resign?

A. I believe his resignation was announced the last week in December or the first week in January.

Mr. Cody: I see. That's all.

The Court: Do you have any further questions?

Redirect examination.

By Mr. Schroder:

Q. These four boys or any four of the boys indicate they were representing any group other than just themselves?

A. No; I don't recall them—I had known these boys fairly well, with the exception, maybe, of Mizell, and they did not indicate, I don't believe, at the time that they were speaking for anyone other than themselves.

[fol. 1012] Recross examination.

By Mr. Cody:

Q. Did you—did you acquaint any members of the Athletic Board with this situation?

The Court: I believe that would be hearsay.

Mr. Lockerman: That would be hearsay, Your Honor.

Mr. Cody: Not what he did, Your Honor, what they did.

The Court: I will let him testify if he acquainted them, not what he said.

The Witness: I am not certain, but it is possible that I told Cook Barwick.

Mr. Cody: I believe that's all.

Mr. Schroder: I have no further questions.

Examination.

By the Court:

Q. Are you on the Athletic Board, Mr. Hartman?

A. No, sir; I am not.

Q. Who makes up the Athletic Board?

[fol. 1013] A. You want the composition of it?

Q. I don't care about the individuals; in various categories or what.

A. To the best of my knowledge there are eight faculty members. I forgot whether that includes the President of the University; he is on the Athletic Board and chairman. Whether that eight includes him in the figure, I don't remember. And there are seven non-faculty members on the Athletic Board, two of whom are selected each year by the Alumni Society of the University of Georgia.

Q. In other words, the faculty members could control the Athletic Board if they saw fit?

A. If everybody block-voted, I guess you could say the faculty could control it.

* * * * * * *

CHARLES DAVIS THOMAS called as a witness on behalf of the plaintiff, after having first been duly sworn, testified by deposition as follows:

Cross examination.

By Mr. Schroder:

Q. You have told the reporter your name is Charles Davis Thomas?

A. Yes.

Q. Where do you reside?

A. 135 Central Park West.

Q. What is your present occupation?

A. I am managing editor of the Saturday Evening Post.

Q. As such, what are your responsibilities?

[fol. 1014] A. Well, under the—I edit the magazine under Clay Blair, Jr. I am the second editor, second managing editor of the Post.

Mr. Smith: Next page, line 20.

By Mr. Schroder:

Q. How old are you?

A. 34.

Q. How long have you been employed by Curtis or the Post?

A. I have been employed by Curtis since of February of 1961.

Mr. Smith: Go to Page 34, line 18.

By Mr. Schroder:

Q. Let me point out to you the statement in this story which says, and I read from Page 83, at the bottom of the second column:

"But careers will be ruined, that is sure." So that you knew what was involved in this story before it was published? You knew that the careers of two men would be ruined as a result of the publication of the story, didn't you?

A. Yes.

Q. And you would make certain that every source available to you, or every source that might be made available to you, was thoroughly investigated to the nth degree before you would let such a publication as this go before your 18 million readers?

A. Perhaps I might clarify things if I said "every significant source."

[fol. 1015] Q. Or 23 million. Let the record show 23 instead of 18. Is that right? How many readers do you have?

A. We claim 23 million. That is what our circulation people tell us.

Q. The standard of conduct followed by the journalism profession certainly would demand that the most particularityness of care be exercised before it would publish any article which it knew in advance would ruin the career of a man or careers of two men?

A. Yes, and that is the policy we pursued in this case.

Q. Now, when the affidavit which Mr. Graham took from Mr. Burnett was brought back here by Mr. Graham and read to you and to Mr. Kahn, you knew then that a Mr. John Carmichael had been present and discussed these notes with Mr. Burnett on the very day that he says that he wrote the notes and heard the conversation, and you knew that then, didn't you?

A. If this is in the affidavit, yes. If not, subsequently hereafter.

Mr. Smith: Page 39, line 19.

By Mr. Schroder:

Q. The affidavit, you said you attached a great deal of significance to the affidavit, which you said supported your belief that he was telling the truth?

A. Yes, sir; he swore to it.

Mr. Smith: Next page.

[fol. 1016] By Mr. Schroder:

Q. At that time, of course, you were familiar with the fact that he had been arrested and convicted of passing bad checks. You know what a bad check is?

A. Yes, sir.

Q. What are you representing to the person that you are writing that check to when you give him the check?

A. That you have funds to cover the draft.

Q. Well, is that a lie when you don't have the funds?

A. Excuse me?

Q. Is it a lie when you represent to the man that you have the funds and you don't have them?

A. Yes.

Q. And that didn't affect your belief in the credibility of one George Burnett just because he swore to you that this was true?

A. It was a matter that we took into consideration.

Q. Did you take it into consideration to the extent that you made any further investigation as to how many other bad checks he had written?

A. We were aware that there were possibly others at the time, yes.

Mr. Smith: Page 60, line 17.

By Mr. Schroder:

Q. You deliberately didn't interview him?

A. Not deliberately. We didn't see any point to it. He told Burnett—

Q. You made up your mind not to interview him, didn't you?

A. Yes.

[fol. 1017] Q. When you, as a responsible journalist, have under consideration the publication of an article which you know will ruin the professional careers of two men, you feel the necessity of relying on more than just plain hearsay evidence, don't you? You want to go and get the real facts, don't you?

A. Well, I expect my writer to.

Q. I mean the Post. I don't mean you individually.

A. All right, all right.

Q. The Post?

A. Yes, sir.

Mr. Smith: Page 62, line 24, bottom of the page.

By Mr. Schroder:

Q. Now, there were other items which occurred to your sports editor yesterday as being highly important to be checked out before this story was published. One was the

notes Burnett said he took at the time he overheard that telephone conversation. Do you agree with that?

A. Yes.

Q. Did you ever see those notes?

A. I have, yes.

Q. When?

A. After publication of the article.

Q. You went on and published it even though you didn't have that source of information available to you, which you thought was so important you went ahead and published the article without getting that information—

A. We knew the notes existed.

[fol. 1018] Q. But that is not—you wanted to see the notes before you published the article?

A. We would have liked to see the notes, yes.

Mr. Smith: Page 65, line 4.

By Mr. Schroder:

Q. Another item which Mr. Kahn—now, whether you agree with him or not, you let me know—told Mr. Bisher he thought the statement from the Alabama football players ought to be obtained.

A. Yes.

Q. But that was never obtained or those were never obtained, were they?

A. It was my understanding that Mr. Bisher was unable to come up with a player that he thought would add anything to the research on the story.

Mr. Smith: Page 66, top of the page.

By Mr. Schroder:

Q. In other words, what you are saying is this: had Alabama football players been interviewed and said, "No, we saw no difference in the way we were prepared for this game than the way we had planned for it in spring practice," you would not have put that in the article?

A. We might have.
Q. The chances are that you would not?
A. No, I would not say that.
Q. You might not?
A. I said we might have put it in the article.
[fol. 1019] Q. Might have?
A. Yes.

Mr. Smith: Page 68, line 20.

By Mr. Schroder:

Q. But don't you know that if your reputation and your character were at stake and about to be ruined, don't you think that you would like to have the full story presented to whoever was going to judge this thing?
A. It depends on what you mean by the full story.
Q. Carmichael's story.
A. The full story—perhaps we should have gone further into Wally Butts' financial connections, and his personal life, and we didn't. That is part of the story, too, but we didn't print that. There wasn't room. It wasn't germane.
Q. What is the objection, as a responsible journalist, to writing the pros and the cons of a story, particularly when a career is involved? As a responsible journalist.
A. There is no objection. One has to narrow—you have to narrow the field somehow to get an article written. Otherwise, you could spend five years writing the article.

Mr. Smith: Page 71, line 23.

By Mr. Schroder:

Q. Now, you have gone to some length in explaining your reliance upon what Coach Johnny Griffith had to say. Now, don't you know that he has denied having said three direct [fol. 1020] quotes from him in this article?
A. I am aware of that.
Q. Did you submit this article to him to check out his quotes before you published it?

A. No, it is not our practice to submit articles to people who are involved in the article for their approval.

Q. You think—

A. This is true in journalism. You rely on your reporters.

Q. Do you think it is fair to the man who is being quoted or to your 23 million readers to put what you would term as important quotations from that man, when not accurate?

A. At the time we publish them we believe they are accurate.

Q. Have you taken any steps to inform your 23 milllion readers that they were inaccurate quotations?

A. I am not convinced that they are inaccurate.

Q. Even though the man you are relying on says they are inaccurate?

A. It may be a question of the context, and I am not sufficiently familiar with the detailed sources of those quotes to be able to say one way or the other. I am not questioning Coach Griffith's veracity.

Q. Let me put it to you this way: You thought enough of the quotes from Coach Griffith to put them in your article, in order to, as you say, ruin the career of two men. You thought enough of them to put them in there, didn't you?

A. That is correct.

Q. And you relied upon them?

A. Yes.

[fol. 1021] Q. And your 23 million readers read what you were relying upon?

A. That's right.

Q. It has now come to your attention that he has denied making three of those quotations. What corrective steps have you taken in order to clarify the atmosphere with your 23 million readers?

A. We have taken none.

Q. There is another—

A. Had Coach Griffith wanted to write us a letter pointing this out, we would have been happy to publish it in the "Letters" column of the magazine.

Mr. Smith: Turn to the next page, line 9.
Mr. Joiner: What page, please, sir?
Mr. Smith: Next page.

By Mr. Schroder:

Q. Furthermore, the careers have already been ruined, at least the one of Wallace Butts.

Now, you rely again—and you checked this article before it was published? You read it very carefully because it was such an important, shocking, significant story?

A. Are you talking about the article or the editorial?

Q. Yes, the article.

A. Yes.

Q. I am now quoting from the left column on Page 81, which is the first column in the story. This is a quote from [fol. 1022] Burnett, directly, you were quoting from Burnett:

"Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off."

That would be, in your opinion, a right vital bit of information for the defensive football team to know about the offensive quarterback of the other team?

A. Yes.

Q. And that is why you put it in the article?

A. Yes.

Q. Did you know that George Burnett has now said that Butts didn't say that to Bryant?

A. I understand that is true, yes, but—

Q. Have you done anything in connection with correcting that bit of misinformation that you were giving your 23 million readers?

A. No, we have not.

Mr. Smith: Page 83, line 9.

By Mr. Schroder:

Q. Do you intend to imply anywhere in this article that there was any betting on this game indirectly or directly by the principals involved?

A. No.

Mr. Smith: Page 92, line 17—18, rather.

[fol. 1023] By Mr. Schroder:

Q. Are you familiar with the fact that I, as Coach Butts' attorney, wired the Curtis Publishing Company on March 11, 1963, requesting that the article which I had learned through the grapevine was to be published, that it not be published, and in that telegram I wired as follows:

"As Coach Butts' attorney I am informing you here and now of the falsity of the charges contained in the proposed article and to respectfully request that you in the interests of fair and accurate reporting refrain from publishing or otherwise releasing said article so as to avoid totally unnecessary damage to my client. Letter follows."

A. Yes, I saw a copy of that telegram.

Q. Why was it never answered?

A. I referred it to counsel.

Q. It was never answered, was it?

A. I don't know that. I didn't answer it.

Q. I also on that same date wrote a registered letter, return receipt requested, again calling to your attention the absolute falsity of the article and pointing out to the Post the damage or destruction that it would do to my client's reputation and again requesting that it not be published. Did you know that such a letter had been written?

A. Yes.

Q. That also was not answered?

A. I don't know. I didn't answer it.

Q. The article in the issue of March 23, 1963, did come out, as it had been printed?

A. Yes.

Mr. Smith: Page 101, line 21.

[fol. 1024] By Mr. Schroder:

Q. You referred to a portion of the article a moment ago that was changed because you wanted some editorial information from Burnett about the "ordeal" he said he was going through. Did you ever consider it somewhat suspicious that he sat on this matter for almost four months without going to the law about it or without going to the coach of the Georgia football team about it or without going to anybody about it?

A. I thought it a matter of interest, which is why I asked that a fuller explanation—a fuller explanation of why he didn't, be written into the article.

Q. Don't you think if one had done what he claims he did and was interested in football, that he would have done something about it before the game was played, had he actually thought it was to be a rig or a fix?

A. I can't speak for Mr. Burnett. I think—

Q. You would have done it, would you not?

A. Yes, I would have, but I don't expect everyone to behave in the way that I do.

* * * * * * *

Robert Henry Edwards, called as a witness on behalf of the plaintiff, after having first been duly sworn, testified by deposition as follows:

Direct examination.

By Mr. Schroder:

Q. Give me the circumstances now as to what took place [fol. 1025] and what was said when you saw him on January 5th?

Mr. Schroder: "Him" being Burnett.

A. He brought notes in and I looked at them.

Mr. Schroder: Your Honor, I now want to read another portion of Mr. Edwards' deposition, Page 66.

By Mr. Schroder:

Q. When is the next time that you had any connection at all with the Butts-Bryant story?

A. The next time was, I got down to Dublin and I stopped in Dublin to get a cup of coffee and I placed a call to Johnny at that time and reached him and he was getting ready to go out to the West Coast to a football clinic or coaches' conference or something.

Q. That was on January 5th?

A. Yes, sir.

Q. Had you called him at any time before that on January 5th?

A. No, sir; no, sir.

* * * * * * *

FURMAN BISHER, called as a witness on behalf of the plaintiff, after having first been duly sworn, testified by deposition as follows:

Direct examination.

Q. Was any conversation had at that meeting pertaining to reviewing movies of the game?

[fol. 1026] A. To my knowledge, no. There might have been, and if it did it didn't figure importantly in any of our discussions. I would have said that it would have been a very good idea, though.

Mr. Schroder: One further question.

By Mr. Schroder:

Q. Did Mr. Graham or any representative of the Post ask you to check with Alabama players in your investigation?

A. No.

Mr. Schroder: Now, if the Court please, it will be remembered that during the depositions yesterday references were made to what Mr. Bisher had informed the writer of the story. I want to read a few sections from Mr. Bisher's deposition relating to those topics which the writer says Mr. Bisher had furnished him.

The Court: You adopting Mr. Bisher as your witness?

Mr. Schroder: I am adopting him as my witness for this purpose; yes, sir.

The Court: If you adopt him as a witness, he is a witness for all purposes.

Mr. Schroder: All right, sir, I have no objection at all to that.

[fol. 1027] The Court: All right, sir.

Mr. Schroder: Because they—well, I will argue that to the jury.

The Court: The point I was making, he was not under the Federal Rule an adverse witness.

Mr. Schroder: That's right, sir. Could I see board No. 2, just a minute, please. Question to Mr. Bisher—

By Mr. Schroder:

Q. Returning to the article in the Post of March 23, 1963, I am going to read to you, Mr. Bisher, from Page 81 of that article, and I will bring it over there where you can check my reading, and I will read a section from the second column of Page 81 which is headed, "Putting the Pieces Together", and it reads, "In the next few hours Burnett tried to piece together what he knew of Georgia football. Butts, a native of Milledgeville, Georgia, had joined the University coaching staff as an assistant in 1938. A year later he was named head coach. For 20 years he was one of the most popular and successful coaches in the South. Then prominent University of Georgia alumni abruptly soured on him, and on January 6, 1961, he was replaced by a young assistant coach named Johnny Griffith. Butts, filed away in the position of Georgia's athletic director (which he had

held along with his coaching job for some years), was outspokenly bitter about his removal from the field." Did [fol. 1028] you inform that information to the author of the article?

A. No.

Q. Did you furnish to the author of the article, Mr. Bisher, any part of that section which I have just read?

A. No, I did not.

Mr. Schroder: On Page 55, reading from Mr. Bisher's deposition—

By Mr. Schroder:

Q. Did you at any time in conversation with any representatives of the Saturday Evening Post, including Frank Graham, Jr., discuss the figure $70,000 that is referred to in that section of the article that Butts is supposed to have lost?

A. To my knowledge, no.

Q. Now, did you pass that on to Frank Graham?

A. I said I did not.

Mr. Schroder: The next one, Your Honor, is on page 57.

Mr. Smith: Is that another column?

Mr. Schroder: That is Page 82, column 2, board 5. It begins at 56.

By Mr. Schroder:

Q. Reading again from the second column on Page 82 of the Post issue: "Griffith had since spoken of his feelings when he had finished reading Burnett's notes and Burnett [fol. 1029] and Edwards had left. 'I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice.'" The quotes and internal quotes that I just read were given by you to Frank Graham?

A. The prior sentence I had nothing to do with. I did not furnish the prior sentence, reading this way: "Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left."

Q. You did not furnish that?
A. No, I did not.

Mr. Schroder: Your Honor understands I will connect these up with Mr. Graham's deposition when I address the jury.

By Mr. Schroder:

Q. This is one on Page 83 of the article which has already been referred to, "one of the wildest ones—"

The Court: You still reading from Mr. Bisher's deposition?
Mr. Schroder: Yes, sir.

By Mr. Schroder:

Q. I refer specifically to Page 83. It says, "One of the wildest was that Butts was mysteriously and suddenly ill and had entered the State Hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was [fol. 1030] seen in Atlanta at a Georgia Tech basketball game." Did you furnish any of that information to Mr. Graham or the Saturday Evening Post?
A. No, I don't know where they got that.

The Court: All right, sir, anything further from Mr. Bisher's testimony?
Mr. Schroder: I am checking, Your Honor. One final question from Mr. Bisher.

By Mr. Schroder:

Q. Did you give information to the Saturday Evening Post that motion pictures of other games were being scrutinized?
A. No.

* * * * * * *

JOHN C. CARMICHAEL having resumed the stand, testified further as follows:

Recross examination.

By Mr. Cody:

Q. Mr. Carmichael, you understand you are still under oath in this case as a witness?

A. Yes, sir.

Q. And under cross-examination?

A. Yes, sir.

Q. Do you recall that on three different occasions you [fol. 1031] have testified with reference to these particular notes?

A. I don't know about three occasions, but I have testified; I don't know how many occasions.

Mr. Cody: Let me have the notes, if you have got them, please.

The Clerk: All right, sir.

Mr. Cody: Just leave them right there for a minute. I will straighten them out.

By Mr. Cody:

Q. Do you remember appearing in Mr. James Therrill's office on March the 21st, 1963, to give some testimony in relation to this matter?

A. I don't remember the exact date, but I appeared in his office; yes, sir.

Q. That was over at the State Office Building?

A. That's correct, sir.

Q. I'd like to ask you, Mr. Carmichael, if there was a record made, if you recall, of what you said on that occasion?

A. There was—there was no one sitting there making a record. There was a tape recorder there taking down what I said.

Q. Have you since that occasion had an opportunity to read a transcript that was written up of what that recording showed?

A. Yes, sir. I called—they printed something in the paper that I didn't say—

Q. I am not asking you that.

[fol. 1032] Mr. Schroder: I think he has got a right to explain.

The Witness: I have got a right to answer a question.

The Court: Just a moment. Let him ask the question and I will permit Mr. Carmichael to explain it.

By Mr. Cody:

Q. I asked you if you have seen a transcript?

A. Yes, sir.

Q. Of your statement that morning?

A. Yes, sir; I have. Can I explain that, how I saw it?

The Court: Wait just a moment, then I will permit you to explain it.

Mr. Cody: I don't want him to go into some argument with me now about why he said it.

The Court: I am not going to permit him to do so.

Mr. Schroder: I certainly think he ought to be permitted to explain.

The Court: I think he could explain it, Mr. Schroder.

[fol. 1033] Mr. Schroder: Right, sir.

Mr. Cody: I haven't asked him yet what he said on that occasion. I want to get that in first. Then I will let him explain it.

The Court: All right, sir.

By Mr. Cody:

Q. Did you make this statement—

Mr. Lockerman: Whereabouts?

Mr. Cody: On Page 5.

By Mr. Cody:

Q. —referring to Mr. Burnett's occasion when he called your attention to this conversation: "He did have some papers that he said were notes. I did not read these notes." Did you make that statement?

A. I didn't pick them up and read them; no, sir; but I did see the notes.

Q. Did you make that statement?

A. If it is in that transcript, I made it.

Mr. Schroder: That is not contradictory to anything in this case.

The Court: I will let him explain.

[fol. 1034] The Witness: All right. You asked me if I had occasion to read a transcript of this. I picked up a paper a few days later, and the paper had a statement that was attributed to me that I didn't make.

Mr. Cody: Well, Your Honor—

The Witness: Accordingly, I called Mr. James Therrill and told him I wanted a transcript of everything I had said on that tape recording, and he sent it to me, and that is how I got to read it.

The Court: Let me see the notes just a moment. Are you through with him?

Mr. Cody: No, sir.

The Court: All right, sir, go ahead.

Mr. Cody: I am through with the notes. I wanted to lay them out there where he could see them.

The Court: All right; go ahead.

By Mr. Cody:

Q. Do you remember—do you remember making this statement or Mr. Therrill putting this question to you and [fol. 1035] you making this particular answer which I will read; it is on Page 17. "Mr. Therrill: Now, you didn't actually read the notes or go over them with Burnett after he had taken them down?" And your answer: "No, I didn't." Is that correct?

A. If that is what is in that transcript, sir, I am not saying I didn't say it.

The Court: Well, is it correct?
The Witness: Sir?
The Court: Is it correct?
The Witness: It is not correct. I did see the notes, Your Honor.

By Mr. Cody:

Q. In other words—in other words, you misrepresented the facts to Mr. Therrill on that occasion?
A. No, sir; I am not trying to misrepresent anything to anybody.

The Court: I don't think that is a proper way, Mr. Cody. I think that tends to get into argument. You can read what he testified then and what he testified yesterday.
Mr. Schroder: If the Court please, there is no discrepancy between the two.
[fol. 1036] Mr. Cody: I think that is argument.
The Court: That is a matter for argument.
Mr. Cody: It is improper.
The Court: But I don't think his question was proper.

By Mr. Cody:

Q. "Question (By Mr. Therrill): Did Burnett ever relate to you what he had heard over the telephone?" And your answer: "Yes, he did, that day. He told me that very day, as soon as he laid down the phone exactly what he had heard. I guess he told me what he had heard." Did you make that statement?
A. If that is in there, sir, I made the statement.

Mr. Lockerman: And will you finish it where he goes on to say "I don't know".
The Court: Address the Court instead of interrupting like that; address the Court, and I will—

Mr. Lockerman: Well, Your Honor, I do take exception to that.

The Court: I say, you can address the Court for that, Mr. Lockerman.

[fol. 1037] Mr. Lockerman: Yes, sir.

The Court: All right.

By Mr. Cody:

Q. Now, do you remember that I took your deposition later on June 26, 1963, and I am reading from Page 8, and I want to ask you if this is a correct transcript of the questions and answers propounded to you at that particular time, referring to the notes now. Question: "Did you examine them? Answer: I did not take them in my hands, no, sir. He sat back down at my desk and I sat down in a chair next to it and he was telling me. He laid these notes out and he was telling me the things that I just mentioned. He laid the notes down on the desk. They were laying there and I did not see them, but I—"

Mr. Lockerman: If Your Honor please—

The Court: Yes, sir.

By Mr. Cody:

Q. "—did see them."

The Court: Just a moment; just a moment.

Mr. Lockerman: I have a copy of that transcript, and he is over on Page 9, and he says, "He laid the notes down [fol. 1038] on the desk. They were lying there." My copy reads, "And I did see them."

Mr. Cody: I am fixing to correct it.

The Court: Let him get to it, then.

Mr. Lockerman: I mean, Mr. Cody read, "I did not see them." My copy reads, "I did see them."

The Court: He read it incorrectly, is that what you are saying?

Mr. Lockerman: Yes, sir.

Mr. Cody: Yes, sir; I am fixing to correct it.

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CARD 16

By Mr. Cody:

Q. "He laid the notes down on the desk. They were laying there, and I did see them, but I did not pick them up and look at them." Is that your answer?

A. That is absolutely true, sir.

The Court: Give me a copy of the deposition.

By Mr. Cody:

Q. Now, Mr. Carmichael, do you remember that on June 26, 1963, you gave another deposition in which these notes were discussed?

[fol. 1039] A. I think it was all at the same time and at the same place.

Q. One I did not participate in, however. This was the deposition taken by Mr. McCall?

A. Yes, sir.

Q. A Birmingham attorney?

A. Yes, sir.

Mr. Lockerman: Your Honor please—

The Court: Yes, sir.

By Mr. Cody:

Q. On Page 78—

Mr. Lockerman: —I don't happen to have that; may I have the Court's copy?

The Court: I don't think we have a copy of it. I presume he was sworn in another matter. I don't have a copy of it.

Mr. Cody: Mr. McCall was present. Maybe he has a copy he can lend him.

The Court: I don't need it; go ahead.

Mr. Cody: Can I read along with him?

[fol. 1040] The Court: I think you can probably lend one to Mr. Lockerman, if there is another one available.

Mr. Schroder: You don't mind if I sort of look on?

Mr. Cody: No.

The Court: Let Mr. Schroder look over your shoulder.

By Mr. Cody:

Q. I am starting to read—

The Marshal: Let's have order, please.
The Court: Yes, sir.

By Mr. Cody:

Q. —from the bottom of Page 78 this is Mr. McCall's question, still speaking of the Burnett matter: "He did inform you on that occasion that Coach Butts told 'Bear' Bryant that Georgia at this time had one of the greatest football players that had ever played in the history of the University of Georgia?" And your answer: "I don't remember the name of the player, but I do remember that he said that one of the players was a great football player, one of the greatest, he said." Question: "And they had added two new coaches?" Answer: "And they had added two new coaches." Now, getting down to the notes, Question: "I [fol. 1041] believe you stated earlier that you saw some notes?" Answer: "Yes, sir." Question: "Were the notes on a single sheet of paper or many sheets of paper?" Answer: "No, on several sheets of paper. I don't know the exact number." Question: "There was more than one sheet?" Answer: "Yes, sir." Question: "Was it in pen or pencil?" Answer: "That I cannot remember, sir. I just don't know." Question: "Was it on a yellow piece of paper like this or a white piec of paper?" Answer: "There again it was on a pad that I had on the desk. I believe actually—I believe it had a gr y tint to it. It was not white, it was not yellow, I don' believe. I believe the paper had a gray—whitish-gray tint to it." Question: "Was it a ruled piece of paper or just blank?" Answer: "No, sir, a piece of paper—a plain piece of paper except for the man's name that we got it from that was on it, I believe." And then turning to Page 81. Question; "Did he say anything about the notes he took down as part of this conversation?" Answer: "Well, he had the thing there about the ballplayer being great and a note, and as I say, I didn't pick them

up and read them, but I remember that particular thing, and also about the two coaches that were added and also about the fact of the Sunday—fact of the Sunday bit that I mentioned." And then turning to Page 90, still discussing the notes, Question: "Would you recognize the notes, Mr. Carmichael, if you saw them again?" Answer: "I am sure I would, sir." Question: "And were they in a stack or pile, or were they spread out on the desk?" Answer: "They were on several pieces of paper, and while he was talking to me he laid them out one at a time, you know, laid them out on the desk there in front of me." Question: "He never related to you what was on those several pieces of paper?" [fol. 1042] Answer: "He didn't pick them up and read them, no, sir, if that answers your question." Question: "No. I am not asking you that. But as he was putting them out in front of you or placing them in front of you, he never told you what was written on those several pieces of paper?" Answer: "He was telling me about this fellow being a great player and about the coaches and about him asking if he would be home on Sunday. This is the three things." Question: "Those are the only things he told you about—only three things he told you about?" Answer: "This is the only three things I can recall him stressing anything on." Question: "You never looked at those notes outside of seeing them on the desk?" Answer: "I never picked them up. I looked at them there on the desk." Question: "Did you read any of it—any of the writing on the paper itself?" Answer: "No, sir, I didn't pick them up to read them." Have I correctly read the transcript of your testimony given in that case?

A. If that is my transcript, sir, you correctly read it, with the exception that I did see the notes and I did see what was written on them, and I will say that now, sir.

Q. Then you have changed your testimony, haven't you, Mr. Carmichael?

A. If it says I didn't, I am correcting it to say I did; yes, sir.

Mr. Schroder: Your Honor, that doesn't—

By Mr. Cody:

Q. Do I understand your testimony now to say you—

[fol. 1043] Mr. Schroder: Read it back to him—excuse me, Your Honor. I don't think he fully understood.

The Court: Let him read that portion back.

Mr. Cody: What portion do you mean?

The Court: About reading the notes or not reading the notes.

Mr. Cody: All right, sir.

By Mr. Cody:

Q. Question: "Did you read any of it—any of the writing on the paper itself?" Answer: "No, sir, I didn't pick them up to read them."

A. That's right. I didn't pick them up to read them, but I did read them, sir, and they were laid right under my nose to where I could see them, so, I am testifying now that I did read what was wrote down there.

Q. Now, getting back to the evidence which you gave to Mr. Therrill when you were there, on Page 5: "He did have some papers"—referring to Mr. Burnett—"that he said were notes. I did not read these notes."

Mr. Lockerman: If Your Honor please, he has already read that. I marked it as having been read a moment ago.

[fol. 1044] The Court: Is this some of the testimony, or is this—

Mr. Cody: This is the same, but I wanted to get back to it to see if he wants to correct this statement.

The Court: I don't think you can keep repeating, Mr. Cody.

By Mr. Cody:

Q. Mr. Carmichael, you—

Mr. Cody: Let me get one other paper here.

By Mr. Cody:

Q. Where had you been on the morning of September 13, Mr. Carmichael?

A. I believe I had been to my dentist; Dr. Davis in Buckhead.

Q. Who is that?

A. Dr. Davis.

Q. What Davis is that?

A. H. M. Davis.

Q. At Buckhead?

A. Yes, sir.

Q. You know what time you left his office?

A. Well, it was early in the morning I went, and I believe that I—in fact, I am not a hundred per cent positive that is where I went, but I believe that is the only place I could have gone. I will put it that way to you, sir.

Q. Do you have any independent recollection other than that where you might have been?

[fol. 1045] A. I haven't even asked Dr. Davis if I was there that day, but I am pretty sure that is where I was at.

Q. I believe you testified on direct-examination that Coach Leahy at Notre Dame brought his football team down there and brought his players out there to eat with you.

A. I have fed a lot of football teams out there, sir.

Q. Did Coach Butts bring some of his team?

A. No, sir; I never fed the Coach's team.

Q. Did Coach Butts come out there and eat with you?

A. As I mentioned, he eat out there the day I met him; yes, sir.

Q. Well, did he come out there thereafter?

A. No, sir; he was not a regular customer of mine.

The Court: Didn't we go over that yesterday?

Mr. Cody: Yes, sir.

By Mr. Cody:

Q. Did I ask you yesterday, Mr. Carmichael, if at these various businesses that you operated, these night spots, if you had floor shows in all of them?

A. Yes, sir; you did.

Q. What was your answer?

A. In all of the supper clubs I operated I did have floor shows. I did not have a floor show, however, at this place we mentioned earlier. All I served there was food; it was strictly a restaurant. But in the supper clubs I had I did have floor shows in all of them.

[fol. 1046] Q. What—would you mind giving me the names, again, of these supper clubs?

A. Well, I had—

Mr. Lockerman: We went over all that yesterday.

The Court: We went over that, Mr. Cody. What is the use of repeating it?

Mr. Cody: I believe Your Honor is right. I think it is improper.

The Court: There was one at the Clermont Hotel, and so forth.

Mr. Cody: I withdraw the question.

The Court: Is there anything further?

Mr. Cody: Yes, sir.

By Mr. Cody:

Q. I want to find out from you—I want to find out from you, Mr. Carmichael, what the nature of these floor shows were.

The Court: What is the relevancy of that?

Mr. Schroder: What is the relevancy of that?

[fol. 1047] The Court: I think we are getting off—

Mr. Cody: I withdraw that if I can't connect it up.

The Court: —far afield.

By Mr. Cody:

Q. Let me ask you this question, Mr. Carmichael. Did you ever have a conversation with Mr. Scaggs—

Mr. Schroder: Who?

Mr. Cody: Mr. Scaggs.

By Mr. Cody:

Q. —who is an officer of the Foundation Life Insurance Company in which the notes, these Burnett notes were discussed?

A. No, sir; I sure have not.

Q. You have never talked to him about it?

A. I have never talked to Mr. Scaggs about these notes. I have set in on a conversation where it was discussed, but I didn't do any talking.

Q. Do you remember on March the 12th, 1957, filing an application with the City of Atlanta for permit to sell alcoholic beverages or mixed drinks?

A. No, sir; I don't recall that particular date.

Mr. Lockerman: Your Honor, what is the relevancy of that?

[fol. 1048] The Court: I don't know. I was waiting—how do you plan to connect that up?

Mr. Cody: I want to show that he has misstated in this application—

Mr. Schroder: Let him see it.

The Witness: What date is that, sir?

Mr. Cody: March 12, 1957.

By Mr. Cody:

Q. Is that your signature on that paper?

Mr. Schroder: Do you have another copy of it?

Mr. Cody: What?

Mr. Schroder: Do you have another copy of it?

Mr. Cody: No, no.

The Witness: That is my signature; yes, sir.

[fol. 1049] Mr. Schroder: May I, as Mr. Butts' attorney, have a chance to look at the paper?

The Court: Yes, sir; yes, sir.

Mr. Schroder: I haven't seen it.

The Court: I haven't either; I don't know the nature of it.

By Mr. Cody:

Q. Do you see the fifth question on that application?

Mr. Schroder: May I see what it is, Your Honor, that he is referring to?

By the witness:

A. (By the witness) They are not numbered. Would you like to read it, sir?

Q. "What was—"

The Court: Just a moment; just a moment. I don't know what is in that affidavit.

Mr. Schroder: I don't either. May I look at it before he goes into it, Your Honor?

Mr. Cody: Yes, sir.

[fol. 1050] The Court: Yes, sir.

Mr. Cody: That is all right.

The Witness: I have no objection to that.

The Court: While this discussion is taking place—you may step down, Mr. Carmichael.

The Witness: Yes, sir.

(Whereupon the witness was excused from the stand.)

The Court: I will permit the jury to refresh themselves on the outside from now until twenty minutes of twelve, and, as previously, I must admonish you not to discuss the case among yourselves or permit anyone to discuss it in your presence during this fifteen-minute interval. You may now pass out; everyone else remain seated.

The Marshal: Everyone else remain seated, please.

(Whereupon the jury retired from the courtroom at 11:23 a.m.)

The Court: What is it?

Mr. Schroder: This is the document.

[fol. 1051] Mr. Cody: You want me—I can give you the substance of it.

The Court: All right, sir.

Mr. Lockerman: Let him read it.

The Marshal: Let's have order, please.

Mr. Schroder: His Honor will know what it is when he takes one look at it.

Mr. Cody: Might as well take a look at this one at the same time. It's another one.

The Marshal: Everyone remain seated, please.

The Court: Let me see the other one.

Mr. Cody: I'd like to state what the relevancy of it is.

The Court: Yes, sir.

Mr. Cody: I want to show to the Court that on two different occasions he applied to the City of Atlanta for license—[fol. 1052] permit to sell drinks, which is the substance of that application.

Mr. Schroder: I think the application is to sell beer.

Mr. Cody: It's what they call a pouring license, but let's—

Mr. Schroder: Well, it reads "beer."

The Court: Is that the legal pouring license?

Mr. Cody: I think that is what some people call it, but I want to prove by this instrument that they asked him on both occasions whether or not he had ever been convicted of a crime. If Your Honor will let me see it just a minute, I don't want to misquote the application, and I want to show the first one—

Mr. Schroder: I thought you didn't have any extra copies.

Mr. Cody: The first one having been signed on the 2nd day of July, 1940, where it says: "Have you ever been convicted or plead guilty to a crime in any court?" The answer to which he says is "no". And I expect to show that he was convicted on two different occasions, one in the State of Ohio and one in Fulton County, Georgia. One of them, the conviction in Fulton County, Georgia, being in connection with the illegal sale of liquor, and was fined five hundred [fol. 1053] dollars. And I say it goes to the credibility of the witness when a misrepresentation of that sort is made; and, secondly, in regard to the—now, the conviction in Fulton County, however, was not until after that particular application was made, so the one—it was in 1949. Now, this March 12, 1957, they asked him: "Have you ever been con-

victed or plead guilty to a crime in any court"? And he made a checkmark by the answer which says: "Yes". "If so, state the offense and date." Then he puts "1932 but I was not guilty and was released." I want to show to the Court that that is a false statement. I have a duly authenticated copy of the proceedings in which he was tried and convicted and served a sentence in connection with that conviction. And I say that it goes to the credibility of this witness, and we are right down to a point in this case, Your Honor, where credibility of a witness—

The Court: All right. 1940; that's twenty—he made an explanation of it. 1940; that's twenty-three years ago.

Mr. Cody: Yes, sir.

The Court: All right, sir; now, what is—

Mr. Cody: I say that on the—on the credibility of a witness it is a very important issue in this case, because he has stated that these are different notes from the ones which he was first shown when this Burnett affair first came to his attention, and I say that the credibility of a witness in that [fol. 1034] respect is most important.

The Court: Oh, I agree with you; credibility of a witness in any case is most important, but on the second question, which was in '57, he says—he says, "1932—" I don't think that is correct; I think it was 1933, is my recollection.

Mr. Cody: Right, sir.

The Court: "But I was not guilty and was released." I don't know whether that is a false statement or not. Most anybody is never guilty, even though they—and released, they are eventually released.

Mr. Cody: But that is not a correct answer. This question says: "Have you ever been convicted and plead guilty?" My point is, he was tried and convicted.

The Court: That is in 1940, the application you have there.

Mr. Cody: No, sir; this is 57.

The Court: Oh, I must be—I have got the '57 one here. In '57 he says—"Have you ever plead—if so, state the offense and date." "1932." That was, as I say, incorrect; it

was 1933. "But I was not guilty and I was released." I [fol. 1055] don't know whether that is a false statement or not.

Mr. Cody: I think it is for a jury to determine. I think the best that can be said in his favor, it is evasive; but I think it is false.

The Court: These are beer permits according to the petition.

Mr. Cody: Yes, sir. Look at the—look at the—we expect to show the '49, the 1949 conviction in Fulton County.

The Court: All right, sir; what about that?

Mr. Cody: That would—

The Court: Is that a crime involving moral turpitude?

Mr. Cody: It wouldn't matter. It is a misstatement in this application; it is a misrepresentation to the public authorities, and it goes to the credibility of this witness. That is the—that is the purpose in the City officials undertaking to issue these licenses to see that they are issued to people without a criminal record.

The Court: Well, what is your '47? Is that an application for a beer license?

[fol. 1056] Mr. Cody: '49. No; the '49 was the date of the conviction that I referred to in Fulton County.

The Court: What was that for?

Mr. Cody: In which he was tried and convicted and fined five hundred dollars.

The Court: Well, that would not be a crime involving moral turpitude.

Mr. Cody: No, sir, it would not. We are not talking about impeachment; we are talking about credibility.

Mr. Schroder: If the Court please—

The Court: Go ahead.

Mr. Schroder: —I am asking for a copy of the conviction. Mr. Cody is standing up here saying he was convicted, and I ask for a copy of the conviction; he says he doesn't have it. He is talking about this '47 thing?

The Court: In Fulton County.

[fol. 1057] Mr. Cody: That is a matter of proof.

Mr. Schroder: Well, do you have it?

The Court: The Fulton County—the Ohio conviction, I have seen that, but I am not familiar with Fulton County.

Mr. Cody: Yes, sir; I have that, and I propose to introduce it in evidence again, but the conviction was on March the 22nd—no, it involved a matter that occurred in 1949, but was tried on March 22nd, 1950, in the Criminal Court of Fulton County, case number 225,584. I will be prepared to present a copy of that to the Court if—

Mr. Schroder: As I understand it, that is the only way he could prove it is by a certified copy.

The Court: He is not attempting to do that. I believe, Mr. Schroder, he is trying to show that the witness made application for a beer license, I assume under ordinances of the City of Atlanta, and in that application he made a sworn statement to the effect that he had never been convicted of a crime.

Mr. Schroder: You mean—

The Court: And I assume—I haven't seen that particu- [fol. 1058] lar, your later application, the application he actually had been convicted of a crime. That is a proper way of impeaching him, but I am not going to let you go back into this '33 conviction. I don't think he—there is a question in my mind whether he improperly answered that question, but on your liquor violation, if you have—I assume he would admit it, and if he doesn't, that is a matter—

Mr. Cody: All right, sir.

The Court: But I am not going to let you go back into that '33 one.

Mr. Schroder: Just a minute.

Mr. Lockerman: May I point out something to the Court?

The Court: Yes, sir.

Mr. Lockerman: He is claiming he improperly answered this question that he is referring to, and I assume he is talking about the one of March 12, 1957, application for beer license. The question was: "Have you ever been convicted

—" and then they have struck out, you know, "or plead guilty to a crime in any court." There is a—

Mr. Schroder: He checks "yes".

[fol. 1059] Mr. Lockerman: He checks "yes". The form itself has two answers, one "yes" and one "no". This copy which he has furnished to us shows he checked the answer "yes, I have been convicted", and then he shows that it was in 1932.

The Court: Well, I am not going to let him go into that. What I was questioning him about was the violation of some liquor law in '47, '49.

Mr. Schroder: Violation of some liquor law in '47 or '49?

The Court: That is what he said.

Mr. Schroder: Well, he answered "yes".

The Court: How many applications do you have there, Mr. Cody?

Mr. Cody: Two.

The Court: Let me see the second one. I have only seen one of them. I had two copies of one; I mean, they are the same one.

Mr. Lockerman: That is the one in 1957.

[fol. 1060] The Clerk: Let me have those two?

Mr. Cody: Here is one of 1957, March 12.

The Court: I have that one. Where is the other one?

Mr. Cody: Here it is. I thought it was given to you.

The Court: Well, the one on July 22, 1940, they asked the question: "Have you ever been convicted or plead guilty to a crime in court?" He says, "No."

Mr. Lockerman: That's right. That was twenty-three years ago.

Mr. Schroder: And the liquor law hadn't been violated.

The Court: I am going to exclude that evidence. I want to be fair to the witness. I am going to rule it out. I want to talk—I want to ask the witness some questions when he comes back.

Mr. Cody: Are you ruling out the 1957?

The Court: I am ruling both out. Let's take a recess for ten minutes.

[fol. 1061] (Whereupon Court recessed at 11:35 a.m., reconvening at 11:52 a.m.)

After Recess

The Court: You may continue. Did you want some more questions from Mr. Carmichael?

Mr. Cody: Yes, sir. I thought the Court said he wanted to ask him some questions.

The Court: No, sir; I am not going to ask him any questions.

Mr. Cody: I have one more.

The Court: You have one more?

Mr. Cody: I want to ask him about that—

The Court: All right, sir; all right, sir; let him come back in.

JOHN C. CARMICHAEL having resumed the stand, testified further as follows:

[fol. 1062] Recross examination (continued).

By Mr. Cody:

Q. Mr. Carmichael, in March of 1950 were you tried and convicted in the Criminal Court of Fulton County on the illegal charge of liquor?

A. No, sir; I don't believe so. If you have got a record, sir, to say I was, I was.

Q. I am asking you—

A. I don't ever remember being charged in my life with the illegal sale of liquor.

Q. Were you tried in the Civil Court of Fulton County and convicted of any such charge—

A. I was tried—

Mr. Schroder: They don't try those cases in the Civil Court of Fulton County.

By Mr. Cody:

Q. In March of 1950—

Mr. Lockerman: Your Honor, that is not the proper way to do it. I think he has to have the record of conviction.

Mr. Cody: I will get the record.

The Court: No, sir; he can ask him, first, and if he denies it, then he brings forth the record. If he admits it—

The Witness: I am denying I was charged with the sale of—illicit sale of liquor.

[fol. 1063] By Mr. Cody:

Q. In March of 1950 in the Criminal Court of Fulton County, what were you charged and tried on?

A. I was charged with being in possession of out-of-state liquor without a Georgia stamp on it.

Q. Were you convicted?

A. Yes, sir.

Q. Were you fined or did you serve a sentence?

A. I was fined a fine, sir.

Q. What is that?

A. I did not serve a sentence, no, sir.

Q. You were fined? How much?

A. To the best of my recollection it was five hundred dollars.

The Court: How is that admissible, Mr. Cody?

Mr. Cody: In connection with this—with the misstatement in the application for this license which was subsequently applied for.

The Witness: That was seven years later.

The Court: All right, sir, go ahead.

Mr. Cody: I have one other question that I want to clear up.

By Mr. Cody:

Q. Did I understand you to say in your testimony yesterday, Mr. Carmichael, when Mr. Schroder was asking [fol. 1064] you about these particular notes which are on the Judge's desk, you made this answer: "No, sir; these are not the same notes that Mr. Burnett handed me."

A. Showed me; he didn't hand them to me; he showed them to me.

Q. Then, is it your testimony now that you did not say yesterday that they were handed to you?

A. If I did, I was in error.

* * * * * * *

Redirect examination.

By Mr. Schroder:

Q. This matter that you were just questioned about in relation to the out-of-state liquor, you testified about that to Mr. Cody when he took your deposition, didn't you?

A. I certainly did.

Q. You gave him all the details then?

A. I certainly did.

Q. And what were the details?

A. The details were that I bought some whiskey from a gentleman from Kentucky. It had Kentucky stamps on it. I did not buy this whiskey to sell; I had no intention of that. I used it—I was using it for a gift to give away for Christmas presents. That was my reason for buying it. And a fellow by the name of John Bradley, who had charge of all the liquor associations in Georgia, found out that I had this whiskey, and he was getting about twenty cents a case on all Georgia liquor that had Georgia stamps on it, and he reported it to the State Revenue Department that I had some whiskey with out-of-state stamps on it. The State [fol. 1065] Revenue agent came to where I was and had it and made a case against me.

Q. Just for possessing it?

A. Just for—well, it wasn't against the law to have the whiskey, Mr. Schroder; it was against the law not to have a Georgia stamp on it, which I didn't even know.

Q. It had a Kentucky stamp on it?

A. Right. I didn't even really know that. That was—anyway, I was charged with that, but I did not sell any of the liquor, and I have not been charged with the illegal sale of it, I am sure.

Q. All right, sir. That is what you told Mr. Cody some months ago?

A. That is exactly right, sir.

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By Mr. Schroder:

Q. What is the name of the concern at the bottom of each page on those notes?

A. Well, it is—the name says, "Compliments of H. E. Knight, Banner Printing Service, Conley, Georgia" with his telephone number.

Q. How many pads with that name on them did you have in your office on Eleventh Street?

A. Oh, probably forty to fifty.

Q. When the office was closed on Eleventh Street, were the pads taken home by those who worked there?

A. By me and Mrs. Burnett; yes; we divided up all the little things in the office that were any good, and we figured we could use these scratch pads, and both of us took some of them.

Q. All right, sir. When is the first time that a photostat or other copy of those notes—when is the first time they have [fol. 1066] ever been or were they ever shown to you?

A. Well, the first time I ever saw a copy of these notes was when the Attorney General and Legislative Committee from the State of Alabama came over here to Atlanta and questioned me, and they showed me a photostatic copy of those notes.

Q. What did you at that time tell them with respect to whether or not they were copies?

The Court: We are getting into the investigation of the Attorney General of Alabama—

Mr. Schroder: Oh; all right, sir.

The Court: —and Alabama, and I don't think that would be—I think we are opening the door, Mr. Schroder.

Mr. Schroder: All right, sir.

By Mr. Schroder:

Q. The first time then—do you remember about when that—do you remember about when that was that you first saw a reproduction of these notes?

A. I don't remember the exact date, Mr. Schroder.

Q. Was it after you had given the answers to the questions propounded to you by Mr. Therrill that Mr. Cody was asking you about this morning?

A. It was after I talked to Mr. Therrill; yes, sir.

[fol. 1067] Q. When you were being questioned by Mr. Therrill, did he show you a reproduced copy of these notes?

A. He showed me nothing.

Mr. Schroder: That's all I have, Your Honor.

The Court: Any further questions of Mr. Carmichael? Let him go down.

Mr. Cody: You can be excused.

Mr. Schroder: Just a minute.

The Court: Just a moment, Mr. Carmichael; they are conferring.

Mr. Schroder: One more question.

The Court: Let him come back to the stand.

Mr. Schroder: I should have consulted my associate before I said that was all.

By Mr. Schroder:

Q. How did these notes, being Defendant's Exhibit 12, differ from those which Mr. Burnett showed you on Sep-

[fol. 1068] tember 13 in the handwriting or any way that you can describe?

A. Well, let me answer that by saying this, Mr. Schroder. Mr. Burnett is quite a doodler, and on the original notes that Mr. Burnett showed to me immediately after he was supposed to have heard this conversation, I recall very vividly that on the first page he showed me there was only one thing wrote on it; there was quite a bit of doodling on the notes that he had, but the only thing that was on that front page outside of doodling was the name of Coach Wally Butts and Coach "Bear" Bryant. On this page the word "Coach" is not on here. This is the only thing that was on that page except the doodling, and it was not written across that page this way at all; it was written this way, sideways. The balance of these notes I did not see. I did not see page 2 at all or page 3 or page 4 or page 5 or page 6 or page 7; none of these pages are the pages that Mr. Burnett laid down in front of me that morning and showed me. He did have four or five pages in his hand, and on one page was the words "Coach Wally Butts" and "Coach 'Bear' Bryant". On another page was wrote a name of a football player with a lot of doodling on it, and it had on there "great football player" or words to that effect, "greatest in history" I believe were his exact words. On another page that he laid down it had "call Sunday" or "Will you be home Sunday, will call"; that is the way it was, "Will you be home Sunday, will call." There was no notes at all with some of the things you have on these notes, that are on these notes. There was no such thing as "10:40 a.m." or "641" or "September 13" or "Jackson 5-3536" or "Athletic office" or any of these things. There were none of these things on the notes Mr. Burnett showed to me.

[fol. 1069] Mr. Schroder: All right, sir; that's all, Your Honor.

The Court: All right, sir, any further questions?

Recross examination.

By Mr. Cody:

Q. How long did you say you had known Coach Butts?

A. Coach Butts?

Q. Yes.

A. I have been acquainted with him for about fifteen years.

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HAROLD HECKMAN called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Your name is Mr. Harold Heckman?

A. That's right, sir.

Q. How long have you lived in Athens, Mr. Heckman?

A. Forty-two years.

Q. Are you connected with the University of Georgia?

A. I am head of Accounting and professor of Accounting at the University.

Q. Are you a member of the Athletic Board?

[fol. 1070] A. Yes; I am.

Q. How long have you been a member of that Board?

A. Since 1946 or '47.

Q. Would you—

A. Right after the War.

Q. Would you give the Reporter the personnel of that Board, if you can remember the entire list?

A. Mr. Bolton, Mr. Driftmier, Mr. Biscoe, Mr. Mills, Dr. Scott, Mr. Sankin—Georie Sankin has been a member—Mr. Tommy Parris, Mr. Bradshaw.

Q. Is Dr. Aderhold a member of that Board?

A. He is chairman of the Board.

The Court: How many are professors are connected with the University and how many are alumni?

The Witness: The majority.

The Court: Can you break them down that way?

The Witness: The majority of the Board has to be connected with the University.

Mr. Cody: Faculty members?

The Witness: Faculty members of the University.

[fol. 1071] By Mr. Cody:

Q. What is the purpose of the Athletic Board, Mr. Heckman?

A. To administer the athletic program of the University, the intercollegiate program.

Q. How long have you known Wallace Butts?

A. Since 1946. He came one year while I was away.

Q. Have you known him intimately during that time?

A. I have known him; I wouldn't say intimately; I have known him; I have met with him very often. I have had very numerous meetings, consultations with him. I would say I know him very well.

Q. State whether or not you know the general character of Wallace Butts?

A. I think I do.

Q. Is it good or bad?

A. I would say now it is bad.

Mr. Schroder: If the Court please, I think the proper question is reputation, is it not?

The Court: No; it's character, Mr. Cody—Mr. Schroder.

Mr. Schroder: Well, I just—

By Mr. Cody:

Q. Could you state to the jury—

The Court: The proper question is: Please state whether you know the general character of the witness in the com-[fol. 1072] munity in which he lives. That witness' answer

is "yes" or "no." What is that character, good or bad? And then—

Mr. Schroder: That's right.

Mr. Cody: You reading Code Section 1804?

The Court: Yes, sir. I am familiar with that. I was reading from Professor Green's book on Evidence, taken from the Code section.

By Mr. Cody:

Q. Mr. Heckman, would you tell the jury whether or not, from that character, you would believe Mr. Wallace Butts on oath?

A. I would not.

Q. How long did you say you had been a member of the Athletic Board?

A. Since immediately after the War, about 19—either 1946 or '47.

Q. Will you state to the jury whether or not this opinion that you have expressed with respect to Mr. Wallace Butts' character, if that applies prior to this Bryant affair?

Mr. Schroder: I don't think—

The Court: I don't think you can go any further. I think the law limits you to the questions you propounded. [fol. 1073] Mr. Cody: I think you are right, Your Honor.

By Mr. Cody:

Q. Have you observed—as a member of the Athletic Board, have you formed any opinion with respect to whether or not the conduct of Wallace Butts has hurt the University of Georgia?

Mr. Lockerman: Your Honor—Your Honor please—

The Court: I don't think that is a proper question.

Mr. Cody: I think it is.

The Court: Let the jury go to the jury room.

(Whereupon the jury retired from the courtroom at 1:59 p.m.)

Mr. Cody: Your Honor—if Your Honor has any doubt about it, I will withdraw it. I admit it's a debatable question.

The Court: Yes, sir; I do have doubts about it.

Mr. Schroder: Well, bring them back in.

[fol. 1074] The Court: Let them—if there is—while they are out, if there is any other question on this, I think now is the time.

Mr. Cody: He has—he has stated in his direct-examination, Mr. Schroder, that he has never done anything to hurt the University of Georgia.

The Court: Yes, sir; but under—under character, as I understand it, the way you—

Mr. Cody: We are beyond—

The Court: —are limiting it, under the Cox versus Strickland case in 101 Georgia, and I think that is the leading case not only in Georgia law, all the Federal courts have allowed it. But you are limited to these particular questions.

Mr. Cody: We are beyond the character evidence now. I was getting off into something else.

The Court: But you were bordering—you were bolstering your character evidence, as I understood your question.

Mr. Cody: I was not—that was not my purpose.

[fol. 1075] The Court: Well, you were—it is my recollection your question was: Have you noticed his conduct, on the Athletic Board, as a member of the Athletic Board, have you noticed his conduct? And I don't think that is admissible.

Mr. Cody: I will withdraw the question.

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Examination.

By the Court:

Q. How many members of the Board are there?

A. I believe it's nineteen.

Q. And the majority—

A. Are faculty.

Q. —are faculty?

A. Connected with the University.

Q. And the others are alumni? How are the others appointed, two by the Alumni Association?

A. Yes, sir.

Q. And the others appointed by whom?

A. By the President, I believe.

Q. The President?

A. Yes, sir.

* * * * * * *

WILLIAM THOMAS BRADSHAW called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

[fol. 1076] Direct examination.

By Mr. Cody:

Q. Mr. Bradshaw, will you give the Court Reporter your full name?

A. William Thomas Bradshaw.

Q. Where are you from, Mr. Bradshaw?

A. Canton, Georgia.

Q. Canton?

A. Yes.

Q. Are you an alumnus of the University of Georgia?

A. Yes, sir.

Q. When did you finish?

A. 1951.

Q. Did you play football?

A. Yes, sir.

Q. Were you there while Mr. Wallace Butts was coach?

A. Yes, sir.

Q. Are you a member of the Athletic Board of the University of Georgia?

A. Yes, sir.

Q. How long have you been a member of that Board?

A. January of '61.

Q. In January of 1963, did you have an opportunity to have a conference with Mr. Wallace Butts?

A. Yes, sir.

Q. Where did that conference take place?

A. Mr. Cook Barwick's office.

Q. Here in Atlanta?

A. Yes, sir.

Q. Can you pinpoint the date for us?

A. The 18th—I believe it was the day of the Touchdown [fol. 1077] Club banquet that night; I believe the 18th, Saturday.

Q. The 18th?

A. Yes, sir; I believe so.

Q. Was anyone present other than you and Wallace Butts?

A. Mr. Barwick; yes, sir.

Q. Did he subsequently leave the meeting, Mr. Barwick?

A. No, sir.

Q. Do you remember the subject matter of that discussion?

A. Yes, sir.

Q. Will you tell us what it was.

A. It had to do with our bringing it to Coach Butts' attention that it might be wise for him to resign as athletic director of the University of Georgia.

Q. What did he say?

A. He said he would contact Dr. Aderhold and would comply with his wishes.

Q. Did you acquaint him at that time with the reason for that request?

A. Yes, sir.

Q. Were you speaking individually or for the Board of—

A. We were asked by the Executive Committee of the Board to speak to Coach Butts.

Mr. Lockerman: If Your Honor please, I don't think he ought to go into any conversation he had outside the presence of the plaintiff.

The Court: I will let him state his authority for talking [fol. 1078] to him. You were authorized by the Executive Committee of the Athletic Board?

The Witness: To speak to Coach Butts on this subject; yes, sir.

The Court: And you were complying with that request?

The Witness: Yes, sir.

By Mr. Cody:

Q. What was the reason for making this request?

A. There were several.

Mr. Schroder: I don't think their reason would be relevant unless that was pointed out.

Mr. Cody: That is what I am trying to get to.

Mr. Schroder: Ask it that way.

The Court: Just a moment; just a moment.

Mr. Schroder: Your Honor, he is—

The Court: I will let him ask whether or not he stated [fol. 1079] to Coach Butts in Coach Butts' presence the reasons for the resignation.

The Witness: Yes, sir.

By Mr. Cody:

Q. You did?

A. Yes, sir.

Q. What was that reason?

A. That Coach Butts' many business interests were taking so much of his time away from his duties as athletic director, the fact that he had become involved with loan companies, and this has been brought out in the newspapers in Atlanta which didn't do anything for his image as an athletic director of the University. I believe those were the main two.

Q. Can you recall any others?

A. Not that we said to Coach Butts. There were others mentioned at the Executive Committee meeting, but we didn't see any sense in bringing them up at this time.

Q. Do you—do you know whether or not Coach Butts thereafter went to see Dr. Aderhold? Don't go into any conversation with him if you were not present, but do you know whether or not—

A. He went to see Dr. Aderhold.

Q. Did Coach Butts thereafter resign?

A. Yes, sir.

Q. Now, what was the date on that resignation?

A. That would be effective either June 1st or June 30.

Q. What date did he resign, not the effective date?

[fol. 1080] A. Oh, this was the following Monday after our conversation.

Q. That would be the 20th?

A. Yes, sir.

The Court: You all speaking—are you referring to January or February?

The Witness: January 20.

Mr. Cody: January 20.

The Witness: Yes, sir; January 20. I would like to say this—

Mr. Schroder: Wait a minute, now, I think—

The Court: I think the orderly way to conduct it, Mr. Bradshaw, is to let Mr. Cody ask you the question and you answer.

The Witness: I was going to explain.

The Court: That is all right. You want to explain a previous answer?

The Witness: Yes, sir.

[fol. 1081] The Court: You can explain your previous answer.

The Witness: I know that he went to see Dr. Aderhold the following Monday. I know that he did resign, and I feel certain that it was at this time that he did turn in his resignation in the form of a letter.

By Mr. Cody:

Q. Are you familiar—

Mr. Schroder: I think the letter would be the highest and best evidence, if we are going into the contents of the letter, unless this witness—

By Mr. Cody:

Q. Mr. Bradshaw—

The Court: Isn't that letter in evidence?

Mr. Cody: That is another letter.

Mr. Schroder: I don't think it is—I say that would be the highest and best evidence, the contents of the letter would be the letter itself.

The Court: Yes, sir; I was under the impression that letter was in evidence.

[fol. 1082] Mr. Cody: That is another letter you have reference to. That is the one of February—

The Court: I excluded that testimony, then, if—the letter would be the highest and best evidence. I sustain the objection.

By Mr. Cody:

Q. Mr. Bradshaw, will you explain to the Court, state to the Court whether or not at the time you had this conversation with Coach Butts on January 18 you had any knowledge, directly or indirectly, of the Bryant affair which later came to light?

A. No, sir; I have no knowledge.

Q. This preceded?

A. Yes, sir.

Q. Now, when the—when the so-called Bryant affair came to light, which is involved in this case, do you know whether or not Coach Butts submitted another resignation effective at an earlier date?

A. Yes, sir.

Q. Do you know what effective date that was?

A. Towards the latter part of February, effective immediately, as well as I recall.

Mr. Schroder: I again say—

The Court: Is that the resignation that is in evidence? [fol. 1083] Mr. Schroder: I don't know whether that letter is in evidence or not. If it is not, it would be the highest and best evidence.

The Court: If he has seen the letter—

Mr. Schroder: No, sir; he has got the letter itself, and it would be the highest and best evidence.

Mr. Cody: It is already in.

The Court: It is already in? I will let him state a letter of resignation was submitted.

By Mr. Cody:

Q. Mr. Bradshaw, did you attend what is known as a Georgia Touchdown Club meeting in Jacksonville, Florida, when Coach Butts made a speech?

A. No, sir.

Q. Did you attend an Atlanta Touchdown Club meeting on January the 15th, 1963?

A. Yes, sir.

Q. Do you know whether or not Coach Butts made a speech at that meeting?

A. Not a speech; no, sir. Darrell Royal, director of athletics at the University of Texas, made a speech, and Coach Butts may have said something in behalf of Mr. Royal.

Q. Will you state to the Court whether or not you have attended any Touchdown Club meetings of the University [fol. 1084] of Georgia alumni where Coach Butts made any comment about the Athletic Board or the coaching staff of the University of Georgia?

A. No, sir; not any gatherings of that nature.

Q. Did you attend the football scrimmage on September 15—

A. Yes, sir.

Q. —before the Alabama-Georgia game of 1962?

A. Yes, sir.

Q. Where was that scrimmage held?

A. On the regular practice field on Ag Hill.

Q. Was that a sort of closed bull session?

A. Yes, sir; except to people invited by the coaches.

Q. Do you know whether or not Coach Butts attended that practice?

A. Yes, sir; he, along with the rest of the Board, Athletic Board.

Q. Did you see the entire practice that afternoon?

A. Yes, sir.

Q. Do you know whether or not Georgia used, in that practice, the plays they intended to use in the Alabama game?

A. No, sir—I am sure they must have, but I don't know play-for-play that they did.

Q. Mr. Bradshaw, would you state whether or not you are familiar with the general character of Wallace Butts?

A. Well, insofar as being associated with him as my coach and then as athletic director, I would to that extent, Mr. Cody.

Q. From that knowledge, can you state whether or not—

[fol. 1085] The Court: I don't believe that is a proper question. I think you have got to ask the question: Do you know the character and reputation of the plaintiff or the witness, whoever it might be, in the community in which he resides, and the community, of course, doesn't mean confined to the exact community, it is co-extensive with his reputation, but I think you have got to propound the question, Mr. Cody, exactly as the Code sets out.

Mr. Cody: I'd like to call Your Honor's attention to one decision that varies from that.

The Court: Well—

Mr. Cody: It is not necessarily in the community where he lives.

The Court: I didn't say that. I said it is co-extensive with his reputation.

Mr. Cody: I see.

The Court: It can be all over the State or all over the United States. I think you would have to confine yourself to the Code. I mean: Do you know the character and reputation in the community? And you can explain what the community would be.

[fol. 1086] By Mr. Cody:

Q. Do you think you are familiar with his general character in the community?

A. Character or reputation?

The Court: Character, character.

A. (By the witness) I believe so.

Q. From that knowledge, can you state whether or not it is good or bad?

A. I would say "bad."

Mr. Cody: I believe that's all.

The Court: All right, sir. Just a moment—just a moment, Mr. Bradshaw.

Mr. Schroder: No questions.

The Court: No more questions. You may step down, Mr. Bradshaw.

Mr. Cody: Let me ask you one more question.

The Court: You will have to come back to the stand, Mr. Bradshaw.

By Mr. Cody:

Q. Have you—have you been present at any meetings [fol. 1087] where critical remarks have been made by Coach Butts about the University of—

Mr. Schroder: I thought this question had already been asked, and he answered that question. I believe he asked him about speeches. I believe I am correct on that.

The Witness: Yes, sir.

By Mr. Cody:

Q. You have?

A. Yes, sir.

Q. Where was that?

A. One was last year, the night before the Florida-Georgia game in Jacksonville. A Georgia party in the Roosevelt Hotel.

Q. I'd like to ask you one more question, Mr. Bradshaw. Will you tell the Court whether or not, from the general character of Wallace Butts about which you testified, that you would believe him on oath?

A. I don't believe so.

Mr. Cody: I believe that's all.

Mr. Schroder: I didn't understand the answer.

The Court: Sir?

Mr. Schroder: I didn't understand the answer.

[fol. 1088] The Court: He said he didn't believe so.

Cross examination.

By Mr. Schroder:

Q. You know Charlie Trippi?

A. Yes, sir.

Q. You believe him under oath?

A. I believe so.

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R. H. Driftmier called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Mr. Driftmier, will you give the Court Reporter your full name?

A. R. H. Driftmier.

Q. Where are you from, Mr. Driftmier?

A. Athens, Georgia.

Q. Are you a member of the faculty at the University of Georgia?

A. Yes, sir.

Q. What are your responsibilities there?

A. I am head of the Department and head of the Division of Agricultural Engineering.

Q. How long have you been connected with the University?

A. Since September, 1930.

Q. Continuously?

[fol. 1089] A. Yes.

Q. The position you have just described, is that one you now hold?

A. Beg pardon?

Q. The position with the University which you have just described, is that one which you now hold?

A. The head of the Department since 1930, the chairman of the Division since 1950 when the College of Agriculture was reorganized.

Q. Are you a member of the Athletic Board?

A. Yes, sir.

Q. How long have you been a member?

A. Since about 1935.

Q. As a member of that Board, have you constantly come in contact with Wally Butts?

A. I have.

Q. In connection with matters pertaining to the University?

A. That's right.

Q. And to the athletic program?

A. That's right.

Q. Please state, Mr. Driftmier, whether or not you know the general character of Wallace Butts in the community.

A. I think I do; yes.

Q. From that knowledge will you state whether or not that character is good or bad?

A. Bad.

Q. From that knowledge of his character, would you state to the Court whether or not you would believe him upon his oath?

A. I would not.

Q. You would not?

A. I would not.

Q. In your services to the University as a member of [fol. 1090] the Athletic Board, have you ever heard Wallace Butts make any critical remarks about the University?

A. I have.

Q. Was that an isolated occasion, or would there be others?

A. About every time the Board of Directors met.

Mr. Cody: I believe that's all.

The Court: All right, any questions, Mr. Schroder?

Cross examination.

By Mr. Schroder:

Q. What is your name, sir?

A. Driftmier.

Q. Driftmier?

A. Right.

Q. You live in Athens?

A. Yes, sir.

Q. You know Charlie Trippi?

A. Yes, sir.

Q. You believe him under oath?

A. I don't know enough about Charlie Trippi.

Q. Do you know Mickey Babb?

A. Beg pardon?

Q. You know one of your students, Mickey Babb?

A. I do not.

Q. Do you know your football captain, Ray Clark?
A. I do not.
Q. Do you know Wallace Williamson?
[fol. 1091] A. No; I do not.
Q. Brigham Woodward?
A. No.

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Dr. O. C. Aderhold called as a witness on behalf of the defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Dr. Aderhold, will you give the Court Reporter your full name, or initials, if you like?
A. O. C. Aderhold.
Q. What is your position with the University of Georgia, Dr. Aderhold?
A. President.
Q. How long have you been President?
A. Well, 1950—thirteen years.
Q. What part of the State are you from, Dr. Aderhold?
A. I am from Lavonia; Franklin County.
Q. Did you attend the University of Georgia as a student?
A. Yes, sir.
Q. When did you finish?
A. Well, I went there as a freshman in 1919; finished Bachelor's Degree in '23; and then did some work on a Master's Degree until '30 in the summers, and received a Master's degree at that time.
Q. I should be ashamed to ask you that question because—

[fol. 1092] Mr. Schroder: I can't hear either one of them, Your Honor.
The Court: Speak out a little bit louder, please, sir.

By Mr. Cody:

Q. Are you a member of the Athletic Board?

A. Yes, sir.

Q. Are you what they term the ex-officio chairman?

A. No; I am chairman by the document that sets up the Board, the charter.

Q. Is it a fair statement today, Dr. Aderhold, that you have, in recent years, kept in close touch with the athletic program of the University.

A. Yes, sir.

The Court: Doctor, you will have to speak out a little louder, if you don't mind.

A. (By the witness) Yes, sir.

Q. Do you recall whether or not Wallace Butts came to you on or about January 20 of this year?

A. Yes, sir.

Q. Did he?

A. He did.

Q. Did he at that time—did you have a discussion with him at that time concerning a conference he had had with Mr. Bill Bradshaw a day or two before?

A. I don't believe he referred to any conference, but he called me on Sunday night and asked to come out to see me Sunday night, and I told him that I couldn't see him Sunday night because we had a visitor there and a dinner party, [fol. 1093] but I'd see him early Monday morning; and so he came to the office at 9:30 Monday morning and I saw him at that time.

Q. Was this or not sometime before the Bryant affair came out?

A. Yes, sir; it was.

Q. Now, what happened at that meeting that you had with Coach Butts, or, I should say—he was the athletic director at that time?

A. Let me check the other question, please, sir.

Q. Go ahead.

A. Yes; the date is right; I do recall now. This was before the other matter came up.

Q. What happened at that meeting?

A. Well, he said he wanted to talk with me about a problem or problems that he had; that he should have come to see me earlier or should have talked with some of the Board members earlier, but that he had some problems that he wanted to discuss with me. And he had always felt free to talk with me about his problems when he had them. Essentially that was the beginning of the conference.

Q. Will you state whether or not any particular action was taken at that conference?

A. No; no action. We discussed some possibilities, and I believe that is as far as that went at that time.

Q. Will you give us— Will you give us the extent of that discussion?

A. Well, the discussion involved several problems, as enumerated by him or that came out of our common discussion. Now, do you want me to comment on those?

Q. Just state what—just state what problems he told you he had.

A. Well, I think the first one he told me about, and spent [fol. 1094] a good deal of time talking about, was his financial situation, and that it was serious, and that if anything happened to his job that this financial structure that he had would fall in, I believe were about the words that he used.

Q. Do you recall whether or not, at that meeting, that he resigned?

A. No, sir; he did not. He asked my advice about what he should do, as we talked about some of these problems. This conference lasted about two hours or two and a half.

Q. Dr. Aderhold, have you ever been present at any— well, I will withdraw that question. Will you state to the Court whether or not you know of the general character of Wallace Butts in the community?

A. Phrase your question again; I'm not sure I understood it.

Q. I asked you to state whether or not you knew the general character of Wallace Butts in the community?

A. Well, I would say it's not good.

The Court: That's not the proper way to answer it, Doctor.

By Mr. Cody:

Q. Just say you do or you don't. I will get to that next.

A. I think it's not good.

The Court: That is still not—the question he asked you is, do you know; and then he can ask you any further question.

[fol. 1095] The Witness: Yes; from the contacts I have; I do.

The Court: All right, sir.

By Mr. Cody:

Q. Now, will you state, from that knowledge, whether or not it is good or bad?

A. I'd say it's bad. I would like to make an addition to that.

Q. Make whatever comment you want.

The Court: No, sir; he can't make any addition to it. That's all. The Code section—

Mr. Cody: All right, sir.

By Mr. Cody:

Q. Dr. Aderhold, could you state whether or not you recall hearing Coach Butts make any remarks about the University?

A. At this meeting?

Q. No; I mean at any time. I would say since 1960; I would limit it to some time.

A. Well, I have heard of remarks that he's made. I don't recall—

The Court: That wouldn't be admissible. Have you heard him make any remarks himself, Coach Butts? I presume you mean of the Athletic Association, don't you, or the University?

[fol. 1096] By Mr. Cody:

Q. Of the University, or the Athletic Board, or the coaching staff?

A. No, sir; I have not.

Q. Have you, as President of the University, and as a member of the Athletic Board, have you had constant contact with Wallace Butts?

A. What do you mean by "constant contact"?

Q. Well, what contact have you had with him? How often would you see him?

A. Well, it depends, I think, on what the situation was. I would say two or three or four times a year on the average, all the years, but it might be in some cases once or twice during the year; other times it might be half a dozen or more times. You mean as it relates to the business—

Q. Right.

A. —of the operation of the Athletic program?

Q. Yes, sir. Did you bring with you, Dr. Aderhold, in response to a subpoena, a letter that you received from Coach Butts while he was athletic director, his letter of resignation?

A. Yes, sir; I did.

Q. Do you mind if I see that? That's the same one, isn't it? Do you mind if I handle your file just a minute? I'll give it back to you.

Mr. Cody: Your Honor, this is the original of a letter which has already been admitted and which has been identified as a defendant's exhibit, but I want to ask him several questions about it.

The Court: All right, sir.

[fol. 1097] By Mr. Cody:

Q. Dr. Aderhold, it is stated in this letter that Wallace Butts had developed business interests. Do you know—did he tell you what those interests were?

A. Well, he talked about several, and I'm not sure that I could name them all, but a considerable part of the discussion about business related to an orange grove facility or operation in Florida; some about loan companies. I believe those were the two main ones. I know there was something about somebody, or some business at Lakeland, Florida, or Lake City, Florida, I don't remember which. Those were the main ones.

Q. As executive head of the University of Georgia, and as executive head of its athletic program, will you state, Dr. Aderhold, whether or not, in your opinion, these interests prevented him from fulfilling the responsibility that he had as athletic director?

A. Yes, sir; he said so.

Mr. Cody: May I take just a moment, Your Honor?

The Court: Yes, sir.

Mr. Cody: There's a good deal that's been produced.

The Court: In the meantime—Doctor, you may step down just a moment, please, sir. In the meantime, we will take a recess for fifteen minutes.

Members of the jury, I must admonish you, as previously, not to discuss this case among yourselves, or permit anyone [fol. 1098] to discuss it in your presence. Simply dismiss it from your mind during the fifteen-minute recess, at which time you will return to the jury box at 3:00 o'clock. Let the jury pass out; everyone else remain seated.

(Whereupon the jury retired from the courtroom at 2:44 p.m.)

The Court: We will recess until three o'clock.

After Recess

The Court: All right; you may go back to the stand, Doctor.

Mr. Cody: Will you identify this for me?

The Clerk: Yes, sir.

Mr. Cody: That really ought to be given the same number as that.

The Clerk: Defendant's Exhibit No. 20 is identified as a copy, and this is the original?

Mr. Cody: Yes, sir.

[fol. 1099] The Clerk: Would you like to make this one—

Mr. Cody: 20.

The Clerk: All right, sir.

The Court: I am informed by the Clerk that one of the letters—I believe it was a copy—

The Clerk: It was this one.

The Court: —has been identified, but had not been introduced.

The Clerk: This is Defendant's Exhibit No. 20.

Mr. Cody: We are substituting the original, giving it the same exhibit number.

The Court: Any objection to the original in lieu of the copy?

Mr. Schroder: Of course not.

The Court: All right, sir.

[fol. 1100] The Clerk: Original letter dated February 23, 1963, to Dr. Aderhold from Wallace Butts.

(Whereupon the document above referred to was marked for identification only as Plaintiff's Exhibit No. 20.)

By Mr. Cody:

Q. Dr. Aderhold, I show you the Defendant's Exhibit No. 20, and ask you if that is the letter that you received from Wallace Butts?

A. Yes, sir.

Q. Do you remember a meeting which occurred on February the 22nd, 1963, in Mr. Cook Barwick's office?

A. There are so many dates, I had better check, I think. Yes; I remember the 22nd.

Q. Do you recall who was present at that meeting?

A. Yes, sir. Those present were Coach Butts, Mr. Bolton, Mr. Hartman, Mr. Dunlap, Mr. Bernie Moore.

Q. Is Mr. Dunlap from Gainesville?

A. Yes, sir; Mr. James Dunlap, Chairman of the Board of Regents, from Gainesville; Chancellor Harmon W. Caldwell, of Atlanta; and Mr. Bernie Moore, of the Southeastern Conference. I believe that is the group that was there.

Q. Will you state to the Court what the purpose of that meeting was?

A. Well, the purpose was to talk with Coach Butts about the information which had come to us, beginning with Mr. Burnett, and had been discussed by several members of this [fol. 1101] same group on two or three occasions prior to this particular date.

Q. Do you know whether or not Coach Butts was made acquainted with the nature of the Burnett story?

A. At this meeting?

Q. Yes, sir.

A. Yes, sir; he was.

Q. How was that meeting handled?

A. Coach Butts came over to Atlanta with Mr. Bolton and me, and I opened the meeting by saying that some information had come to us regarding a proposed telephone conversation, and that Mr. Cook Barwick had directed—handled a study of the report on the situation, and that I would like to turn the meeting over to him for handling; and I did.

Q. Was he a member of the Athletic Board?

A. Yes, sir.

Q. And was he attorney for the Board?

A. Yes, sir. The Executive Committee of the Board asked him to serve as attorney for this study and investigation.

Q. At that meeting, do you know whether or not Coach Butts was shown these notes of Mr. Burnett's?

A. Yes; he was handed the notes.

Q. Can you state to the Court what statement he made, if anything?

A. Well, he looked over them and we talked, I guess, about an hour, and there were many things said. I think he started out by saying that "This is just general football talk," and I think that, as I recall it, that he said, "I guess I talked with him over the phone," or "I probably talked with him over the phone," referring to Coach Bryant, "and I can understand how somebody listening may have made [fol. 1102] these observations, but I want to assure you I had no intention of hurting the University of Georgia, or giving them any information about the University of Georgia athletic team or program."

Q. Did you go into a detailed discussion of some of the items in this note—in these notes?

A. What do you mean by "detailed"?

Q. Well, did you discuss any items that were mentioned in the notes?

A. Well, I couldn't name a specific item, but Coach Butts was talking about various phases of the situation, and actually demonstrating some of the techniques used, and that sort of thing, in coaching.

Q. Did you discuss with him whether or not Coach Bryant called him back on a Sunday night?

The Court: Was it Sunday night, or—

By Mr. Cody:

Q. On the following Sunday, September 16.

A. Yes, sir; I believe—may I look at the notes here?

Q. Yes; you may refresh your recollection from any memoranda that you have.

A. Well, I made these notes some several days after the meeting, and essentially the notes say that more than two

hours was involved in the discussion. Coach Butts devoted a considerable part of that time in the discussion of football, and how coaches discuss games, and so on. He indicated that the call was made, and that these items were probably discussed, but they did not mean what Mr. Burnett had indicated that they did mean.

[fol. 1103] Q. Was there anything said about Coach Butts signing an affidavit?

A. The notes I made on that—may I do a little background on the question?

Q. Go ahead.

A. Mr. Barwick was handling the questioning, and prior to the meeting, or the afternoon before, he indicated that he was going to ask Coach Butts if he would do the two things which Mr. Burnett had done. Now, whether or not he asked for both of these things at that time, I am not clear, for this reason. My notes indicate that he did ask regarding the affidavit and the polygraph test, or lie detector test, at the same time. That is the way my notes indicate, and Coach Butts said, no, he would not. And then there was some discussion about the lie detector test which Coach Butts indicated he would not take. I have not talked with Mr. Barwick specifically about this, but I noted that there was an indication in the Cook report, the Eugene Cook—

The Court: No, sir; we can't go into that.

By Mr. Cody:

Q. Don't go into that.

A. Okay. May I say, Your Honor—can I say—

Q. Make any explanation you want.

The Court: I don't want you to get into the Cook report.

The Witness: I just understood it was possible that Mr. Barwick asked only the one question. If so, if he asked only [fol. 1104] the one question, then it was not to the lie de-

tector test because I know that was discussed, and I think the other was, and I so noted it at that time.

By Mr. Cody:

Q. Dr. Aderhold, as Chairman of the Executive Committee of the Athletic Board, did you authorize Mr. Bill Bradshaw and Mr. Barwick to have a talk with Coach Butts prior to this time, back in early January?

A. This goes back to a meeting of the Executive Committee on January 5, I believe.

Q. 1963?

A. 1963. The Executive Committee met and discussed many of the problems of our athletic program, and reviewed some of the situations, some of the alumni reports and Board member reports, and several rather specific comments were made by Coach Butts, whether or not he was helping or hurting the athletic program, and what was being said, and so on. So, out of that discussion, which lasted from 10:00 o'clock to about 4:00 in the afternoon, with an interruption for lunch, it was decided that somebody should discuss all of these issues with Coach Butts, let him know what the Executive Committee had talked about, the specific terms that we had talked about, and discuss it with him before the meeting of the Board in January—January the 28th, which was up-coming.

And there was some discussion as to who should do that, and the decision was—they requested Mr. Bradshaw, who was there as a member of the Coaching Committee, if he and—I think he was asked if he and Mr. Cook Barwick would sit down and talk with Coach Butts about these is-[fol. 1105] sues and problems, and get his reaction. So, we did not direct him, but in the discussion he agreed to talk with Mr. Barwick, and I later understand that they did talk with him.

Q. Did you outline to that Committee the area of the discussion to have with Coach Butts?

A. No, sir; I did not outline it, but Mr. Bradshaw was in the meeting during the discussion, and knew what the problems were that we were discussing.

Q. He was the one speaking for the Executive Committee?

A. Well, he and Mr. Barwick.

Q. Barwick?

A. Yes, sir.

Q. Now, did, shortly—did you have your full meeting on February the 28th, your Board meeting?

A. Yes, sir.

Q. Coach Butts there?

A. Yes, sir—you mean January the 28th?

Q. January 28th.

A. Yes, sir.

Q. This was prior to any of the—any knowledge of any Bryant affair; this was January the 28th, I believe you said?

A. Well, at that time I knew about the Bryant thing on the 28th; I knew about it in the sense that the notes had been given to me. I had had a meeting with Mr. Cook Barwick and had gone over the notes with him, in company with Mr. Bolton, but that is—and he said he would begin an investigation, looking into it.

Q. There was no notice of the Bryant affair on the January the 5th meeting?

A. No, sir; or the January 20th.

[fol. 1106] Q. Now, what happened at that meeting on the 28th, January the 28th?

A. Well, several things happened. The minutes of the Board—I have these listed, and I do not have the minutes with me, but if you are referring specifically to Coach Butts, I can—I think I can relate that—

Q. Give us—

A. —about as it is.

Q. Give us the substance of that.

A. I can check it in the minutes. Coach Butts indicated

to the Board that he had become engaged in many business activities which were requiring a great deal of his time, and that he would like to be retired as of June 30th, and retired after that time. He, I believe, did not expand very much on those reasons, but they are in the minutes of the Board, if you want to check those.

Q. Is that the primary problem that you discussed at that meeting his retirement?

A. No; there were—well, I don't know how you class them as primary or secondary; we talked about several matters.

Q. What other problems did you discuss with him at that meeting?

A. With Coach Butts?

Q. With Coach Butts.

A. I think most of the rest could be classified as routine matters, business of the Athletic Board. Maybe I had better check that—I think that's right.

Q. All right; check that.

A. Yes; I think other than just sort of general routine matters that that was all that was discussed at that meeting. There was an Executive Committee meeting following this [fol. 1107] meeting, at which some other matters were discussed which grew out of this question.

Q. Did you attend the Executive Committee meeting?

A. Yes, sir.

Q. What did you discuss with Coach Butts at that meeting?

A. Coach Butts was not at the meeting.

Q. I see.

A. And I—

Q. I wouldn't want—

A. And I think to point—

Mr. Schroder: Just a minute. Mr. Butts was not at that meeting.

The Court: That would not be admissible unless it illustrates another issue, refutes testimony that's been previously given, but I can't see that. I mean, certainly if he wasn't present it would be hearsay.

By Mr. Cody:

Q. Do you recall whether or not there was any discussion at that January 28th meeting as to some of Coach Butts' associations?

Mr. Schroder: What meeting are we talking about? Are we talking about the Executive meeting?

The Court: Are you referring to the Executive meeting?

[fol. 1108] Mr. Cody: No, sir; I'm talking about the Board meeting that Coach Butts was present at on January 28th.

The Court: He was present—

Mr. Cody: Yes, sir; he was present. He's already testified about that.

The Court: If he was present, I will let him testify to that.

A. (By the witness) No; there was no discussion that I recall at that meeting.

Q. Prior to the January 28th full Board meeting, did you have any personal discussion with Coach Butts about the up coming meeting?

A. You are referring back to the January 20th meeting when Coach Butts visited me in the office?

Q. Yes, sir.

Mr. Schroder: What game are we talking about?

The Court: January 20th.

Mr. Schroder: I thought he said up-coming game.

Mr. Cody: I didn't say that.

[fol. 1109] The Court: No, sir; he didn't say "game."

By Mr. Cody:

Q. Tell the Court about any personal discussion you had with Coach Butts with reference to the meeting of January 20th, prior, just prior to the January 20th meeting.

Mr. Schroder: May I inquire as to the relevancy of this, Your Honor?

The Court: I don't know, but is that the meeting you have been into, where Coach Butts came to his office on Monday morning?

Mr. Cody: Yes, sir; we have only touched on it. I want to get the substance of that meeting, the full substance of that meeting.

The Court: Between Coach Butts and Dr. Aderhold?

Mr. Cody: Yes, sir; no one else present.

The Court: Sir?

Mr. Cody: No one else present at that meeting.

[fol. 1110] The Court: Yes, sir; I thought you had been into that.

Mr. Cody: Not fully; no, sir.

The Court: I will let you go ahead.

Mr. Schroder: I still inquire as to what the relevancy of it is, Your Honor.

Mr. Cody: We can't tell.

Mr. Schroder: What's all this got to do with it?

The Court: I don't know whether it refutes testimony as to whether he's spoken against the University, or any of that, I can't tell, but I will let him proceed as long as it is relevant; if it is not relevant, I will rule it out.

By Mr. Cody:

Q. Go ahead.

A. Well, there were four or five matters discussed, some of them I believe brought up by Coach Butts, or alluded to by him, and some that I brought up as coming to me from alumni, Board members and others.

Q. I want to know what the substance was.

[fol. 1111] Mr. Schroder: Is this supposed to be in contradiction to something that has already been testified to?

The Court: I assume it is on the question of when he resigned and why he resigned.

Mr. Schroder: I thought we had been through all that on another meeting.

The Court: I don't know whether it is the same meeting. That is what I was making inquiry about.

Mr. Schroder: Let's try to restrict the witness, then, to the area about which he can testify, because I have no idea what he is going into. It may not have any relevance to the case at all. I can't—

The Court: Neither can I and I can't tell until he testifies.

Examination.

By the Court:

Q. Is this the meeting you have discussed that happened on Monday morning following the discussion with Coach Butts on Sunday night?

A. Yes, sir; this is the meeting.

Q. Is it anything different that you testified to concerning prior to the recess?

A. Well, as I recall it, Mr. Cody asked me what was [fol. 1112] the primary matter discussed, and I commented on that as the first item which Coach Butts opened up the discussion with, and that was the matter of his being involved in—

Q. You didn't complete that. You didn't complete what all transpired during the meeting.

A. I didn't know what exactly he meant by "primary" and he didn't ask me any further thing. I didn't know—

The Court: I believe it is relevant as to what the terms of the resignation were.

Mr. Schroder: May I approach the bench with Mr. Cody, Your Honor?

The Court: Yes, sir.

(Whereupon a conference was held at the bench between the Court, Mr. Schroder and Mr. Cody.)

The Court: You may proceed.

By Mr. Cody:

Q. Go ahead, Dr. Aderhold. Just tell us the substance of these other areas of your discussion on that occasion; don't go into any detail.

A. Well, I am sure I will not get them in the order in which we talked about them. One was this financial situation, and I believe that an hour of the time was devoted to that. He told me in great detail or in considerable de- [fol. 1113] tail what the financial—what his financial situation was and how precarious it was, and that if the Board were to fire him or if he were to resign, then this whole structure would fall down or crumble down on him. Those are not the exact words, but that was the essence of it. And we talked about that a little and he gave me some figures which I put on a card, and it, to me, looked bad too, and then he went back to his original comment: "What advice would you give me? I came for advice, and what would you advise?" And on this particular thing I said, "Well, Coach, this is completely beyond me; I don't know, this is involved." And I believe we added up, I did, somewhere around seventy-five to a hundred thousand dollars, and he indicated where these notes were, some of them, and what the conditions were involving them, and my recommendation on that, when he came back to it, was that, "Coach, I don't know of anybody that is any better to advise you about these matters than Bill Hartman. He is a man that you have confidence in, and he's a businessman who knows something about these figures." And he said,

"Yes, I know that; I have consulted with Bill some." And my recommendation was that he go talk to Bill about that. Then on the other items, whether—

Mr. Schroder: If the Court please, unless this is related to some resignation, I don't know what the relevancy would be.

Mr. Cody: That is what we are leading up to.

[fol. 1114] The Court: I will let him proceed for a while, Mr. Schroder.

By Mr. Cody:

Q. Don't go into any great detail; just give us the substance of it.

A. Well, the matter of reported criticism of Coach Butts of the athletic situation, we discussed that back and forth, commenting upon the reports that had come to me and come to members of the Board that he was critical of Coach Griffith and the coaching staff and others, and on that particular point I think I emphasized the fact that we had a great deal of criticism about his being critical of Coach Griffith. Well, he then proceeded to say that this was not true, at least he did not mean to criticize the University, the athletic program, or Coach Griffith. Well, that is number two. There was a discussion of some relationships with persons in Atlanta, specifically about—

Q. Don't go into any specific—don't go into that part of it. Any other area?

A. Well, that's all that I can recall, without looking at my notes, and if you would like for me to do it, I will.

Q. Did you or not advise him to resign, Doctor?

A. Toward the end of this, then I had already said, "I think you ought to see Bill Hartman about your financial situation." And he kept referring back to his financial situation in relation to his quitting, and he said, "Now, what about this situation?" And I said, "Well, Coach, I that that the Board is going to take positive action about

this thing, one way or the other. There is so much feeling that our athletic program isn't going, and it is because we [fol. 1115] do not have cooperation and leadership at the head. Whether this is true or not, I don't know, but this is what's being said, and that, as I see it, there are two things that you might do. One is that you might request that the Board give consideration to resigning and retiring at the end of this fiscal year, June 30, but I think the Board is going to take some kind of action, and I don't know what the Board will do with that request." But I assume that Coach Butts thought that maybe that was advisable. At least, then on the 28th, that is what he did, he retired, and—I mean, he asked for retirement, asked to be—resigned on June 30 and retired after that, and gave as the reasons, according to the minutes, his financial—because of the time he was having to devote to outside activities. I think that summarizes it.

. . . . . .

By Mr. Cody:

Q. Dr. Aderhold, I show you the Defendant's Exhibit No. 21, and ask you whether or not that is a letter directed to you, as President of the University of Georgia, from Dr. Frank Rose, President of the University of Alabama.

A. Yes, sir; it is.

Mr. Cody: That's all.

The Court: Any further questions, Mr. Cody, on behalf of Dr. Aderhold?

[fol. 1116] Mr. Cody: No, sir; I have no further questions.

The Court: All right, sir; go ahead.

Cross examination.

By Mr. Schroder:

Q. Dr. Aderhold, you have testified at some length about meetings that were held in Athens by the Athletic Board.

The Court: By the Executive Committee and the Athletic Boards?

The Witness: Yes, sir.

By Mr. Schroder:

Q. At least two of those meetings had to do with certain matters involving Wallace Butts; is that correct, sir?

A. Yes, sir.

Q. The first of which was January 20th?

A. No; January 5th.

Q. All right, sir. There was a meeting on January 20?

A. Well, that was a conference which Coach Butts requested and he and I met.

Q. When was the meeting held after the conference in Atlanta by Mr.—whatever the gentleman's name was?

[fol. 1117] The Court: Bradshaw.

By Mr. Schroder:

Q. —Bradshaw; was that January the 28th?

A. Yes; that's correct.

Q. Sir?

A. Yes, sir; that's correct.

Q. You had an idea that you were going to discuss something with Coach Butts that had been reported to you by some of the alumni; is that right?

A. Which meeting, Mr.—

Q. The meeting on January the 28th.

A. That was a regular Board meeting on January 28.

Q. You planned to, at that time, to discuss with Coach Butts matter that had been raised by some of the alumni previous to the meeting?

A. Yes. He and I discussed them, and I understand that he and Mr. Barwick and Mr. Bradshaw had discussed them.

Q. I thought you said that Mr. Bradshaw was appointed on a committee to talk to Mr. Butts about it before he had the meeting.

The Court: I think, Mr. Schroder, he said January the 5th, that some committee, the Executive Committee met, and they appointed these two gentlemen to meet with Coach Butts on January 20 and report to a full meeting of the Board on January the 28th.

Mr. Schroder: That is the point I am trying to establish.

[fol. 1118] The Witness: Your Honor, that—

The Court: That is correct, isn't it?

The Witness: That was prior to the 20th, that is, their meeting was prior to the 20th. The 20th was the date on which Coach Butts and I talked about—

The Court: Oh, yes. You don't know what date they met with Mr. Bradshaw?

The Witness: I don't believe I do.

Mr. Schroder: Well, the point is quite simple, and I think I can get it over.

By Mr. Schroder:

Q. When you had something to discuss with Coach Butts at a meeting, you usually discussed it with him before the meeting, didn't you?

A. Explain the nature. Sometimes I did and sometimes I didn't.

Q. I know one time you didn't. Now, I want to find out about the times you did. During the month of January when you had in mind discussing with Coach Butts some complaints which you said had come from some of the alumni, you let him know that the matter was going to be discussed at the meeting before the meeting, didn't you, January 28?

[fol. 1119] A. On January 28; yes, sir.

Q. You knew—

A. He and I talked.

Q. You knew what you were going to be talking about when you got to the meeting, didn't you?

A. Yes, sir.

Q. Certainly. On February the 22nd, you had a meeting attended by Coach Butts relating to the Butts-Bryant matter, didn't you, in Atlanta, February 22?

A. I think that's correct.

Q. Yes, sir; that's right.

The Witness: I'm sorry, Your Honor.

The Court: That's all right.

The Witness: I just have the copies here.

The Court: That's all right.

By Mr. Schroder:

Q. Are you confirming the date?

A. I am sure the date is right; if you say it is right, I am sure it is.

Q. There is no doubt in your mind about it being the date, is there?

A. Well, let's check it and see.

Q. All right, sir. I really don't—I am not trying to confuse you.

A. Yes, sir. It was Friday morning, February 22nd.

Q. Did you have any committee appointed to inform [fol. 1120] Coach Butts about what was going to be discussed at that meeting?

A. Well, the group meeting the day before consisting of these gentlemen that I named a few minutes ago suggested that—I mean, we all suggested that we should not talk with Coach Butts about this matter, that it had been pursued up to that point and that we needed to discuss it with him. They asked me if I would call Coach Butts when I got home that night and ask him to come to a meeting the next morning in Cook Barwick's office.

Q. Which you did?

A. Yes, sir.

Q. Did you tell Coach Butts at the time you called him what the meeting was about in Atlanta?

A. No, sir.

Q. Why?

A. Well, he didn't ask, and I just told him that we wanted him in Mr. Cook Barwick's office. I didn't ask him to be there. He asked if he could ride over with me, and I said I was going to come in Mr. Bolton's car and I was sure Mr. Bolton would be glad to have both of us come with him.

Q. Which you did?

A. That's right.

Q. The three of you rode over here from Athens on the morning of February the 22nd?

A. Yes, sir.

Q. Coach Butts, you and Mr. Bolton?

A. That's correct.

Q. You and Mr. Bolton knew what that meeting was to be about, didn't you?

A. Yes, sir.

Q. And Mr. Butts was with you all the way from Athens to Atlanta?

[fol. 1121] A. Yes, sir.

Q. Were you all talking?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. Why didn't you tell him then why you were bringing him to Atlanta?

A. Well, all the discussion about this case after the first meeting had been carried on with these people that I named a while ago present, and I didn't—well, my idea was that we talk about it all together at the meeting.

Q. Wouldn't let him know even what you were going to bring him over here and confront him with. That is a true statement, isn't it?

A. Well, it is a true statement that we had—this group had met with and discussed all of the matters as a group, and my feeling was that that ought to be done the same way, though he did not raise a question and I did not volunteer to open.

Q. Insofar as you know—

The Court: Was this February 22nd, the Athletic Board?

The Witness: No; it was not the Board.

Mr. Schroder: Not the Board; it was the committee that met.

The Court: Is that the one that had Mr. Bernie Moore?

[fol. 1122] Mr. Schroder: That's right.

The Court: Chairman of the Board of Regents?

The Witness: Bernie Moore, Mr. Harman, Mr. James Dunlap, Chancellor Caldwell, Mr. Bolton.

By Mr. Schroder:

Q. You say the same group met every time you discussed it?

A. Well, after the first meeting with Burnett in which Mr. Barwick had a recording of the conference.

Q. Every member of that group met every time when you discussed it?

A. Well, I will have to—I think that's right, but I can check it and see.

Q. How many times did you meet, approximately?

A. Well, met one time with Mr. Burnett. The next time, the addition was Bernie Moore. I think I had better check and get the exact people who were there.

Q. That won't be necessary, sir. My point is, you rode over here with a man who had been connected with the University of Georgia for how many years?

Mr. Cody: Your Honor, he has covered that point, I think he is arguing now, and I move to exclude it.

The Court: I will let him ask him again, did he inform Coach Butts while they were en route or did they wait until they reached Mr. Barwick's office?

[fol. 1123] By Mr. Schroder:

Q. You rode over here in the car with a man that had been head of the athletic department for the University of Georgia for over twenty years, knowing that he was charged with what Burnett had charged him with, didn't you?

A. Yes, sir; to meet with this group.

Q. Yes, sir. So far as you know he didn't know anything about what you all were meeting about, did he?

A. At that time, he didn't; during that discussion he indicated he did know.

Q. And you didn't mention it to him at any time until you got in the meeting; is that right?

A. That's right, until I turned it over to Mr. Barwick for handling.

Q. Up until that time you all had been discussing with him a retirement, hadn't you?

A. Yes, sir. Going back to the 20th, the conference he had with me on the 20th and the subsequent meeting with the Board on the 28th.

Q. That was a month before February 22, at least a month, over a month; during that time you all, the group, had been discussing a retirement under which he would be paid approximately six thousand dollars a year, hadn't you?

A. Well, that figure was named as a possible one—

Q. All right, sir.

A. —but the committee that was asked to look into it was to examine his insurance—I mean, his retirement under the Athletic Board and the retirement under the teacher's retirement, because part of his salary was paid by the University and therefore that part was subject to teacher retirement, and maybe one other item, see what that came to and what would be involved in a retirement [fol. 1124] program that would pay some reasonable amount, and six thousand dollars had been named; yes, sir.

Q. After the Saturday Evening Post story, that was no longer discussed, was it?

A. It has not been discussed directly, though Coach Butts and I discussed it briefly on the date that this letter was written.

Q. The date that Dr. Rose's letter was written?

A. No; I'm sorry, the one that—

Q. The February 23rd letter?

A. Yes; the one that Coach Butts wrote. At that time—excuse me.

Q. All right. Let's pass on to February the 23rd for a minute. Coach Butts came to your office on February 23rd about noon, didn't he?

A. Well, around 12:00 or 12:30, somewhere along in there.

Q. And he told you that he had heard that there was going to be an article published in that day's paper stating that he was going to resign or that he had resigned?

A. Well, I think I can recall fairly accurately what was said. He indicated that, I believe, Mr. Bisher or some sports editor had—some sports writer had called him either the night before or early that morning saying that such an announcement would be made and that he wanted me to know that he did not authorize that.

Q. And he came to you and he told you, rather than have that come out, without you knowing anything about it, that he had not authorized it, in order not to embarrass you and not to embarrass the University of Georgia he would tender his resignation?

[fol. 1125] A. Well, he didn't give those reasons, but—but he did—

Q. Let's move on to Sunday.

The Court: Go ahead and let him finish. Did you finish your answer?

The Witness: Well, I think the statement of fact is what he said when he came in, and later he did say that he was going to resign. There was no relation, as I remember, in the discussion with the two things.

By Mr. Schroder:

Q. You didn't ask him for his resignation, did you?

A. No, sir.

Q. No one that you know of asked him for his resignation after the February 22 meeting, did they?

A. Not that I know of; no, sir.

Q. As a matter of fact, you were in Birmingham on January the 24th, weren't you—excuse me, February the 24th?

A. Yes, sir; I went to Birmingham the evening of the 23rd, and I was there on the 24th.

Q. And you met with Dr. Rose, didn't you?

A. Yes, sir.

Q. And you told Dr. Rose what had been reported to you by one George Burnett, didn't you?

A. Yes. I think we shared with Dr. Rose all of the information which the committee had, and we shared it not only with Dr. Rose but the group asked Bernie Moore if he would also meet with us, and the meeting was held in his office, so the four of us were there at that time.

[fol. 1126] Q. You speak of all of the information you had, all the information you had was from Burnett, was it not, insofar as it related to this telephone call? Did you have any information from anyone else that was listening?

A. No, sir.

Q. It was all Burnett, wasn't it?

A. It was the Burnett report that we had; that's correct.

Q. All right, sir. And you talked to Dr. Rose in Bernie Moore's office in Birmingham, didn't you?

A. Yes, sir.

Q. Bernie Moore, as a matter of fact, had suggested that that meeting be held in Birmingham in his office and that it be confidential, didn't he?

A. Who did?

Q. Bernie Moore.

A. Bernie Moore? No, sir. I called Dr. Rose while the committee—while this group was up there, and asked him

if he would meet us in Bernie Moore's office. Bernie was in the meeting and agreed that we could meet in his office, and he would meet us.

Q. There was no mention of it being a confidential meeting?

A. Well, I don't recall that there was any mention of it, but—.

Q. It was your understanding—

A. I am certain that my concept was that it was to be a confidential meeting at that time.

Q. At which time, insofar as you knew, Dr. Rose would be acquainted for the first time with Burnett's story?

A. As far as I know that is true.

Q. That was the reason for going over there—for having the meeting, wasn't it?

[fol. 1127] A. Yes.

Q. And when the meeting got under way, it was disclosed it really hadn't been confidential as you and the others had expected it to be, wasn't it?

A. Well, I don't know what you mean. If you will elaborate a little I will react to it.

Q. When you walked in and sat down at the meeting, Mr. Moore seemed quite upset because he had been called by a sports writer wanting to know what you all were meeting about, didn't he?

A. Well, during the meeting—I don't recall toward the first; toward the end of the meeting, but I wouldn't be positive about that.

The Court: Who was the fourth man? It was you and Dr. Rose, and—

Mr. Schroder: Bernie Moore.

The Court: Who was the fourth man?

The Witness: Cook Barwick.

The Court: Oh, yes. Thank you.

By Mr. Schroder:

Q. And the man who called Bernie Moore to find out what you were supposed to be meeting about was, again, Mr. Furman Bisher, was it not?

A. May I refer to the notes?

[fol. 1128] Q. Surely.

A. I know, in general, I think, what he reported. I'm sorry; I can't put my hand on it right now, but I think we can nail the dates—

Q. Sir?

A. As I recall it, there were two questions, and I wouldn't say one of these preceded the other at the moment. Dr. Rose, I think, asked if we had heard anything—

Q. I am speaking now about Furman Bisher, not what Dr. Rose said he heard.

Mr. Cody: Let him finish.

Mr. Schroder: I want an answer that is responsive.

The Court: I don't know whether he can respond to it or not.

By Mr. Schroder:

Q. Let me ask him simply, did Dr.—did Bernie Moore say anything about having received a call from Furman Bisher to inquire why the three or four of you all were meeting?

A. Yes, sir. He reported that Furman Bisher called him, I believe, the night before—

Q. All right, sir.

A. —either prior to that or after it, and I wouldn't say which. Dr. Rose asked—do you want to know—

Q. I just wanted to know if it had not been your understanding that it was to be a confidential meeting, and was it not so that a newspaper sports writer did call wanting [fol. 1129] to know why the meeting was being held?

A. No; it wasn't what he—what I remember that he reported. He said that Furman Bisher had called him, and I believe he said the night before—

Q. All right, sir.

A. —and asked some questions that, I think he said, led him to believe that he knew that we were meeting over there.

Q. All right, sir.

A. Now, that is the substance of it.

Q. You went on and had your meeting, and Coach Bryant was apprised of what you had received from George Price Burnett, Jr.?

A. No, sir.

Q. He wasn't?

A. I never did talk to Coach Bryant.

Q. I'm sorry. I made the mistake. The man that was there representing the University of Alabama?

A. Dr. Rose; yes.

Q. And Dr. Rose was told, or he said, well, he was going to look into it himself, didn't he?

A. Yes; he expressed concern, and said that he'd go back and get right on it, that he had to be in Washington, I believe, the first part of the week. He and I both were supposed to attend a meeting in Chicago the latter part of the week, but he said, "I will get somebody started right into it." And I think he mentioned—I know he mentioned two people, one is a fellow, I think he said, Mr. Coleman and Mr. Bennett, "I will get them started on it right away," or something to that effect, "and I will let you know what we find out."

Q. You didn't hear from him again—as you say, he was traveling—until you received the letter which Mr. [fol. 1130] Cody—which you just produced and handed to Mr. Cody?

A. On March 6th; that's correct.

Q. That was the date of the letter?

A. It was dated then. I think I received it about the 8th.

Q. He was, in that letter, reporting on what he had turned up, I mean, reporting on the result of the investigation, sir?

A. Yes, sir.

Q. Did you ever answer the letter?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Why?

A. Well, he said on nearer the end of it that if he found any more information that he would let us know, and our group had agreed to turn over what information we had to the Southeastern Conference, to the NCAA, and to the President of the University of Alabama. We had felt that we had pursued the matter as far as we could.

Q. Well, he told you, did he not, that he found nothing to substantiate what you had told him in Birmingham?

A. Who? President Rose?

Q. President Rose; yes, sir.

A. Well, that is not what is in the letter to me.

Q. You talked to him, though?

A. No; I have not talked with him except the day that this letter was subpoenaed and released.

Q. And he called you on that date?

A. He called me on the phone to ask me if the letter had been released or subpoenaed and released, and I told him, yes, that it had been subpoenaed. I didn't know that it [fol. 1131] had been released, and he said, "Well, it has been." I mean, I didn't know it until really just before I talked to him, because some person from AP or UPI had called from Atlanta and asked one question, "Did you get a letter from President Rose dated the 6th of March?" And he said, "I have seen a copy of the letter." I said, "If you have seen a copy of the letter and it is addressed to me, you can assume I received it."

Q. Yes, sir. But I want to get back—

A. And then—

Q. —to this telephone conversation.

A. Yes, sir. Immediately, then, as I hung up the telephone I had a call from Dr. Rose in Tuscaloosa, and he asked if the letter had been released, and I told him just about what I have said here, and he said, Well, the New York office of the AP had just—had called him and told him about the letter, and that he had made the following comments, none of which I took down, but he said he gave it to AP, and I read it in the story the next day, and it essentially was what he had told me over the telephone.

Q. All right, sir. Now, Dr. Rose told you when he called you on the telephone some two weeks after he had written you that the letter which he had written had been written hurriedly, that it was an attempt by one college president to pass along to another college president information relating to a game which he knew nothing about, and he assumed that you weren't aware or acquainted with the terminology, meaning football?

A. You mean, did he say all that to me?

Q. In essence, isn't that what he told you?

A. I think what he said to me is in the AP report and [fol. 1132] story. I read it the next day, and it was about just what he said.

Q. All right. You tell me what you remember him telling you on the telephone.

A. Well, it was to the effect that he had hurriedly written the letter, that he didn't know much about football, technical football, and that he had talked to Mr. Bryant, I believe he said, two or three times about it, and really that is about what he said on the phone.

Q. And didn't he also, in that conversation with you, tell you that Coach Bryant had told him, when he first approached the matter with Coach Bryant, that Coach Bryant had said that he talked with Wally Butts many times on many topics, including the new enforcement policy regarding defensive tactics in football?

A. He said that in the letter.

Q. Yes, sir; I know it. But didn't he also in the telephone conversation with you, tell you that the reason the University of Alabama, including the Coach and the President, were so concerned about the new enforcement policy was that they wanted to make certain no incident ever happened again to the University of Alabama such as that which happened in the previous football season commonly known as the Darwin Holt-"Chic" Granning incident?

A. I don't believe he said that to me.

Q. In effect, they were very much concerned about the boys playing—not doing anything that might create another incident like that?

A. He said that, I think, in the meeting in Birmingham when we were talking, but I don't recall that he said that at all on the telephone.

[fol. 1133] Q. He told you how that incident alone had harmed the University of Alabama through the press?

A. He didn't comment on it at all, just referred to it.

Q. He told you at that time he didn't want any such incident to occur, particularly between the University of Georgia and the University of Alabama?

A. No, sir.

Q. He didn't talk about the fact that Georgia Tech and Alabama had agreed to sever relations sometime in the future, and he did not want that to arise between the University of Georgia and Alabama?

A. No, sir; I don't recall him saying anything about that.

Q. You remember him talking about the new enforcement procedures that Coach Bryant and he were discussing the night he went back to confront Coach Bryant?

A. In the letter?

Q. Yes, sir. You remember also, do you not, when he talked to you on the telephone, that being a college professor and unfamiliar with football terminology, that he meant, when he was writing to you, to tell you or to acquaint you with the fact that it was those defense tech-

niques that he was concerned with, and that is why Coach Bryant and Coach Butts had these conversations, and that if he used "plays" in his letter, it was just one college professor's way of saying "techniques"?

* * * * * * *

By Mr. Schroder:

Q. Now, he told you that on the telephone, didn't he?

[fol. 1134] A. He told me that he mean't "techniques". The rest of it I don't recall much about, except what the AP reported the next day was essentially what he had told me on the phone.

Q. All right, sir. He pointed out to you where he had used the word "plays". He didn't understand it; it was a defensive technique he was trying to describe to you in his letter, and he told you what plays were used, I mean, techniques?

The Court: Haven't you been over that once?

Mr. Schroder: I don't know, sir. I don't want there to be any doubt.

The Witness: There are other—

The Court: I don't think we can keep repeating it.

The Witness: He referred to it in other parts of the letter.

By Mr. Schroder:

Q. During that conversation he also asked, didn't he, why you hadn't answered his letter?

A. No, sir.

Q. Did he mention anything about you answering his letter?

A. No, sir; he did not.

Q. All right, sir. You are positive?

A. Yes.

Q. Sir?

[fol. 1135] A. Yes. I don't think he has ever asked me why I didn't answer his letter.

Q. All right. You have already said, I believe, he asked you, did you release the letter?

A. He asked me, "Was the letter released?" And I said, "It was subpoenaed; I did not release it to anybody."

Q. He told you he considered that to be a confidential communication because it had been so marked, didn't he?

A. He did not say that.

Q. What did he say about it being confidential?

A. He said, "This letter which I wrote you, has it been released?" And I said, "It's been subpoenaed, and I just learned from a telephone conversation a minute ago that it apparently has been released."

Q. Did he say anything—it is marked "Confidential", isn't it?

A. Yes, sir.

Q. Did he say anything to you—did he use that word in the telephone conversation?

A. Well, I don't remember that he did.

Q. Did he also tell you that he felt that you owed him the courtesy of letting him know that it had been subpoenaed?

A. No, sir.

Q. He didn't discuss that with you?

A. No, sir.

Q. You are sure?

A. I am.

Q. Sir?

A. Yes, sir; I am.

Q. Is there any question in your mind, or has there ever been any question in your mind when Dr. Rose told you that the unfortunate use of the word "plays" instead of [fol. 1136] "techniques", has there never been any question in your mind that he meant it?

The Court: How many more times are we going to go over "plays" and "techniques"? You don't have to answer that, Dr. Aderhold.

Mr. Schroder: I want to know if there is any doubt about him having meant it.

The Court: I think he has answered it three times, Mr. Schroder.

Mr. Schroder: I have not asked for his reaction, Your Honor.

The Court: I think you have asked him the question three times.

Mr. Schroder: May I—I will cut it out if I can ask him this one more question.

The Court: No, sir; you have asked him that three times—the same question.

Mr. Schroder: No. I asked him—I am asking him now, is there any doubt in his mind about President Rose meaning what he said.

[fol. 1137] The Court: I told you, you have asked the question three times.

Mr. Schroder: I have asked that?

The Court: Yes, sir.

Mr. Cody: I don't see how any witness, Your Honor, could testify with any accuracy about somebody's mental reaction.

The Court: I have already ruled on it. Let him proceed.

The Marshal: Let's have order, please.

By Mr. Schroder:

Q. I believe you testified on direct examination that you would see Coach Butts maybe two, three or four times a year?

A. Oh, I saw him, of course, many more times than that.

Q. I don't mean on the street; I mean in connection with his position there as athletic director.

A. Well, I haven't kept any record, but I would guess that is within the range of our meetings.

Q. In the meeting of February 22nd, when you finally acquainted Coach Butts with what he was over there for, did you say that the notes were handed to him and he riffled through them, or what did you say?

[fol. 1138] A. I didn't say "riffled through them."

Q. I didn't mean to put that in your mind—in your mouth. Just tell me what he did do. Did he have his glasses on?

A. They were handed to him. He said he didn't have his glasses, I believe, and somebody—I don't remember whether it was Mr. Barwick or Mr. Bolton—said, "Try mine," and handed them to him, and he said, "Yes; I can see."

Q. All right, sir. How long did he spend with the notes?

A. Well, I don't recall it consumed very many minutes; just briefly looked through them.

Q. Just what, sir?

A. I don't recall it—

Q. I didn't hear the last thing you said.

A. —consumed very many minutes.

Q. You said it didn't consume very many minutes; you'd say briefly?

A. I would say briefly, a few minutes; I don't know whether three or five.

Q. And I don't believe you said that any particular item in those notes was discussed by him when he was going through them?

A. What do you mean by "specific items" now?

Q. Well, to me that would mean there were several entries in the notes, and were they gone over one by one, entry by entry, or was any particular entry discussed?

A. I don't believe so.

Q. All right, sir.

A. I think he—I think he generalized about them rather than any specific one.

Q. And he then proceeded, I think you testified on direct [fol. 1139] examination he then proceeded to discuss football in general at the meeting, including you?

A. What do you mean "including me"?

Q. I mean, including you as a group, he was discussing football there for about an hour, I think you said?

A. Well, I wouldn't put an hour on it, but approximately that; yes.

Q. All right, sir. And he took the position, as you said, that the information that was contained in these Burnett notes were not in the category that they would have helped anyone getting ready for a game with the University of Georgia?

A. Well, I don't believe he was asked that question.

Q. Let me put it this way. You did testify he told you and the others he would never do anything that would hurt the University of Georgia, didn't he?

A. He said, "I didn't do anything that I thought would hurt the University of Georgia and I never would," or something to that effect.

Q. All right, sir. These notes that he had there in his hand, if they contained information that might have helped an opposing coach, that would have hurt the University of Georgia, wouldn't it?

A. Well, presumably so.

Q. You don't know what is in those notes insofar as football knowledge is concerned, do you?

A. No; I do not.

Q. You don't know whether there was anything in those notes that would be helpful or harmless, do you?

A. This is certainly not an expert's reaction, but there were names called, and whether or not that is helpful and how they react, or not, I have an idea that maybe if [fol. 1140] you knew a good deal about the reaction that it would be helpful.

Q. Did you ever discuss these notes yourself with anyone that was familiar with football jargon?

A. I saw a run of the film—

Q. Yes, sir.

A. —with the notes.

Q. Yes, sir. Did you discuss the notes with someone when the film was being run?

A. Yes. I mean, the notes were discussed.

Q. Yes, sir.

A. I listened.

Q. The film was being run by Johnny Griffith, wasn't it?
A. Yes, sir.

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By Mr. Schroder:

Q. Did Coach Griffith tell you, in effect, that the only thing that he saw in those notes that would be of help would be knowing two formations?

Q. Did he at that time point out to you—
A. I think he indicated that he thought they would be of help.
Q. All right, sir.
A. But I don't think he mentioned specific formations.
Q. Did he, at the time that he was showing the film to you, point out that the first four times that the University of Georgia football team used one of these formations that it caught Alabama by surprise and the plays run from those formations were successful?
[fol. 1141] A. I don't think there is any—

The Court: I don't remember Coach Griffith testifying to that. Several others testified to that.
Mr. Schroder: Mr. Pearce did.
Mr. Cody: He didn't testify to that.
The Court: No.
Mr. Joiner: No.

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Dr. Hugh Mills, called as a witness on behalf of the Defendant, after having been first duly sworn, testified as follows:

By Mr. Cody:

Q. Your name is Dr. Hugo Mills?
A. Yes, sir.
Q. Where do you live, Dr. Mills?
A. In Athens, Georgia, 3280 Jefferson Road.
Q. How long have you lived there?

A. I have lived at this address about three years now.

Q. How long have you lived in Athens?

A. At this present time since 1954, I believe.

[fol. 1142] Q. Are you connected in any way with the University of Georgia?

A. Yes; I am an associate professor in the Education School.

Q. How long have you been a professor?

A. I first joined the staff in 1948, I believe, and then I had a three-year term back out in public school and back the next time I believe in 1954, so I have actually had two tenures with the University. I have been there since 1954 constantly.

Q. Are you a member of the University of Georgia Athletic Board?

A. Yes, sir.

Q. How long have you occupied that position?

A. I am in my second term. The term is for one year, so it would be about a year and a half, I guess, now.

Q. In your work at the University, have you—have you had occasion to know Wallace Butts?

A. Yes, sir.

Q. Please state to the Court, Dr. Mills, whether or not you know the general character in the community of Wallace Butts?

A. Yes, sir; I think I know the general character of Wallace Butts.

Q. From that knowledge will you state to the Court whether or not that is good or bad?

A. Given those choices, from my knowledge I would now have to say "bad".

Q. From your knowledge of that character can you state to the Court whether or not you would believe Wallace Butts on oath?

A. I would not any longer.

[fol. 1143] Mr. Cody: I believe that's all.

The Court: Mr. Schroder—

Mr. Schroder: Yes, Your Honor.
The Court: —Do you have any questions?

Cross examination.

By Mr. Schroder:

Q. Dr. Mills, after the January 28th meeting of the Board—you attended that meeting, didn't you?
A. Yes, sir.
Q. And after the meeting you talked wtih Wallace Butts, didn't you?
A. Yes, sir.
Q. And in that conversation you told him what a wonderful job you thought he had done there at the University, didn't you?
A. Yes, sir.

Mr. Cody: Speak so I can hear you, Schroder; I can't hear you.
The Witness: And will be happy to explain that statement.

By Mr. Schroder:

Q. Well, you made the statement to him?
[fol. 1144] A. Yes; I did.
Q. All right, sir. Do you know Bill Hartman?
A. Yes, sir.

Mr. Cody: I think he ought to be permitted to explain his statement, Your Honor. I think you permitted Mr. Schroder's witnesses to do that, and if he wants to make an explanation I think he ought to be permitted to do it.
Mr. Schroder: I understand Mr. Cody is not through, yet, with the witness.
The Court: Sir?
Mr. Schroder: I didn't understand Mr. Cody was through with the witness.
The Court: Mr. Schroder, I think he can explain his answer.

Mr. Schroder: It is all right with me.

The Court: You can explain it, sir.

The Witness: As well as I remember in these circumstances we were viewing the maps of the proposed recreation experiment stations in North Georgia where we were [fol. 1145] in Mr. Masters' office at the Continuing Education Center, and I told Coach, because I felt that things had gone very badly for him, not in the meeting but of late, that all in all I felt he had had a very good influence over the years, which was my way of saying, in fact, that, "I am very sorry and I hope things do better for you now, and I certainly did mean that, of course."

By Mr. Schroder:

Q. In 1959 Wallace Butts was elected the number two football coach in the United States, wasn't he?

A. I'm sorry, but I don't recall.

Q. You say you do know Bill Hartman?

A. Yes, sir.

Q. He is a man of honor?

A. In my estimation, yes, sir.

Q. You would believe him, wouldn't you?

A. I would.

Q. Do you know Ray Clark, the captain of the Georgia 1962 football team?

A. Yes, sir.

Mr. Cody: Your Honor, I think it is the character of the Plaintiff in this case, not that of—not that of other parties.

Mr. Schroder: These people have testified—

The Court: I think, Mr. Cody, if I remember the rule correctly, I don't know that Mr. Schroder is properly putting the questions, but I am sure he can, I think he can [fol. 1146] ask him to say he knows So-and-So. I think he can bolster the evidence of Mr. Hartman or Mr. Clark, or anyone else.

Mr. Cody: Very well; very well.

The Court: It is a proper rule. I don't know that you propounded your question like the Code Section, but you can ask him does he know the reputation of Mr. Hartman.

Mr. Schroder: All right, sir.

By Mr. Schroder:

Q. And Mr. Ray Clark?

Mr. Cody: I do want to make this point for the record, Your Honor.

The Court: All right, sir.

Mr. Cody: Until the character of a witness is in issue, I think the Courts have held that evidence as to character is inadmissible.

The Court: All right, sir; have you got the law on that? Let the Jury go to the jury room. Let's see the law on that.

[fol. 1147] (Whereupon the Jury retired from the court-room at 10:12 A. M.)

Mr. Cody: 16 Georgia Appeals, Your Honor.

The Court: Let me get 16 Georgia Appeals. Will you state what that case holds, and by that time I will have the volume.

Mr. Cody: It is my understanding that it was held in that case that the credibility of a witness—it is my understanding that the witness can not be impeached on evidence introduced as to his character unless there's been some attack on it.

The Court: Well, I don't know whether you would call an attack—one way to impeach a witness would be contradictory testimony.

Mr. Cody: Yes, sir.

The Court: And some of the witnesses would be questioned about, Mr. Clark and Mr. Hartman, there's been contradictory testimony in regard to whether or not plays set out in those notes would have or would not have been beneficial.

Mr. Cody: Yes.

[fol. 1148] The Court: That is one way of contradicting it, I mean, impeaching is by contradicting statements.

Mr. Cody: Let me take a look at one Code section we had in mind.

The Court: You are referring, I believe, to 38-108?

Mr. Cody: I think it is.

The Court: Yes, sir. This testimony went in yesterday, Mr. Cody, without objection on your part. I remember he asked Mr. Bradshaw in regard to Charlie Trippi; I believe I am right on that.

Mr. Schroder: That's correct.

The Court: What is your citation?

Mr. Cody: It is 1803.

The Court: Sir?

Mr. Cody: Code section 1803.

[fol. 1149] The Court: What is your citation in 16 Georgia Appeals? I have it here now.

Mr. Cody: Page 832, headnote one. I think Section 1804 touches on this subject too.

The Court: Have you got any Code section?

Mr. Cody: Yes, sir.

The Court: As I understand the Code section, Mr. Cody, —I am reading from the Code section, a witness may be impeached by evidence as to his general bad character. The impeaching witness should be first asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly he may ask from that character if he would believe him on his oath. The witness may be sustained by similar proof of character. And that is just what—

Mr. Cody: That is the witness on the stand. A witness—

The Court: No, sir; you wouldn't sustain a witness by his own testimony. You would sustain it by someone else, and he is sustaining Mr. Hartman's and Mr. Clark's, I believe, by this witness.

[fol. 1150] Mr. Cody: Only, I understand, when his character has been attacked. You can not offer evidence—

The Court: I don't know that you have attacked his character, but you have in a roundabout way, I assume it is your contention, that this evidence showed that these notes

were of benefit, and these two witnesses testified—I don't remember about Mr. Clark, but I remember Mr. Hartman stated that in his opinion and Mr. Trippi, that they didn't affect the outcome.

Mr. Cody: I understand Your Honor's ruling.

The Court: Yes. I will let him answer. Is there anything else while the Jury is out?

Mr. Schroder: No, Your Honor.

Mr. Cody: No, sir.

The Court: All right, let them be brought back in.

(Whereupon the Jury returned to the courtroom at 10:18 A. M.)

The Court: All right, Mr. Schroder.

[fol. 1151] By Mr. Schroder:

Q. Dr. Mills, you stated that you do know Mr. Ray Clark?

A. Yes, sir.

Q. You are familiar with his reputation in the community?

A. I am not real familiar with his reputation in the community. I do know him and have a high regard for the boy; yes, sir.

Q. Do you know Mickey Babb?

A. Yes, sir.

Q. Do you know his reputation in the community?

A. Yes, sir.

Q. Would you believe him under oath?

A. I would.

Q. Do you know Wally Williamson?

A. Yes, sir.

Q. Do you know his reputation in the community?

A. Yes, sir.

Q. Is it good or bad?

A. Good.

Q. Would you believe him under oath?

A. I would.

Q. Do you know Mr. Charlie Trippi?
A. Yes, sir.
Q. Do you know his reputation in the community?
A. Yes, sir.
Q. Is it good or bad?
A. Good.
Q. You would believe him under oath, wouldn't you?
A. I would.
Q. Did I ask you about Mr. Brigham Woodward?
A. No, sir; I don't believe you did.
[fol. 1152] Q. Do you know his reputation?
A. I do not know it as well as the others. I have talked to the others personally on occasion. I don't believe I have ever talked to Mr. Woodward personally, but I do know who he is, and I know him as one of our students.
Q. You know his reputation?
A. To that extent, yes.
Q. Is it good or bad?
A. Good.
Q. You would believe him under oath, wouldn't you?
A. I would.

* * * * * * *

J. D. Bolton, having resumed the stand, testified further as follows:

Redirect examination.

By Mr. Cody:

Q. Mr. Bolton, you heretofore have been sworn as a witness?
A. Yes; I have.

Mr. Cody: This is Mr. J. D. Bolton.

By Mr. Cody:

Q. Mr. Bolton, will you tell the Court once again how long you have been connected with the University.

A. Since July 1st, 1933.

[fol. 1153] Q. And you presently occupy what position?

A. Comptroller and Treasurer of the University of Georgia, and also Treasurer of University of Georgia Athletic Association.

Q. In that capacity have you had much contact with Wallace Butts during the period that he has been at the University?

A. Yes, sir.

Q. Has that been fairly constant?

A. Yes, sir.

Q. Does your duties as Treasurer of the Athletic Association cause you to have business dealings with him?

A. Yes, sir.

Q. Will you please state to the Court whether or not you know—you are acquainted with the general character of Wallace Butts in the community?

A. Yes, sir; I believe I am.

Q. From that knowledge will you state to the Court whether or not that is good or bad?

A. I would have to say it is bad.

Q. From that knowledge of his character, would you believe him on his oath?

A. No; sir; I would not.

Q. Mr. Bolton, have you ever talked with Wallace Butts or been at any meetings where Coach Bryant was discussed, or whether he mentioned Coach Bryant's name?

A. This meeting in Cook Barwick's office on February 22nd, I believe it was.

Q. By what name did he refer—did he refer to Coach Bryant at that time.

A. This is February 22nd, 1963. At that time, to the best of my recollection, he referred to him as "Old Bear" in that one instance.

[fol. 1154] Q. Do you remember at that meeting whether or not Wallace Butts had his glasses with him?

A. Yes, sir; I can remember very distinctly.

Q. Did he have them or did he not?

A. Evidently he did not have them, because I gave him my glasses to examine the notes with.

Q. Did he have anything to say as to whether or not he could see with your glasses?

A. Yes, sir; he said, "I can see out of these things."

Q. Did he examine the notes in your presence?

A. Yes, sir.

Q. Mr. Bolton, were you—prior to the Bryant affair, were you on a committee appointed by Dr. Aderhold to look into any matters concerning Wallace Butts?

A. Yes, sir.

Q. Do you know when you were appointed on that committee?

Would your notes refresh your recollection?

A. I think it was January the 5th.

Q. Of 1963?

A. 1963.

Q. What is that you are looking at?

A. Looking at the minutes of the Athletic Association.

Q. Go ahead.

A. Minutes of the Board meetings and Executive Committee meetings.

The Court: You the secretary?

The Witness: No, sir. I have sometimes acted as secretary when others were not there.

[fol. 1155] By Mr. Cody:

Q. Will you state to the Court the assignment that was given that committee?

A. The committee was instructed, and, as well as I remember, the committee was composed of Mr. Heckman and Mr. Bishop Grant and I, to study expense accounts and personal telephone accounts of Coach Butts.

Q. Well, how did the University come into that—

Mr. Lockerman: Your Honor, I don't see the relevancy of this at all, and I think the Jury should be instructed to disregard it.

The Court: Let's don't go into that. I will let you ask him in regard to the termination, what that committee—I

presume you are going up to the question of the appointment of Mr. Barwick to investigate it?

Mr. Cody: That is another committee.

The Court: Sir?

Mr. Cody: That is another committee.

The Court: Well, I will rule this evidence out.

Mr. Cody: Yes, sir.

[fol. 1156] Mr. Lockerman: Will you instruct the Jury?

The Court: Members of the Jury, I will instruct you to disregard any statement in regard to the committee looking into any telephone calls that might have been charged to the University. That is not relevant in this matter, and you should disregard it.

Mr. Cody: I believe that's all.

Recross examination.

By Mr. Schroder:

Q. You referred a moment ago to a notebook that you had there covering the meeting in Mr. Barwick's office. Could I see it please, sir?

A. My notebook?

Q. Yes, sir.

The Court: I don't believe he—his testimony wasn't that he had evidence of minutes of the meeting in Mr. Barwick's office.

Mr. Schroder: No; when he was testifying, refreshing his recollection.

The Witness: Do I have to give him my personal notebook?

[fol. 1157] Mr. Schroder: You mentioned something—I don't want to look at your personal notebook.

The Court: He thought maybe you had some notes. Do you have any notes that were made in regard to that meeting that are separate? He would be permitted to have them. But if it is your personal notes—

Mr. Schroder: Could I sort of stand behind him and let him show me what entries he had?

The Court: Let him read them out to you and then point them out.

The Witness: Which date, February 22?

Mr. Schroder: Yes, sir.

The Witness: 10:00 A.M., Cook Barwick, Caldwell, Dunlap, Moore, Hartman, Butts, and, of course, Dr. Aderhold and I were there too.

By Mr. Schroder:

Q. Is that all the notes you have relative to that meeting?

A. Yes, sir.

Q. Well, when you were asked a minute ago about what Coach Butts had to say when he was referring to Coach [fol. 1158] Bryant, you looked at your notebook and said, "Old Bear". You don't have that in there, do you?

A. No; I looked for the date in the notebook.

Q. Oh, looking at the date refreshed your recollection?

A. Yes, sir.

Q. You been at Athens, you say, since 1933 at the University?

A. Yes, sir.

Q. You were there when I went through the Law School?

A. Yes, sir; I remember you well.

Q. You have been there long enough, have you not, to form an opinion as to the general character and reputation of William Hartman in that community?

A. I think so.

Q. In your opinion, is it good or is it bad?

A. I would say it is good.

Q. Would you believe him under oath?

A. I have never had occasion not to.

Q. Is your answer "yes"?

A. I believe I would.

Q. Your answer is "yes"?

A. Yes.

Q. Do you know Coach Charles Trippi?

A. Yes, sir.

Q. He lives in Athens?

A. Yes, sir.

Q. Are you familiar with his character and reputation in the community where he lives?

A. Not as well as I am with Coach Hartman. I have never been thrown closely with Coach Trippi.

Q. No; I didn't mean your personal association with him, [fol. 1159] but what is his general reputation in the community in which he lives?

A. As far as I know it would be good.

Q. And you would believe him under oath?

A. Yes, sir; I would.

Q. Do you know Ray Clark, Captain of the University of Georgia football team?

A. I would know him if I were to see him.

Q. Sir?

A. I would only know him if I were to see him.

Q. Are you familiar with his reputation in the community?

A. No, sir; I would not be.

Q. Sir?

A. I would not be.

Q. And he is the Captain of the team?

A. I think he was.

Q. In '62?

A. Yes, sir.

Q. But the last time we put a team on the field he was the Captain of it, wasn't he?

A. I think that's right.

Q. Do you know Mickey Babb?

A. I think I'd know him if I were to see him.

Q. Do you know his reputation?

A. No, sir.

Q. Do you know Wally Williamson?

A. I'd know him if I were to see him.

Q. Do you know his reputation in the community?

A. No, sir.

Q. Do you know Brigham Woodward?

A. Same answer. I'd know him when I'd see him.

Q. But you don't know anything about his reputation?
[fol. 1160] A. No, sir.
Q. Do you know John Gregory?
A. Yes, sir.
Q. You know his reputation in the community?
A. Yes, sir.
Q. Is it good or bad?
A. I think it is good.
Q. Would you believe him under oath?
A. I don't believe I could answer that question.
Q. Why not?
A. May I explain?
Q. Yes, sir.
A. I think the answer would have been yes immediately, but if the newspapers have reported him right, I could not answer the question you asked without studying it further, and I haven't seen the evidence myself.

Mr. Schroder: All right, sir. That's all—

By Mr. Schroder:

Q. Going back to the topic I was questioning you about at the beginning of this examination, I have in my hand a transcript prepared by the Court Reporter here of your testimony when you were on the stand last week. This question—I ask you if you remember this question being asked you by Mr. Cody: "Could you recall for the Jury what comments he did make," referring to Wallace Butts? Answer by Mr. Bolton: It got down—"It's just conversation, ordinary football talk among coaches, and that you know I would not give Old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia." Do you remember giving that answer?
[fol. 1161] A. No, sir; I remember saying "Old Bear".
Q. Last week?
A. Yes, sir.

Q. Since you were last on the stand, has Mr. Cody or anyone from this office discussed the testimony in this case with you since then?

A. Yes, sir.

Mr. Schroder: All right, sir, come down.

Examination.

By the Court:

Q. Mr. Bolton, let me ask this question. I believe there are about, what, thirteen or nineteen members on the Athletic Board?

A. Eighteen, I believe.

Q. Eighteen, and two of those, I believe, are appointed by the Alumni Association, which is a separate—I believe the Alumni Association is a separate corporate entity, is it not?

A. That's correct.

Q. Is the Athletic Association a corporation, do you know?

A. Yes; it is a corporation.

Q. It is a corporation?

A. Yes, sir.

Q. What—the charter of the corporation, what is the provision as to the election of members to the Athletic Board?

A. If I remember correctly, Your Honor, I think the President appoints the faculty members or suggests to the committee who appoints the faculty members, and then [fol. 1162] the Board elects the non-faculty members every year; they are re-elected.

Q. You mean the non-faculty members of the Board—

A. Yes, sir.

Q. —are elected by the faculty members of the Board; is that correct?

A. I think that's right.

Q. Except for the two alumni?

A. I think except for the alumni, and you see—let's see, fifteen, there are eight faculty members and seven non-faculty members, and I think under the—

Q. The Southeastern Conference requires that the majority members of the Board be faculty members?

A. That's correct, sir.

Q. But under the charter the faculty members elect the non-faculty members; is that right?

A. I can tell you how it is handled. We have a nominating committee that is usually made up of a majority of the non-faculty members, and there will be a faculty member on there, but the majority is made up of non-faculty.

Q. Non-faculty?

A. To nominate non-faculty members each year at the Board meeting.

Q. Does this Board decide what the compensation the Director of Athletics and coaches and all assistant coaches should be?

A. Yes, sir.

Q. What was the compensation—what is the compensation of the Director of Athletics?

A. At the time Coach Butts was made Director, I believe it was twelve thousand.

Q. What is the compensation of the head coach at Georgia?

[fol. 1163] A. I believe Coach Griffith's was set at fifteen thousand. At the time of Coach Butts, I believe, if my memory serves me correctly, it was eighteen-five. That included some—not only salary but subsistence allowance.

Q. And you are a separate corporation, the Athletic Association?

A. Yes, sir.

Q. I presume that all your accounts and so forth are not only audited by the University but audited by the State of Georgia too?

A. No, sir; they used to be, but since 19—I can't remember the exact date, but 1948 or '49, although the Athletic Association was incorporated, there was a State Act of

the Legislature declaring the University of Georgia Athletic Association and the Georgia Tech Athletic Association as separate corporations, and—which did not come under the State. Therefore, the State auditor has not audited since that date.

The Court: I believe that's all.

Redirect examination.

By Mr. Cody:

Q. Mr. Bolton, when the question arose as to what your testimony was last week as to what name Coach Butts used when he referred to Coach Bryant, did the Court Reporter call you?

A. No, sir.

Q. It is your testimony that in that meeting he referred to Coach Bryant as "Old Bear"?

A. That is my understanding; that is my memory of it.

[fol. 1164] Q. And that is what you testified to last week?

A. Yes, sir.

Mr. Cody: I believe that's all.

The Court: Any further—any further questions?

Recross examination.

By Mr. Schroder:

Q. During the time Wallace Butts has been connected with the football picture there at the University, during all of which you were at the University, tell the Court and Jury approximately how much revenue the University has picked up through his football teams?

The Court: I don't think that is relevant, Mr. Schroder. I was simply—probably my evidence was irrelevant. I was simply trying to bring out the full picture, what the Athletic Board was, but we can't go into

Mr. Schroder: I will go back to one of the questions Your Honor asked, and the answer he gave.

The Court: I didn't mean to get into a different field. I was simply making an inquiry for personal information. I did want to know the whole athletic situation. I thought it was pertinent on that.

[fol. 1165] Mr. Schroder: I was glad to find that out myself. I thought the amount of salary paid was pertinent.

By Mr. Schroder:

Q. The amount of salary paid Coach Butts as athletic director was twelve thousand dollars by the Board, wasn't it?

A. Yes, sir; that was his beginning salary.

Q. I mean, as athletic director.

A. Yes; as athletic director.

Q. But he did receive the same amount of money as he had when he was head coach, which would be eighteen-five, didn't he?

A. He did—you mean after he became athletic director? No, sir.

Q. G.S.E.F. didn't pay sixty-five hundred a year?

A. I don't know about that.

Q. You don't know what the Georgia Student Educational Fund is?

A. I know what it is, but I have no knowledge of their records.

Q. You don't know that he got from the University sources the same amount as athletic director that he did as head coach?

A. No, sir.

* * * * * * *

FRANK SCOBY called as a witness on behalf of the Defendant, after having first been duly sworn, testified by deposition as follows:

[fol. 1166] Direct examination.

By Mr. Joiner:

Q. Will you state your name, please?
A. Frank Scoby, S-c-o-b-y.
Q. What is your residence address?
A. 6141 North Lemont Avenue.
Q. And is that in Chicago, Illinois?
A. Chicago, Illinois.
Q. What is your primary business address?
A. 315 North May, M-a-y. This is Chicago, Illinois.
Q. Do you have any other business addresses, other than that one?
A. No.
Q. What is your home telephone number?
A. Mulberry 5-6662.
Q. And do you have more than one telephone number at home?
A. No.
Q. Would you give us those of your business telephone numbers that you can recall by memory?
A. CHesapeake 3-0800.
Q. Do you remember any of the others?
A. No.
Q. What business are you in, Mr. Scoby?
A. Beer distributing.
Q. And what is the name of your business?
A. Better Brands of Illinois, Incorporated.
Q. What brands of beers do you distribute?
A. Miller High Life.
Q. Any other brands?
A. Ballentine Ale and Amstel.
Q. Do you also distribute distilled beverages?
A. No.

[fol. 1167] Q. Have you, in the last few years, distributed any distilled beverages?

A. No.

Q. Do you now, or have you over a period of the last five years, distributed any alcoholic beverages, except for malt beverages?

A. No, not in five years.

Q. You had some time previous?

A. About eight years ago I had a Scotch, yes.

Q. What brand of Scotch was that?

A. Lean Gramey.

Q. Do you have any interest in the Red Top Brewing Company of Cincinnati, Ohio?

A. Do I have?

Q. Yes.

A. No.

Q. Have you previously had an interest in this company?

A. I operated the company for John MacArthur, an insurance man, for a period of about three years, two years, before we liquidated it.

Q. When was it liquidated?

A. Approximately six years ago. Five or six years ago.

Q. How long have you been in business in the Chicago area?

A. Since 1945.

Q. How long have you lived in the Chicago area, since that time?

A. Since about that time.

Q. Where were you from, originally?

A. Previous to that I was in Detroit, Michigan.

Q. Is that your home?

A. No. My home is Colorado Springs.

Q. Do you know Wallace Butts.

[fol. 1168] A. Yes, sir.

Q. When did you meet Wallace Butts?

A. Oh, about fifteen years ago, I believe. In 1947 or '48.

Q. What were the circumstances under which you met Wallace Butts?

A. It was the time Frank Lahey was coaching the All-Stars and Wallace Butts was on the staff. I met him through Frank Lahey.

Q. Do you remember the year?

A. I believe it was 1947. I am not positive.

Q. How long have you known Coach Frank Lahey?

A. At that time about three years.

Q. Have you seen Coach Butts frequently since the time you first met him?

A. Quite often.

Q. Could you say about how many times each year since then?

A. Some years it may have been two or three. Other years it might have been eight or ten, depending on the situations, whether he was in town or not.

Q. Have you seen him at least once each year since you met him in 1947?

A. Yes, I would say so.

Q. And would you give us your best recollection of what would be the most number of times that you have seen him during this period of any one year?

A. In any one year?

Q. Yes.

A. Seven or eight, possibly ten.

Q. Do you recall now what year that would be?

A. No, not in particular.

Q. Now, to the best of your recollection how many times have you seen Coach Butts over a period of the last three years?

[fol. 1169] A. Possibly fifteen times.

Q. And of those fifteen times, how many of them would have been within the immediate preceding year?

A. Six or seven, I'd say.

Q. Now, during these times that you have seen Coach Butts, where would you usually see him?

A. Normally it would be, because he would just be in town and call me up and I'd meet him.

Q. What places, other than Chicago, have you been with Coach Butts?

A. I was with him once in Atlanta and once in Miami.

Q. Have you ever been to Athens?

A. Never.

Q. Now, I suppose you have been to South Bend?

A. Quite often.

Q. With Coach Butts?

A. Yes.

Q. What would be the occasion for your visit to South Bend with Coach Butts?

A. On two or three occasions when he had a day off he would come up here and go down to see a Notre Dame game. Another time he went to an Old Timers' game, or I think twice we went to an Old Timers' game.

Q. Do you recall attending any other athletic contest with Coach Butts, other than the athletic games you have mentioned?

A. Yes, I attended a Florida game with him about five or six years ago, I guess it was. I'm not sure of the date.

Q. Was that a Georgia-Florida game?

A. Yes, Georgia was playing. I shouldn't say I at-
[fol. 1170] tended the game with him; I went down to see one of his games.

Q. Do you remember which Florida school?

A. Pardon?

Q. Was it the University of Florida?

A. In Jacksonville.

Q. Did you have occasion to visit with Coach Butts on your trip to Jacksonville during that time?

A. I met him before that game.

Q. Now do you recall any other athletic contests that you have attended or have been present when Coach Butts was present?

A. I saw his game in the Orange Bowl when he played Missouri, I believe.

Q. What year was that, do you recall?

A. I don't remember.

Q. That was the year when the University of Georgia played the University of Missouri in the Orange Bowl in Miami, Florida?

A. That's right.

Q. Now, have you ever attended a World Series game with Coach Butts?

A. World Series Baseball game?

Q. Yes.

A. No.

Q. Have you ever attended any professional football games with Coach Butts?

A. Several All-Star games.

Q. When you say "All-Star games," are you referring to—

A. All-Star football.

Q. Are you referring to the game where the All-Stars from the colleges play the leading team from the professionals for the previous year?

A. That's right.

[fol. 1171] Q. Where is that game played?

A. Soldier's Field, here.

Q. That is here in Chicago?

A. Right.

Q. Do you have any other mutual acquaintances with Coach Butts, other than Coach Frank Lahey?

A. I probably know a great many people that he knows. I don't know of anybody that's close to him that I also know.

Q. Would Coach Wilkenson at Oklahoma be in that group?

A. Coach Wilkenson is a good friend of mine.

Q. Is he also a friend of Coach Butts, or do you know?

A. I wouldn't know.

Q. What other coaches are you acquainted with or considered to be friends with?

A. I probably know thirty coaches.

Q. Could you give us those that you recall, please, sir?

A. I can recall a few of them. I know Coach Brennen at Notre Dame, I know Coach Koherick, I know Coach Jones at Oklahoma.

Q. What is Coach Jones' position?

A. The assistant coach. Brenny Crimmons real well at Indiana. Joe McGartle, he used to be an assistant coach for Notre Dame. Coach Grandalius.

That's all I can think of at the moment. I know a good many more than that.

Q. How about Coach Paul Bryant?

A. Brown?

Q. Bryant, at the University of Indiana.

A. To the best of my knowledge I never met him.

Q. You haven't mentioned any other coaches in the Southeastern conference other than Coach Butts?

[fol. 1172] A. Not that I can recall.

Q. Have you ever made any trips with Coach Butts, other than the one to Miami that you have mentioned?

A. I never made a trip to Miami with Coach Butts?

Q. You just happened to be in Miami at the same time, but you didn't travel together?

A. That's right.

Q. Have you ever made a trip anywhere with Coach Butts, outside of the Chicago area, other than the ones to the South Bend?

A. Not that I can recall. I met him in New York on two or three occasions when he happened to be there when I was there.

Q. Do you recall the occasion for his being in New York when you met him there?

A. No. He was just there when I was there. I go to New York quite often.

Q. You don't recall the occasion for your being there?

A. No particular reason for being there, either one of us.

Q. Now, what was the purpose of your trip to Atlanta?

A. There was a health food product that I thought Coach Butts might be interested in, called—I cannot think of the name of it. That movie guy on the West Coast was mixed up on it. They took it off the market.

I asked some friends of mine who might be interested in it, and they thought Coach Butts might be interested, to give his football players some employment, and I met him there. It's something like Metrecal, but that isn't it. I met [fol. 1173] him there, and after we both heard the spiel, we both thought it was a phony and walked away from it.

Q. Do you remember the name of this company that manufactured the food?

A. No, but I will get it later. A movie star on the West Coast was behind it, and the Pure Food and Drug people made him take it off the market.

Q. Do you remember the name of the movie star?

A. I'll get the name of it later; I just don't recall right now.

Q. Then what would have been the participation of yourself and Coach Butts in this program, if you had decided to go into it?

A. My only interest in it was the fact that Tom Lahey and a couple of other—Tom Lahey was Frank's brother, and a couple of other insurance people were very interested in getting into it on a sectional or territorial basis. Tom suggested to me that Coach Butts might want to put some of his boys to work with it.

Q. In other words, he would be something of a distributor of the product?

A. That's right. As far as Butts and I personally being involved in any one situation, there was no interest or no intent.

Q. Now was it your previous testimony that some friends of Coach Butts suggested to you that he might be interested in this?

A. No, no. Some friends of mine suggested to me that Coach Butts might be interested in it, and the friends were Tom Lahey and a couple of other fellows that worked for Bankers Life and Casualty.

Q. What were their names?

A. I don't know. I just remember Tom Lahey. He is with Bankers Life and Casualty, too. Nutri-bio.

[fol. 1174] Q. Do you know how to spell that, sir?

A. No, I don't.

Mr. Nussbaum: I think it's N-u-t-r-i-b-i-o.

By Mr. Joiner:

Q. When was this trip to Atlanta?

A. As I recall, it's about three years ago. I'm not sure.

Q. And did you—

A. Possibly two years ago would be better.

Q. Is it your testimony that is the only time that you have been with Coach Butts in the State of Georgia, on this one trip?

A. To the best of my knowledge.

Q. On your trips to New York, do you generally stay at any one particular place?

A. Almost always at the Essex House.

Q. Do you know where Coach Butts usually stays on trips to New York?

A. Well, the one or two times I met him there he stayed at the Essex House also, because I told him I was going to be there.

Q. Now, during the time that you have known Coach Butts you testified that he had visited you frequently in Chicago. Were most of those just of a social type, coming up for a football game or something like that, or were they connected with business?

A. They practically were all of a social type. Not necessarily coming up for a game, but if he happened to be in town he would call me and say he was coming in for some reason.

Quite often he would come in and try to get students out of this area. He would say, "I'm going to be in town, let's [fol. 1175] have dinner and a couple of drinks," which we did.

It was always a social situation.

Q. Did you ever try to help him get students in this area to participate in the athletic program at the University of Georgia?

A. I wouldn't dare.

Q. Why?

A. I would get disowned from the alumni of Notre Dame.

Q. Have you ever been involved in any business ventures with Mr. Butts?

A. No.

Q. Have you ever been approached by Mr. Butts to make an investment in a business venture?

A. As far as me making an investment, no. As far as him asking me for advice as to how he could finance various things, yes.

Q. And do you recall these particular projects that he was interested in getting your advice on?

A. Well, one in particular had to do with some small loan companies that he was involved in in Georgia. He needed financing for them.

Another one was some type of a concentrated orange juice situation.

Q. Do you recall on how many different occasions you spoke to him about the small loan companies?

A. Not offhand. I might have had a phone conversation ten or fifteen times with him.

Q. What about the orange grove project, do you remember how many times you spoke to him about that?

A. Several. He sent me a complete rundown on it, and after looking at it I wouldn't advise anyone to invest in it, and I just didn't do anything about it.

[fol. 1176] Q. Do you recall any other projects that he has asked you to give him your advice on?

A. No, just an orange grove, a concentrated orange juice, and a small loan situation is all I recall.

Q. Now did Coach Butts ask you to invest in either the loan companies or the orange grove project?

A. Did he ask me personally to invest in them?

Q. Yes.

A. No.

Q. Did he ask you to try to obtain capital from a Chicago —from the Chicago area, or was he just asking for your advice?

A. No, he asked me to try to obtain capital for all three of them.

Q. And you say all three of them. I don't believe you mentioned but two.

A. Yes, an orange grove and the concentrated orange juice situation, and a small loan company.

Q. Were you able to obtain any capital for any one of these?

A. Frankly I didn't have enough confidence in any of them to approach anybody.

Q. How long did it take you to make up your mind that you didn't have confidence in these particular companies?

A. Well, after he sent the complete brochure and rundown in on particular these two things, the grove and the concentrated orange juice, I didn't think they were good investments for anybody and I wouldn't advise anybody that I knew to put any money in them.

• • • • • • •

[fol. 1177] Q. Did you receive information about these companies within a short while after Coach Butts first spoke to you about them?

A. It was over a period of time. I don't recall the time. Probably—we discussed them at various times over a period of seven, eight or nine months.

Q. Do you recall any one particular time when you were carrying on these discussions, more than any other previous time?

A. Yes. I met somebody named Surgent down in Miami with Coach Butts. He asked me to come down and see this gentleman, whoever he—I even forget the name of the company that he represented that had to do with the concentrated orange juice.

After I had had the brochure, the rundown or the statements or whatever you want to say on the entire set-up, I told Wally I didn't think the deal was a solid deal and he asked me to come down and meet Mr. Surgent with him, which I did.

He said that Mr. Surgent could probably explain it better and I would understand it better.

After I got there I was still of the same opinion.

Q. When did you go down to see Mr. Surgent?

A. About two years ago.

Q. After you went down to see Mr. Surgent did you have any further discussions with Coach Butts about this particular project?

A. Possibly. Probably I did.

Q. Would it have been any number, or—

A. You don't just tell a guy, "Well, I don't think your deal is any good," and walk away. You let him talk, I probably talked to him six or eight or ten times about it since.

Q. Now other than that particular period two years ago, [fol. 1178] has there been any period of time since you have been dealing with Coach Butts on these projects in which there was more activity than normal?

A. No, I don't think so.

Q. Would you state whether or not you have invested in a company known as Continental Enterprises, Incorporated?

A. Well, I don't recall investing in it. I bought some stock in it.

Q. Do you recall the amount of your investment in that company?

A. Not offhand. I have got records of it, but I don't recall what it is.

Q. Could you give us an approximation of the amount?

A. Some sixteen or eighteen thousand dollars, I think. Somewhere in that neighborhood. Maybe twenty-three thousand dollars, I am not sure.

Q. How have you fared on that investment?

A. Not well.

Q. Do you have any idea approximately how much your loss has been on the investment?

Q. I got out of some of it before it went all the way down. I probably, today, have about an eight or ten thousand dollar loss.

Q. How did you come to invest in this particular company?

A. Coach Butts called me and told me he thought it was a good investment, that there was indication that they

were about to get a deal with Coca-Cola or Pepsi-Cola, or some big outfit that had something.

I think Corn Products was one of the people that he mentioned.

Q. Did he send you information about this company, or did you have access to it from other sources?

[fol. 1179] A. No, I just took his word for it. That's a very normal thing on a stock. It's like going to the races.

Q. Do you know a gentleman by the name of Louis Wolfson?

A. I have met him.

Q. Do you recall when and where you met Mr. Wolfson?

A. I met him through Frank Lahey.

Q. Do you remember when?

A. Approximately ten years ago in New York, at the Plaza Hotel.

Q. How many times have you seen Mr. Wolfson since then?

A. Possibly twice. Not over twice, I don't think.

Q. Do you recall when these two times were?

A. No. Well, one time, yes.

I met him outside of the Stadium the night that Georgia played Missouri. Other than that I don't remember meeting him.

* * * * * * *

DR. H. M. DAVIS called as a witness on behalf of the Defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Cody:

Q. Dr. Davis, will you give your full name to the Court Reporter?

A. Dr. H. M. Davis, Dr. Hamilton Maxmillian Davis.

Q. Are you a dentist practicing in Atlanta, Dr. Davis?

[fol. 1180] A. Yes, sir.

Q. Where is your office?

A. In Buckhead, 3110 Roswell Road.

Q. Speak so these Jurors can hear you, Dr. Davis.

A. Yes, sir.

Q. In response to a subpoena have you brought your records into Court, certain records into Court with respect to one of your patients, Mr. John C. Carmichael?

A. I have brought some that I felt were pertinent to this.

Q. Yes. Will you state to the Court whether or not you have, since the service of this subpoena on yesterday, undertaken to determine whether or not Mr. John C. Carmichael was a patient of yours on September the 13th, 1962?

A. We have examined, meaning people in my office, have examined the record, and we find nothing to indicate that.

Q. What records did you examine?

A. We took last year's appointment books, both the hygienist's and mine, we took our back records insofar as perhaps a deposit could have been made. We took our daily sheet from which we transpose to a file card a more complete record of the patient.

Q. Did you check your X-ray records?

A. We checked X-rays, the date that X-rays were made. We went back to his original appointment as a patient, traced it right up to the present day. There were intervals when we did not see him.

Q. How long have you been practicing dentistry in Atlanta?

A. December 15th, 1934. I think that is about twenty—it will be twenty-nine years.

[fol. 1181] Mr. Cody: I believe that's all.

Cross examination.

By Mr. Schroder:

Q. Was he a patient of yours during that period in 1962?

A. Yes, sir.

Q. Mr. Cody didn't indicate to you that he testified positively that he had gone to your office on September 13, did he?

A. I am sorry; I'm afraid I don't follow you.

Q. Did Mr. Cody or someone from his staff, they didn't indicate to you that Mr. Carmichael had not testified positively that he had gone to your office that morning?

A. I was told that he might have been there.

Q. Might have been there?

A. Yes, sir.

Mr. Schroder: All right, sir, that's all.

Examination.

By the Court:

Q. Doctor, did your records show any time in September, 1962, that Mr. Carmichael was a patient of yours?

A. There is nothing to indicate that. The first—there was an interval there we did not see him for a while, and then the first appointment of '62, 1962, our records show the 4th day of October, 1962.

[fol. 1182] Q. That was the only appointment that your records show he had in 1962?

A. No, sir.

Q. All right, sir.

A. Following that he had one, I think it was the 12th. I jotted it down.

Q. In other words, for the year 1962, October the 4th, 1962 is the first date that your records indicate he came to your office; is that correct?

A. October 4th, 12th, 26th, 31st.

* * * * * * *

FRANK SCOBY testified further by deposition as follows:

Direct examination (continued).

By Mr. Joiner:

Q. Do you recall when those two times were?

A. No. Well, one time, yes.

I met him outside of the Stadium the night that Georgia played Missouri. Other than that I don't remember meeting him.

Q. And that was in Miami?

A. Right.

Q. Do you know a Mr. Sam Wolfson?

A. I think I met him once.

Q. Do you recall when and where you met him?

A. At about the same time in Frank Lahey's home in Long Beach, Indiana.

Q. Do you know Mr. George Solitare?

Mr. Schroder: Who?

[fol. 1183] By Mr. Joiner:

Q. George Solitare?

A. Not that I recall.

Q. Other than the business ventures that you have already discussed in which Coach Butts was interested, have you-all had other business dealings?

A. Not that I recall.

Q. Have you discussed any possible future business dealings that maybe didn't go through?

A. No.

Oh, yes, yes, I have.

Q. Would you tell us about that, please?

A. Yes, I have.

I'm about to attempt to make a Scotch brand name, called Sir James Douglas, and I discussed that with Coach Butts after he severed his connection as coach of Georgia, that I might want him to take over the Southeastern section of the country for this as a representative. And that is still a possibility.

Q. Would this Scotch be made here in this country?

A. Bottled in Scotland.

Q. And is that a new brand name?

A. Yes.

Q. It would be your brand name, and you would import this Scotch?

A. That's correct.

Q. Now, what would Coach Butts' duties and responsibility in connection with the distribution of this product be, if the deal goes through?

A. It would be his duties and responsibilities to hire salesmen in certain areas and get distributors for it and be an over-all representative for the product in certain states, and to see that it was properly handled when it got into accounts and probably supervise the sales personnel.

[fol. 1184] Q. Had your discussions reached the point where you could tell me the states that Coach Butts would handle it if the deal does go through?

A. Well, I had in mind Florida and the Southeastern tip of the country down there. There was nothing done, never anything definite.

Q. Would that include Alabama, Georgia, South Carolina?

A. Probably it would. There has never been anything definite about it. That's probably it, yes. That's the thoughts I had in mind on it.

Q. Now what compensation would Coach Butts receive for his part in distributing this product?

A. Well, there was never anything definite on it. It never got that far. Probably it would be some type of drawing account against a commission.

Q. What generally would be the commission for a person in this capacity in the distribution of a product? Is there any set commission in the industry?

A. No, there is nothing set on that. That would be something that would vary, that would have to be mutually worked out.

Q. Could you give us an indication of approximately what commission you had in mind?

A. No, I can't because I didn't have any commission in mind.

Q. Could you give us an indication of, in the industry as a whole, the approximate commission that would be paid?

A. There is no set deal on that. It depends on the man's ability to produce.

Q. Have you negotiated with people in the other areas of the country about the distribution of this product?

A. Yes.

[fol. 1185] Q. And what stage have your negotiations reached with these people?

A. Nothing definite, other than my own organization. I have had some brief conversations with Frank Lahey about being the representative in the Northwest on it, and no definite arrangements.

Q. If you do decide to go through with this project, could you give us an indication of when you will start distributing this product?

A. Yes. Probably about the 10th of August in New York, and about the 20th here.

Q. Do you feel now that you are going to have this product distributed by that time?

A. Yes.

Q. Is it a definite thing now?

A. It is on the water.

Q. In other words, the distribution of this product by you is definite, but there is no definite deal worked out with Coach Butts?

A. Not with anybody else, not with anybody else.

Q. Not with Coach Butts or anybody else in the country?

A. No.

Q. What about the Chicago area? Would you distribute it yourself in this area?

A. That's right.

Q. Have you filed your label with the Liquor Control Commission in the State of Illinois?

A. Not yet. I have Federal approval on it.

Q. And what Federal agency gives approval on that type of thing?

A. The Alcohol Tax Unit.

Q. Do you recall the number of your import license, or if you don't have one, the import license of Better Brands of Illinois, Incorporated?

[fol. 1186] A. No, I don't have it. I can get it for you, but I don't have it.

Q. Does Chi-1-96 sound like it might be this number?

A. I don't know the number.

I can make a phone call for you and get it for you if you want it.

Q. No, I don't think that will be necessary.

Do you recall the dates when you were in New York and Coach Butts was also there, or if you don't recall all of them do you recall any particular dates?

A. I don't recall any of them.

Q. Do you know whether or not any of them have been in the last two years?

A. I think so, on one or two occasions.

Q. Would you say whether or not you have ever loaned any money to Mr. Wallace Butts?

A. Not directly.

Q. Have you indirectly?

A. I arranged a loan for him at a bank.

Q. Would you tell us about that loan, please?

A. I think it was early in 1962. He said he needed ten thousand dollars for awhile, and I asked my bank if they would loan him ten thousand dollars if I would endorse the note.

They said they couldn't go over six thousand dollars because he wasn't a depositor and he wasn't a customer. He did get a six thousand loan at about that time, and I endorsed the note for him.

Q. Do you know whether or not that loan has been paid?

A. I think the present balance on the loan is about one thousand, five hundred.

Q. Have you ever made any gifts to Coach Butts or any members of his family?

[fol. 1187] A. Not that I recall.

Q. During the time that you visited in Atlanta what people, other than Coach Butts, were you with?

A. I don't remember anybody else.

Mr. Joiner: Skipping down to the third question on that page.

By Mr. Joiner:

Q. Would you state whether or not you consider Coach Wallace Butts to be a close, personal friend of yours?

A. I do.

Q. When have you last seen Coach Wallace Butts?

A. Oh, approximately three or four months ago.

Q. Where did you see Coach Butts at that time?

A. Here in Chicago.

Q. Have you ever been in Los Angeles area when Coach Butts was there, or in the Los Angeles area?

A. Not that I recall. I have been in Los Angeles a lot of times, but I don't remember ever meeting Coach Butts out there.

Q. I believe some of your family live in the Los Angeles area, is that correct?

A. My mother did live there.

Q. And is your mother now deceased?

A. That's right.

Q. Do you know a John Smith from Atlanta?

A. Is he in the produce business?

Q. Yes.

A. I think he was up here on one or two occasions with Wally.

Q. Do you know his partner, Mr. Sonny East?

A. No.

Q. Do you know Mr. Frank Childs?

[fol. 1188] A. I met him once at an All-Star game bout eight years ago.

Q. Was that here in Chicago?
A. Here in Chicago.
Q. Have you seen him at any time since then?
A. No.
Q. Do you know Mr. C. D. Young? He is from Atlanta.
A. No.

Mr. Joiner: Skipping now to Page 33, second question.

By Mr. Joiner:

Q. Do you know a gentleman by the name of John Marcus from Augusta, Georgia?
A. No.

Mr. Joiner: Now, to Page 34, the last question on that page.

By Mr. Joiner:

Q. During the college football season of 1957—

Mr. Schroder: Wait a minute until I catch up with you.
Mr. Joiner: Page 34, the last question.
Mr. Schroder: All right, sir.

By Mr. Joiner:

Q. During the college football season of 1957, did you place any telephone calls to Terre Haute, Indiana?
[fol. 1189] A. I may have.
Q. Do you recall whether or not you did?
A. No, I don't.
Q. Do you recall placing telephone calls to Mr. Leo Shaffer?
A. I do.
Q. What was the purpose of these telephone calls?
A. Wager on football.
Q. During the football season of 1957, do you recall approximately how much money you bet on football games?
A. I think approximately fifty thousand dollars over the season.

Q. Will you state whether or not the entire amount was placed with Mr. Shaffer?

A. Yes, I think it was.

Q. Would you state whether or not all of your wagers were placed on the telephone?

A. Yes, I think the majority of them were, if not all.

Q. Would you state whether or not you bet on both college and professional football games?

A. I probably did.

Q. Would you state to the best of your recollection the smallest wager that you placed with Mr. Shaffer during the college football season of 1957?

A. Individual wager?

Q. And what was the amount?

A. An individual wager on one game?

Q. Yes.

A. It probably was five hundred dollars.

Q. Would you explain what you mean by "individual wager"?

A. A wager on any particular game.

Q. On any one particular game?

[fol. 1190] A. Yes.

Q. And do you recall the largest wager that you placed on any particular game during the 1957 football season?

A. Probably two thousand dollars.

Q. What would be the odds on your bet on these games?

A. Eleven to ten.

Q. Would you explain to the Court and Jury the meaning of an 11-to-10 odd?

A. You have to bet one thousand, one hundred to win one thousand, or if you lose, you lose one thousand, one hundred. If you win you win one thousand dollars.

Q. And would you state whether or not it would be correct to say that when the odds are 10 to 11, you would have to bet three thousand, three hundred to win three thousand dollars?

A. That is correct.

Q. Would you state whether or not on this particular football season—

Mr. Schroder: I think you ought to read what comes after that.

Mr. Joiner: All right. "Mr. Schroder: What do you mean by this particular football season? Mr. Joiner: The one which we have had reference to in the last several question, that of the 1957 season."

[fol. 1191] By Mr. Joiner:

Q. (continuing) —your bets would be on a particular game to be won by a particular team by a certain margin?

A. That's right.

Q. And could—

A. Not necessarily on a particular game, I might bet ten games one Saturday.

Q. And could you give an indication of how you would determine which teams to bet on?

A. Everybody has their own system on that. It's guessing and doping.

Q. Well could you give us your system?

A. Well, I didn't have any. The proof of that is that I lost pretty good.

Q. Would you have any advance indication of what the point margin for the teams would be?

A. Pick up any newspaper in the United States and find it.

Q. Where do newspapers get that from, do you know?

A. No, I don't.

Q. Is it uniform throughout the country?

A. Pretty uniform, as far as I know.

Q. If you bet on a particular team and were given 19 points, what would have to be the score of the game in order for you to win?

A. You were giving 19 points or getting?

Q. Giving.

A. They would have to win by 20 points.

Q. And then what if they were taking by 19 points?

A. They would have to lose by 18, or they would have to win by less than 19, excuse me.

Q. What would happen if they won by 19 points?

A. It's no bet, it's a tie.

[fol. 1192] Q. What do you mean when you say "no bet"?

A. It's no bet, it's a tie.

Q. Then what would happen with reference to your money that you put up?

A. Nothing. No action.

Q. You wouldn't get that money back?

A. I never put up money. You don't put up money over a telephone.

Q. Well, how was the accounting procedure for the betting handled, if you didn't actually put money up?

A. You settle over 30 days one way or the other.

Q. Do you recall how many times you settled during the 1957 season?

A. No, I don't.

Q. Do you recall approximately how much you won or lost during the season?

A. As I recall, I lost somewhere between twelve thousand dollars and fifteen thousand dollars during the season.

Q. How would the amount that you won or lost be transported to or from you?

A. Someone would come in and pick it up or deliver it. You would check a figure with them.

Q. Do you recall the name of the person who came by to pick it up from you?

A. Somebody named Lefty.

Q. Do you know his last name?

A. No. I've only seen him on maybe one occasion, or two occasions.

Q. Would you state whether or not you knew this person that you refer to as Lefty prior to the time that the 1957 football season began?

A. No.

[fol. 1193] Q. What if any disagreement did you ever have with Leo Shaffer as to the balance that you owed him or he owed you?

A. I don't ever recall having any.

Q. Was Mr. Shaffer carrying on this operation by himself, or with others?

A. I don't believe so. As I recall, there were several of them on trial in there.

Q. Did you personally know any of the others, other than Mr. Shaffer?

A. No.

Q. Would you state whether or not you placed wagers on football games during seasons prior to 1957?

A. May have placed a few small bets previous to that. I just don't recall. That was the year I got my—got the ring in my nose.

I don't think I did.

Q. Would you give us some indication of the amount you may have bet during the years previous to 1957?

A. I don't recall.

Q. If you did that any at all?

A. I don't recall any bets previous to that.

Q. And when you say that you may have bet, are you referring maybe to bets with a friend who would attend any game with you, five dollars, or something like that?

A. Certainly, you always do that.

Q. Do you still do that?

A. Occasionally.

Q. Do you remember what this fellow, Lefty, looked like?

A. No, sir.

Q. And will you tell us how many occasions you remember seeing Lefty?

[fol. 1194] A. Possibly once. I think in the two or three times he was in there I wasn't even there. I would just leave an envelope for him, and he would pick it up.

Q. Do you recall Wallace Butts visiting you during the football season of 1957?

A. I don't recall any particular instance, no.

Q. Well, did he visit you at any time during the season?

A. He may have. I don't know. In fact, I think possibly that year he might have been up to the All-Star game. I am just not sure about it.

Q. Did Coach Butts usually stay in one particular place when he visited Chicago?

A. No, not that I know of.

Mr. Joiner: Page 44, first question.

By Mr. Joiner:

Q. Mr. Scoby, did you testify at the trial of Mr. Leon Shaffer in 1959?

A. I did.

Q. Do you recall the charge that was made against Mr. Shaffer?

A. I know it had to do with—all I know is that it had to do with the Federal Gambling Stamp situation.

Q. And do you recall the time of year when that trial was held?

A. No, I don't, offhand.

Mr. Joiner: Page 45, second question.

[fol. 1195] By Mr. Joiner:

Q. Would you state whether or not your testifying in this particular trial received some publicity in the Chicago papers?

A. It received a great deal.

Q. Do you recall whether or not it was in all the papers?

A. No, I didn't read all the papers. All I can tell you is it received a great deal of publicity.

Q. Mr. Scoby, I show you Defendant's Exhibit 3 of this date, and ask you to state to the best of the recollection whether or not this is in fact an article about your testimony in Leo Shaffer's trial, which appeared in the Chicago Daily News on July 18, 1959?

A. It appears to be.

Q. And do you recall a number of articles of similar import being in the Chicago papers during that period of time?

A. Yes, sir.

Mr. Joiner: Skipping now to Page 48, the third question.

By Mr. Joiner:

Q. Mr. Scoby, have you been engaged in any gambling activities whatsoever over the period of the last year?

A. No, sir.

Q. Have you had occasion to visit the State of Nevada during the period of the last year?

A. Now wait a minute. Let me clarify that question. Illegal gambling activities, no. Legal, yes.

Q. Would you give us a summarization of your legal gambling activities in the past year?

A. I've done some in Las Vegas in the past year.

[fol. 1196] Q. Would you give us an approximation of how much you won or lost during the past year?

A. No.

Q. Could you tell us whether or not you won or lost?

A. I probably have lost. It hasn't been any great amount either way.

Q. Will you state whether or not you consider one hundred thousand dollars to be a great amount?

A. I consider it a great amount, yes, sir.

Q. And would you state whether or not your losses for this past year have approached that amount?

A. No, they have not.

Q. Would you give us your best estimate of your losses for the past year?

A. Crap table, mostly.

Q. Any other, in addition to that, during the times that you visited Nevada?

A. Possibly a little roulette.

Mr. Joiner: Page 52, question 5.

By Mr. Joiner:

Q. Do you recall the number of times that you visited Nevada during the last year?

A. No, I don't.

Q. Could you give us an approximation?

A. Maybe four.

Q. Would you state whether or not your gambling activities are confined to the State of Nevada, or do you also at times carry on these activities outside the State of Nevada?

A. Not recently, in the last several years.

Q. Would you elaborate on that answer with reference to the previous question, please?

[fol. 1197] A. Well, this deal in Terre Haute had the effect of curing me of this type of activities. No activities since then of any appreciable amount.

Mr. Joiner: Page 55, last question on the page.

By Mr. Joiner:

Q. Have you had occasion to speak with Wallace Butts on the telephone over the period of the last year?

A. Yes.

Q. Do you have an approximation of how many times you have spoken with him?

A. I would estimate somewhere between 25 and 40.

Q. And what was the subject of these telephone calls?

A. Some of them were just things that personal friends would talk about over the telephone for no reason. Some of them were Butts trying to get established in various fields since he was no longer coaching. That's about the extent of it. In fact, that is the extent of it.

Q. Mr. Scoby, would you state whether or not you consider yourself to be a compulsive gambler?

A. I certainly will: I am not.

Q. What is your answer to that?

A. I am not.

Q. Have you recently made a statement to the effect that you are a compulsive gambler?

A. No, sir.

Q. Would you state whether or not your gambling activities—

[fol. 1198] Mr. Schroder: Go ahead.

By Mr. Joiner:

Q. —have been something you have attempted to hide from your friends?

A. No.

Q. Most of your friends are aware of your gambling activities?

A. Well, I didn't put it in the newspaper.

Q. But your intimate friends would be aware of your gambling activities, is that right?

A. I don't know what my friends are aware of. I will make the statement that I haven't attempted to hide it.

Mr. Joiner: Page 64, the fourth question.

Mr. Schroder: Just a moment; let me catch up. Go ahead.

By Mr. Joiner:

Q. Mr. Scoby, do you recall receiving a subpoena to appear and testify at this deposition?

A. Yes, I did.

Q. And do you recall the date and times set in the subpoena for your appearance?

A. The date and time set for this appearance?

Q. Set by the subpoena for your deposition?

A. Yes.

Q. Would you state what that date and time was?

A. 2:00 P.M., on the 22nd of July.

Q. Would you explain to the Court and Jury why you did not appear at that time?

A. I didn't appear on advice of counsel.

[fol. 1199] Mr. Schroder: If the Court please, the last subject matter, I think, that was being discussed in the reading of the deposition, I think the record ought to show when he says he was advised by counsel that he said his own counsel.

The Court: Yes, sir.

Mr. Schroder: I don't want there to be any question about it.

The Court: All right, sir.

Mr. Schroder: And the second one, I believe Mr. Joiner pointed out, the deposition was taken on Tuesday, July the 23rd, and I think the date they were talking about was July the 22nd.

The Court: 22nd; yes, sir.

* * * * * * *

Cross examination.

By Mr. Schroder:

Q. Mr. Scoby, counsel for the Saturday Evening Post has spent considerable time cross-examining you or examining you this morning, but he has studiously avoided asking you anything in connection with the article which [fol. 1200] his client has published in its March 23, 1963, issue.

Now, for the record I think it ought to be made known to you that his client denies under oath that it ever implied that there was any gambling motive in connection with the article it wrote in the Saturday Evening Post.

Let me ask you some questions now, which I think might be relevant to the article published by the Saturday Evening Post forming the subject matter of this libel suit.

I think counsel also failed to ask you anything in connection with any telephone conversation which you might have ever had with Wallace Butts, although yesterday he subpoenaed all the records of your home telephone and your office telephor from the Illinois Bell Telephone and Telegraph Company.

In any telephone conversation that you have ever had with Wallace Butts at any time, was the subject matter of betting the outcome of any athletic event ever discussed?

A. No, sir.

Q. To your knowledge did Wallace Butts ever have any information which might indicate to him that you had bet or would bet or might have bet on the outcome of any athletic event without regard to when it might have taken place?

A. Not to my knowledge.

Q. Did you ever discuss betting on any games of any kind with Wallace Butts?

A. No, sir.

Q. In September, 1962, the records indicate that there were approximately three telephone calls placed by Wallace Butts to you. Would you please refresh your recollection [fol. 1201] and tell the Court and Jury what the substance of those telephone conversations were?

A. I don't actually recall any of them, with the exception of one about that time.

Q. Do you recall a telephone conversation having been placed to you by Wallace Butts from Birmingham, Alabama, on September 22, 1962?

A. I don't recall that specific call, no.

Q. Do you recall a man by the name of Sargent talking to you about that time from Birmingham with Wallace Butts?

A. At approximately that time I recall talking with Mr. Sargent.

Q. That was in connection with what subject?

A. It was in connection with financing on this concentrated fruit juice.

Q. During September 1962, or at any time prior to September, have you ever had any telephone conversation with Wallace Butts which related in any manner to a forthcoming game to be participated in by the University of Georgia football team?

A. Well, I may have said, "Well, how do you think you'll do," when he was coaching. I certainly wouldn't say that I haven't asked that question. But that has never been anything further than that.

Q. That was while he was coaching?

A. That's right.

Q. In September 1962, did you have any conversation with Wallace Butts in which he indicated to you that he felt you should place a bet on the outcome of any game played by the University of Georgia?

A. No.

Q. Have you at any time discussed with Wallace Butts on long distance telephone or in person what his thoughts might be with regard to a forthcoming football game so [fol. 1202] that you might be in position to place a bet on the outcome of that game?

A. Well, I would assume that just in the normal conversation when he is up here to an All-Star game, I would say, "Well, how do you think this game will come out tonight, Wally?" Other than some casual remark like that, the answer is no.

Q. Would you use that information to bet on the outcome of the game?

A. No, sir, I certainly would not.

Q. What church do you belong to, Mr. Scoby?

A. Queen of All Saints.

Q. Here in Chicago?

A. Yes.

Q. What religion is that?

A. Catholic.

Q. Are you active in your church activities?

A. Pretty active.

Q. You have a son practicing law here in Chicago?

A. Yes, sir.

Q. He is a graduate of the University of Notre Dame?

A. And Northwestern.

Q. Where did he take his law?

A. Northwestern.

Q. And took his undergraduate at the University of Notre Dame?

A. Right.

Q. How many other children do you have?

A. Three.

Q. Do they live at home?

A. Yes.

Q. What clubs do you belong to here in Chicago?

A. Illinois Athletic and the Chicago Athletic and the Edgewater Golf Club.

[fol. 1203] Q. What have you and your company done towards sponsoring underprivileged athletic teams here in Chicago?

A. We sponsor several Puerto Rican teams.

Q. Did you bring a team from New York to Chicago this past summer?

A. I brought the Puerto Rican All-Stars or champions in here to play the Chicago champions.

Q. Will you now take the Chicago champions to play the New York champions to play the New York champions?

A. On the second of August.

Q. Is it fairly difficult to get into these clubs that you have referred to here in Chicago, the IAC or the Illinois Athletic Club, or Chicago Athletic Club?

A. I don't know that it is. I didn't have any trouble with them.

Q. I believe you testified when you were being questioned by the lawyer for the Saturday Evening Post that you learned your lesson, so to speak, when you testified for the United States Government in the case brought by the United States Government by the party that was referred to here earlier by the name of Shaffer?

A. I think I did.

Q. And it is your testimony today that insofar as your knowledge is concerned Wallace Butts knew nothing about that activity or that team or that case?

A. I couldn't say that he didn't. It was in the newspapers.

Q. But that was in the Chicago newspapers?

A. As far as my personal knowledge is concerned, I don't know that he knew anything about it.

Q. You never discussed it with him?

A. No, sir.

[fol. 1204] Q. You never discussed gambling with Wallace Butts?

A. Not to the best of my recollection. Certainly not on football.

* * * * * * *

Q. During the year of 1957, were you a mem-

Q. Were you also a member of these clubs that you testified that you belong to?

A. I certainly was.

Q. Will you state—

Mr. Schroder: These questions are being asked him by the Post lawyers, this being the re-direct.

The Court: What page are you on?

Mr. Schroder: 81, Your Honor, right at the top.

Mr. Lockerman: About the middle of the page.

The Court: I see.

By Mr. Schroder:

Q. Will you state who paid for the hotel room and consequential expenses thereto in New York City at the time you were together with Coach Butts at the Essex House in New York City?

[fol. 1205] A. I probably did, I am not sure. The chances are that I paid for it, which is not an unusual thing. I paid for lots of people's rooms.

Q. One of the necessary essentials to your business is entertainment of people in general, is it not?

A. That is correct.

Q. What do you approximately contribute to your church per year in the way of donations?

A. Approximately six thousand dollars.

Q. You have referred, on your direct examination, to various all-star colleges against the leading pro team here in Chicago, which is the game put on for the Milk Fund every summer?

A. I don't know what the fund is, but it is a charity fund, a Chicago charity.

Q. Those games have been played over how long a period of time?

A. I think they have been on ever since I have been in Chicago.

Q. Didn't Arch Ward begin those games back in 1933 or 1934?

A. I don't know when they began.

Q. Since you have been living here in Chicago what is your custom with reference to entertaining visiting dignitaries such as football coaches from all over the country and outstanding players?

A. Well, for about the first—from, say, about 1950 through '56 or '57 or '58 we always—we started having an All-Star party previous to the game, and then taking people out in buses. It becomes such a big thing around 1958, that we discontinued it. We used to have as high as—well, at the last one was about five hundred people, and we probably, at that time, would have fifty coaches as our guests [fol. 1206] out of the five hundred people. The rest of them would be our customers.

Then it got so big we couldn't handle it any more, and we discontinued it. The last few years we have just had smaller parties of ten, fifteen or twenty people.

Q. You would take those fifteen or twenty people to dinner before the game?

A. And then bring them back after the game.

Q. And take them to the game as your guests?

A. That's right.

Q. Reference has been made to frequent trips that you have made to New York City. Are you also engaged in business in New York City?

A. I am distributor for Miller High Life Beer in New York City.

Q. Now, Miller High Life Beer is owned by the Miller family, of Milwaukee?

A. That's right.

Q. And the former president of that company, who is now deceased, was Fred Miller who was captain of the University of Notre Dame Football team in the late twenties, 1929, I believe?

A. Yes.

Q. Frank Lahey played on the same team with Fred Miller whose family owned Miller High Life, and he was president until his death a couple of years ago?

A. That is correct, about six years ago.

* * * * * * *

DR. O. C. ADERHOLD having resumed the stand, testified further as follows:

[fol. 1207] Cross examination (continued).

By Mr. Schroder:

Q. Dr. Aderhold, you testified yesterday, I believe that Coach Butts looked upon you as an adviser of his?

A. Well, he said that he appreciated my counsel and came to see me to talk about some of his problems.

Q. After Coach Butts resigned as head football coach, you and the other officials there at the University of Georgia began to look around for someone to succeed him as head football coach?

A. Yes, sir.

Q. Coach Butts, at that time, recommended as his successor Johnny Griffith, didn't he?

A. Well, I believe I will have to make an explanation as a part of that answer.

Q. Will you give me the answer first, and then you can explain it, sir.

A. Mr.—Coach Griffith was on his list, and he estimated that he was probably the best prospect on a list that he sub-

mitted. That was not a complete list that the coaching committee interviewed, however.

Q. Well, then, the answer to my question would be "Yes", would it not? He had him at the top of his list as coach to succeed him as head football coach at the University of Georgia?

A. Well, he listed those that he thought had possibilities of succeeding him as head coach, and in a note—well, he evaluated each one of the, made some evaluation of each one of them, and regarding Johnny Griffith he said, "He is a good organizer; he will have the respect of other coaches, and he is probably the best prospect of the staff."

[fol. 1208] The Court: Did you take that to be that that was his number one choice?

The Witness: I would interpret that to be correct.

By Mr. Schroder:

Q. In 1961—

A. May I—the explanation that I would like to make is that when Coach Butts visited me on the Sunday afternoon that he indicated that he wanted to be relieved as head coach, we talked about not only a successor, without calling any names, but a successor, and spent a considerable length of time as to the major responsibilities that he would assume or could assume if the Board elected him as a full-time athletic director. Among other things he said that, "I think the Board ought to make this decision, but I will supply to you and any committee, anyone else you want to, my private evaluation." And it was in respect that he submitted a list of all the coaches that he thought had possibilities, and made an evaluation of them, all the coaches that are now—that were at that time on the staff.

Q. And as you just said, you interpreted that to mean that Coach Griffith was his Number One choice?

A. Yes. He did not, I must say, rate them or say "This is my choice," but he did say that, "I think these qualities would indicate that he would be a good coach." He talked

about some of the others and indicated what he thought were their strengths and weaknesses.

Q. In 1959, Coach Butts was elected to the presidency of the American Football Coaches Association, wasn't he?

[fol. 1209] A. Yes, sir; I believe that's right.

Q. And there have only been, throughout the history of that Association, two other coaches given that honor in the whole time, Coach William Alexander of Georgia Tech and Coach Dan McGuggan of Vanderbilt?

A. I really don't know.

Q. You don't know? Before you became President of the University of Georgia, Dr. Aderhold, Coach Butts had been head coach at the University approximately ten or eleven years, hadn't he?

A. Yes; ten or eleven; I don't remember whether it was '39 or '40 he was elected head coach.

Q. And during that time he produced six bowl teams, didn't he?

A. I don't know; I am sure that must be right.

Q. In 1950 when you became President until Coach Butts retired as head football coach there was but one Bowl team produced, was there?

A. That's correct.

Q. Now, in 1959, Coach Butts was elected the Number Two football coach in the whole United States, wasn't he?

A. I believe so; I am not sure of the year.

Q. You referred in your testimony yesterday to what was said at the meeting on February the 22nd of this year, and you testified that although you weren't sure, I believe, whether Coach Butts was asked to sign an affidavit, you were sure that he was asked to submit to a lie detector test, didn't you?

A. Yes, sir; I thought both, but that was my testimony, and that is the way I remember it.

Q. You know that he has taken one since then, don't you?

[fol. 1210] Mr. Joiner: May it please the Court, I don't believe that this evidence would be admissible unless we are

going to show the circumstances under which the tests were taken, the type of tests that were taken, where it was taken, and the operator who administered the test.

The Court: I will let him show he took a test. I will not let him show any results of any test. Do you understand that? All parties understand that?

Mr. Schroder: Yes, sir.

The Court: All right, sir.

By Mr. Schroder:

Q. But you do know I made him take tests since then, don't you?

A. I saw that in the press; yes, sir.

Q. During your ten year period or your tenure of office at the University as President, Wallace Butts was more or less known as "Mr. Georgia"; wasn't he?

A. Well, he had several names. That was one of them, by some people; yes.

Q. Before the Saturday Evening Post published its article on March 23, 1963, did anyone from the Saturday Evening Post talk to you?

A. No, sir; I don't believe so.

Q. Do you know Charlie Trippi—

A. Yes, sir.

Q. —of the University—formerly of the University of Georgia football staff?

[fol. 1211] A. Yes, sir.

Q. He resigned, I believe, during this past summer?

A. Yes, sir.

Q. His family still lives in Athens, and he does when he is not away from the City?

A. Well, I don't know; I assume so.

Q. He has lived there for a number of years?

A. Yes; that's correct.

Q. Are you familiar with his reputation in the community?

A. Yes, sir—well, I think I am.

Q. Is it good or bad?

A. As far as I know it is good.

Q. Would you believe him under oath?

A. Yes; I think I would. I don't know of any reason that I wouldn't.

Q. Do you know John Gregory?

A. Yes, sir.

Q. He is still on the staff there as the defensive coach?

A. Yes, sir.

Q. He also has lived in Athens a number of years, has he not?

A. Yes.

Q. Are you familiar with John Gregory's reputation in the community?

A. Well, I don't know that I am.

Q. You don't know that you are? Is that your answer?

A. Yes; I think that is a fair answer.

Q. You know Bill Hartman?

A. Yes, sir.

Q. Former President of the University of Georgia Alumni Association?

[fol. 1212] A. Yes, sir.

Q. He is presently a trustee for the Georgia Student Educational Fund?

A. Yes, sir.

Q. He lives in Athens?

A. Yes, sir.

Q. You know Bill Hartman's reputation in the community in which he lives?

A. Yes; I do.

Q. Is it good or bad?

A. It is good.

Q. Would you believe him on oath?

A. Yes, sir.

Q. You know the Captain of the 1962 Georgia football team named Ray Clark?

A. I just know him as a football player; I don't know him personally.

Q. Do you know his reputation in the community?
A. No, sir.
Q. Sir?
A. No, sir.
Q. Do you know Brigham Woodward?
A. I know he is on the team.
Q. You know his reputation in the community?
A. No, sir.
Q. You know Mickey Babb?
A. I know he is on the team.
Q. Do you know his reputation in the community?
A. No, sir.
Q. Do you know Wally Williamson?
A. Yes, sir; I do.
Q. Do you know his reputation in the community?
A. No; I don't believe I do.

* * * * * * *

[fol. 1213] Dr. Frank Anthony Rose called as a witness on behalf of the Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Schroder:

Q. Will you state your full name, please, sir?
A. Yes, sir. Frank Anthony Rose.
Q. At the present time where are you located professionally and in what capacity.
A. As President of the University of Alabama, Tuscaloosa, Alabama.
Q. Now, Dr. Rose, will you please, for the benefit of the Court and Jury, state your qualifications, your educational background, and similar information?
A. Well, I am a graduate of Transylvania College in Lexington, Kentucky, Transylvania Seminary, Lexington, Kentucky, and I did graduate work in philosophy in the University of London.

Q. After you graduated from there, what did you do?

A. I served as head of the Department of Religion and Philosophy at Transylvania College. I was minister of a large church at Danville, Kentucky for five years, and at the age of twenty-nine became President of the Transylvania College, Lexington, Kentucky, from which I had graduated, and served there for seven years as President. On September 5th, I will have finished six years as President of University of Alabama.

Q. What literary or other associations do you play a particular part in or a significant part in at the present?

[fol. 1214] A. Well, I am serving as chairman of the Board of Visitors of Eyre University.

Q. Of what?

A. Of Eyre University. I am a member of the Board of Curators of Transylvania College. I am chairman of the Commission on Graduate Study Experiences for the Armed Services, for the American Council on Education. I served on the Board of Trustees of the National Foundation for Infantile Paralysis. I am serving as chairman of the March of Dimes in my sixth year in Alabama. In 1954, I was selected one of the ten outstanding young men in the United States. I was selected in 1955 as the outstanding citizen in Lexington, Kentucky. And last year I was selected as the outstanding citizen of Tuscaloosa, Alabama.

Q. As President of the University of Alabama, Dr. Rose, did you attend a meeting in Birmingham, Alabama, on Sunday, February the 24th, 1963?

A. Yes; I did, sir.

Q. Would you relate, please, who attended that meeting and where it was held?

A. I received a telephone call from Dr. Aderhold three or four days before, Sunday, February the 24th, asking if I could meet him in a confidential meeting with Commissioner Bernie Moore, the Commissioner of the Southeastern Conference, and I asked him what was the purpose of the meeting? And he said, well, for the time being that he would like to say, to discuss an ethical matter. And so

on that morning at 9:00 a.m., I met with Dr. Aderhold. He brought with him Mr. Cook Barwick, and we met with Commissioner Moore.

Q. Will you just briefly summarize so that we can lay the foundation for later work by you what was reported at that meeting, briefly. I don't want to go into everything that [fol. 1215] was said and string it out. Just briefly summarize what was said.

A. Well, Dr. Aderhold and Mr. Barwick told me that—that there had been a telephone conversation or telephone conversations between Coach Bryant and Coach Butts regarding the coming football game to be played in September—around the middle of September.

Q. In 1962?

A. In 1962. They further informed me that there was a man by the name of Burnett that had heard the telephone conversation and that he had stated that Coach Butts had given Coach Bryant some information that would affect the outcome of the football game between the two institutions.

Q. Were you—was that the first knowledge you had of any such incident?

A. Yes, sir; that was the first knowledge.

Q. What did you do after you left that meeting?

A. Well, before I left the meeting I asked him questions, and there were many additional questions raised in my own mind, and then I drove home alone, which is some fifty-four miles away, greatly disturbed and thinking over every facet of the problem. And then when I got home I spent the rest of the afternoon thinking about it and trying to reach some conclusion as to what was the best approach to make to the problem. I came to the conclusion that the best thing to do was to, first, face the person that had been accused, or one of the persons accused, and so I called Coach Bryant and told him to meet me in my office at 7:00 P.M., where we did meet, and I interrogated him and talked with him for a period of about three hours.

[fol. 12[illegible]] Q. Was it or not indicated by Coach Bryant that that was the first time he had had any notice of this incident?

A. Yes, sir; it was the first time that he had heard about it. I might say that I think that he was confused by it. He did not recall specific telephone calls at first, and then I kept sharing with him the notes that I had taken while I was talking with Dr. Aderhold and Mr. Barwick and Commissioner Moore, and then he recalled that he had had many telephone conversations with all of the coaches and athletic directors with whom we play. He informed me that this was nothing unusual, that coaches talk about many things before a ball game, and that he had had a great deal of concern about playing the University of Georgia, particularly after we had had the unfortunate experience that we had had with Georgia Tech over the Holt-Granning incident in which Holt, one of our football players, had left the ground on a block, a tackle, and his forearm had caught the Granning boy of Georgia Tech in the jaw and broke his jaw, and we had received such unfavorable publicity about all of this that I had informed him on several occasions that he must use every precaution to see that this type of incident never happened again. Coach Bryant was just as concerned about the bad publicity of the University as I was.

And that he had been informed in a meeting with Coach Butts that there were new interpretations of rules and that he should make himself aware of them, and that he had tried to understand them in previous conversations and could not understand these new interpretations, that he, at a coaches' meeting, a meeting of the coaches of the Southeastern Conference, raised many questions about the new [fol. 1217] interpretations, and this was later confirmed by Commissioner Moore that Coach Bryant asked more questions about the change of rules of the new interpretations than any other—than all the other coaches in the meeting.

Coach Bryant said that he had talked several times with Coach Butts about this personally and on the telephone. He had talked to him about ticket sales, as there were approxi-

mately six to eight hundred tickets that the University of Georgia had not sold, and that he was concerned because there were many people in Alabama that wanted the tickets, but he didn't specifically remember discussing any one thing.

He said he could have talked about investments, Continental Enterprises, in which they had investments, but that he would try to think about it and try to answer as many of the questions as he possibly could.

Q. Did you, after that particular meeting in your office on Sunday evening, February the 24th, talk to Coach Bryant again on several occasions?

A. Yes, sir. I talked to him twice after that before I wrote to Dr. Aderhold.

Q. Between February the 25th and March the 6th, were you in Tuscaloosa all of the time?

A. No, sir. I told Dr. Aderhold that I would be unable to give him an immediate report of my conversation with Coach Bryant, as I had to go to New York City to attend a meeting of the National Foundation for Infantile Paralysis, would be gone most of the week, which I was. I returned on Thursday evening, was tied up in conferences all day Friday, and then had to leave again Monday morning to go to Washington for a meeting of the American Council on [fol. 1218] Education, and I wrote to Dr. Aderhold that morning before I left.

Q. There has been identified here a letter—

Mr. Schroder: May I please—this is not a copy of the exhibit; this is not the one with the exhibit number.

The Court: Don't you have the original?

Mr. Schroder: I will borrow it from Mr. Cody. May I borrow it, Mr. Cody?

Mr. Cody: What's that?

The Court: The original letter.

Mr. Schroder: That is one of the ones we can't find right now; it was in that file.

The Clerk: Is this the one you are talking about?

Mr. Schroder: Yes.

The Clerk: That is Defendant's Exhibit No. 21.
[fol. 1219] Mr. Schroder: Just mark that here.
The Clerk: Just say "D-21."

By Mr. Schroder:

Q. There was identified here yesterday a document, Exhibit No. D-21, being a letter to Dr. O. C. Aderhold, dated March 6, 1963, signed Frank A. Rose, from the office of the President, University of Alabama. The original at the moment is not available. I want to ask you some questions about that, if you recognize it as a letter from you to Dr. Aderhold—

A. Yes, sir.

Q. —or a copy of a letter?

A. This is a copy of the letter I dictated to my secretary on the morning of March the 6th, before I left to go to Washington. I had to catch a plane at 8:40 and hurriedly dictated this letter. I did not have time to read it after dictating it. She signed it, was to confer with Coach Bryant and ask him if this was a good interpretation of the conversations that we had. Coach Bryant was out of the City, and she signed it and sent it on to Dr. Aderhold.

Q. All right, sir.

A. It was in this—it was in this letter, as best as I as a layman or a University President, could try to answer some of the questions that Dr. Aderhold and Mr. Cook Barwick had raised at our meeting.

Q. To what extent, if any, are you familiar, Dr. Rose, with the game of football as it is presently being played and the so-called jargon, language of the trade used by coaches?
[fol. 1220] A. Well, I thought I understood it pretty well until I really began to get into this investigation, but I have never played organized football; I played "sandlot" football as a boy, but I am not very familiar with all of these terms of scientific modern-day football.

Q. To what extent, if any, Dr. Rose, would you say you were familiar with interpretations of football rules that have been issued or promulgated by some national body?

A. I don't know anything about them.

Q. In that letter—well—

Mr. Schroder: May I ask the witness to read the letter, Your Honor?

The Court: No, sir; you can ask him about any portion of the letter. The letter will be in evidence.

Mr. Schroder: All right, sir. It is sort of difficult—

Mr. Cody: Your Honor, I was mistaken. The original of that letter is in another file.

Mr. Schroder: That's better. If I can use one and he use the other.

The Court: All right.

[fol. 1221] By Mr. Schroder:

Q. Dr. Rose, in the letter, being the exhibit you are holding in your hand, you advised Dr. Aderhold you had made an investigation?

A. That is true, yes, sir.

Q. And that you were attempting by this letter to pass on to him the information which you had received in your investigation, including what Coach Paul Bryant had to say to you about conversations that he had had with Coach Butts?

A. Yes. These were the questions that he raised.

Q. In that letter you point out to Coach Aderhold—President Aderhold about Coach Butts' position in the football rules committee—

A. That's right.

Q. —as representative-at-large? In the third paragraph of that letter you state that Coach Butts had discussed these rules changes with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that—and you say this—"That the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia

team." Do you have any explanation or interpretation or whatever you might term it?

A. Mr. Schroder, I was writing this to Dr. Aderhold, the President of the University of Georgia. He had asked specificially about the University of Georgia. This was not limited to the University of Georgia; it could have been to any University we were playing. Paul Bryant was greatly concerned about criticisms that had been made against the University, what had been termed "hardnose" football, [fol. 1222] "dirty" football. Our University had been severely penalized by people who had not acted responsibly. I was trying to reveal to him the purpose of the conversation.

He believed that Coach Butts was a good football statistician, he knew the rules; he served on the National Rules Committee; he knew the new interpretations. And he wanted to find out from him what these changes were, what could affect the result of an incident that would cause one of our football players to be dismissed from a game that would cause another bad ugly incident as it happened with Georgia Tech. But his was not Coach Butts' explanation of what—

Q. Coach who?

A. Coach Butts' explanation to Coach Bryant that Georgia Tech had any set plays or that he was going to reveal any set plays or patterns, but the techniques that were used offensively.

Q. Blocking, you mean?

A. Butt blocking. I remember he named that. I didn't know then and don't know now what that means. Head blocking. I don't know what that means, but these were some of the things that he said that he was concerned about.

Q. That Coach—

A. And I think rightly so, because we had discussed it many times. We did not want to go through a game what we had gone through with Georgia Tech.

Q. In your—in the next paragraph, Paragraph 4 of the letter, you indicate that Coach Bryant asked Coach Butts

to let him know what the plays were, and on September 14, he called Coach Bryant and told him—

A. Well, these were techniques. I think any layman would use the term "plays" and if I hadn't been told better [fol. 1223] I would use the "plays" and I still forget and use the "plays," but these were "techniques," offensive techniques.

Q. There was a question, you say, about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16?

A. Well, now, this was my interpretation of what Coach Bryant told me that could have been discussed or he could have talked about in answer to a question that Dr. Aderhold had raised about one of the Georgia players, Mr. Burnett hearing Coach Butts say that one of the Georgia players committed himself too quickly, and I asked him about that, that from my notes, and he said, "I don't know what that means," he said, "I've never heard about it." But he said, "It could have been some technique that was being used and some approach of defensive tactics that I could have used." And this was my interpretation of Coach Bryant's guess of what they could have been talking about there.

Q. When you—

A. And it was my best answer I could get to the question that Dr. Aderhold raised in my mind when he wanted an answer to it.

Q. What, if anything, does it mean to you with respect to football when someone has said "committed himself too fast"?

A. I don't know, sir. I can't tell you. I can make a guess that maybe he started off too fast or he showed what he was going to do rather quickly. I just don't know. I would have to guess at it.

Q. You then write, "It was then that Coach Bryant [fol. 1224] changed his defense and invited Mr. George

Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention."

A. I made an error there. It was before the telephone conversations that Coach Bryant had had Mr. George Gardner there with the permission of Commissioner—with the permission of Commissioner Moore to meet with his coaching staff and go over his defenses and to ascertain whether they were legal or illegal.

Q. Under this new interpretation?

A. Under the new interpretations that Coach Butts had told him about. And it was on the basis of his conversations earlier with Coach Butts and in the coaches' meeting the coaches of the Southeastern Conference meeting that he became so concerned about these new interpretations and felt it would serve a good purpose.

Q. Your next paragraph, you quote Coach Bryant as informing you that "Calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules."

A. Yes, sir; he said that he didn't know. Well, I asked him if he felt that any of these rule interpretations, calling his attention to the changes or anything else that was said, could have affected the outcome of the ball game, and he said that he doubted it very seriously, that he received no specific information or any specific knowledge that would [fol. 1225] affect the score or the outcome of the ball game between the University of Alabama and the University of Georgia.

Q. The same information that he says was told him by Coach Butts was told to, I think you said, a whole meeting of the coaches on another occasion in Birmingham?

A. Yes, sir; a meeting of the coaches of the Southeastern Conference, I believe.

Q. And Coach Butts was the chief speaker at that meeting?

A. Yes, sir.

Q. Did you ever receive a reply to your letter from Dr. Aderhold?

A. No, sir; I did not. And when we parted Commissioner Moore's office—

Q. I will take that back from you.

A. —each one of us agree, we would conduct our own private confidential investigation, and that we would share with one another within the next few days as much information as we could get, and I never heard from Dr. Aderhold again until I called him several weeks later. He never acknowledged my letter. He did not inform me that the letter had been subpoenaed. This letter was written hurriedly. It was not written as a legal document to be used in any court case. It was not verified. It was not read after it was dictated, and I think substantially if you read that total letter and take it in its total context, you will find I conveyed to Dr. Aderhold that on the preliminary investigation that I had made, in talking with Coach Bryant, talking to his banker, talking to two of his friends—

The Court: To his banker?

[fol. 1226] The Witness: To his banker.

A. (By the witness) —talking to two of his friends, talking to two of my vice-presidents and business manager of athletics, that in my estimation the whole thing, based on the notes and the information that they had heard, that they had received from Mr. Burnett was overplayed, and I still think that that letter, taken in its full context, conveyed just that.

Mr. Schroder: You may examine.

Cross examination.

By Mr. Cody:

Q. Dr. Rose, would you mind giving me your signature on this piece of paper?

A. Yes, sir.

Q. You want to step down here to the desk?

A. You want me to sit down?

Q. Doesn't matter, just whatever you want to do. Thank you.

Mr. Cody: Will you identify this as Defendant's Exhibit —I believe it will be 25 or 26, somewhere along there.

The Clerk: Defendant's Exhibit No. 27 for identification is a signature of Dr. Rose.

[fol. 1227] (Whereupon the above paper was marked for identification only as Defendant's Exhibit No. 27.)

By Mr. Cody:

Q. Now, Dr. Rose, when Mr. Schroder read you the first paragraph of this letter, he read the language as follows, as just making an investigation. You mind if I read you the entire paragraph?

A. Be fine.

Mr. Schroder: May the witness have a copy in his hand?

The Court: Do you have an extra copy? Does someone have an extra copy?

Mr. Cody: Yes, sir.

By Mr. Cody:

Q. "I have spent a great deal of time investigating thoroughly the questions—," now, when Mr. Schroder read you that paragraph, he left out the word "thoroughly," didn't he?

Mr. Schroder: If the Court please, I didn't indicate I was reading that letter verbatim. I think Your Honor told me it couldn't be read.

The Court: That's right. Well, read the letter to him. Read the whole paragraph and ask him did he write that.

[fol. 1228] By Mr. Cody:

Q. "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received." Now, let's talk about the first paragraph just a minute.

A. All right, sir.

Q. Was that paragraph written as you dictated it?

A. Yes, sir; that is; as best I recall that is the paragraph that I dictated.

Examination.

By the Court:

Q. You mean you didn't dictate all the letter?

A. Sir?

Q. You didn't dictate all the letter?

A. I dictated all the letter, yes, sir.

Cross examination (continued).

By Mr. Cody:

Q. Am I to understand your testimony, Dr. Rose, that you did not read the letter after you dictated it?

A. No, sir; I did not.

Q. Nor did you sign it?

A. No, sir. I had to catch a plane for Washington.

Q. Who did sign it?

A. My secretary.

Q. Who is your secretary?

A. Mrs. Stanley Park.

Q. Let's pass to the second paragraph.

"Coach Butts has been serving on the football rules com-
[fol. 1229] mittee, and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed—" you've got "changes"—"particularly on certain plays." Now, is that written as you dictated it?

A. I would say that it is, because my secretary usually does a pretty good job. I couldn't swear to it, sir, but I think I did dictate that.

Examination.

By the Court:

Q. Is that what you intended to convey?

A. No, sir. Now, I know it is not what I intended to convey because I have gotten a great deal more information about it, and it wasn't the defenses used by L. S. U. and Tennessee and Alabama were discussed. All defenses used by universities were discussed, but it was reported that the officials were specifically going to watch these three institutions, the University of Alabama, L. S. U., and Tennessee, to see that these new interpretations were carried out and there was no violation of the rules.

Q. From whom did you acquire that information?

A. Well, Coach Bryant gave it to me after he received a copy of this letter.

Cross examination (continued).

By Mr. Cody:

Q. Now, let's pass on to the third paragraph.

"Coach Butts had discussed this with Coach Bryant and
[fol. 1230] the two were together at some meeting where

Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team."

Now, I believe you stated that is incorrectly transcribed or what explanation is it you make of that?

A. Mr. Cody, what I said, I was trying to answer for Dr. Aderhold this—this commitment or quick commitment that he had raised as a question that Mr. Burnett had purportedly—was reported to have given him, and I was speaking to the President of the University of Georgia, singling out his institution, but I could have been talking about any institution in the Southeastern Conference or anywhere else. I wasn't talking about any specific play of the University of Georgia football team as given to them by their coach.

Q. Well, were you undertaking here to quote Coach Bryant?

A. No, sir. Let me go further and say that in my discussions with him he talked about a lot of things that they could have been talking about, and tried—tried to explain to me these new interpretations which he didn't quite understand, himself. He was puzzled by them, and ten days later I wrote the letter after talking with Coach Bryant, and I tried, in my layman's language, to reveal what Coach Bryant had not said specifically to me, but what, in a general discussion of what their discussion could have been about; wasn't even sure of that. I was trying to reveal to Dr. Aderhold my intepretation of it.

Q. Dr. Rose, do you know enough about football to know [fol. 1231] that if one team can execute a play, or formation in such a fashion as to cause the opponent to be penalized, that that would be beneficial to the team that had the ball?

A. Yes, sir; I think I can recall one where it would be. If the team played like they were going to snap the ball

and didn't, and caused the team to get off-sides and got them a five yard penalty, I can understand that.

Q. Sometimes a five-yard penalty can mean the difference between a win and a loss, can't it?

A. Yes, sir; I'm not arguing that with you.

Q. In looking at these notes that you observed that Mr. Burnett had made—I assume they showed you these notes?

A. No, sir; I have never seen them.

Q. They didn't bring them to Birmingham?

A. I can't answer that, but they weren't shown to me.

Q. You have seen them since?

A. I saw them in the Saturday Evening Post article.

Q. What did you see, a photostatic copy in the Post article?

A. I don't recall. I remember seeing it there; I guess it was a photostatic copy.

Q. Do you know enough about the game of football to know that on a particular play the ball is snapped on a count of 3, 4, 5, or 6, in order to try to draw the opposing team off-sides?

A. No, sir; I don't; I don't know that much about it.

Q. Let's pass on to this fourth paragraph, Dr. Rose. First, let me ask you one other question about Paragraph 3. Did Coach Bryant say anything to you about a descrip-
[fol. 1232] tion of the play that would injure a Georgia player?

A. He tried to explain some descriptions of plays, not of Georgia, but just plays in general. Mr. Cody, after he finished I still didn't understand what he was talking about.

Q. Well, let's pass on to the fourth paragraph.

"Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14, he called Coach Bryant and told him."

Did you get that information from Coach Bryant?

A. He said that he—this is not specifically what Coach Bryant said. He said that he had talked with Coach Butts about some of these rule interpretations, some of these

techniques, offensive techniques, defensive techniques, and that he would like to know more about them because he did not understand the new interpretations as they were.

Q. But you say here, Dr. Rose, "Coach Bryant asked Coach Butts to let him know what the plays were."

A. Yes, but this had to do with these new techniques, or the violations that could be committed with these new techniques.

Examination.

By the Court:

Q. Are you referring to defensive techniques? You are talking about Jordan?

A. I was talking about—Coach Bryant says that he thinks that he is one of the best defensive coaches in America. He says he thinks that Coach Butts was one of the best offensive coaches; and over the years he had [fol. 1233] talked with Coach Butts about offensive techniques, of patterns, that they had even shared—that he had given Coach Butts, over the years, some defensive techniques, and little points about defenses, and that he had gotten from Coach Butts, just as he had gotten from Coach Wilkinson, he said at Oklahoma, and Coach Royal at Texas, points, offensive points that were helpful to him and his boys.

Q. What was your understanding of why Mr. Jordan could be penalized and relieved from the game on a defensive play? Is that what you are talking about?

A. If an offensive player was injured, just like—

Q. Yes, sir.

A. —the Granning boy, you see, and Darwin Holt, and he said if he ever lost LeRoy Jordan in a ball game, he would probably lose the ball game, and I think we would agree with that.

Cross examination (continued).

By Mr. Cody:

Q. In other words, if Jordan had been put out of the game, it would help Georgia?

A. Not necessarily Georgia; any school.

Q. Well, Georgia included?

A. Well, yes; it could be.

Q. If they were talking—if they were talking on September the 14th—

Mr. Schroder: If the Court please, the Post article says it was September the 14th, but I think Mr. Burnett says it was September 13th.

[fol. 1234] Mr. Cody: I think we can agree on that.

The Court: Well, whatever it was.

Mr. Cody: There is some confusion.

By Mr. Cody:

Q. Dr. Rose, if they were having this conversation on September the 13th, and the Alabama game was the upcoming game for the 22nd, the opening game of the season, does it seem reasonable to you that this discussion involved some subsequent game of Alabama?

A. No, sir; it doesn't, to me, not taking all of the facts and all of the information that I now have, I don't think so.

Q. Now, let's—let's pass to the second sentence in that fourth paragraph.

"There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player."

Do you recall what Coach Bryant was talking about when he gave you that information?

A. No, sir; and I didn't understand it then.

Q. Do you understand it now?

A. No, sir; I don't. And I'd be afraid to try to explain it, but it had—it had something to do with—with some kind of tackling technique. Now, I don't know whether it was butting with the head, or just—or leaving the ground, or whatever it was, he tried to explain it. He went over and [fol. 1235] over it again, and I still couldn't explain it, and I still don't know it now. I did see somebody try to explain it on television, a television program later, and it made sense to me then, and I can't recall it.

Q. Wouldn't it have been a lot clearer for you to have let Coach Bryant dictate this letter?

A. It would have been much better, yes, sir.

The Marshal: Let's have order, please.

By Mr. Cody:

Q. The last sentence in Paragraph 4.

"Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16." Did you get that information from Coach Bryant?

A. Coach Bryant said to me that there was a particular point of play, not just the University of Georgia's play, but a play that they had talked about and discussed. He said he didn't know where he saw the play first, that it could have been in a clinic, but he knew that Coach Butts, over a period of years, had used it, and he wanted to know about that particular point on that play. Coach Butts didn't recall it, but was going to try to think about it and would try to get him additional information on what a man did here or did there, but it wasn't—this wasn't a University of Georgia play.

Q. Give me the date again you were talking with Coach Bryant again on this subject?

A. February the 24th, the night that I—

Q. In your office on the campus at Tuscaloosa?

A. Yes, sir.

Q. Does it seem inconsistent to you, Dr. Rose, that Coach [fol. 1236] Bryant would, at that time, have told you that

he did call Coach Butts on September 16, and yet when we undertook to take his deposition, or he later has stated that he remembers nothing about that call; does that seem inconsistent to you?

A. Coach Bryant told me that night that he didn't remember calling Coach Butts back.

Q. Well, where did you get—where did you get the date September 16th, and who from?

A. He told me that he could have called him back, and then I checked our records and there was a call to Athens, and I asked him if he could have made that call, and he still couldn't remember whether he made that call or not.

Q. Well, then, the last sentence in Paragraph 4 is a misstatement of fact?

A. On the basis of what I knew then, I didn't think it was, but if he—if he did not call back, somebody called Athens from the University—from Tuscaloosa on September 16.

Q. Are you aware of the fact, Dr. Rose, that when I took your deposition in Birmingham some few months ago, that you testified that you didn't find out through the telephone records that there was a September 16 call until long after this letter was written?

Mr. Schroder: Let's see where that is in the deposition.

By Mr. Cody:

Q. Do you remember making a statement to that effect?
A. No, sir; I don't remember it.

[fol. 1237] The Court: Just a moment; just a moment.
Mr. Schroder: I want a point of order here.
The Court: Where is the deposition?
The Witness: I have one here.

By Mr. Cody:

Q. Well, may I ask you when you did find out for the first time that there was a call?

A. I found out before I wrote the letter because I didn't even know about the dates; in fact, I am not sure it is the 16th or 15th. You keep saying 14th, and then they were supposed to have called back two days later, that would have been the 16th, and then Mr. Schroder said 13th; if it had been two days later it would have been the 15th.

The Court: I think, Doctor, there's been confusion about whether the first call occurred either on the 13th or 14th. I am right on this, am I not?

Mr. Cody: It's really the 13th and 16th. We are not in any disagreement on that.

The Witness: You have been trying to confuse me on those two days.

[fol. 1238] By Mr. Cody:

Q. I'm not going to try to confuse you. Let me ask you this question, Dr. Rose. When it says in this letter that "Coach Bryant asked Coach Butts to check on that play, which he did, and call back on September 16," were you—were you undertaking to convey the statement that Coach Butts called back on September the 16th, or Coach Bryant—that is the last sentence in Paragraph 4.

A. That at that time, Mr. Cody, on checking the telephone calls, there was a call from Tuscaloosa to Athens. I surmised that Coach Bryant had called back Coach Butts, but Coach Butts and Coach Bryant had never told me that he had called back; that he didn't remember it but I surmised that he had, because there was a call from Tuscaloosa to Athens.

Q. Now, let's pass on to the fifth paragraph.

A. All right, sir.

Q. "It was then that Coach Bryant changed his defenses . . ." I am not finishing that sentence. I want to first ask you if Coach Bryant told you that he changed his defenses?

A. Coach Bryant told me that he brought his players in—not his players, his coaching staff, and that they went

over and over these new interpretations to try to see how much understanding they all could get of them, and that they would try to carry them out as best they could understand them, but he said they could not get agreement of understanding on it, and it was then that he had Mr. Gardner but he had had Mr. Gardner before the call.

Q. I am going to get to Mr. Gardner in just a minute. But he did tell you he changed his defenses?

[fol. 1239] A. That he changed his techniques; yes, sir; not his defenses. It would be his techniques.

Q. The word "defenses" is error?

A. Yes, sir.

The Court: What's in the letter, "defenses" or "techniques"?

Mr. Cody: "Defenses."

The Court: Oh, yes.

By Mr. Cody:

Q. Now, reading on in the same sentence, ". . . and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses." And now you say that Mr. Gardner did not come there thereafter?

A. He came before.

Q. He had already been there?

A. Yes, sir; and this—Coach Bryant didn't know—didn't know whether he had been before or after the telephone call.

Q. But his particular statement, too, is an error?

A. Yes, sir.

Q. Also the following sentence, which is along the same line: "This Mr. Gardner did the following week." And then, the next sentence in that fifth paragraph: "The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention."

[fol. 1240] A. The techniques. It says "defenses," but it was techniques.

Q. Well, that, too, is an error; right?

A. Yes, sir; but I am not a modern-day football coach.

Q. From whom did that information come that is contained in that sentence?

A. I asked him if he—if, after meeting with Mr. George Gardner and his discussions with Coach Butts on rule interpretation and rule changes, if he had learned anything that changed any of his coaching or any of the techniques of his team, and he said that he had learned nothing that made a difference.

Q. Let's turn over to the next page. This is the sixth paragraph and the first sentence.

"Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously." Is that a quotation from Coach Bryant, a statement that he made to you?

A. I asked Coach Bryant if he felt in his discussions with Coach Butts that he received any knowledge or information that would affect the outcome of the game, and he said, no, but that any time that you learn something from another coach, or in talking to another coach that would keep you from getting penalized, of course, it favored them, but he doubted seriously that if anything that he learned from Coach Butts really made a great deal of difference to the outcome of that particular game.

Q. Dr. Rose, when you use the term "outcome," are you talking about the result of the game?

A. Yes, sir.

Q. That is, win or a loss?

A. Yes, sir.

[fol. 1241] Q. Did you ever doubt in your mind, before that game, that Alabama would lose? May I put it another way, if that confuses you.

A. No, sir; it doesn't confuse me.

Q. Did you know that Alabama—

Mr. Schroder: Wait a minute, whoa; whoa.

The Court: Let him answer.

A. (By the witness) I didn't know how the game was going to come out. It was the first game of the season, and I just didn't know, but after the game was over I was surprised that the score wasn't bigger than it was.

The Marshal: Let's have order, please.

A. But I didn't know before the game how it would be.

Q. You used the expression "first game of the season"; why did you use that expression as you did?

A. Sir?

Q. Why do you use the expression you did about it being the first game of the season? Is that because you know so lettle about the opponent?

A. Yes, sir; and our own team.

Q. But you did know that Alabama had a much better team than Georgia?

A. I was much more impressed with it after the game.

Q. What about it before?

A. No, sir; I thought we had a pretty good team, but I didn't know what Georgia had.

[fol. 1242] Q. Didn't the Birmingham papers and the Tuscaloosa paper state what the advantage was, or what the odds were? Don't you always read that?

A. No, sir; and I have a coach that always thinks he's going to lose every ball game, and he tries to keep me thinking that. I had no idea.

Q. Well, let, then, get back to this question. This sentence I read you, the first sentence there in the sixth paragraph, that "Coach Bryant informed me that calling this to his attention may have favored the University of Alabama . . ." is that your undertaking to quote something in this letter that Coach Bryant told you?

A. In answer to my question that if finding out these new rules, the interpretations, and in his conversation with Coach Butts, did he specifically get anything, and he said he didn't think so. He said any time you talk to anybody, or you read what's been written in the paper, or just in many ways, you pick up information. He said some of it

is good, some of it is bad, but he said it may have favored. But I don't know.

Q. But doesn't it seem inconsistent to you now, Dr. Rose, that since you have found out that George Gardner had been in Tuscaloosa the week before and had pointed out these so-called rule changes, doesn't that statement seem inconsistent to you?

A. No, sir; it doesn't, not in its full context.

Q. When you were having this conference with Coach Bryant, this three-hour conference, did he tell you that time George Gardner had been to Tuscaloosa?

A. Yes, sir.

Q. You know who George Gardner is, don't you?

A. Yes, sir; I know who he is.

[fol. 1243] Q. For the record, state—

The Court: Who is George Gardner?

By Mr. Cody:

Q. State who he is?

A. He is the Commissioner of the Southeastern Conference Officials. I believe that is his title.

Examination.

By the Court:

Q. Would he be head of all the referees and umpires?

A. I don't know whether he would be head of them, but he would be responsible for assigning them and getting them to this place to call this football game, and that one, and then evaluating their work at the end of the year.

Q. In other words, he would be the final authority on interpreting the rules, insofar as the officials enforcing them; is that correct?

Mr. Schroder: I think we can stipulate that Mr. Gardner is really in charge of all of these, Your Honor indicated, umpires, referees, headliners.

Mr. Cody: That's right.

The Court: So Mr. Gardner would be in charge of the [fol. 1244] referees and instruct them as to what penalty—when to enforce a particular penalty.

Mr. Schroder: That's correct, sir; he teaches them what to watch for.

The Court: Insofar as the Southeastern Conference is concerned?

Mr. Schroder: That is correct.

Cross examination (continued).

By Mr. Cody:

Q. I have one more sentence I'd like to read to you, Dr. Rose, in that same paragraph. "He did say . . ."—who is "he" that we are talking about?

A. Coach Bryant.

Q. "He did say that it prevented him from using illegal plays after the new change of rules." Is that what Coach Bryant told you?

A. He said that after the visit of Mr. Gardner and after his conversation with Coach Butts that he understood some of these rule changes and interpretations, and that it did prevent him from using illegal plays.

Q. Does it seem inconsistent to you, Dr. Rose, that Coach Bryant, in response to your inquiry on this particular date, could have given you all this information and yet subsequently does not remember any conversation about it at all with Coach Butts?

A. It doesn't in light of my conversations with him for [fol. 1245] that three-hour period, Mr. Cody, because: one, I think he was kind of shocked at the specifics of the thing, or the two telephone conversations, because there had been numerous personal conversations, telephone conversations with other coaches, discussing some of the same problems. He had called and talked with Coach Darrell Royal in Texas, whom we do not play during the regular season, but played in the Orange Bowl game. And there were others that he named, and there was a great deal of information about the whole thing that he just didn't specifi-

cally remember, but said that this is what we could have—could have been talking about, but I don't remember. When I checked the files a call had been made back.

Q. Had you checked the files before you talked to Coach Bryant?

A. No, sir.

Q. To confirm the telephone call?

A. Sir?

Q. To confirm the telephone call of September 16?

A. No, sir; no, sir; I had not.

* * * * * * *

Cross examination (continued).

By Mr. Cody:

Q. Dr. Rose, on Page 20 of your deposition, which was taken in Birmingham several months ago, do you recall making this statement that is at the bottom of the page: "He—" meaning Coach Bryant—

Mr. Schroder: Could I have this copy?

[fol. 1246] The Court: Don't stand behind him. Give him the original.

By Mr. Cody:

Q. "He—" meaning Coach Bryant "—said that it wasn't unusual for coaches to talk about many things previous to a football game." Did you know when he told you that that Wallace Butts was not the coach at Georgia?

A. Yes, sir.

Q. You knew he had not been coach since 1960?

A. I knew he was athletic director, and Coach Bryant is athletic director, and they talk about football too.

Q. But he is also the coach?

A. Yes, sir.

Q. He is the head coach?

A. If he were going to talk to anyone about football tickets, he'd talk to Coach Butts.

Q. Is that what he told you they were talking about, tickets?

A. He said they could have been talking about tickets.

Q. When you prepared this letter of March the 6th, had you consulted with any of your executive staff of the University?

A. Yes, sir.

Q. One of your vice-presidents?

A. One of my vice-presidents, my present Director of Alumni Affairs who used to be Business Manager of Athletics and Ticket Manager. Those were the ones with whom I talked.

Q. Do you know if either one of those gentlemen had ever played football?

[fol. 1247] A. No, sir; I don't believe they had. They may have; I don't know.

Q. On Page 30 of this same deposition, I'd like to read you one question and answer that is recorded here in the middle of the page; these lines are not numbered: "Dr. Rose, was the information obtained by you and counsel communicated in this letter of March 6 obtained from Coach Bryant? Answer: "Yes." Is that a correct transcript of your testimony at that time?

A. Yes, sir. But—but limited, because, as I said, he recalled many things that they could have been talking about, and that my letter was my best layman's interpretation, Mr. Cody, of the many things that Coach Bryant said they could have been talking about.

Q. But such technical information as is contained in your letter of March 6—

A. That technical information in my letter is not worth five cents as I see it now, because I did a very poor job being a technician on modern football. But I did the best I could do to convey to Dr. Aderhold—

Q. I am not arguing about that. But the information contained in that letter, you did undertake to explain, whether it is techniques or rules or what-not, you did obtain it from Coach Bryant?

A. It is my—it is my interpretation of what I thought Coach Bryant was trying to tell me.

Q. I see. You referred a moment ago in your direct examination by Mr. Schroder to the Granning incident. What was that you were talking about, Dr. Rose?

A. Mr. Cody, I explained it that in our football game with Georgia Tech in 1961, that on a play in which there was a kick, and Granning was receiving the kick, that [fol. 1248] Darwin Holt came in fast and left the ground and hit Granning, and Granning ducked his head down just as he hit, and it broke his jaw. And this was a terrible thing to happen, but these things do happen in football. But the University of Alabama, the total University, was severely criticized by a few members of the press, and particularly one here in Georgia, in which, in later months, they called our University a football factory, a University that the coach ran, a University that was interested only in football, and I will tell you it was terrible, because for a University to spend thirty million dollars a year on academics and less than two hundred thousand dollars a year on athletics to be termed as that, we did not want anything else to happen with any other institution that would create another incident like it.

Q. Now, turn to Page 45 just a minute, Dr. Rose, which—

Mr. Schroder: Excuse me, Mr. Cody, I didn't get the page.

Mr. Cody: 45. Just below the middle of the page.

By Mr. Cody:

Q. —which is referring again to the conference you had with Dr. Aderhold in Birmingham when Bernie Moore was present. I want to read you one question and answer and see if that is a correct transcript of your evidence at that time. "What specifically were these questions that he had raised?" meaning Dr. Aderhold; Answer: "As to whether Coach Butts had given Coach Griffith—" I don't know why it was "Griffith", it should have been "Bryant", I assume—

[fol. 1249] "detailed plays and information about the players of the University of Georgia to Coach Bryant and whether they had helped him in the ball game." Is that a correct transcript?

A. Yes, sir.

Q. With the exception of the clerical error the Reporter made about Griffith?

A. There is no clerical error, Mr. Cody. Read it again.

Q. "As to whether Coach Butts had given Coach Griffith detailed plays—" should have been "Bryant". It mentions Bryant in the following line.

A. No; Had given plays of Griffith to Coach Bryant.

Q. Then there should be an apostrophe after Coach Griffith?

A. That's right.

Q. Dr. Rose, on Page 51—I just have one more excerpt from this record to read to you—up at the top of the page, after discussing this so-called exchanging telephone conversations, Question: "What did he say then?" meaning Coach Bryant. Answer: "He said that he had made a telephone call to Athens and that he was pretty sure that he had called and talked to him about—" and then there is an interruption—"What did he say?" Answer: "That he had called him to talk to him further about the enforcement of the rules." I won't read the balance; if you want me to read the balance I will, but the question I want to read you now, Dr. Rose, when you were giving that testimony, were you sure that Coach Bryant had told you that he had called Coach Butts on that September 16?

A. No, sir. When we checked and found in the files that there had been a call from Tuscaloosa to Athens, Coach [fol. 1250] Bryant checked with other members of his staff to see if they had made the call, and he hadn't ascertained that they had, and so it was that he said that he probably called to Athens himself to talk to him further about the discussion of rules and interpretations as they discussed them before.

Q. Dr. Rose, would I offend you in any way if I asked you to give me one more of your signature? Here is my pen, if you want it.

A. Let me tell you this. She signs all our government contracts. She was on vacation and I signed some, and the government sent it back and said, "This is not the President's signature."

The Court: Let's just go ahead and sign it.

By Mr. Cody:

Q. Thank you. Do you remember, following that deposition that was taken in Birmingham, that you sent me—

Mr. Cody: Will you identify that, please?

The Clerk: Defendant's Exhibit No. 28 for identification is a signature of Frank A. Rose.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 28.)

[fol. 1251] By Mr. Cody:

Q. —that you sent me a telephone record which we agreed at that time would be sent?

A. Yes, sir.

Q. Is this the letter with which you transmitted that record?

A. Yes, sir.

Q. Did you sign that?

A. No, sir.

Q. Who signed it?

A. My secretary.

Mr. Cody: Will you identify this, please?

The Clerk: Yes, sir.

Mr. Cody: 29?

The Clerk: Yes, sir. Defendant's Exhibit No. 29 for identification is a letter dated June 19, 1963 to W. B. Cody from Frank A. Rose.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 29.)

By Mr. Cody:

Q. Dr. Rose, I have subpoenaed several letters from the Georgia School of Technology which you have written to one of the officials there that have been produced this morning in response to that subpoena. The first one that I'd [fol. 1252] like to call your attention to is a letter of November the 29th, 1961.

Mr. Schroder: Your Honor, I haven't seen any of these documents.

The Court: All right, sir, let Mr. Schroder see them.

Mr. Cody: I believe I will wait and get them all identified. Will you identify these three exhibits?

The Clerk: Yes, sir.

Mr. Cody: It doesn't matter in which order.

The Clerk: All right. Defendant's Exhibit No. 30 for identification is a letter dated November the 29th, 1961, to William B. Hartsfield from Frank A. Rose.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 30.)

The Clerk: Defendant's Exhibit No. 31 for identification is a letter dated February 20, 1963, to Dr. Edwin D. Harrison from Frank A. Rose.

[fol. 1253] (Whereupon above document was marked for identification only as Defendant's Exhibit No. 31.)

The Clerk: Defendant's Exhibit No. 32 for identification is a letter dated December 18, 1962, to Dr. Edwin D. Harrison from Frank A. Rose.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 32.)

By Mr. Cody:

Q. Dr. Rose, I show you the Defendant's Exhibit No. 30, this particular exhibit being a photostatic copy, but I'd like to ask you if that is your signature? Did you sign the original of that letter?

A. No, sir; that is not my signature.

Q. Is that one your secretary signed?

A. That is my secretary, Mrs. Park.

Q. Now, Exhibit No. 32, will you state whether or not this is a letter to Dr. Edwin D. Harrison, President of Georgia Tech? Did you sign that letter?

A. That is my secretary.

Q. Same lady?

A. Yes, sir.

Q. Now, I will ask you the same question about Exhibit No. 31?

A. That is my secretary.

Q. Now, on this last exhibit which I have shown you, you note that this seems to be a personal letter; you called him "Ed"?

A. Yes, sir.

[fol. 1254] Q. Are you in the habit of letting your secretary sign personal letter of that type?

A. Yes, sir.

Q. Dr. Rose, the pen which I used a moment ago is not the type pen I intended to use. Would I offend you if I asked you to give me one more signature?

The Marshal: Let's have order, please.

Mr. Cody: Thank you. Will you identify that?

The Clerk: It will be Defendant's Exhibit No. 33.

(Whereupon above document was marked for identification only as Defendant's Exhibit No. 33.)

Mr. Cody: I believe that's all we have.

Examination.

By the Court:

Q. Doctor, did you—did you consider this matter of great importance, the letter you were writing to Dr. Aderhold?

A. The accusation, Judge, I think was one of the most disturbing things I have had to happen to me in thirteen years of college administration. I don't think I have ever had anything to upset me more.

Q. Is it your testimony—is it your testimony or is it not that you dictated the letter and your secretary signed it [fol. 1255] before you saw the letter written? Is that right?

A. Yes, sir. And she was to check it with Coach Bryant to see if this was a good representation of our discussion.

Q. Did she check it?

A. No, sir. He was out of town, and I had told her to get it off that day, and she went ahead and sent it.

* * * * * * *

Redirect examination.

By Mr. Schroder:

Q. As soon as you—did you subsequently call Dr. Aderhold on the telephone and point out to him the fact that this letter was inaccurate?

A. That's right; yes, sir.

* * * * * * *

James Wallace Butts, having resumed the stand, testified further as follows:

Redirect examination.

By Mr. Schroder:

Q. Coach Butts, you heard the testimony introduced here by the Saturday Evening Post yesterday and today given

by members of the Athletic Board, certain members of the Athletic Board?

A. Yes, sir.

Q. Now, Mr. Butts, I want to ask you, in spite of whatever they may think or say, in your testimony before this [fol. 1256] Court and Jury that you have given in this case, is that or not the truth?

A. That is the truth, sir.

Q. As an expert in the field of coaching, is there any play that any offensive team could have that would severely penalize a defensive team and cause a defensive player to be expelled from the game?

A. No, sir; and may I explain briefly?

Q. Yes, sir.

A. If a play was run around the right end or a play was run around the left end, if the fullback ran over right guard, if the left halfback ran over the tackle, it would not make any difference on any one of those plays. A defensive man might violate the techniques of defensive football by piling on, hitting with his rear, butting him with his head, but there is no particular play in football that would cause any such violation. I would like to add, sir, that it is possible that by changing the count a defensive player or players might be drawn off sides, and in that event it would cause a penalty to the defense.

Q. Would the defensive man who went off side be put out of the game?

A. No, sir; it would cost him five yards.

Mr. Schroder: All right, sir; he's with you.

Mr. Cody: We have nothing further.

Mr. Schroder: You may come down.

[fol. 1257] Examination.

By the Court:

Q. Is there such—Coach Butts, may I ask this question. This is on football and I am certainly no authority.

A. Yes, sir; Your Honor.

Q. Is there such a play as the offensive team drawing the defensive team off sides and getting a penalty?

A. Your Honor, I explained that by changing the count or by some guard or tackle moving, it could draw the defense off tackle.

Mr. Schroder: Off side.

By the Court:

Q. And the opposite team would be the one penalized? There is no such thing as an illegal formation on defense, as long as you have eleven men on the field and not off side, it is not illegal, is it?

A. Your Honor, you could put one on the line of scrimmage and eleven back in the seats if you wanted to.

* * * * * * *

SUMMATION TO JURY ON BEHALF OF DEFENDANT

Mr. Cody: Gentlemen of the Jury, representing the defendant in this case, I want to sincerely speak to you this morning with some mixed emotion. I say "emotion" because in the first place this case involves several parties, the first one, the plaintiff in this case who, for many years, enjoyed the most that could be obtained out of his profes- [fol. 1258] sion. He arrived at or near the top of that profession, and he did that with the help and the assistance and the cooperation of the Athletic Board and the faculty of the University of Georgia over a period of many years, and he was well compensated for his services. He was a man who was held in the esteem and confidence of those University officials.

The other party involved, one other party involved is the defendant in this case, the Saturday Evening Post, which is a publication that is the oldest in this Country, two hundred thirty-six years, I believe, continuous publication. It started as far back, I believe, as the days of Benjamin Franklin, and I assume that it has been received with public acceptance.

But the third party involved in this case, as I view it, is the University of Georgia, the oldest State educational institution in the United States, started even prior to the adoption of the Federal Constitution. The University of Georgia has trained many people in this State to some extent, Mr. Schroder as well as myself, trained us to do the job which we are trying to do in this case, and, if I may say so, it trained the Judge who is in charge of the trial of this case.

What disturbs me most is that a man should reach the top of the profession about which I am talking, and then at some point in his life come to a change which embarrasses himself and his University and the people who he was employed to train.

I would like to read one small portion of an instrument [fol. 1259] which has been introduced in evidence which I believe, in just a few words, expresses the responsibility that falls upon a football coach or, on the other hand, an athletic director who is in charge of the training of the youth of our State.

My days at the University go back to those of Chancellor Barrow, David C. Barrow, a gentleman who never ceased to talk about the fact that the greatest asset of our State is its youth, and when you fail to train them properly, you have slipped a cog.

And, basically, that is one unfortunate and unpleasant experience that we, as lawyers and you as jurors, have to face in this case, because something has failed.

The University of Georgia is a member of the Southeastern Conference, and its athletic program is about the same as any other large university, and a great deal of money is spent on it because an athletic program is just as important in the education of our youth as the academic portion of that education. In that connection the Southeastern Conference has adopted the rules and the enforcement program, the Constitution and Bylaws of the National Collegiate Association, which is an organization designed

to keep collegiate athletics on a high plain and commensurate with the standards which you are trying to establish in the training of these youthful people.

Here is what this says: "Individuals employed by the Association"—meaning the Athletic Association—"employed by or associated with member institutions for the administration, the conduct of coaching of intercollegiate [fol. 1260] athletics are in the final analysis teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by fine example. Much more is expected of them than of the less critically placed citizen."

From that point I would like to pick up just a minute one or two things and then I will briefly discuss the one or two law points involved in this case. I want to tell you what happened to the plaintiff in this case, because it is important in leading up to what subsequently developed into what I think to be a critical event.

This trouble started back in 1960, and I will briefly run down a few points in this evidence in order to illustrate to you what it meant to this plaintiff and to our University. Back in 1960, and this evidence comes from the best friend that Wallace Butts ever had, Bill Hartman, the best and the closest friend he ever had, because he was the intermediary who stood between Coach Butts and these graduates of the University of Georgia and in an effort to then straighten out this unpleasant situation, and if you remember the evidence you will recall that he stated that in 1960 he met with the group in Atlanta who had called attention to this night life on the part of Coach Butts and the resulting unpleasantness that it was causing our University, and it resulted in Bill Hartman returning to Athens and confronting Coach Butts with the situation. And it developed out of that he was notified that unless he resigned, the entire matter would be thrown before the [fol. 1261] Athletic Board of the University.

He did resign and in fairness to him and as another indication of the generosity on the part of the University officials, all of whom were sympathetic with him, all of whom had been friends of his for years, including Dr. Aderhold, permitted him to resign upon two conditions, one, that he would have nothing whatsoever to do with football, and the other condition was that they would let him be athletic director, a very generous opportunity on their part and an opportunity for the man that had done wrong to straighten himself out.

Frankly, it seems to me from the evidence which has been introduced in this case that the University officials may have made a mistake and now regret it, but, nevertheless, out of their own generosity they undertook to straighten out a man who was their friend and who needed another chance.

He had that opportunity. They did reduce his salary from eighteen thousand five hundred dollars down to twelve thousand five hundred dollars, but certainly with the lesser responsibilities, if any, that he took on, I would say that that was a reasonable salary upon which he could have maintained himself.

But he became bitter and that bitterness grew from bad to worse, and you have heard the University officials state under oath that it became so bad that it became a statewide topic, and again he had to be confronted with these facts. He not only had failed the University in the training of our youth, which principal responsibility was to [fol. 1262] build character in these young people who were at the University to be trained, and a part of their training was building character, he not only failed in that, but in the process he lost his own, and one of the most tragic things that I have experienced in my forty-one years of the practice of law is to find a man in the responsibility which he at one time held to have dropped to the point where his best friend and his employer and the people with whom he is closest associated will come before a disinterested jury,

face-to-face with the man himself, and say that he has lost his character. He has my sympathy more than yours, and I speak to you in the deepest sincerity when I say that.

I have only one explanation of it, and that is the associations that he kept. I don't know what influence this man Scoby had on him. Scoby said he doesn't gamble any more. I will say this to you, that in all of my experiences I never heard of a man that bet fifty thousand dollars on collegiate football in one football season. If I had a friend that had been my friend over a period of sixteen or seventeen years, if he followed that kind of a practice I believe I would know about it, and I would shun his companionship.

And I will tell you something else. Maybe one standard of conduct may apply to me as a lawyer, but there is a higher standard of conduct to be applied to a man who is a football coach at a university or head of the Athletic Department.

Again, let me mention Chancellor's Barrow's name. I can't help but do it, because that man did more for me than [fol. 1263] any man with whom I have ever come in contact with.

When I attended the University of Georgia for four years, Chancellor Barrow used to make a talk in chapel every day for about twenty minutes, and he never ceased to say how important it was to maintain a good companionship. When I got there I was a scrawny-looking fellow with a twelve and a half collar and a pretty inexperienced man, and that was the first experience I learned at the University of Georgia, before I opened a book, and that is the experience Schroder has had and that is the experience that Judge Morgan has had, and it is the finest lesson that any young man at the age of eighteen can experience, because he is in the formative years of his life where he is trying to train himself for business, and at the same time in most cases it is the first time that that young man has ever been away from home for any long period of time. He is on his own when he gets there, and he needs the help and guidance,

and there are men at the University today that now take the place of such people as Professor Sanford and McPherson and Doctors Vocoff, Payne, and Parks, and those people, Hooper, who were there when I was there, trying to do the same job.

Now, let me pass on from that for just a moment. This business that I am talking about of Coach Butts toward the University and toward the Athletic Board, and including the coaching staff, in spite of a letter which Mr. Schroder may read to you which said he was a great friend of the coach, and so forth, he condemned them all, and he not only did it in private, he did it in public.

[fol. 1264] You heard a man testify here, Bill Bradshaw, a big strapping, fine-looking young man who lives in Canton, Georgia, and who is now on the Athletic Board of the University of Georgia, who heard these comments. It wasn't hearsay; he heard them himself. And how on earth a man could condemn the University of Georgia in the presence of his employers is beyond my comprehension, and it shows this, and this is why I am sympathetic to Coach Butts.

Something snapped in him; something changed. From 1960 right on up until the day that he was relieved as Athletic Director he was a different man. He had hurt himself, his University, and the people who he was employed to train, and neither I nor anybody in this courtroom will ever know who was stained by that conduct, nor will you ever know where it stopped. It may be influencing some young fellow today who himself is unconscious of the example which has been set before him, and he today may not know how that influence has affected him.

There are some ten thousand students at the University of Georgia, or thirty thousand, as I recall, over the State, but those are branches, about six or seven at Georgia Tech—that is a part of the University System—but there is about ten thousand at Athens. It would be hard to tell who has been affected by such an influence. But I will say

this to you, if the public at large over the State was aware of this misconduct, if the faculty was aware of it, if the Athletic Board was aware of it, and if the alumni of our good University was aware of it, I will guarantee you that a big portion of those students were, and if one man has [fol. 1265] been influenced badly by it, that is all the condemnation that is needed.

I want to mention one other thing. You recall the evidence of Mr. Bolton, Dr. Aderhold, and some of these other men whom I hope you will accept as worthy of belief. They are still your employees; they are charged with the responsibility of educating your children, your relatives and mine, and if they are not worthy of belief, they, too, should be discharged.

In early January, 1963, after this continuance and after this bitterness and after this open criticism, and after a continuance of this same conduct, instead of getting better, it got worse.

They call him in—and bear in mind, this is before any of the Butts-Bryant affair—and he was notified that as Athletic Director he would have to resign, otherwise the full Board was meeting on January the 28th. This discussion with Coach Butts was on the 20th which followed a meeting of a special committee that met on January the 18th, and on the 20th, he was notified that at the full Board meeting to be held on the 28th, if he hadn't resigned by that time that they would discharge him. So he resigned.

They did arrange for him to stay on, let it be effective June 30, so as to make some arrangement about a pension, and then—

Mr. Schroder: If it please the Court, I don't think it is good for any lawyer to interrupt another lawyer during [fol. 1266] his summation, and I am not going to interrupt Mr. Cody at any time during his summation, but his recollection as to what the evidence is and mine may differ, and the jury, I think, ought to know that what we are talking about in our summations, is our own recollection of what

the evidence is and not what the evidence itself might be. I do not agree with the last statement that Mr. Cody made.

The Court: I think the jury heard the evidence, and their recollection is probably as good as yours, Mr. Schroder's, Mr. Cody's and mine. I will let him go ahead.

Mr. Cody: All right, sir.

There is one other thing that happened at that meeting that his attention was called to, and that is that during this period of reprieve which he had been given, during which time he had been made Athletic Director, he developed a great many outside business interests, including this loan business and a lot of others, which your employees and mine, the faculty at the University of Georgia, decided conflicted with his interests and gave him no time to fulfill the responsibilities that had been placed upon him, and that was another reason why he was asked to resign.

In that connection, let me point out one thing that shows you how Coach Butts more or less cracked up. I don't say this in criticism of him. I am really ashamed to mention it, but in fairness to my client I am charged with the responsibility of pointing out to you matters which, if serious, give you reason not to believe what he says. I don't think he [fol. 1267] knew himself what he was doing. I don't think he fully understood or comprehended the effectiveness of it, because when he went over the State in an effort to obtain these licenses to operate these small loan companies, he had to get the permission of the Comptroller of the State of Georgia for the issuance of a license, because the small loan business in Georgia is controlled by the Comptroller General, a public official of our State.

Exhibit No. 11 of the defendant is a financial statement which this man gave to your public official, and it says—it recites his assets and his liabilities in detail, and then says at the bottom that his net worth on July the 17th, 1961, is two hundred five thousand nine hundred eighty-eight dollars, and, yet, in order to obtain your sympathy in this case—I assume that was the reason—he stated on this

stand under oath that he was now insolvent, and Mr. Schroder undertook to ask him how could he become insolvent between July 17, 1961 and the date of this trial, and he said he sold a couple of his stocks. One of them he did—he did receive a loss on it, but the other one turned out to be a big gain, and those two transactions didn't change his financial status one bit; it improved it, if anything, because he said he bought the Georgia International Life Insurance Company stock at six, I think, and sold it at eleven. If he had held onto it, it is a lot more than that now, but that is beside the point.

The point I want to make is that a man that will go to one of your public officials, bet enough to start into this business and a lot of other businesses while he is charged with the duty of Athletic Director, but it is worse, in order [fol. 1268] to obtain the license to do that, to misrepresent your financial condition.

I want to talk to you a minute, Gentlemen, at this point about the law of this case. It is not very complicated. It is fairly simple. Judge Morgan might disagree with me. He is charged with the responsibility of giving you the law of this case, but I want to mention this.

No. 1, we take no issue with the plaintiff in this case with the fact that up until a certain time he enjoyed the greatest of a reputation as a football coach, had many friends throughout the United States, was asked to make public speeches. I will go so far as to say, in all fairness to him, that he knows as much about or did know as much about football as any man in this country, and I, a few years ago, would have put him up against anybody. But the point in this case is, what happened after that, after he terminated his responsibility as a football coach following 60, and how did it affect this case?

I will get to this Bryant affair in just a minute. I don't have much time, but I do have another opportunity to speak to you on Monday, as you probably understood from the Judge's comment. I will have a little time between now and

then to think about what I want to say, and I will try to do a better job than I am doing this morning, but I want to touch now on the question of law involved in this case that I assume the Court will instruct you about.

In a libel action, if some unfavorable comment or critical comment, no matter what that comment is, is made, if the [fol. 1269] defendant can prove the truth of it, there can be no liability, and if you believe that the truth has been shown by a preponderance of the evidence, you must find a verdict for the defendant in this case.

Now, let me define to you or mention briefly what I assume the Court will instruct you about in its charge to you as what it means by "truth". It means substantial truth, not every word in the article. You can make mistakes in the article. It means that the defendant is charged with the responsibility of proving the truth of that part of the article which constitutes the sting of the so-called libel, that is, they could cover a wide area in the article itself and make some mistakes in it, as we have made in this case. There are some errors in this article; no one denies that. We spent hours and days talking about a few mistakes in the article, and I confess that there are some mistakes in it, some misquotations, not particularly chargeable against the Post, although they are responsible for it because it came through their agent—Furman Bisher was one of them, who is a responsible journalist in Atlanta—and if he makes a mistake, we have to be responsible for it. Nobody has dodged that issue, but if somebody is misquoted or some misstatement is made which is a reflection on somebody else, it doesn't have anything to do with his particular case.

The first day of this trial I went home that afternoon, a little bit tired, and picked up the paper to read it, and some newspaper man made a comment about me. He said I was age fifty and slightly bald. He missed my age by fourteen [fol. 1270] years, and whether or not I am slightly bald, I will let you be the judge of that. Frankly, I think he's drastically wrong in both of them.

He has got a right to make whatever comment he wants, but in journalism the law assumes that mistakes can be made. You can't check out every—you can't check out every incident before you publish an article. A man didn't come to me and ask me what my age was. I don't guess he would have had time to write his article in the paper if he checked every detail in the article, because he covered a wide area of subjects.

But, be that as it may, there is very little I can say about that. I want to talk to you a minute about these notes. May I have them just a second?

The Clerk: Yes, sir.

Mr. Cody: We are getting down to the Bryant affair now. These notes are made by an amateur, not a football coach. A lot of them don't make any sense. It is written down in pencil on notepaper, taken during the course of the telephone conversation; several are almost illegible, but there is a lot in these notes, and before I touch on what is in these notes that apply to this case, I want to mention this to you.

There are two other things that Mr. Schroder would like to forget about, because in his questioning of these witnesses that he had, they said that these notes weren't any good and one said you might as well tear them up. He [fol. 1271] didn't give those witnesses the benefit before they testified of the detailed deposition that was given by this man Burnett long prior to this trial in which he explained a great many things about that telephone conversation that are not mentioned in these notes. He amplified these notes and explained some things about it.

Mr. Schroder: If the Court please, I don't remember Mr. Burnett testifying in any deposition in this case. There wasn't read any deposition of Mr. Burnett. I think that is highly improper.

Mr. Cody: He examined—

The Court: Just a moment. What is your—

Mr. Cody: He examined him about some depositions.

Mr. Schroder: Mr. Cody—

The Court: Yes, sir.

Mr. Schroder: —is attempting to state to this jury—

The Court: You quote—I don't think—

[fol. 1272] Mr. Cody: I won't quote the deposition.

The Court: I don't think anything that was said in the deposition which was not read would be admissible.

Mr. Cody: Very well, Your Honor; very well.

And then we come, as I consider it, to the most important feature of this case, and that is that on the last page of these notes is the extension number of "Bear" Bryant at the University of Alabama switchboard. Extension 641. Anybody could obtain that, I guess. You could have called up down there and found out that extension number. I don't deny that, if a man wanted to falsify these notes.

He put down the time as 10:40 a.m. on September 13, 1963. That, too, could have been falsified, because anybody can write that time and the date down, but here is something that no man could put down and be accurate unless he had some sort of a psychic power.

It says here "Give Wally a ring Sunday." Now, this was on September 13, a Thursday. Sunday was the 16th, and not until recently has any confirmation been made of that Sunday telephone call, and bear in mind, Gentlemen, this call from "Bear" Bryant to Wally Butts on the quiet of a Sunday afternoon, and the telephone records show that the call went to Wally Butts' home, lasted an hour and seven minutes, and nobody, to this day, knows what the subject matter of that conversation was. Neither Wally Butts nor [fol. 1273] "Bear" Bryant remember making the call, nor do they remember the subject matter about which they talked. That is one of the most incredible things about this case.

There is only one class, only one type of person on earth that could talk an hour and seven minutes and not remember making the call or not remember what they talked about, and that exception is, in my judgment, a teen-ager. A teen-ager can turn the radio on and listen to Ricky Nelson, and at the same time turn the T.V. on to listen to

"Bonanza" or "Dr. Kildare" and spread out on the floor like syrup, and grab that telephone and talk for an hour and seven minutes without knowing what they are talking about or who they called. But, I dare say, that even a few of those would remember something about the call.

But in this particular case, two men who were talking football, let's say it is just general football talk, talking that length of time before this upcoming Georgia-Alabama game, I say to you in all sincerity that to be unable to remember the call or the subject matter is one of the most unbelievable things that I can imagine. I don't intend to comment on that any more. I simply say that there is not the slightest bit of evidence, not the slightest bit of doubt that that call ever took place and the length of it, and if, at the conclusion of this case, you as a matter of fact find that call didn't take place, you want to find a verdict for this plaintiff.

But you will have with you in the jury room a toll ticket of the American Telephone and Telegraph Company or Southern Bell Telephone and Telegraph Company. Here they are. You can look at them. And that company has a [fol. 1274] machine—this is not a human error on anybody's part; this company has a machine that, the minute a call is through, that machine stamps the time of that call, because all along, since the connection was made and since the party started talking, that machine was recording the time, and it is on the back of this toll ticket, and there could be no possible human error about it.

The same applies to the call of September 13, which Butts made to Bryant.

I only have a few more minutes this morning. I want to mention something before I close, and I may have something to say Monday on the same subject.

The subject of any legal investigation is to ascertain the truth, and if you can ever find out what is the truth in this case, your decision, of course, will be easy. This has been a long case. You have been patient, and in your effort to strive to obtain the truth you necessarily will have to judge

the credibility of witnesses. The Court will give you some instruction about that, because there are some Code Sections in Georgia, and this case is governed by Georgia law, even though we are trying it in the Federal court. You are the judges of the credibility of the witnesses.

Now, I want to mention, first, this fellow Carmichael. He started out in this case by undertaking to convince you he was a real estate man and an insurance man. The truth about it, he is neither one. He changed his testimony—and this is under oath to you—he changed his testimony three [fol. 1275] or four times before he ever got to you. He testified one time in a public hearing that was had involving this matter, he testified another time on deposition which I questioned him about, and then he testified a third time in connection with another case, not this one, and something was asked him about this same transaction, and if I recall the testimony correctly, every one of them was different, and then when he got before you he changed his testimony three times. You remember he was here one day and his testimony was along certain lines, and he came back the next morning and said that his testimony the previous day was in error, and he made two or three changes in it, such changes as might suit his convenience.

Now, you can judge the credibility of that type of a witness, not me to judge but you. I simply point it out for what it might be worth, because I may be just a little bit more experienced in the handling of a witness than you might be, because I submit to you that a man that will do that is not worthy of belief in any respect.

And let me touch on "Bear" Bryant just a minute. "Bear" Bryant was charged with the same responsibility as Wally Butts with the training of young people, and he brought two of the finest looking boys into this courtroom that I ever saw in my life. You may not remember them by name, but I do. Sharp is one and Pell is another, Jimmy Sharp and Charles Pell. Jimmy Sharp was a tackle on the 1962 football team and was captain of that team. Charles Pell was the guard. Never in my life have I seen two finer

looking young men, both by appearance and physically, and they made such good witnesses that even Judge Morgan was [fol. 1276] prompted to ask Sharp something along this line —I don't remember the exact transcript of the record; it will be in the record; you may remember it better than I do; I had my mind on other things. The Judge asked him if he intended to study to be a coach, something along that line. I don't remember his exact answer; all I know was that it left me with the conclusion that he might, or something of that sort, and it comes out, and this evidence is in the case, that those two men are on the coaching staff at the University of Alabama and recognized as such. They are assistant coaches, and I say to you that that type of exception, don't blame these young men; they are under the influence of "Bear" Bryant, and if "Bear" Bryant asked them to come up here and condone the fact that they were assistant coaches, I guess they'd do it, because somehow or another a coach has got an influence over a young man that no other person has, not even his parents, and that is the tragedy of this whole situation.

I believe in deception on the football field, but deception in the courtroom is another thing, and I dare say that if those two boys had stated in open Court they were assistant coaches at the University of Alabama, I would have asked them some more questions. I don't recall that I cross-examined either one.

I forgot to mention one thing about this fellow Carmichael. There is another fellow that has been a friend of Butts for fifteen years. He denied it was any close friendship, tried to pretend it was an acquaintance; I guess that's right. But somewhere in the examinations of that witness [fol. 1277] he said he went to his dentist that morning, and after he left there he came on to this office where he ran into Burnett. And I asked this dentist to come to Court, bring his records. He said he hadn't seen him in a long time up until October 4th. That is, in essence, what the records show. I could be wrong. If I am, you can criticize me for it. I can't remember every detail in this case, but,

as I recall, he said October the 4th was the first date that his records showed the man had been there in a long time, but we were talking about September the 13th. That is the important date in this case.

When you are talking about the credibility of witnesses, you have under consideration probably the most important phase of the trial of any legal case. Some witnesses hide facts, and when you find one doing that, you ought to accept his testimony with suspicion.

Let me give you an illustration. We took the deposition of this man Scoby in Chicago, and we undertook to find out something about his acquaintances, and we wanted to find out who this man was that was handling all these bets. If I knew his name and address, I might have been able to give you some more information about this case. All I learned was his name was "Lefty." Well, there are a lot of people named Lefty and a lot of people left-handed, including Dr. Rose. Lefty doesn't mean anything to me nor to you. He didn't know his last name, where he lived. All he knows, Lefty was the one that picked up this money when he lost and brought the money there when he won.

[fol. 1278] Let me tell you this. You have got some very credible witnesses in this case, and they didn't tell you all they know. They have saved all of us a lot of embarrassment in this case, including Coach Butts, and rightly so, and I am delighted that they did, and I have been a party to it, but if Dr. O. C. Aderhold, president of the University, if Mr. J. D. Bolton, who has been there nearly forty years, if Harold Heckman, who has been there thirty-something years and is now head of the Accounting Department and teaches business accounting and business administration at the University, if Dr. Hugh Mills, who is head of the Department of Education, I don't know what that encompasses, I think that is general academic subjects, if Mr. Driftmier, who is head of the Agricultural Department—and, incidentally, outside of two other schools in the United States, I believe the University of Georgia has one of the largest agricultural departments in the world; they have got

a terrific agriculture department down there; if those type men and the men such as Bill Bradshaw, who studied football under Coach Butts and who now represents the alumni of the University, if those sort of men are lying to you, if you think that, then I think you ought to find a verdict for the plaintiff in this case, because our case depends upon people of that character and that responsibility.

It is not up to me to tell you to believe them. If you have the slightest doubt about their honesty or their integrity or the correctness of their evidence, then we have not carried the preponderance of the burden of this proof which is placed upon us, and you ought to find a verdict for the Plaintiff. But I don't believe, and I say this as my time ends—

[fol. 1279] I have a minute, don't I, Judge?

The Court: Yes, sir.

Mr. Cody: I don't believe that those men, charged with the education and the training of your children and mine and the training of children who are hereafter to come, would come into this Federal Court in the presence of a jury and Judge Morgan and the assembled audience, and say what they did, and if what they have said is false and is of no effect, there is no person in this courtroom that is more disappointed than I, and there is no person in this courtroom, in that event, that would worry more about the future of our State.

What little I have to say left I will say Monday. I will try to formulate what few remarks I am to say with a little more definiteness and probably in briefer form, because I will have a little more time to think about it. But, in the meantime, I thank you for your patience which you have shown in this case, and I hope that over the weekend that you will give serious consideration to such comments as I have made, and if I have made any exaggeration or any misstatement in my recollection of what the evidence is in this case, I hope you will forgive me.

* * * * * * *

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY, PETITIONER,

vs.

WALLACE BUTTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT BY MR. LOCKERMAN

Mr. Lockerman: Please the Court, before addressing my remarks to the jury, I want to point out to Your Honor [fol. 1280] what the legal contention is of the plaintiff in this case, that is, in part. As Your Honor knows, this being a libel action, libel is defined under the laws of this State as being a false and malicious defamation of another expressed in print or writing, tending to injure the reputation of an individual and to expose him to public hatred, contempt or ridicule.

Now, we contend that although that definition of libel includes and refers to the element of malice, that in this case there was no necessity for the plaintiff to offer evidence of actual malice on the part of the defendant for the law itself infers the existence of malice whereas in this case a libel is published, and, that therefore it is not necessary that the jury find that there was any actual malice on the part of the Curtis Publishing Company.

The Court: That is in so far as general damages is concerned but no as to punitive?

Mr. Lockerman: That's correct.

The Court: Yes, sir.

Mr. Lockerman: We point out that the article complained of contains the words "corrupt", "fixed", "rigged", and to "sell out" in referring to the plaintiff, Wallace Butts.

[fol. 1281] Now, we contend that proper definition of the word "corrupt" is that it means depraved, debased, or perverted, and we contend that the proper definition of the word "fixed" means to tamper with in advance, and that the word "rigged" means to arrange, carry out or manipulate by deceptive or fraudulent means, to fool and hoax. We contend that the words "to sell out" means to betray for compensation the cause or associates with whom one is identified, and we think that Your Honor should charge the jury along that line.

We further contend that this article, when it is read in its entirety, that the article complained of in this Saturday Evening Post charges the plaintiff with being corrupt and with rigging and fixing the 1962 Alabama-Georgia football game. We contend that that greatly injured the plaintiff in his profession as a football coach, and that the article therefore, we contend, is libelous per se, that is, that it is libelous on its face as a matter of law.

We feel that the Court should so charge the jury and to further charge the jury that the defendant in this case, Curtis Publishing Company, had the burden of proving the truth of the things it said about the plaintiff, and that if the defendant has not carried that burden and proved the truth of those things by a legal preponderance of the evidence, then the jury must return a verdict for the plaintiff in the amount of damages to which, under all the circumstances, they find that he is entitled.

We further contend that the defendant in this case has filed what is known as a plea of justification, and that un- [fol. 1282] der the law that by filing that plea the defendant has the legal burden of proving the words contained in the article which charged the plaintiff with being a rigger and a fixer of the 1962 Georgia-Alabama football game, and accusing him of being a participant in the greatest sports scandal since that of the Chicago White Sox in the 1919 World Series, and that it charges that he was a corrupt person who betrays or sells out his people, and he rigged and fixed the Alabama-Georgia football game as a gambling device in order to restore his financial resources. And further it charges that he was so corrupt and foul that his betrayed players were forced in the game like "rats in a maze and took a frightful physical beating", all of which is alleged in our Paragraph 11 of the petition, the plaintiff's complaint, and we contend that the jury should be charged that nothing short of the defendant proving the truth of those charges by preponderance of the evidence will suffice as a defense.

We further say that under the pleadings in this case and as the pleadings will show that Wallace Butts is asking for general damages in the sum of five million dollars. Of course, we also—the petition, as I will later on point out, shows we ask for an additional five million dollars as punitive damages, but he is asking the general damages for five million dollars to compensate him for the injury to his peace, his happiness, and his feeling as a result of the article published concerning him in the Saturday Evening Post of March the 23rd.

Now, we feel that the jury should be instructed that unless they find that the defendant has proved that this ar- [fol. 1283] ticle was true, then the plaintiff would be entitled to recover general damages without proof of any amount, that it is not necessary for the plaintiff to prove that he incurred any special damages; nor is it necessary that the plaintiff prove that he has suffered any pecuniary or physical harm for the reason that the law presumes that the general damages flow from a libelous publication which injures one in his trade, occupation or business.

We contend that in a case such as this the law doesn't prescribe any measure of damages except to leave the question of damages entirely to the enlightened consciences of impartial jurors, such as the gentlemen that we have in the box, and that the jury should strive to give such damages as, in their opinion, will fairly compensate the plaintiff for the injury done. We feel that the jury should be so instructed.

In addition to asking for general damages, as I mentioned just previously, in the amount of five million dollars, the plaintiff in his petition is also seeking to recover an additional five million dollars as punitive damages under the law to deter the Curtis Publishing Company from repeating the injury to his honor, his reputation, and his integrity in the future.

We contend that under the law of Georgia, there may be aggravating circumstances in a case of this type, either in the act or in the intention of the defendant, and we con-

tend that such aggravating circumstances are present in this case. We say that the defendant has failed to prove the truth of the charges, and in addition to the amount the plaintiff is seeking as general damages that the jury should award to the plaintiff five million dollars as puni-
[fol. 1284] tive damages to deter the defendant from repeating the injury to his honor, reputation, and integrity, and we think the jury should be so instructed.

Now, on the question of punitive damages, as on the question of general damages, we contend that the law prescribes no set way in which such damages shall be computed, that being left entirely to the enlightened consciences of these jurors.

We contend the jury should be authorized to consider in this connection the wealth of the defendant, and we further contend that the defendant has not sustained the burden of proving the statements by it about the plaintiff as being true, and that the jury is authorized to consider that fact in—authorized to consider that fact that this is an aggravating circumstance as referred to and provided for in the law in determining the amount to be awarded the plaintiff. We think that the jury should be instructed on that subject.

We point out, Your Honor, that evidence has been offered during the trial to the effect that the plaintiff, Wally Butts, through his attorney, prior to the time that the article was published, requested the defendant not to publish the article, stating to the defendant, Curtis Publishing Company, that it was not true, and that after the article was published that the plaintiff demanded a retraction by the Curtis Publishing Company of what it had said about him. Now, that is admitted in the pleadings too, the fact that the request not to publish and the request for retraction were made, and there is no question about that.

[fol. 1285] Now, under Section 105-720 of the Code of Georgia, it is relevant in an action for libel such as this for the plaintiff to prove that he had requested a retraction.

The Court: Is that 105-620 or 105-702?

Mr. Lockerman: Your Honor, it is—

The Court: That's all right; I will find it. I was just in doubt.

Mr. Lockerman: Yes, sir. Proof that he requested the retraction.

Now, we contend that the proof by the plaintiff, and, of course, the admission in the pleadings, that he demanded a retraction but the defendant failed to retract the article may be considered by the jury on the question of malice and bad faith.

We contend that the defendant has failed to prove that the article was true, and that the defendant has admitted that it refused to retract the article after being requested to do so, and we think the jury should be instructed that it is authorized to consider this fact as an aggravating circumstance in arriving at the amount of punitive damages to be awarded the plaintiff.

I want to read to the Court from the case of Cox versus Strickland, which is a libel suit action in 101 Georgia 482, decided by our Supreme Court here in the State of Georgia, [fol. 1286] where, at Page 493, beginning at Page 493, our Supreme Court has this to say:

"The right to publish through the newspaper press such matters of interest as may be properly laid before the public does not go to the extent of allowing the publication concerning a person of a false and defamatory matter, there being no other reason or justification for so doing than the mere publication of news. But false assertions, when they impute the commission of crime, are actionable; and when not based upon any facts legally tending to prove the crime imputed, the publication cannot be said to be privileged. It will not do to say that such a publication was made with reasonable care, however good the motive may have been.

"In popular belief, one man can publish of another what he sees fit, if, by bluff or otherwise, he can avoid any personal consequences on account of such act; the party aggrieved must either submit or go gunning for the publisher, or to retain his place in public estimation as a man of

honor. Generally the libeler is not in evidence; his work is done behind the scene; you cannot always know his motive. Upon the surface he is the embodiment of fairness, of patriotism, yea, sometimes his religious views almost deter him from work he is about, but, patriot as he is, he will do the public a service, and often he strikes a better man than he is, a cowardly blow though it be. Character is defined by Webster to be particular qualities impressed by nature or habit on a person, which distinguish him from others. The libeller would strip him of these. He wishes him to appear, not in his true character, but in a fictitious one, a character that he would give him. We [fol. 1287] can understand why a thief would steal, he is after gain; so forgery is committed, and other crimes; but from a moral standpoint a man who would destroy character must be ranked along with the felon who commits arson, he cannot hope to profit by it; he cannot appropriate that of which he deprived another. Character ought to be protected; the law ought to be enforced to protect it. I could not do better than quote just here from the preface to the letters of Junius: "If the characters of private men are assailed or injured, a double remedy is open to them by action and indictment; if through indolence, false shame, or indifference, they will not appeal to the laws of their country, they failed in their duty to society, and are unjust to themselves; if, from an unwarrantable distrust of the integrity of juries, they would wish to obtain justice by any mode of procedure more summary than a trial by their peers, I do not scruple to affirm, that they are in effect greater enemies to themselves than the libeller they prosecute.'"

Summation to Jury on Behalf of Plaintiff

Gentlemen of the Jury, I have been actually stunned and amazed by the address that Mr. Cody just made to you. Mr. Cody is a fine man. Mr. Cody is a fine lawyer. I respect him very much. I know that in the this case that he

is being persuaded by the Curtis Publishing Company, his client in the matter, in which he necessarily must avoid discussing the real issues. The only reason that he spoke to you first in this case, being the defendant, is because the Curtis Publishing Company came in and filed a plea of what the law refers to as justification in which he claimed, in which the Curtis Publishing Company claimed [fol. 1288] that what it had said about Wally Butts was true. They, therefore, had the burden of proving that those things were true.

I don't believe that in any place in what he has said to you that he has touched in one iota on the burden that he had of proving the truth of these charges that were made as so prominently shown in that editorial in the Saturday Evening Post. He has seen fit to talk to you about anything except the truth of those charges.

Mr. Cody, apparently, Gentlemen, is taking the position that if you will just believe that Wally Butts has bad character, that the Saturday Evening Post can say anything that it wants to about Wally Butts, that it can say anything that it wants about anyone, if in some way they can come before a jury that tries the case and try to create some feeling on the part of the jury that the person that they have charged with being, say, corrupt, and with being a fixer, is of some bad character. I don't believe that you are going to let the Curtis Publishing Company, so far as the Northern District of Georgia is concerned, continue with that type of policy.

Mr. Cody told you about having been at the University of Georgia, and about how Mr. Schroder was at the University of Georgia, and Judge Morgan was at the University of Georgia. He has, of course, referred to the gentlemen that they brought here from the University of Georgia. It seems to me that the Curtis Publishing Company is trying to hide behind the skirts of the University of Georgia, that this great institution that it is. We are [fol. 1289] all proud of the University of Georgia. Mr.

Cody has no single claim to that at all. I am proud of the University of Georgia. I have a son that graduated from there in June. We all are.

Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth.

After the Curtis Publishing Company brought in the parties from Athens, Wally Butts went back on the stand and he still, with raised hand of telling the truth, swore to you that what he had told you in this case was the truth.

Mr. Cody has not referred to the fine young men that came over here from Athens who know Wally Butts so well. He doesn't want to mention to you, obviously, the fact that those fine young men and the coaches that came over here and testified in behalf of the truth of what Wally Butts has told you as all of us who have been in this case know that they supported the truth of what he said.

[fol..1290] Mr. Cody did not attack the character of any of those witnesses. He knew that he could not, and they have verified right to the letter everything about the heart of this case that Wally Butts has said.

Mr. Cody tried to cast doubt in your mind as to the integrity and as to the character and as to the honor of Coach Paul Bryant by suggesting that he compelled those two fine young boys who came over here to testify, that he conspired with them and rigged with them to come over here and testify.

I think Mr. Cody knows very well that the brochure that he referred to, a type of brochure of that type is put out at the end of the season and that when young boys who have graduated or rather who have completed their eligibility, outstanding young men of the team have completed their eligibility, that they are carried on the staff as helping in coaching. That brochure is prepared for next year, and I think Mr. Cody knows that, but he wants you to believe that there was a conspiracy on the part of those fine young men and Paul Bryant who come over here and tell you untruths about this case which they did not, and they verified everything to the real heart of this case that Wally Butts has told you.

Gentlemen, Mr. Cody referred, of course, to John Carmichael, and he tried to imply to you that John Carmichael had lied, had told untruths to you on the stand by claiming that John Carmichael had said that he was at the dentist's office on the morning before he went to the office where he found Burnett at his desk. Now, I don't ask you to accept my memory, but I believe if you search your own carefully [fol. 1291] you will remember that John Carmichael said that he thought he went to the dentist; he repeated it several times, "I think to the best of my recollection I was there, but I cannot be sure. It's been a long time ago." And that was what he said. And then the Curtis Publishing Company in its desperate effort in this case to try to case some question on his testimony, go out and get a doctor to come in and say, "No, we don't have any record." The man never did say that he was positively there.

And, speaking of John Carmichael, I wonder if it has occurred to you why, if his testimony wasn't true, why the Saturday Evening Post did not bring and present to you, as we did John Carmichael, this man who is referred to throughout this argument by the name of Milton Flack. Have you seen him? Now, bear in mind that he came to that office on Eleventh Street about 2:00 or 2:30 on the afternoon of the same day that Burnett allegedly made these notes, and that they sat down and discussed the

notes and discussed what was supposed to have been said. Now, if those notes weren't fraudulent, if they weren't fictitious except for the first page and the last page as testified to by John Carmichael, why didn't the Curtis Publishing Company bring that man in here? They know where he is. And I say it is not right to try to cast doubts in your minds about any such thing as that.

Pierre Howard seemed to have been furnishing a great deal of information to the Saturday Evening Post in connection with this matter. He is a local lawyer, and he is a man that the Post paid, oh, I don't know how much it was, five hundred or a thousand dollars; I think it's a thousand [fol. 1292] dollars to Pierre Howard, and they have not brought him in to testify as to the truth as to what they have assumed the burden of proof.

I think you ought to consider those things. I think you ought to give it careful consideration, and I know that you will.

Mr. Cody drew comparisons about his bald head and about whether or not—being types of inaccuracies in papers. He talks about Ricky Nelson. He talks about Dr. Kildare. He won't talk to you about the real heart of this matter, because he knows that it cannot be proven, and he has known it from the beginning, and I feel sorry for him. He had a terrific burden and he can't carry it, and he doesn't want to talk about it. He wants to talk about anything except that, and that is all he has done for two weeks, including specifically today.

Gentlemen, March the 18th, was the blackest day that could ever befall—I mean, to Wally Butts, that could ever come upon any man. That was the day that the Saturday Evening Post that bears the date of March 23 hit the press, or hit the newsstands, I mean, not the press. It had been printed up long before. On that day of March the 18th, Wally Butts became an ashamed, heartbroken form of just a shell of himself. As he told you before, he broke down on the witness stand, that he had been, after it came out, he had been ashamed to run into people or to look

them in the eye for so long, but that he had gotten to the point to where he had the strength to look any man in the eye, and that from here on out he will look them in the eye, and he swore to you that was because of the fact [fol. 1293] that what they had said about him was not true.

Wally Butts had spent thirty-five years as Head Coach, either in high schools at Monroe, starting in Monroe, going up to Male High at Louisville, and over to some other at Lexington, Kentucky, and finally coming to the University of Georgia where he had been for twenty-five years. He had reached the height of his profession. He had gotten every honor, practically, that could be gotten by a coach in the Southeastern Conference or in the United States, for that matter.

The Saturday Evening Post would have you believe that this man's character is bad. I want to read to you the fourth paragraph of the complaint, that is the petition, of course, that was filed in this case, and it alleges this in Wally Butts' petition:

"Plaintiff, during his career, has enjoyed a national reputation as a successful and respected member of the coaching profession, and has been accorded many honors, among which was his election in 1959 as resident of the Football Coaches Association, a national organization of football coaches throughout America. Upon invitation he has coached the College All-Stars, the Blue-Gray All Star game, and the North-South All-Star game. Plaintiff has, during his career, been widely sought as a speaker and lecturer on various aspects of football, and has spoken and lectured at clinics, banquets and other public gatherings throughout the United States. In addition, plaintiff has been approached and offered employment as head football coach by several colleges and professional foot- [fol. 1294] ball teams in the country due entirely to his reputation as successful member and leader in his profession."

And when that suit was filed the Curtis Publishing Company came into this Court and filed its answer to it, and

admitted every word of it. Now, since having done that, the Curtis Publishing Company is trying to contradict what it said in its own pleadings in judicio, here in the courtroom.

If Wally Butts' character is bad, Gentlemen, it is because of the things said against him by this Saturday Evening Post. If people say that he is of bad character, it is because of that, and why do you think we are suing the Saturday Evening Post? We say that they have ruined him, and they did ruin Wally Butts, unless you gentlemen correct this and say what should be said to the world in this case and find, of course, that the Curtis Publishing Company has not proven the burden, has not proven the truth of its charges against Wally Butts.

I want to talk a little bit about the Curtis Publishing Company. Mr. Cody referred to Benjamin Franklin and about the two hundred thirty-six years that the Curtis Publishing Company has been publishing a magazine. Of course, it was a great magazine; it had a very conservative reputation until the new management of editors took over, Mr. Clay Blair, Jr., Mr. Davis Thomas, and the others whose depositions we read to you.

They did not bring one man here from the Curtis Publishing Company or the Saturday Evening Post to put him [fol. 1295] on the stand to testify to anything in support of what they claimed they were going to prove to you. As you know from the evidence, Clay Blair, Jr., when he took over the editorship of this, he wanted to create a different image. He wanted to get away from the image of Benjamin Franklin. He wanted to create his own image. As a matter of fact—

Where are those things, those exhibits?

—when you have those exhibits out you will find that he wanted to get so far away from the image of Benjamin Franklin, that he has taken his facsimile, this image of Benjamin Franklin, which for years and years and years was carried on the Post; he has taken it off; he doesn't want it. He tells you in his sworn testimony in this case

that he has created, he has changed the image of the Saturday Evening Post. He wants to create furor. He wants to make people mad. He wants to be sensational. He has a yardstick, a new yardstick of the image he wants to create in that magazine. He wants to make it a fireside confidential weekly publication and get into the homes of twenty-three million readers in America. He tells you that his final yardstick of the kind of image that he is creating is represented by the number of libel suits that they had at the time that he took his deposition—I forget the date—maybe sometime in May or June of this year or something like that. That is the final yardstick as he measures it, of the type of magazine that they want to publish.

Gentlemen, the Saturday Evening Post apparently has gone into the business of buying libel suits. They bought [fol. 1296] this one. They paid George Burnett five thousand dollars for this libel suit, and they told him, "We will give you two thousand dollars for an affidavit. We want to try to make it appear, in effect, that we got an affidavit from you, and we will give you two thousand dollars just for an affidavit." But, in effect, they said, "If you make it good enough, Mr. Burnett, we will give you three thousand dollars more." And that is exactly what they did. They gave him three thousand dollars more. They bought themselves a libel suit. That is right in line with their policy, the image that they want to create. They want to be sensational.

In this very law suit alone that has been in every paper, every radio station, every television station for months and months and months, and recently hour on the hour, all over the world, they have gotten untold millions of dollars in publicity where the name "Saturday Evening Post" is on the ears and the lips and tongue of all the people in the world.

These reporters here, all over this courtroom are sending this out. That is what they want. You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain

the Saturday Evening Post ever got. There is no way of telling. They could not have bought the publicity they have gotten in this case probably for fifty or seventy-five or a hundred million dollars, because it is world-wide, and you try to buy space in magazines, daily papers, radio stations, television stations all over the world where your name is mentioned every hour on the hour, such as this has been, [fol. 1297] you can't do it for any amount of money, and they have used Wally Butts for that purpose.

If you should return a verdict in this case, say, for five million dollars, they would think that they had won the greatest victory that could possibly be returned in the case.

Who do they rely on in this case? They rely on George Burnett, an eavesdropper, a man who is always one step ahead of the Sheriff, and he was caught, and he was on probation at that time. It is in the article. It shows it. Not only is he an eavesdropper, but he is a telephone conversation sneak, and that is the kind of man that they ask you to believe in preference to all of these witnesses that we have brought here in proving our case to you.

Gentlemen, there are so many things I would like to discuss with you. I have a limited time, because my fine partner Bill Schroder, is going to make the concluding argument in our behalf on Monday morning, and I want to leave him all the possible time that I can. I know he will cover it, the things that I have not mentioned to you.

I am sorry that I may have appeared to have gotten right emotional about this matter. I am emotional about it. I am mad about it. There are just thousands and thousands of people who are mad about it too, and I believe that in your deliberations and in your final verdict that you are going to return the kind of verdict that will help [fol. 1298] restore Wally Butts as he should be restored in the eyes of the world.

Thank you.

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Mr. Schroder: If it please the Court, Gentlemen of the Jury, it's a good feeling to be back where I can discuss this case directly with you again as we did when we first got into it Monday, two weeks ago.

I am going to, because the time is somewhat limited, be forced to skip over and not discuss some matters which I feel confident ought to be discussed, and perhaps you Gentlemen feel that I should discuss, but being limited as I am by the time allotted in which I am to complete the summation, I will necessarily have to skip some topics, but I do not want anyone on the jury to get the idea that because I have not touched upon them that I did not think they were important.

I want to begin by taking up where the Saturday Evening Post Lawyer ended Friday. I sat here for an hour and listened to that argument. I made voluminous notes, and there were several things which were stated in that argument which I think must be dealt with here and now.

Throughout that argument not two minutes were devoted to the merits of the case; not two minutes were devoted to the plea of justification, that is to say, that what is in that article published by the Saturday Evening Post is true. On the other hand, practically fifty-five minutes was devoted [fol. 1299] to a subject that has never arisen in this case in this courtroom until the 'eleventh hour'.

I remember the Saturday Evening Post lawyer stating to you that, in effect, Wallace Butts, because of some testimony given by O. C. Aderhold, President of the University of Georgia, Mr. Bolton, Comptroller, ought not have a recovery. Now, Gentlemen, that is not true. Gentlemen, that is not a fair statement. Part of the evidence in no way can be considered in support of their plea of justification.

Speaking of character evidence, you were told Friday by the Saturday Evening Post lawyer that if you believed Dr. Aderhold lied on the stand, then bring in a verdict for Wallace Butts. I say, again, to you, that is an unfair statement, and it is an unwarranted statement, and it does not apply in this case.

It was told you that the University of Georgia is a third party to this case. That's not so, and I personally resent it.

Mr. Lockerman argued to you immediately after the Post lawyer sat down. Here the Post was attempting to hide behind the skirts of the University. On further thought, it is not the skirts of the University that the Post would hide behind, but rather it is the coat tails of Dr. Aderhold. Mr. Aderhold was not here testifying as a representative of the University of Georgia; he was here testifying as a plain citizen Aderhold. If it ever occurred to me for a single second that he was testifying to what he did testify to as a representative of the University of Georgia, then my reaction would be, I would go home im-
[fol. 1300] mediately, I would get my diploma and I would send it back to the University of Georgia. I would take this gold watch, which is inscribed "Presented by the faculty to William H. Schroder, First Honor Graduate, School of Law, University of Georgia, 1938", and I would send that back to them. Likewise, with this Phi Beta Kappa key won at the University of Georgia; I would send that back to them.

I would apologize to those four fine youths who came over here and testified as witnesses for the cause of Coach Butts, those fine youths who the Post lawyer would have you believe were being corrupted.

I would apologize to my daughter who is a co-ed at that institution.

No, sir, Mr. Aderhold was over here expressing his own personal views, and I will point out to you in just a moment that character evidence, good or bad, why it has no place here.

It was obvious from Dr. Aderhold's testimony that over the years he has been—he has built up an almost blinding jealousy for Coach Butts. When he became President in 1950, Coach Butts had already produced seven bowl games, and he was "Mr. Georgia"; he was getting the plaudits that Mr. Aderhold thought that he should be getting when he became President. For the next ten years they had but

one bowl game, and obviously there must have been many an argument between the two as to the budget which was being set aside for recruiting purposes.

[fol. 1301] Despite that, in 1959 Coach Butts did produce a championship team. In 1959 Coach Butts was elected the second best coach in the United States. In 1959 Coach Butts was elected President of the American Football Coaches Association, only the third time that single honor has ever been conferred upon a coach of the South, the other two, of course, being William A. Alexander, that great man from Georgia Tech, and Dan McGuggan from Vanderbilt, both of whom have long gone.

I say, why do they bring that in here at the last moment? It is because the Saturday Evening Post does not want to face up to the issues which they made by their pleadings, and what did their pleadings do insofar as this question is concerned? They have filed a paper in this court, an official paper, in which they have admitted that Coach Butts has enjoyed a national reputation as a successful and respected member of the coaching profession, that during his career he has been offered several college and professional football jobs, because of what? Due entirely to his reputation as a successful member and leader in his profession. They have admitted that.

In that article which they published, and I will show it to you in a moment when I get to that portion, they write "careers will be ruined, that's for sure." My question to the Saturday Evening Post lawyer is: How can a career be ruined if there is no career to ruin?

As the man who wrote the article, Mr. Frank Graham, Jr., we had to go to New York to find out what his story was. They wouldn't bring him down here and let him look [fol. 1302] you in the eye. And here is what Frank Graham, Jr., said in New York when his deposition was taken under oath, and this part has been read to you; therefore, it is in evidence. "In my opinion", and I am quoting, "when this article was published it was the death of Wallace Butts in his chosen profession."

Mr. Graham says again, on page 139, "both Curtis Publishing Company and I both knew that when that article was published it would ruin Coach Butts' career."

And Mr. Charles D. Thomas, the senior Editor, we had to go up there and get his testimony too, and they haven't brought him here to look you eye-to-eye and give you his story. Here is what he said up there, and it was read under oath. "I knew"—this is page 33—"that the article being published by the Saturday Evening Post was placing the professional reputation of Butts on the line." He knew it when he published it. Now, if he didn't have one, why was he so swearing?

Mr. Thomas, again, in that same deposition, page 34, "I knew before the article was published the careers of two men, including Coach Butts, would be ruined as a result of the publication." Not as a result of the testimony of Dr. Aderhold but as the result of the Saturday Evening Post article.

And they come in here Friday and they don't want to answer what their own witnesses have already testified to, and they don't want to face up to it. They want to put it in the lap of Dr. O. C. Aderhold, and, incidentally, I asked [fol. 1303] him on the stand had anyone from the Saturday Evening Post ever contacted him before writing the article, and his answer was in the negative.

Gentlemen, obviously they don't want to face up to the issue in this case, but they want to confuse and confound and befuddle the Gentlemen of the jury seated there in that box to such a degree that whatever amount you ordinarily or otherwise would give Wallace Butts would be reduced by that type of evidence.

Evasive, sidestepping the issues all the time, all the while trying to influence your thinking insofar as the amount of money that you would award Wallace Butts because of a malicious, defamatory article they published in the March 23 issue of the Saturday Evening Post.

A backfield composed of those Post officials who will not get on the stand where you can see them, Mr. Clay Blair,

Mr. Thomas, Mr. Roger Kahn, and the author, Mr. Frank Graham, would be unbeatable. They can sidestep and dodge issues better than the four horsemen of Notre Dame could ever sidestep would-be tacklers. Why don't they come in here and tell you they believe the story that they wrote?

The Saturday Evening Post lawyer was talking to you about your rights to determine the credibility of the witnesses, which is your exclusive right, and when you go to determining that you have a right to look at the witnesses on the stand to determine their personal credibility insofar [fol. 1304] as that is apparent from the stand. The Post doesn't even read the deposition of their officials. The Post doesn't even put a single one of them there where you can see them; we have had to do it.

Who is the Saturday Evening Post to start raising some questions about somebody's reputation or somebody's character? This Saturday Evening Post, who less than two years ago made a 180-degree turn from the widely respected, highly regarded Post magazine of the old, with the great Benjamin Franklin on the masthead, and they went into what they have announced as a sophisticated muckraking policy. Do they care anything about the Good Book? Are they familiar with a great verse from Chapter 8 of St. John when he was teaching the scribes and the Pharisees, and they brought a woman caught in adultery before Him, and they said, "Unto the law of Moses we are commanded to stone her." And Christ said, "Let him who is without sin among you be the first to cast the stone at her." And hearing this they went away, one by one, led by the eldest.

Does the good law "Thou shalt not bear false witnesses against thy neighbor" mean anything to the Saturday Evening Post? Does "Judge not lest ye be judged" mean anything to them?

I didn't mean to take up so much of your time on that subject, but I am telling you, Gentlemen, it's been brought in here to befuddle your thinking and to confuse you and to confound you. I think the best evidence of the type of

man that Wallace Butts is, he hasn't hidden away from this courtroom; he's been here every day, and he's been on [fol. 1305] the stand. You have had a chance to look at him, to observe him.

Seated here with him throughout for two weeks has been his lovely wife, Winnie and his three daughters. That is a glowing tribute, as glowing a tribute as were those four boys coming over here, and the trainer, Sam Richwine, and Charlie Trippi and John Gregory coming over here and showing you what they thought of Wallace Butts.

I am now going to discuss the real issue in the case, and I hereby challenge the Saturday Evening Post lawyer to also discuss the real issue in the case.

Now, he made a statement Friday in connection with this topic I am prepared to leave now. He is being directed in this case by the Post, because he wouldn't have made this statement otherwise. He made the insinuation or the innuendo that there was other evidence that he could have introduced but he didn't. That's not fair; that's not professional; that's not ethical.

The only thing, and he knows the only thing that any jury in any case can consider is the evidence that has been produced here in a legal way for their consideration. I don't know what he was talking about; I doubt if he does. But he wanted you, again, Gentlemen of the jury, to forget the real issue in the case and to reduce, as the law calls it, mitigate the dollars that you would otherwise award Wallace Butts.

[fol. 1306] They have plead what they call a plea of justification. They have done that for one purpose and one purpose only, because they know they can never sustain it. They did it so they could get the concluding argument, and that is a valuable asset to any lawyer, to be able to make the final argument to the jury, because the opposition cannot answer him then. They are through. The plea of justification of law says that what they have said of Wallace Butts in that article is true. Well, let's take a look at it.

I will just take the first couple of boards here, being the first two columns. All right, sir, this is the first line in the story.

"On Friday morning, September 14, 1962" this took place. Well, we know that is not so, and they admit it.

"'Coach Bryant is out on the field'" they say here. Coach Bryant says they had no morning practice, there would be no need to be on the field, and it was in the newspapers and Graham could have found it if he wanted to look for it.

Down here we have got, "'Hello, Bear.'" The testimony is uncontradicted that they do not refer to each other that way in the presence of each other.

These may be minor, but they are enough, in my mind, if I marked every one of those, to show that this was a very careless, irresponsible job done by the Post in its investigation and in its reporting of the article.

[fol. 1307] Now, Mr. Graham, he is the man who wrote the article, here is what he says right here. "As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later." Mr. Graham, the man, one of the four men they would not bring down here, testified by deposition on page 51, nothing in Graham's notes which he got from Burnett indicated what was to be used or what was to be done in the football game.

Mr. Graham, again, in his deposition at page 51, "Burnett gave me no record, no information as to the details of the plays and formations." He says Burnett didn't give them to him because he didn't have his notes; he needed his notes to refresh his recollection.

That came from Mr. Graham, not from Mr. Burnett. I say that is not fair journalism; I say that is not true, careful reporting.

Going on down here again on this first column in the whole article, "occasionally Bryant asked Butts about specific offensive or defensive maneuvers." In Graham's depo-

sition he says Burnett didn't say that. He said he needed his notes to check it on, and he was going to get his notes and he was going to check it, but he never did get his notes, and he went on and published the article anyway.

Here, by George P. Burnett. He said, "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet." Graham said he told Burnett that, and he put it in [fol. 1308] quotations. Of all people, Burnett says, "I never told him that." The Saturday Evening Post thought that was a mighty important item to put in that story, to induce the reader to the conclusion that this was a fixed and rigged ball game.

Mr. Kahn, the Sports Editor, and Mr. Thomas, the general Editor, both testified by deposition that that was vital information for the defensive team, Alabama, to know, that it was of the utmost importance. Now, they didn't even tell him that. He put it in there on his own.

I can go through this whole set of boards here, column by column. That is simply in illustration. You have seen the witnesses come in here who have been quoted in this article with saying things which would indicate that the article was true, come in and deny they ever made any such quotation, including a Georgia football player who still has another year to play, and without regard to what he might feel might face him when he went back to Athens, he came over here and got on this stand for his old Coach who was coaching him when he was there, and the boy is still there, Mickey Babb. They had him quoted as saying something like this: Taunting him or taunting the Georgia players by saying "You cannot run that old play on us, 'eighty-eight pop'. In effect, we know every play you have got." That was a deliberate misquotation put in that article for one purpose only, like this one about Rakestraw's feet, to lead the reader of the article to the conclusion that what these great Editors said here in the article was true.

[fol. 1309] Sam Richwine, old Sam, I had never seen him before; he is a trainer over there; he is still working there

and in the face of Dr. Aderhold and Bolton. He came over here and stood up and was counted for Wallace Butts. He says, "The quotation attributed to me in there was never made; I don't even know the plays of Georgia's team." And he is quoted as saying, in effect, that the Alabama players knew the Georgia plays during that game. He says it is one hundred percent incorrect, and, in answer to a question put to him by the Court, he says, "The only thing I knew about either team was the physical condition, and I did say, if I said anything to Mr. Bisher, I did say that the physical condition of the team in 1962 was better than it was in 1961."

And last, but not least, Coach Johnny Griffith stated that in three major instances he was misquoted by the Saturday Evening Post article. He was misquoted in one matter which was so important to the Post they made a headline word out of it, "I never had a chance." Johnny Griffith said, "I never made such a statement." They put it in there, again, for the purpose and the only purpose of inducing the reader to go along with this scurulous attack they have made on Coach Butts in this editorial in which they call him corrupt, in which they say he had fixed a game, rigged a game, threw his boys down the river, sold out his school.

These are facts upon which they claim makes that true.

Johnny Griffith again, down at the bottom, denied it. You can go over those Gentlemen. You remember—here is an- [fol. 1310] other one from Griffith here, denied; Johnny Griffith, denial there; Mickey Babb, denial here; Sam Richwine, he denied that. Yet, they file a plea of truth, a plea of justification saying that what they have said in that article and in this editorial is true, and what evidence have they brought here to support that?

They want to run around on the periphery, keeping your mind off the issue.

And who are they to judge a man's character? Mr. Aderhold? Some people don't go to night clubs, I know. Some people may think that's bad. But does that justify anyone writing an article like this? If they were relying on that,

why didn't they put it in the article? If they were relying on that, why didn't they come in here and file a paper admitting that his reputation was good?

Skipping along from the article to what was the information that they never had in their possession when they wrote the article, and that are the so-called Burnett notes. They recognized the importance of having those notes; they wanted those notes; they never got them; they wouldn't wait on them; they never really made any real effort to get them. Furman Bisher said he was never asked to get the notes for them, and he was the man on the ground here. They didn't want the notes; they didn't want to know anything that might deter from that editorial.

They came down here, Gentlemen, knowing that a man by the name of John C. Carmichael was present when the telephone call was intercepted, and Mr. Kahn testified that [fol. 1311] they knew that before Graham came here, and Mr. Graham testified that he knew that before he came here, but they did not purposely, deliberately interview Carmichael, and the reason they didn't was because they evidently came to the conclusion that he would not agree with what Burnett had to say.

That, journalism? That, fair reporting? When you are getting ready, as they say, to kill a man in his chosen profession, when you are getting ready, as they say, to ruin a man's career, they call that reporting, fair reporting, seeking the truth?

What else did they not do? They did not review the film of the game. Now, mind you, Roger Kahn, the Sports Editor, who ought to know more about sports than Mr. Thomas, who was his boss, said, "I thought it would be a good idea to review the film." Mr. Thomas testified, "Mr. Kahn thought it would be a good idea to review the film, but I overruled it; I was his boss." And you know why? Had they reviewed those films with anyone who knew anything about football, they would have known, Number one—well, we won't go all through the Burnett notes again—Number one, how the touchdowns were scored, four of which were

scored because of a man being out of position. They would have known Brigham Woodward commits fast, that not a single pass was ever thrown in his area, which an opposing coach would do if he thought that was so, or someone had told him that was so.

Had they reviewed those films, they, again, would have known that what they were getting ready to write about or [fol. 1312] what they were getting ready to write in that article was highly doubtful. Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me and owes the people of America when it is getting ready to write an article which it knows and which it states therein that it is going to ruin us, that it is going to kill us in our profession?

Taking the reputation of a man, taking a man's character and assassinating it like they have done is worse than death itself to me, because they still leave the man living with his reputation torn from him. Don't they understand that? Doesn't it mean anything to them? Can you imagine a worse day for any man to be still alive and attend the funeral of his own reputation? It is impossible to conceive of, and they were going through all of this careless reporting, irresponsible reporting, not going for the truth but something merely to lift their sagging circulation. They were libelling for profit to lift their sagging circulation so their advertising revenues would increase, would improve.

They have brought in another thing here, Gentlemen, which I assume the Saturday Post lawyer is going to discuss at some length with you, and that is the—Dr. Rose's letter. I am only going to touch on it briefly, because I really think that is all of the attention it deserves, but you will remember there was a letter written on March 6, which was after this article was put to bed and went to press, it had no influence on the Post when it wrote its article, in which he attempted to explain certain technical matters in football concerning which he had testified he knows nothing, [fol. 1313] to Dr. Aderhold, and, in good faith, because the question came up when Paul Bryant was on the stand, that

man came all the way back here from Mexico City to explain it. He says he didn't sign the letter but his secretary did. Then the Saturday Evening Post steps in with its usual defense and makes the fine educator, that Doctor of Divinity, that man who had his own church for some five or six years, sign his signature, not once, but three times on a separate piece of paper, to do what? What are you going to do with that? They don't believe him under oath? What can they get out of it? They are hurting him in the public eye. It is like asking him to take a lie detector test when he gets off the stand. But there will be some talk about that. That is the typical defense.

There will be some talk about gambling. Now, isn't that a strange thing for them to draw in this man from Chicago and make a lot of hoop-la about him, and the fact that back in 1957 he bet—him owning the Miller High Life franchise in New York and Chicago, I couldn't imagine a greater gold mine, to him betting fifty thousand dollars in '57, and the only year he ever bet that, the fact he bet that, they are trying to say there is gambling in this game because Coach Butts knew him. But he wasn't gambling in the year they are talking about now, and they know that, and there is no evidence to the contrary to that.

I assume Mr. Frank Scoby has been ruined all over again by his being kicked around by the Post in this article by a man who says, "I learned my lesson when I went down there [fol. 1314] and testified against my old bookmaker for the United States Government.

Why bring that in now? You know what they testified to when I went to New York and took their depositions, these same witnesses, Thomas, Kahn, and Graham.

Mr. Thomas, at page 83, "I had no intention of implying there was any betting by either Butts or Bryant." And Mr. Kahn, who wrote the article had this to say, under oath; "I did not imply that the game was fixed or rigged because of any betting angle."

Why bring it in unless it is to muddy the water and to keep your minds away from the issue in the case?

Frank Graham, again, who wrote the article, "I am not suggesting, when I wrote that article, or intimating that either Butts or Bryant bet on the game, either directly or indirectly." I hope they will discuss that with you and explain why they brought it in here in spite of what their own officials had to say their intention was when they published the article. Has that intention changed now? I can't change after the article is published. It is what they are thinking about and what they put in that article when they maligned and killed Wallace Butts that counts.

Coach Bryant and Dr. Rose mentioned these new rule changes, and I am not going to read them to you. I want to identify the two documents for you, why there has been so much concern to Alabama and Dr. Rose. The granning-[fol. 1315] Holt incident had a profound effect upon Dr. Rose, and he was not going to stand for it again, and his coach knew he was not going to stand for it again, and he was very much concerned about not letting it happen again, so much so that was even more important that any other phase of the athletic program to Dr. Rose. These are the new enforcement policies.

It amused me somewhat to hear my opponent stand here before you Friday and again and again and again criticize Wallace Butts, the man that they have killed, by saying that he was critical of Johnny Griffith. Johnny Griffith didn't testify to that. Johnny Griffith testified that Wallace Butts was the man that gave him his first job at the University, put him on the staff where he could finish his education, and also get paid to help do that. He testified that Coach Butts, when he got him back there as an assistant coach, after he had been over to Furman, loaned him two thousand dollars, and that Coach Butts signed his note with him at the bank, co-endorsed it, and on many occasions when the payments would become due, Coach Butts would make them. Critical of Johnny Griffith? Johnny Griffith didn't say so. Maybe it was Dr. Aderhold that said so, but he is not Johnny Griffith.

February the 26th, 1963, five days after the Saturday Evening Post has come in here and bought this libel suit, Wallace Butts wrote Johnny Griffith, "Dear Johnny, I hope you have a great year in football. You and your staff deserve the good breaks, and I hope the ball will bounce the right way for you." Again, they want to cloud the issue. [fol. 1316] They bring in something by Dr. Aderhold to the effect that there was criticism. Johnny Griffith didn't say so, and certainly that letter doesn't sound so. And Johnny still owes him money.

Before this article was published, and this is admitted to be true by the Post, when the word got around about it, I sent them a telegram not to do it because it wasn't true. I sent them a registered mail letter asking them not to do it because it wasn't true. I got an answer to neither one. They went on anyway, and Mr. Clay Blair, the head man of the Post, testified, and you heard him testify, not in person, wouldn't get up there in person, but by deposition that I took, about the call he had from Coach Butts' daughter, Jean, how she wept and she cried and implored him not to print that story because of what it would do to her Dad. No, not the Post. They went ahead. They knew what they were getting into when they did it.

As Mr. Lockerman pointed out to you Friday, that is what they wanted. They wanted a libel suit. The more libel suits they got, the better they like it. And as Exhibit No. 2 will show, this is Clay Blair, this is the man who is building the image or rebuilding or changing the image of the Post. January 15, '63, just a little less than a month before he bought this libel suit, he writes to his staff, he says here, congratulating them on the change of the image, according to like he wants the Post to be, not like Benjamin Franklin wanted it to be, "Your work has not gone unnoticed. We have many press clips commenting on the new vitality in the Post. Joe Culligan has been extremely flattering in his com- [fol. 1317] ments, as have the other directors of the Curtis Publishing Company." Those were the new ones they brought in and the new President they appointed when they decided to change the image of the Benjamin Franklin Post.

Now, listen to this, Gentlemen. "The final yardstick, we have about six law suits pending," and he later identified those law suits as libel suits, "meaning that we are hitting them where it hurts." Proud of his libel suits, proud of the publicity, the free advertising he gets from his libel suits.

Mr. Clay Blair, who wouldn't get on the stand and testify so you could see him, had this to say when his deposition was taken, at page 44, which we read. "I was not being facetious when I used the phrase 'sophisticated muckraking'. I meant it then and I mean it now." Their type of sophisticated muckraking is this article here where they can get a mere germ of an idea that they know will sell and will cause people to get hit where it hurts them, and result in a libel suit with a hundred million dollars worth of free advertising to them, and that is what they want. I will show you why that is what they want.

Mr. Clay Blair, again, "I changed the image of the Post." He says that the March 23 issue—that is the one with Butts' story in it—is a step in the right direction. "This issue takes us twenty-five percent toward the goal of the magazine that I envision."

Gentlemen, if that is just twenty-five percent, that type of story, toward the goal he envisions, what can we look [fol. 1318] for or hope to look for when that is multiplied four times.

He says, Mr. Clay Blair, again, "the Post advertising revenues fell from one hundred six million dollars in 1960 to eighty-six million in 1961 and to about sixty-six million in 1962. I did not like that trend dropping twenty million dollars from a one hundred six in 1960 to eighty-six in 1961 and again to sixty-two million in 1962."

That is when they changed the image. They have got to get those advertising revenues up, and I say that is the worst kind of libel that you can have. A newspaper can print a libel because someone has given it some information that turned out to be inaccurate, but when you go out and buy a libel—and they paid over nine thousand dollars for this story, which will show here in the vouchers, paid nine

thousand dollars for it—and did the reporting job that they did, they knew what they were getting; and they have it. One hundred million dollars of free advertising.

They have got twenty-three million readers. They are proud of it, that they are circulating this new image among twenty-three million readers that they sent that article to from which they have now gotten this free advertising all over the world, as Lickerman said, every hour on the hour. They don't care about Butts. They wouldn't care about you or about me. They are just one step in the direction that they are aiming.

[fol. 1319] Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way that lesson can be brought home to them Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it.

Every man living, and woman living in the United States, I believe, who knows anything about this law suit is counting on you to keep this sort of crowd from going on under the old Saturday Evening Post name which was respectable, going on under that name with this so-called sophisticated muckraking that they are now so proudly publishing all over the country, that that is what they are engaged in.

I am looking to you for my protection. Heavens knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them.

The Court: You have got ten minutes, Mr. Schroder.

[fol. 1320] Mr. Schroder: Thank you, Your Honor. Ten

minutes—twenty-five percent along the way of the magazine they envision.

Gentlemen, this is the Saturday Evening Post that we all knew, loved and respected so much before they came in with the new directors and their new president and their new muckraking. There we have got old Benjamin Franklin up there. He was on all those mastheads up until this one. He is not on this masthead. This article has been introduced in evidence without objection: "Father is a football coach". This same old Saturday Evening Post that we loved so much was proud to write a story about Wallace Butts in its true picture in 1954 with the lovely daughters there seated by him and his other daughter there, here still seated with him. He is still the same Wally Butts to them, although the Post wouldn't have anyone else believe it.

He may walk along the sidewalks scared to look people in the face, because he knows what most of them think about him now, having read what they have read about him.

He was never given a chance, never given a chance until he came into this courtroom to face his accuser, and until this day he has never been given a chance to face the Saturday Evening Post face-to-face. They wouldn't come down here and face him or face you. They have nothing but contempt for us, arrogant though they be.

[fol. 1321] I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

Here's another magazine, another article, the great old Saturday Evening Post that we loved and respected,

"Georgia plays for keeps," fine article about Wallace Butts and what they thought about him then. Poor old Wally.

Those will be out with you, Gentlemen, and it will give you an idea as to the degree that the new Post has changed from the policies of the old Post, one hundred and eighty degrees.

My time is up. I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating even since it came out, and I have lived in agony along with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any [fol. 1322] of those things, don't hold it against Wallace Butts.

You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess, they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: "Glory, Glory to old Georgia."

Thank you.

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The Court: You may proceed, Mr. Cody.

CONCLUSION OF SUMMATION ON BEHALF OF DEFENDANT

Mr. Cody: Please the Court, Gentlemen of the Jury, my time too is short in which to conclude this case, and I expect to get right down to business. First, I want to reply to one comment made by Mr. Lockerman in his argument to you on Friday. I will try not to touch this subject again after I answer his statement. He said that if Wallace

Butts' character was bad, it was because of the article which the Saturday Evening Post published. If you believe that statement to be true, you ought to find a verdict against the Defendant. If he had any qualms or doubts about the truthfulness of that statement, all he had to do when these close associates and friends of Wallace Butts were on the stand was to ask them when his character became bad.

[fol. 1323] You and I both know that men such as have testified in this case would not come into this court and say that his character was bad purely because of something that was said about him in the Saturday Evening Post. They would be here defending him and I would myself, and I think those men would have been his staunchest defenders had there been any truth in that statement.

The second thing I want to mention, in order to clear the issues in this case, is a statement made by Mr. Schroder where he intimated that the Defendant in this case injected into the case the question of gambling. Nothing could be further from the actual facts. If you will read this article, and you will have it out with you, you will find that no such statement and no such intimation is made in that article charging Coach Butts or Bear Bryant with any gambling.

Here is how it got into the case, and this, too, you will have in your jury room. If you will turn to paragraph 11, subsection (c), of this law suit, this is the one that they filed and which involuntarily we came into this court to answer. They say the Plaintiff is charged in this article with rigging and fixing the Alabama-Georgia football game with Coach Bryant as a gambling device in order to restore his financial resources. If you find any such statement in this article as that which I have just read about any gambling device, well, then, too, you ought to find a verdict against the Saturday Evening Post.

When they injected the issue in this case, we had to come in and defend that charge, and that is where our

[fol. 1324] friend Scoby got into the picture and a few others. I will talk about him in a few minutes.

Now, Lockerman said I didn't talk about the Burnett notes in the argument which I made to you on Friday, and Mr. Schroder has mentioned that again today, although he has studiously avoided it himself. Not one word has been mentioned about those notes, and I want to get down to it right now, and here is what is in those notes. They mention players and they mention plays. You will have those notes out with you.

True, they are made by an amateur, and true, some of those notes are hard intelligible, but some are, and Coach Griffith and Coach Pierce and Coach Frank Inman have told you what they thought of those notes and what they meant, and those are the three ranking coaches at the University of Georgia today. They said that those notes mentioned formations, and strange enough they said of the eight or nine formations which Georgia used in the entire 1962 season, they didn't have time to train their team to use them all, but they trained that team to use two particular formations for the Alabama game inasmuch as it was the opening game of the season.

And strange to say, those two formations are mentioned in these notes. They picked that up.

I don't know too much about football, and I am going to say very little about it after I finish with these notes. [fol. 1325] In those notes there is a pass pattern that is mentioned and Griffith recognized it as one which was called by that particular name by Coach Butts. That is that optional left pass business. There is a mention made about Alabama not over-shifting on a certain play and there is mention of quick kicks, and Woodward commits himself fast. I don't know whether you will notice it or not when you get out, but these notes, when that boy Woodward's name is mentioned, it is spelled in the notes W-o-o-d-a-r-d. His name is Woodward. I don't know whether you noticed it or not, but Coach Butts pronounced his name "Woodard".

And he refers to a weak pass defense, anybody except Blackburn, and in the long count with the left half in motion, and Coach Pierce said this was one of Georgia's plays, and Porterfield referred to as a good running back, and then Babb catches everything they throw, and then he talked about something in there about avoiding a penalty on the part of Alabama.

Then we come down to this part of it. Burnett put down the time that call was completed, ten forty, and the telephone records show that the connection was made at 10:25, and the calculagraph, which is the automatic machine used by the Telephone Company, shows the call lasted fifteen minutes and some seconds.

There are some strange coincidences which confirm what is in those notes, but here are two other things I call to your attention and I am going to pass on from those notes. Bur- [fol. 1326] nett made an explanation of several parts of it. He didn't write down everything he hears, but he did remember this part of it. He picked up some evidence of bitterness against Griffith. I don't know what that is, and you don't either. We never will know, but he says with respect to a certain condition of the Georgia team, he says that is no credit to Griffith. They got two other coaches, two new coaches and then there is another part of the explanation he makes and it is this. Bryant wasn't satisfied with the information that he got, he was trying to get more, and Butts told him he didn't know, but he'd find out, and Bryant said he would call him on Sunday.

Now, you and I don't know what happened in that telephone conversation on Sunday, except that in the conversation that lasted an hour and seven minutes, and it had something to do with this particular game, and nobody will ever know what was discussed in that conversation.

We lawyers have learned to recognize and to evaluate what we call circumstantial evidence. Forget about the notes for just a moment, and let's think about the circumstantial evidence in this case.

I would like to point out to you the conduct of Burnett when this whole controversy arose, and pit it against the conduct of Wallace Butts. We might as well call a spade a spade, because after all that is the crux of this case, and I have been accused of not wanting to talk to you about it.

I saved this part of my time to discuss it with you.

[fol. 1327] In the first place, when called into a conference with a bunch of strangers, that is, the University Officials, Burnett promptly agreed that that conference could be taped and what was said be recorded. Secondly, he signed an affidavit after he was requested to do so. He promptly agreed to take a lie detector test and promptly took that test. He gave the University of Georgia Officials permission to look into his background in every respect, and a part of that was his war record, which I might say was a right enviable record, and if there was anything wrong about that record as disclosed by Burnett when he was on this stand, you can bet your life that Mr. Lockerman or Mr. Schroder would have confronted you with any error.

Now, what did Wallace Butts do? When he appeared before the same crowd on the next day, there may have been some slight difference in the personnel of those that were present, but as I recall, they were the same. I could be in error. When he appeared before those University officials, he declined to take a lie detector test. Secondly, though there is some conflict in the evidence, he declined to sign an affidavit.

Dr. Aderhold and Mr. Bolton have both testified that he declined to give them an affidavit. In addition to that, and this was after he employed counsel, he did admit—he did admit that Burnett probably heard what he said he heard, that is the language, and that is as far as they got. He resigned the next day. That, too, has some significance as far as circumstantial evidence is concerned. Later—first I should say at this particular meeting those University offi-

[fol. 1328] cials saw in those notes a reference to the fact that Bryant would call him back on Sunday. It is maybe at that time of much significance, it is now, and they tried to

find out from him if Bryant did call him on Sunday afternoon following this September 13th call, and you know what his answer was. He didn't remember the call, and he didn't remember anything that might have been said. Again, that is that call that lasted an hour and seven minutes.

And then the University officials went a little bit further. They made a check of a lot of other telephone calls, and that is where this man Scoby came into the picture, and there were two remarks made by Wallace Butts at that time that evidently riled the University officials some, after getting down to the rock bottom of this thing. He first said that he had never done anything to hurt the University. I am not going to touch on that any more, but he said this, he says, "I have never associated with anyone who was a gambler."

In the meantime, they had done a little checking themselves on this fellow Scoby, and I am going to get to that in just a moment.

And then let me point out to you something else. Schroder has questioned me or the Post as to why they didn't consult with Bear Bryant or Wallace Butts before they published this article. I will tell you way. They would have gotten the same response I got when I cross-examined Coach Butts. He didn't remember going to the office of Communications International on September 13 here in Atlanta, the point [fol. 1329] from which the call was made, the first call. He didn't remember being in Atlanta on September 13th. He didn't know where he was on September 13th. That date was important.

The record in this case shows that he had fourteen telephone conversations with Frank Scoby in Chicago in the month of September, 1962. That is the month of this particular football game, and he does not remember any one of those calls, with one exception, and that in spite of the fact, Gentlemen, that two of those calls were the day before this football game, one on the day of the game and one on the Sunday morning following the game. He did remember something about the one on the day of the game, and I should think that would impress him just a little bit more.

And he said that he called Scoby for this man Sargeant who was from Florida in Birmingham—that is where the game was being played that night—and he put Sargeant on the phone and let him talk to Scoby and that is all he had to do with it.

But the strange thing to me, and it is somewhat irreconcilable, is that all of those calls, including that one on the day of the game, were charged to the University of Georgia, which in itself was not fair and it strikes me as not being entirely honest. I don't know who this fellow Sargeant is, but if a call was made for his benefit, he should have paid for it.

My time is a little bit short, and I want to discuss with you a few miscellaneous comments that I think are important in the consideration of this case.

[fol. 1330] Up until the time that Dr. Rose came into this picture there was no positive evidence that Bryant remembered anything about either of these crucial telephone calls.

Let me read you one or two excerpts from this letter that Dr. Rose wrote Dr. Aderhold. It is a right long letter; I wouldn't read it all. In the first place, he says, "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions." You remember that he testified that one of those occasions lasted three hours.

"As best I can ascertain, this is the information I have received. Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14"—he meant 13th—"he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that would seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16th. It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, head of the officials of the Southeastern Conference, to come to

Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did on the following week."

He has corrected that Gardner had been there and gone. He didn't come the following week.

[fol. 1331] "The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention." Now, listen to this: "Coach Bryant informed me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously." He is hedging on that.

It is a strange thing to me that in trying to analyze all of this conglomeration of evidence, Gentlemen, that Coach Bryant would testify in this case that he didn't remember anything about those telephone calls or the subject matter discussed, and certainly never told Dr. Rose some of the things that are in this letter. He says if he ever had a telephone conversation with Butts on September the 16th—that is that Sunday call again—they probably talked about some tickets. He wouldn't have talked to Butts about any tickets. Butts didn't have anything to do with any tickets. He hadn't been Coach down there since 1960, and all of us know that the ticket situation is handled by managers, business managers for a football team, because it is a big business.

In order to further back up Bear Bryant, one of the tragedies of this case is that Dr. Rose then backs up himself and says that he didn't sign the letter, didn't read it after it was written. I did get him to admit he dictated this letter, and that it was after his conferences with Coach Bryant. Maybe he didn't sign it, but it is his handiwork.

I will tell you this, you will have that letter out with you, together with a bunch of other letters that have been identified and put in the record in this case, including the signa-[fol. 1332] ture on these three documents, which he signed in your presence, and I ask you to judge for yourselves whether or not those signatures are the same. It appears to me to be that way.

Now, let me talk to you a few minutes about this fellow Scoby. He didn't appear here personally. We had to go to Chicago to take his deposition, and the depositions are not entirely satisfactory. They are not as impressive as when you see a man from the witness stand. You can't listen quite as intensely. Sometimes there is an expression on a man's face or tone in his voice that says something that his words don't say, but I have jotted down a few parts of that man's deposition which was read to you. I think it was on Thursday.

That man said that he was the, as Mr. Schroder has said, the beer distributor in Chicago and New York, and up until 1958 was the distributor for a stated brand of scotch whiskey. He said he first met Wallace Butts in 1947, and had seen him quite often since then, eight or ten times a year, and had attended various athletic contests with him, that he had met Butts in Atlanta to discuss some food product, the purpose of that conference being—now, listen to this, and this is what disturbs me, it is almost beside the point and yet it is important—he said the only reason he got interested in that food product was that he wanted to find a job, find employment for some of Butts' football players. That ought to be disturbing to a University official, too, and when we asked him about that food product, he said that he admitted it was a phony—that is the expression he used—and [fol. 1333] the Food and Drug people, Food and Drug Department, that is the Federal Government, kept it off the market.

He says he met Butts several times in New York, paid his expenses after he got there. He said that Butts asked his advice as to how to finance various things, including this small loans business, and Butts asked him to invest in the small loans business and asked him to obtain capital for all three of his businesses, small loan business, the orange grove business, and this concentrated orange juice business, and he said he didn't have enough confidence in any one of them to put any money in it and he didn't hesitate long in telling Butts about it. And all of that occurred two years

ago. This is while Butts was Athletic Director at the University of Georgia.

He says he invested in the neighborhood of forty-three thousand dollars in Continental Enterprises. That is the same company that Butts and Bryant had some money tied up in and lost it. This man said he lost heavily on it himself.

I am not mentioning this subject to embarrass anybody. I am mentioning it to show you that this is more than a casual acquaintance that we are talking about. That is what they would have you believe and that is what Mr. Schroder undertook to reveal to you, but it is more than a casual acquaintance.

And he says—now, listen to this, it is on page 25 of that deposition—after Butts severed his connection as coach at Georgia, he told Butts he wanted him to take over the [for 1334] Southeastern section of the country for a new brand of Scotch whiskey and his duties would be to hire salesmen, get distributors, see that it was properly handled, supervise the personnel and be the overall representative, and that his compensation would be a drawing account and a commission, and what that would come to would depend upon his ability to produce, and he said it is still a possibility.

He said that he endorsed Butts' note at the Chicago bank and that there are still fifteen hundred dollars outstanding on that endorsement. He goes into detail as to how many times he has been with Butts, and then he gets down to this crucial part of it, and this is where he said he never bet less than five hundred dollars on a college football game, and that the maximum he would usually bet on one game would be two thousand dollars, and we asked him how many games he would bet on on one Saturday, and his answer was "About ten." You know what that means. Take it in its most favorable light, it means he could bet or did bet as much as twenty thousand dollars on one day, a total of twenty thousand dollars on ten different football games. And you wonder why we mention anything about it, after

charged in this complaint in the language which I quoted to you a few minutes ago?

He said he bet as much as fifty thousand dollars in the season of 1957. Now, the reason he admitted that, he knew we had the record on him, because he had testified in that government case, and like all other gamblers, when that record was closed, there is no other way for us to find out [fol. 1335] about any other bets, so he says he didn't make any more bets, but he has admitted to you in that deposition that he makes three or four trips a year to Las Vegas and gambles out there, and he never has undertaken to hide it from his friends and it was pretty well publicized.

And listen to this. This is on page 75 of that deposition. This is something Mr. Schroder asked him, "During September, 1962, or at any time prior to September, 1962, or at any time prior to September, have you ever had any telephone conversations with Wallace Butts which related in any manner to a forthcoming game to be participated in by the University of Georgia team?" Answer: Well, I may have said, "Well, how do you think you will do?" when he was coaching. I certainly wouldn't say that I haven't asked that question." Now, that indicates one thing to me and only one thing, and it should by inference indicate something to you, and that is that while Wallace Butts didn't have anything to do with betting on any football game himself, and which I say we never charged him with, nevertheless here was another one of his friends taking advantage of the information that he had, trying to get all the information that he had so he could win money as the result of it. That is the only reasonable inference I can draw from it.

Butts said that all he ever asked Scoby was some advice about a business deal or two, but this man didn't confirm that. He said he was asked to put money into it and actually made investigations and then turned them down. No, so [fol. 1336] much for that fellow Scoby. I wish we had him down here and could tell a little more about him.

Now, in what few minutes I have left, I want to say to you that there was one shocking thing stated by Bear Bry-

ant in this case I can't reconcile. He said that when the time came to play this football game on September the 22nd, Georgia surprised him, says that is the surprising statement in this case.

You have as an exhibit in this case the statistics of that game, and you will find, if you will look on the third page, the fact that the total yardage gained by Georgia in the first half—and you don't have to know much about football to understand this—was fourteen yards. That is the total yardage gained in the first half by running with the ball.

And then if you will turn to the last page, you will see the statistics of the game after it was over, that is, the complete game, and that the total yardage gained by Georgia during that entire game by running with the ball was thirty-seven yards. I expect it did surprise Bear Bryant to some extent. He hadn't played a game of football in years where anybody had that sort of an experience with his team. He may have been surprised, but it was for a different reason from what he said.

Even Mr. Schroder doesn't agree with Bryant on that statement. Schroder says that everybody has that play called a pro-set, and that couldn't have surprised anybody, because it is a normal formation in football, and it is one of the eight or nine formations that teams generally use that is true.

[fol. 1337] The real help that this information gave to Bryant was to know that of the eight or nine formations that were generally used by football teams, Georgia wouldn't use but two, and that gave him an opportunity to train his team by eliminating about seven other formations for which he would have to train if he hadn't had any information at all.

Now, let me talk to you just a moment about the use of this word "fix".

Judge, I have about—

The Court: You have got twenty minutes.

Mr. Cody: When you take this article out with you, you will see that the heading on it is—they have charged that

this was a fix of one particular football game. You are not supposed to know of your own knowledge what the word "fix" means. The Court has the responsibility and duty to tell you what it means and I assume that it will fulfill that obligation.

I have looked it up, and the Court has, and the word "fix" means to tamper with in advance, and that is what this man has been charged with, and if he tampered with that game in advance, I say that it is corrupt and the use of the word in this article is correct. If he tampered with that game, it is corrupt.

And I want to explain to you or mention something which I think possibly the Court will cover in its charge to you. [fol. 1338] If you believe that this game was tampered with in advance, even with respect to plays, players, formations, or anything of that sort, which might be calculated to affect the result of the game, then the Defendant in this case has proved the truth of this alleged libel, and you would be directed I presume by the Court to find a verdict for the Defendant, if you believe that to be true.

Now, the burden is upon us to prove to your satisfaction that there was information divulged about that coming game which could be calculated to affect the result of that game, and we believe that the furnishing of that information did something that violated the standards of ethics and conduct set by the Southeastern Conference, and contrary to the moral conventions of the people with whom the Plaintiff was working.

Most of the evidence in this case about football is really immaterial. What is material is that certain information was given which tampered with that upcoming game. We do not have to show under the law what the motive was in divulging such information. We do not have to actually show it actually affected the game. The Court will instruct you about that. All we have to show is that if this information was calculated to affect that game, and if it was in fact given, then the plea of justification has been sustained,

and I think you will understand that issue when the Court completes its instruction to you.

And the case boils down to that one fact and that alone, and it is as simple as that, and if you believe that that is what was done, then you ought to find a verdict for the [fol. 1339] Defendant in this case, and I believe the Court, as I said, will so instruct you.

If the information wasn't furnished, you ought to find a verdict for the Plaintiff.

I notice something has been said in this case, Gentlemen, about the absence of witnesses. We could have strung this case out another two weeks. It has been trying to Schroder and Lockerman and me and my associates, just as it has been trying to you and this court. There has got to be an end somewhere to the trial of any case. There is always somebody you could bring into court as a witness that you don't bring, but you just go on and on. I can think of some witnesses that they might have had on this question of character. I know what I would do if somebody attacked my character. I would get my preacher and my friends and my business associates and I would bring them into court and I would ask them to testify in my behalf.

This question of the absence of witnesses is an old lawyers' trick. I remember one statement that the dean of the Atlanta Bar made one time. I am referring to Mr. Reuben Arnold, who died a few years ago. He practiced law in this town sixty-seven years, and he really was the dean of lawyers. I think everybody concedes that. He was trying to give some advice to a young lawyer one time about how to argue a case to a jury, and this young lawyer asked him a few questions about it. He said, "Well, when you go to argue a case, if the law is against you, you talk about the facts. If the facts are against you, you talk about the law." Ed, he said, "if the law and facts are against [fol. 1340] you, you talk about the lawyer on the other side."

That is an old trick of we lawyers. We criticize the other fellow sometimes unconsciously, and sometimes we go too far.

Two weeks is long enough to try any case, and if a lawyer undertakes to cut short a trial after covering the territory that he is required to cover, then he ought to be praised for it and not condemned. I brought enough witnesses into this court to try to give you a clear picture of what this case was all about. You had Dr. Aderhold, Mr. Bolton and Mr. Harold Heckman. You had Bill Bradshaw and you had Mills and you had Mr. Driftmier, Head of the Agriculture Department at Georgia. You had Griffith and Pearce and Inman, those three coaches. Their story covered a wide range and not always the same subject.

Here is what they thought, and I am going to wind up my discussion with you on this point. They thought that something was done which was wrong. They thought something was done which hurt the University, and they had the courage to come into court and to state to you just what they did think and just what they did know. It was not all a matter of opinion.

I hope that in your consideration of this case you will not put your stamp of approval on something which those men say happened, not me—I am just arguing the case—not put your stamp of approval on something which they thought was wrong and which they thought affected the [fol. 1341] University of Georgia and which they thought affected that particular game.

I want to take this opportunity to say what I did in my discussion with you Friday. I thank you for the patience which you have shown in this case. I thank you for the service which you have rendered. The trial of a case before the jury is the greatest asset that we lawyers have. It is the most important function of our system of jurisprudence, and I am sure that everyone connected with this court appreciates the service that you have rendered. And with that statement I want to leave this case in your good

hands. I want you to do what you think conforms to the law as the court gives it to you in its charge, without favor or affection or sympathy toward either party.

Thank you.

* * * * * * *

After Recess

The Court: Members of the Jury, I don't know how long the charge will be. It might be taken in two parts. If during the charge—I have attempted to correlate the charges, but during the charge, if you should desire to refresh yourselves, just hold up your hand, and we will have an intermission.

CHARGE OF THE COURT TO THE JURY

Members of the jury, this is a civil case, and the plaintiff, as you already know, is Wallace Butts, and the defendant [fol. 1342] is Curtis Publishing Company.

The plaintiff has filed a complaint setting out what he contends the facts in the case to be, and then asks for a judgment.

The defendant came into Court at the proper time and filed what is called an answer to that complaint in which it denies the material allegations in the plaintiff's petition, and contends that the plaintiff is not entitled to recover anything.

Now, the pleadings in the case are not evidence, except insofar as admissions are made in them. They are simply the contentions of the respective parties and make up the issues of fact which you are to pass upon. You may read the pleadings and refer to them as often as you wish in order that you may understand more clearly the contentions of the parties and the issues in the case. The pleadings will be out with you during your deliberations.

The Court is responsible to the jury for the law applicable to the case, and it is the jury's duty to accept the law given in charge by the Court and to apply that law to

the facts in the case. You are the sole judges of the facts, the weight of the evidence, and the credibility of the witnesses.

The Court will not express any opinion about the facts. Any such expression or intimation would not be binding on you, because you should form your own opinion and reach your own conclusion about the facts.

[fol. 1343] I want to leave absolutely to the judgment of this jury the issue that is before you as to what this evidence shows or fails to show. Your authority, however, is not to be exercised arbitrarily. It must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law which I give you.

Now, members of the jury, the plaintiff, Wallace Butts, brings this suit against the defendant, Curtis Publishing Company, for ten million dollars because of an alleged libelous publication by the defendant. In his petition the plaintiff alleges that he has been engaged in the football coaching profession for approximately 35 years, in high school and secondary schools, and from 1939 until 1961 as head coach at the University of Georgia, at which time he became Athletic Director at the University.

The plaintiff further alleges that he has enjoyed a national reputation as a successful and respected member of the coaching profession, and has been accorded many honors such as president of the Football Coaches Association, and has, by invitation, coached the College All-Stars, the Blue-Gray All-Star game, and the North-South All-Star game.

The plaintiff alleges that during his career he has been widely sought as a speaker and lecturer on various aspects of football, and has lectured at clinics, banquets, and other such public gatherings throughout the United States; that, in addition, the plaintiff has been approached and offered employment as head football coach by several professional and college football teams in the country, due entirely to [fol. 1344] his reputation as a successful member and leader in his profession.

The plaintiff further alleges that the defendant, Curtis Publishing Company, is engaged in the publication of magazines and periodicals, the best known and the most valuable asset of such periodicals and magazines being the Saturday Evening Post, which has a vast and impressive circulation.

The plaintiff contends that during the last several years the advertising revenues of the Saturday Evening Post have substantially declined, and that it now shows staggering deficits; that because of these deficits, and in an effort to bolster the sagging circulation and increase advertising revenues, the defendant did publish, through the Saturday Evening Post, willfully, maliciously and falsely, a libelous article concerning the plaintiff, in the issue of the Post of March 23, 1963, said article being entitled "The Story of a College Football Fix", with the sub-title, "How Wally Butts and Bear Bryant Rigged a Game Last Fall."

The plaintiff alleges that prior to the actual circulation of this article on or about March 18, 1963, the plaintiff, through his attorney, notified the defendant by telegram and a letter that the contents of the article were false and advised that the article not be published. A copy of the telegram and letter are attached to the pleadings and will be out with you during your deliberations.

The plaintiff further alleges that on March 18, 1963, pursuant to Georgia law, he requested the defendant to retract [fol. 1345] and correct the defamatory statements concerning the plaintiff in this article, which the defendant refused to do, and refused to reply to this request of the plaintiff. A copy of this telegram is attached to the pleadings and marked Exhibit C, and will be out with you during your deliberations.

The plaintiff contends that the publication of this article is libelous and has caused him extreme mortification and embarrassment in that the article is a direct insult and attack on his honor, character and integrity as a football coach, and contends that his career as a member of the football coaching profession has been ruined and destroyed by this article.

The plaintiff further contends that the statements and insinuations contained in the said article have damaged plaintiff as aforesaid in the following particulars:

(a) Plaintiff is charged in large block letters in the very title and sub-title of the article with being a "rigger and fixer";

(b) In an italicized editorial, plaintiff is charged with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial the plaintiff is relegated to a status of worse than that of "disreputable gamblers," and corrupt person who, employed to "educate and guide young men", betrays or sells out his pupils;

[fol. 1346] (c) Plaintiff is charged with rigging and fixing the Alabama-Georgia football game with Coach Bryant as a gambling device in order to restore his financial resources;

(d) Plaintiff is charged with such a degree of corruptness and foulness that his betrayed players, as a result of plaintiff's alleged deceptions, fixing and rigging, were forced in the fame like "rats in a maze" and "took a frightful physical beating"; and,

(e) Defendant, in a final act of malice, contempt and editorial irresponsibility, closes its article with its definition of plaintiff as a fixer as being one who never leaves open a "chance" by stating "when a fixer works against you, that is the way he likes it."

Now, I have been reading the contentions as set out by the plaintiff in its petition.

The plaintiff brings this action and seeks to recover five million dollars in general damages, and sues for five million dollars in the nature of punitive damages to deter the defendant from repeating this trespass on his honor, reputation and integrity.

The defendant came into Court at the proper time and filed its pleadings in answer to the plaintiff's complaint. The defendant denies, in its first defense; certain insinuations and innuendoes which plaintiff alleges in his complaint resulted from publication of the article, but pleads that the statements in the article complained of, which are of and concern the plaintiff, are true. By this plea the defendant pleads justification.

[fol. 1347] Under the Georgia law, when a defendant files a plea of justification, such as was filed in this case, the defendant admits the publication of the statements contained in the article, and the whole case then proceeds upon the theory that it is admitted by the defendant that the publication is true, and the defendant takes the position that it was justified in publishing these statements.

Members of the jury, the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true, that is to say, that the defendant, Curtis Publishing Company, assumes the burden of proving that the statements contained in the article published in the Saturday Evening Post in its March 23, 1963 issue, which article was entitled "The Story of a College Football Fix" are true.

Now, by a preponderance of the evidence is meant that greater weight of the evidence upon the issues involved, which, while not enough wholly to free the mind from a reasonable doubt, is yet sufficient to incline a fair and impartial mind to one side of the issue rather than to the other.

Now, members of the jury, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts in the case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

[fol. 1348] As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply re-

quires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The article in its entirety will be out with you in the jury room for your consideration.

I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication. I charge you that Paul "Bear" Bryant, the Alabama coach and any aspersions upon him are not any issue in this case, and you would eliminate from your consideration any alleged acts on his part. Our concern is only with the plaintiff, Wallace Butts, and references to Bryant in the article may be considered only insofar as they are related to Wallace Butts. Any libel committed against Bryant, if Bryant was libeled, is not a matter for consideration here.

As stated above, this is an action brought by the plaintiff against the defendant for a libel alleged to have been committed by the defendant against the plaintiff.

[fol. 1349] A libel is a false and malicious defamation of another, expressed in print or writing, or pictures or signs tending to injure the reputation of an individual, and exposing him to public hatred, contempt or ridicule.

However, as I have told you previously, the defendant in its plea of justification, contends that the statements in the article are true. I charge you that truth is a complete defense in a civil action for libel. A libel, members of the jury, is a false defamation of another, and therefore, if what is printed is true, then there is no libel.

The truth of the charge may always be proved in justification of the libel. Truth in the law of libel means substantial truth. It is not necessary that every detail of the

article be proven to be accurate, but it is necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff.

To establish the defense of truth the defendant must prove what is known in the law as the "sting of the libel". The sting of the libel in this case is the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant information which was calculated to or could have affected the outcome of the game. By this I mean, could have caused one team to win or lose, or could have increased the number of points by which the game was won.

If you find that the plaintiff did give Coach Bryant information which was calculated to or could have affected [fol. 1350] the outcome of the game by causing one team to win or lose, or by increasing the number of points by which the game was won, then you must find that the defense of truth has been established. In that event, you must, of course, return a verdict for the defendant.

The article complained of contains the words "corrupt", "fixed", "rigged", and "sell out". The word "corrupt" is defined in part to mean depraved, debased, or perverted. The word "fixed" is defined in part as meaning to arrange, carry out or manipulate by deceptive or fraudulent means, to fool or to hoax one. The word "sell out" means in part to betray for compensation the cause or associates with whom one is identified. You should keep these definitions in mind during your deliberations.

So the issue, members of the jury, for you to determine first in this case is whether or not the defendant has proved to you that the article complained of in the Saturday Evening Post is true. If the defendant, Curtis Publishing Company, has proved to you by a preponderance of the evidence that the statements contained in the article of March 23, 1963, entitled "The Story of a College Football Fix" are true, then there is no libel, and the defendant would be entitled to a verdict.

[fol. 1351] If, on the other hand, the defendant has failed to make out his plea, that is, has failed to prove to you by a preponderance of the evidence that the defamatory statements contained in the article are true, then the plaintiff would be entitled to such damages as you feel proximately and necessarily resulted from the publication. The extent of those damages depends upon the circumstances of the case, such as the malice of the defendant, the offensive character of the libel, the pain caused to the injured party, the number of publications, and the general circumstances of the libel.

Regarding the defendant's plea of justification, which is a plea that the statements are true, unless this plea of the defendant is proved to the satisfaction of you jurors, such a plea cannot and will not defeat the action; but there may be evidence under which, though insufficient to establish it, may disclose facts and circumstances in mitigation, and this may be considered by you, as jurors, to reduce in any degree that you may deem proper the amount of damages which you otherwise would have found.

Thus, a plea of justification may, according to the evidence introduced under it, have one of three effects in this action.

(1) The plea being established, the action is simply defeated;

(2) Failure to establish it, connected with failure to show any reasonable or proper cause for filing the plea of justification, may aggravate the damages; or,

[fol. 1352] (3) The partial or imperfect establishment of it or the production of evidence strongly tending to establish it may mitigate the damages.

Stated in another way, if the defendant proved the truth of the defamatory allegations, that is a complete defense, and this would be sufficient to defeat the plaintiff's claim, and you should return a verdict for the defendant. This is so because the truth is always a defense in a civil action for libel.

If at this point in your deliberations you determine that the defendant has established that the statements contained in the article are true, then you would end your deliberations here and return a verdict for the defendant, Curtis Publishing Company. If, on the other hand, you determine that the defendant has failed to prove or has only partially or imperfectly established the truth, then the plaintiff is entitled to damages, and this brings us to the question of damages and how they are to be evaluated and considered.

The plaintiff in this case sues for general and also for punitive damages. The law of Georgia recognizes both of these types of damages in a libel suit. I shall treat these separately since they are governed by different principles, and, likewise, you are to consider and pass upon them separately.

General damages are such as the law presumes to flow from any tortuous act, and may be recovered without proof of any amount. A tort or tortuous act is the unlawful violation of a private legal right, other than a mere breach [fol. 1353] of contract, express or implied.

In some torts the entire jury is to the peace, happiness and feelings of the plaintiff. In such cases no measure of damages can be prescribed except the enlightened consciences of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed.

Under the law of Georgia, if the publication was libelous per se, and I charge you that this article was libelous per se, and the law will presume that anyone so libeled must have suffered damage. In such case, no measure of damages can be prescribed, except through the enlightened consciences of impartial jurors.

I charge you that the words "libelous per se" in this case mean words of such character that a presumption of the law arises therefrom that a party has been degraded in his business or professional reputation.

As the publication was libelous per se, I charge you that malice is to be inferred. However, the existence of malice

may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence [fol. 1354] of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact.

I charge you that general damages are intended to compensate a party who has been libeled for the actual damages he has suffered, to make him whole, as the cases often say.

I charge you that the law presumes that the plaintiff has a good reputation, and when a defamatory statement is made against him, the law presumes he has sustained injury to that reputation and to his feelings. The law, recognizing the difficulty of proving damages, does not require a defamed person affirmatively to prove the exact amount of damages sustained by him. These are to be determined by you members of the jury in the light of all the facts and circumstances of the case,

The damages awarded must be based upon the injury to his reputation and in his occupation in the minds of those who know him or know about him. A defamed person is also entitled to be compensated for the mental anguish, pain, mortification, and humiliation he has experienced as a result of the publication.

Obviously, there is no yardstick by which you can determine these items with exactitude. In deciding this question of damages, as in all others, you must use your common [fol. 1355] sense and good judgment in determining what sum will fully compensate the plaintiff for the damages suffered. The amount awarded must bear relationship to the injury which you find he has sustained as a result of

the article. You take into account a man's general reputation, his social and business or professional standing in the community, how well-known he is, the nature of the defamatory charge and its tendency to injure such a man in the public estimation of his character, and the extent of its distribution.

When I use the phrase "a man's reputation and standing in the community", it is not limited to his reputation in the immediate area of his residence. Rather, it is his reputation in the community within which he is known. The community may be said to be co-existive with the spread and extent of his reputation.

Wallace Butts is a widely-known football personality. It is conceded that this article was distributed widely in this country and with a substantial circulation. The plaintiff is entitled to rely upon his presumption of good reputation.

I charge you that a person of bad reputation is not entitled to the same damages as a person of good or excellent reputation.

I charge you that a substantial verdict for general damages must be founded upon a finding of substantial injury. If you find that there has been no substantial injury, then the damages may be normal.

[fol. 1356] We now come to the question of punitive damages. Punitive or exemplary damages are of an entirely different nature from general or actual damages. Before you would be authorized to find punitive damages under the Georgia law, you must first determine that the plaintiff, Wallace Butts, is entitled to recover general damages. However, if you decide to award punitive damages, the sum you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion. The law of Georgia provides that in every tort there may be aggravating circumstances, either in the act or the intention, and in the event the jury may give

additional damages to deter the wrong-doer from repeating the trespass.

Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights.

[fol. 1357] The burden of proof to establish the facts of actual malice is upon the plaintiff, Wallace Butts, and this burden he must bear by a fair preponderance of the evidence. I have previously defined to you what constitutes a preponderance of evidence.

Actual malice involves the state of one's mind, and your determination must be made from all the surrounding facts and circumstances.

Further actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case.

Here you may consider the libel itself, the very nature of the defamatory matter in conjunction with all the other evidence and the circumstances under which the article was written and published.

A publication may be so extravagant in its denunciation and so vituperative in its character as to justify an inference of malice.

Evidence has been offered during the trial to the effect that the plaintiff, prior to the time that the article was published, requested the defendant not to publish the arti-

cle, stating that it was not true, and after the article was published plaintiff demanded a retraction.

I charge you that under Section 105-720 of the Code of Georgia of 1933, it is relevant in an action for libel such as this for the plaintiff to prove that the plaintiff requested a retraction, proof that the plaintiff did demand a retraction but that the defendant failed to retract the article [fol. 1358] may be considered by you on the question of punitive damages, if you find that the defendant has not established its plea of justification.

You may consider the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.

In considering the question of malice you may also take into account the plea of justification filed by the defendant, and whether this plea of justification was filed in good faith, and under an honest expectation of being able to establish the alleged justification. You should only consider this plea of justification on the matter of damage if you find the defendant has not established it, and further find it was not filed in good faith by the defendant with any honest expectation of establishing it.

This brings the Court to another matter on the subject of malice when during the trial certain hearsay matter was admitted into evidence. Usually, of course, such hearsay matter is not admissible, but was received in this instance as evidence which might show mitigating circumstances or lack of malice.

I charge you that a defendant may resist or minimize a claim for punitive damages by showing mitigating circumstances, including the sources of its information and the grounds for its belief. A defendant may show that it acted without malice and that there was neither actual malice nor any circumstances from which malice may be inferred. In a word, a defendant is permitted to show that, in publishing [fol. 1359] this article, it in good faith relied upon certain matters which had come to its attention. And if the jury ac-

cepts this as credible, this would go in mitigation of punitive damages.

As you may recall, evidence was introduced on the trial as to the certain tests taken by a polygraph, sometimes referred to as a lie detector. Ordinarily, of course, this evidence would not be admissible in a court of law, but you may consider it only in the light of what credence or credibility the defendant used such test in determining malice, if any, on the part of the defendant.

I charge you that there were various other conversations with third persons and testimony or documents of third persons which merely reported what other persons had said or written. Of course, all of this evidence was hearsay, and there was no opportunity by the opposite party to examine such persons, some of whom were beyond the jurisdiction of the Court.

I charge you that you should dismiss from your minds completely any reference to any investigation by the Attorneys General of Georgia or Alabama, or anyone other than the parties of the charges contained in the article complained of. Neither the fact of any investigations nor the results thereof have any bearing whatsoever on the trial of this case. In arriving at your verdict you must restrict yourselves solely to a consideration of the evidence legally admitted during this trial, and the law given you in charge now by the Court.

[fol. 1360] The hearsay evidence was admitted solely for the single purpose for which it was offered by the parties, to show the absence or presence of malice as that word has been defined to you. It is not received to establish the truth of any of the statements contained in the publication, and it is in no respect to be considered for such purposes. It is for you to say whether or not such information obtained was of such nature as to justify a reasonable mind in believing and relying on them.

In deciding whether or not Curtis Publishing Company was justified in relying upon information by which it seeks to repel a charge of actual malice, you may take into ac-

count the journalistic experience of Curtis Publishing Company and its general experience.

I charge you further that a corporation acts through its agents or employees, and is liable for their acts within the scope of their employment.

It is necessary, members of the jury, that I charge you on the law of damages, but the fact that I charge you on the law of damages carries no intimation, one way or the other, that you are required to award damages for the plaintiff against the defendant.

The Court has not reviewed the evidence in detail. I have restricted myself in this charge to but a few references to the evidence. Counsel in their summations have exhaustively reviewed the evidence with respect to the various issues in the case. There has been a sharp conflict in the testimony in this case, and it is your duty to determine the truth.

[fol. 1361] Members of the jury, I charge you that the term "impeachment" is defined legally to mean efforts which tend primarily to show that the witness is narrating a falsehood or that he is not worthy of belief. The terms "impeachment" and "attack on the credibility of a witness by way of impeachment" are synonymous and means that efforts are being exerted to prove that a witness who has been examined is unworthy of credit. In other words, it calls in question the veracity of a witness.

I charge you that a witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

I charge you further that a witness may be impeached by evidence as to his general bad character.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other

particulars. And you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

You are made by law the sole and exclusive judges to the credibility of witnesses. In passing upon their credibility the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying; their intel- [fol. 1362] gence; their interest or want of interest in the case; their bias or prejudice, if any exists; their means and opportunity of knowing the facts to which they testify; and the probability or improbability of the testimony to which they testify; and also their personal credibility insofar as the same may legitimately appear upon the trial of the case. The manner, conduct and appearance of witnesses on the stand are legitimate matters for consideration by the jury.

During the course of the trial I have passed upon the admissibility of evidence and various motions made by counsel. I wish to emphasize that you are to draw no inference from the Court's ruling with respect to the admission or reject of evidence or the sustaining or overruling of any motion. Where the Court sustains an objection excluding evidence, you are not to assume that the excluded evidence would have been unfavorable to the party who objected, and so, too, you are to draw no inferences that had it been admitted it would have been favorable to the party who offered it. These rulings related solely to matters of law.

If perchance during the trial I have made reference to testimony or in this charge have made reference to any of the testimony that does not accord with your recollection, you must reject that completely. I have no right to invade any function that you have in this case, and as you well know, your function is to decide the facts. Of course, I have made every endeavor to state the facts as I understood them, but disregard my statements completely if they do not accord with your own view.

[fol. 1363] From time to time I have occasion to ask questions of some witnesses. The judge has a right and indeed

a duty to see that the facts are clearly presented, and the purpose of the Court's questions was to clarify certain matters in the case. You are not to draw any conclusions that by reasons of my questioning the witnesses I have any point of view as to the witnesses' credibility or hold any view as to how you should decide the facts in this case. And, as I have told you before, the determination of the facts in the case are to be made by you members of the jury. You are the supreme judges of the facts and none may invade that province.

Under your oaths you are sworn to try this case in accordance with the law in evidence. You should not be actuated by motives of sympathy or prejudice. Your duty is to try the issues fairly and impartially and without fear or favor. You came into the jury box without any preconceived view, idea, or opinion, concerning the right or wrong of either of the parties, and what you know about the issues should have been learned only from the witnesses on the stand and the exhibits in this case, and your final determination of the facts must be based upon that evidence. Remember, you are not responsible for the consequences of your verdict, but you are responsible for its truth.

Now, for your convenience the Clerk has prepared a form of verdict, and I would suggest this, that when you retire to consider your verdict, you elect one of your members as Foreman. Of course, the manner in which you conduct your deliberations is entirely up to you, and I make this suggestion, that you elect one of your members [fol. 1364] as Foreman so that the Foreman may preside over the meeting so that you may conduct an orderly discussion and arrive at a unanimous verdict.

The form of verdict which has been prepared has four questions or issues which you are to determine. The first question concerns the issue of liability, and this, members

of the jury, is the first question or issue which you have to decide. As I have previously stated to you, if you find that the defendant has proved to you its plea of justification in accordance with the rules of law heretofore stated to you by the Court, then it would be your duty to return a verdict for the defendant as to liability. If, on the other hand, the defendant has not carried its burden by proving its plea of justification, then it will be your duty to return a verdict for the plaintiff.

So, on this first question or issue which you are to determine, the form of verdict which has been prepared for you provides as follows: "We, the jury, find in favor of blank". And you will fill in this blank either "Wallace Butts" or "Curtis Publishing Company".

If your answer to the first question on the issue of liability is in favor of Curtis Publishing Company, then you need not consider Questions 2, 3, or 4.

Second, if your answer to Question No. 1 is "Wallace Butts", then you would go further and say "We assess general damages for Wallace Butts in the sum of blank dollars."

[fol. 1365] Third, if your answer to Question No. 1 is "Wallace Butts", and you have found in Question No. 2 an amount, then you would be entitled to go further and say "We find that Wallace Butts is, or is not, entitled to recover punitive damages from Curtis Publishing Company."

And fourth, if your answer to Question No. 1 is in favor of Wallace Butts, and your answer to Question No. 2 is a certain amount, and your answer to Question No. 3 is that he, Coach Butts, is entitled to recover punitive damages, then your verdict would go further and say, "We assess punitive damages in the sum of blank dollars."

I charge you that you cannot award punitive damages without assessing general damages in some amount.

After you have arrived at a verdict, the Foreman should sign that verdict form and date it.

After you have retired to consider your verdict, if there are any matters upon which you desire further instruction or any clarification of instructions, do not hesitate to let the Marshal know of your request in that respect, and you will be brought back into the courtroom for that purpose. You will retire to the jury room to await further instructions.

* * * * * * *

The Court: All right, sir. Any exceptions on behalf of the Defendant to the charge?

[fol. 1366]

DEFENDANT'S EXCEPTIONS TO THE COURT'S CHARGE TO THE JURY

Mr. Cody: May it please the Court, the first one is with reference to the Court's charge about the article being libelous per se. We want to protest the record. We have discussed it at pre-trial, and we have called the Court's attention to the Weatherford case, it being our position that the Plaintiff in this case, at the time of this publication, was not in that profession, and, secondly—

The Court: I charged that—I charged that it was libelous per se on the basis of the Winestrof—Dun & Company versus Winestrof.

Mr. Cody: I think I understand the Court's view about it.

The Court: Yes, sir.

Mr. Cody: At one point in the charge you stated to the jury that they take their evidence from the witness stand. Technically, I think that is—

The Court: I said "witness stand and exhibits", I believe.

Mr. Cody: And exhibits, and you eliminated the word "deposition".

The Court: I believe during the trial of the case I in-

[fol. 1367] structed them in regard to the depositions, they would be considered as if the witness had been here.

Mr. Cody: If so, that would cover it.

The Court: I believe that is true. I believe I did it on two different occasions.

Mr. Cody: I wouldn't want any instruction to encompass a disregard of depositions, because the defendant's case, in part, is by evidence produced by depositions.

The Court: I believe I charged the jury on depositions twice. I instructed them twice when depositions were read.

Mr. Cody: I see.

The Court: All right, sir, any further exceptions?

Mr. Cody: And then with reference to requests which have heretofore been made to the Court in writing, we take exception to the absence of the charge to include request No. 3, which deals with what credit should be given to an impeached witness, and we take the position that his testimony shall be disregarded entirely if he has been successfully impeached.

[fol. 1368] The Court: If the jury so sees fit.

Mr. Cody: Yes, sir; unless corroborated by circumstances or other unimpeached evidence.

The Court: I believe I gave them that, Mr. Cody.

Mr. Cody: I see. And then there are one or two Code sections concerning which written request was made. I call attention to the defendant's request No. 5 which has to do with a person testifying in his own behalf is not entitled to a finding in his favor, if that version of the testimony most unfavorable to him shows that the verdict should be against him.

And request No. 6, whenever a party presents himself as a witness and the evidence is contradictory or equivocal, his testimony must be construed most strongly against him.

The Court: Well, No. 5, I didn't think it was applicable to this case, and No. 6, I believe I gave in different wording. I don't always follow the words that the attorneys set up in the pleading—set up in the request to charge.

Mr. Cody: I have some question, Your Honor, about that reference in the charge to the worldly circumstances

[fol. 1369] of the parties. We think that that should be considered only under Code section 105-2003.

The Court: What do you mean? You don't think that relevant to the worldly circumstances of the party?

Mr. Cody: Well, not—does Your Honor have Section 105-2003?

The Court: No, sir; but I am familiar with that. The reason I gave that, there were some cases in Georgia to the effect, or I read some cases to the effect that the worldly circumstances and the wealth of the parties should be taken into consideration, and that was the reason, that a party—a hundred dollars punitive damages against one party would be more severe than maybe ten thousand dollars against another party—

Mr. Cody: Yes, sir.

The Court: —because it is according to the wealth and worldly circumstances. We are talking about punitive damages—

Mr. Cody: Yes, sir.

The Court: —and that was the reason I gave it.

[fol. 1370] Mr. Cody: I got the impression it was not limited to punitive damages, it had only—but I was afraid that the language that the Court used might be broad enough to encompass other types of damages.

The Court: I meant it to apply only to punitive damages, and I think it was under the punitive damages section which I charged. Do you remember what I made it in connection with, Mr. Cody?

Mr. Cody: No, sir; I don't.

The Court: Do the attorneys for the plaintiff—it was my recollection I was discussing punitive damages. Do you know where it is?

Mr. Cody: Your Honor, I withdraw our exception to that last.

The Court: That disturbs me. I think I meant it as punitive. If I didn't—

Mr. Cody: I will withdraw our exception.

The Court: You withdraw your exception? I meant to refer to it, and I can't find it. All right, sir, any other exceptions?

[fol. 1371] Mr. Cody: No, sir.

• • • • • • •

Let the jury be brought in.

(Whereupon the jury returned to the courtroom at 10:31 a. m.)

The Court: Mr. Foreman, have you arrived at a verdict, sir?

The Foreman: We have, Your Honor.

The Court: Present the verdict to the Marshal.

Let the Clerk publish the verdict.

VERDICT

The Clerk: Will you stand, please.

"Wallace Butts versus Curtis Publishing Company; verdict: (1) We, the jury, find in favor of Wallace Butts.

"(2) We assess general damages for Wallace Butts in the sum of sixty thousand dollars.

"(3) We find that Wallace Butts is entitled to recover punitive damages from Curtis Publishing Company.

"(4) We assess punitive damages in the sum of three million dollars.

"This the 20th day of August, 1963; Joe B. Dekle, Foreman."

• • • • • • •

[fol. 1372]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON DECEMBER 10, 1963, IN REGARD TO DEFENDANT'S MOTIONS FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT

The Court: And if that be true, and I am looking at it from a practical standpoint, I think you have to, without committing the court in any way—I am just throwing this out, why wouldn't the proper thing—you have alleged to twenty-five or thirty different errors. If the court granted a motion for a new trial because it was excessive, the question of whether the court committed error in those thirty-five or thirty-seven different ways as to the charge, as to the admission of argument, if it was improper, why wouldn't it be proper to let it all go to the Court of Appeals at one time, and then at that time if they say it has got to be retried, the verdict is excessive, perhaps they might pass on these thirty-five or thirty-seven different alleged errors, and if it was error, then on a new trial the court could correct those errors.

Mr. Cody: Well, if Your Honor thinks that errors have not been committed such as those—

The Court: I am not saying they have or have not. You are alleging them.

Mr. Cody: That's right.

The Court: If they have been committed they should be corrected.

A two-weeks-and-three-day trial is cumbersome and expensive for all the parties, for the court as well and for the Government.

[fol. 1373] Mr. Cody: Well, I think Your Honor is losing sight of the fact of many a case has been tried without any error whatsoever and yet an excessive verdict resulted, nobody knows why, and yet it is the duty and responsibility of that court to correct it.

The Court: All right, sir. Suppose it is excessive; let's assume that it is excessive—

Mr. Cody: Yes, sir.

The Court: —and the court grants a new trial, and then we try it again, and the court charges the jury as it did before, and the argument of counsel comes in as it was before, or substantially so, then we still haven't decided whether his argument is improper or the court's charge is improper. That is what I am looking at, looking at it from a practical standpoint, with the idea of expediting it.

• • • • • • •

The Court: All right, sir. Suppose the court should determine that probably a certain portion of the argument was improper, and therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again, and the same charge was given to the jury, and then the verdict was, maybe, not quite as excessive, but you came back and made a motion for new trial after a substantial verdict was rendered, the court, on the [fol. 1374] question of the court improperly charging the jury, we would have to go back again.

• • • • • • •

Mr. Lockerman: The testimony that they are now complaining about as having not been admitted was, as they stated, ruled out on the ground it was hearsay. They, at no time, made any statement to the court as to the purpose for which the testimony was being offered or what it was expected to prove. Your Honor's ruling was eminently correct as the matter stood when that testimony was sought to be put in.

Now, if they had taken the position then that they are taking now, and if they had explained to Your Honor the purpose for which it was being offered, then undoubtedly Your Honor's ruling would have been possibly different, or could have been, anyway.

I don't think we need to deal with that very long, because in the case of Maryland Casualty Company v. Simmons, 2 F. 2d, 29, which is the Fifth Circuit Court decision from this court, from Georgia—I think it is this court—

anyway, it is from the State of Georgia, in which certiorari was denied by the Supreme Court of the United States in 45 S. Ct. 226, 255 U. S. 634. The Fifth Circuit held as follows:

"Exclusion of evidence not ground for reversal in absence of showing as to its nature or statement of what it intended to prove."

[fol. 1375] Now, certainly in this case there was introduced into evidence the record of the telephone company which showed that a telephone call was made at the date and hour claimed and the telephone number to which it had been, you know, made, so there was proof to substantiate Burnett that a telephone call was made.

Now, they made no point, as I said, about the reason for trying to claim that they should be permitted to show what the telephone operator said over in Alabama. Mr. Cody did recognize that it was hearsay, and, as a matter of fact, before Your Honor ruled on the matter, on the objection, Mr. Cody himself—and the record shows he stated to the witness, "No, don't go into that." He recognized as the matter stood then it was hearsay, and there was no—

The Court: Yes, sir; I am frank to say, had I known what was developing, I think the evidence could have been admitted or should have been admitted.

* * * * * * * * *

[fol. 1376]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 6

TO: POST STAFF
FROM: Clay D. Blair, Jr.

January 15, 1963

If I—or you—had time, I'd like to congratulate each of you personally. In lieu of this, let me say in this broadcast that you are putting out one hell of a fine magazine. The articles are timely, full of significance and exclusivity. The cover, the layout, type and other visual aspects have improved tremendously. The cartoons are the best being published. The new fiction program bids fair to become one of the great breakthroughs in magazine publishing.

Your work has not gone unnoticed. We have many press clips commenting on the new vitality in the Post. Joe Culligan has been extremely flattering in his comments, as have the other directors of the Curtis Publishing Company. The final yardstick: we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism.

I think you should be very proud of the publication you're turning out.

GS231
42593

Double space between each payment. The amount of each check should be shown opposite the payee's name. Do not show Account to be charged for each check. Charges should be summarized.

THE CURTIS PUBLISHING COMPANY
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DUPLICATE-ORIGINATOR'S COPY

THE SATURDAY EVENING POST MARCH 9, 1943

Amount of Check	Summary by Charge	
	Account	Amount

2149T

Milton R. Flack ✓
c/o Pierre Howard, Esq. 1324 Healey Bldg.
Atlanta Georgia (SS# will follow)
Research fee & guarantee of exclusivity on:
SECRET SPORTS STORY- Article

✓ 500 00

B

K ✓

Date Paid | Bank | First Check No. 100

1041

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 8

[fol. 1377]

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT NO. 9

G8131
42593

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CHECK REQUISITION

DUPLICATE-ORIGINATOR'S COPY

	Amount of Check	Summary by Charge	
		Account	Amount
Frank Graham, Jr. ✓ 201 Congress St BKLYN 1, NY # 114-22-5737 Article: A STORY OF A COLLEGE FOOTBALL FIX	✓ 2,000 00		

THE SATURDAY EVENING POST MARCH 24, 1951

2749T*

1042
[fol. 1378]

GS233
42598

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DUPLICATE-ORIGINATOR'S COPY THE SATURDAY EVENING POST APRIL 3, 1963 - Editorial

	Amount of Check	Summary by Charge	
		Account	Amount
Furman Bisher The Atlanta Journal Box 4689 Atlanta 2, Ga. SS# 244-14-7956 Work on Article: THE STORY OF A COLLEGE FOOTBALL FIX by Frank Graham, Jr.	✓ 1,000 00	STAMP C. BOX	

21491

D

Date Paid | Bank | First Check No. 147

1043

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 10

[fol. 1379]

GS235
42594

THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION

21491

Pay To Western Union Date 3/6/63

Address

TRIPLICATE - ORIGINATOR'S COPY	Account Number	Amount
To wire money to Pierre Howard 1324 Healey Building Atlanta 3, Georgia in further connection with "Secret Sport Story" (George Burnett and Frank Graham)	09-211-49	$500.00 ✓ X
EXPS. ACCT'd. for TO D. Schanche - IN CONNECTION WITH "SECRET"		

Embossed Total

Signed	FOR ACCOUNTING USE ONLY Check Date	Check No. 970
Approved E Do not approve until total is embossed	Bank	

PLAINTIFF'S EXHIBITS NOS. 11 AND 12

GS235
42594

THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION

21492

Pay To Western Union Date 2/25/63

Address

TRIPLICATE - ORIGINATOR'S COPY	Account Number	Amount
To wire first payment for rights to exclusive "secret" sports article (G. Burnett with Frank Graham), to: ✓ Pierre Howard, attyt (receiving money in behalf of Burnett) 1324 Healey Building Atlanta, Georgia	Entered as Mail Check 09-21 -	✓ 2,000. 00 ✓ X

[fol. 1380]

Embossed Total

Signed	FOR ACCOUNTING USE ONLY Check Date 2/25/63	Check No. 950
Approved Do not approve until total is embossed	Bank	

1044

GS233
42594

THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION 21491

Pay To Pierre Howard ✓ Date 3/19/63

Address 1324 Healey Bldg., Atlanta 3, Ga.

TRIPLICATE - ORIGINATOR'S COPY	Account Number	Amount
Additional payment for Sports article by Frank Graham, Jr., in accordance with contract of 2/26/63. (in behalf of George Burnett) ✓ (No Social Security # available at this time)	09-211-49	✓$3,000.00

Embossed Total

Signed	FOR ACCOUNTING USE ONLY	
	Check Date	Check No.
Approved	Bank	
Do not approve until total is embossed		

GS231
42593

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DUPLICATE-ORIGINATOR'S COPY SATURDAY EVENING POST APRIL 17, 1963 Editorial

Amount of Check	Summary by Charge	
	Account	Amount

2T49T

Frank Graham, Jr.
201 Congress St Bklyn 1, NY - 114-22-5737
Exp inc on Article: STORY OF A FOOTBALL
FIX.....$512.09

In United States District Court
Plaintiff's Exhibits Nos. 14 and 15

[fol. 13821]

"21491"

BILL RECEIVED REQUISITION

INSTRUCTIONS: Use this form in place of a purchase requisition when bill has been received prior to issuance of a purchase requisition. Prepare form in quadruplicate. Give a complete description of each item. Retain third copy. Forward first, second, and fourth copies to Supply Division. Use bill Received Order Number when requesting information.

ORDER NO. 68540

VENDOR

Fugazy Travel Bureau
488 Madison Avenue
New York 22, New York

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL VALUE
2/18	M38091 John Skow - Idl/Lisbon/Sante Maria/ Lisbon/Madrid/Seville/Madrid/London/Glasgow/ London/Idl. 2/18 - (U.S.Foreign Bases assignment)		583 40
2/20	M38650 Graham, F. - Idl/Atlanta 2/20		38 59

CHARGE NO.	AMOUNT
09-211-49	621.99

DIVISION: Post Editorial
REQUESTED BY: G.Muller DATE: 3/15/63
APPROVED BY: DATE: 3/15/63
AUTHORIZED AMOUNT ON SIG.
F.O.B.
1 BILL 2 CREDIT

INV. DATE	DUE DATE	DATE TO ACC.	BY	% DISCOUNT	DISCOUNT AM'T	NET AMOUNT	CREDITOR'S NO.

GS-244A

Purchasing Div. 109

[fol. 13822]

1046

[fol. 1383]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 16

SOUTHEASTERN CONFERENCE
REDMONT HOTEL
BIRMINGHAM, ALABAMA
FA 2-6173

PRESIDENT
J. WAYNE REITZ
UNIVERSITY OF FLORIDA
GAINESVILLE, FLA.

COMMISSIONER
BERNIE MOORE

SECRETARY
T. A. BICKERSTAFF
UNIVERSITY OF MISSISSIPPI
UNIVERSITY, MISS.

MEMORANDUM

TO: SEC Institutions

SUBJECT: Unnecessary Roughness in College Football

I wish to direct your attention to a memorandum that was sent to all Head Football Coaches by William D. Murray, President of the American Football Coaches Association, and H. O. (Fritz) Crisler, Chairman, NCAA Football Rules Committee (copy enclosed).

At a joint meeting of the Conference Football Coaches and game officials on August 4, 1962, Mr. George Gardner read and discussed this memorandum. Also, stressed the com- [fol. 1384] pliance with NCAA Football Rule 9, Sections 1 and 2, Article 1:

Section 1. Disqualifying Fouls

"No player shall strike an opponent with his fist, or deliver a blow with extended forearm, elbow, or locked hands, or kick or knee an opponent during the game or between the periods."

PENALTY—15 yards. Offenders shall be disqualified.

Section 2. Personal Fouls

"e. There shall be no piling on, falling on, or throwing the body on an opponent; after the ball becomes dead."

PENALTY—15 yards. Flagrant offenders shall be disqualified.

It is the policy of the Southeastern Conference to follow a strict enforcement program in all of the above areas, as stated in paragraph 7, page 39, of the SEC Constitution and By-laws, and the officials were so instructed.

At a separate meeting with the Head Football Coaches, or their representatives, on August 4, we asked for their co-operation in an all-out effort to eliminate unnecessary roughness in the game of football.

[fol. 1385] I sincerely hope that the entire coaching staff at each member institution will conscientiously cooperate in such a program.

Bernie Moore
Commissioner

enc.
Aug. 27, 1962

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT NO. 17

TO: INTERCOLLEGIATE FOOTBALL COACHES, COMMISSIONERS AND OFFICIALS

FROM: THE PRESIDENT OF THE FOOTBALL COACHES ASSOCIATION AND THE CHAIRMAN OF THE FOOTBALL RULES COMMITTEE

Re: Unwarranted viciousness and brutality in our college game

In recent years there has been a growing concern about the malicious brutality which appears to be on the increase in our great game of intercollegiate football. At its January meeting the Rules Committee received with alarm reports from many districts of uncalled for viciousness, particularly in the area of striking or delivering a blow with the hand or forearm and "piling on" after the ball has been declared dead.

[fol. 1386] The officers and trustees of the Football Coaches Association shared the concern of the Rules Committee as indicated in the draft of the following statement last June:

> "It is reported that in some isolated instances brutal play is being tolerated. It is the unanimous expression of our officers and trustees that the coach is responsible for eliminating brutality in football. Training methods that are aimed at injuring the opponent should be done away with."

After long deliberations and a searching review of the rules it was concluded that the language in Rule 9 quite clearly defined the line between legal action and illegal

practices with willful viciousness to inflict bodily harm to an opponent.

The difficulty did not seem to be in rule construction but rather, first, in a laxness of officials to vigorously enforce the existing rules, and, second, the unwillingness of a few coaches to be worthy of their noble profession by properly instructing and disciplining their boys with regard to brutal play.

The various Conference Commissioners who have jurisdiction over officials will in no uncertain terms direct them to vigorously enforce all rules to stamp out malicious brutality and viciousness. Officials will be instructed not to exercise judgment about intent, but to rule on any overt act. By way of example, they will be ordered to penalize any contact with an opponent on the ground or in a "pile", after the ball is declared dead.

Not long ago a request was made of our fine coaches to help eliminate a developing muckerism, practiced by a [fol. 1387] very limited few, in feigned injuries and false starts. The coaches are to be congratulated on their magnificent response in the destruction of those evils. This is another appeal to our courageous head coaches to enlist their full force of influence to rid our game of inexcusable brutal and malicious play.

All of us, whose good fortune it is to be associated with our grand game, hold a sacred trust to crush any evil practices. We have under our trust the most precious possession of any father and mother, their son. Let us join together in being worthy of our stewardship in the protection, on both sides of the line of scrimmage, of those sons from brutality which will only lead to tragic incidents and rule changes that none of us will like.

William D. Murray, President
American Football Coaches
Association
H. O. (Fritz) Crisler, Chairman
NCAA Football Rules Committee

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 21

February 22, 1963

Mr. Pierre Howard, Attorney
1324 Healey Building
Atlanta 3, Georgia

Dear Mr. Howard:

This is a letter form verification of our agreement in regard to a story which has been given to me exclusively for [fol. 1388] the Saturday Evening Post by Mr. George Burnette. It is agreed that the Saturday Evening Post will through me, as their agent, pay for Mr. Burnette's benefit the sum of $2,000.00 for having given the full details and story to me; that if this story is published by the Saturday Evening Post as the exclusive revelation of Mr. Burnette and contingent upon the signing of a contract to be furnished by the Saturday Evening Post that we will pay Mr. Burnette an additional $3,000.00.

It is further agreed that I will present to the Post, for the protection of Mr. Burnette my recommendation that the accepted standard in the industry for royalty and resale rights be adhered to.

Very truly yours,

Frank Graham

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Consolidated Balance Sheet

	December 31, 1962	December 31, 1961
Assets		
Current		
Cash	$ 12,507,000	$ 12,888,000
Marketable securities, at amortized cost	—	353,000
Accounts receivable	22,119,000	22,129,000
Inventories	18,412,000	21,069,000
Prepaid expenses and advances	2,595,000	1,886,000
Total current assets	55,633,000	58,325,000
Investments and advances	3,065,000	2,947,000
Property, plant and equipment	64,625,000	63,980,000
Other, principally goodwill	4,487,000	4,977,000
Total assets	$127,810,000	$130,229,000
Liabilities		
Current		
Bank loans	$ 22,100,000	$ 7,600,000
Long-term debt due within one year	2,593,000	1,500,000
Accounts payable	7,432,000	11,097,000
Accrued expenses	9,797,000	5,371,000
Total current liabilities	41,922,000	25,568,000
Long-term debt	17,418,000	14,096,000
Subscription contract deferrals	40,538,000	43,716,000
Total liabilities	99,878,000	83,380,000
Stockholders Equity		
Prior preferred stock, no par value, additional $1 dividend cumulative to extent earned		
$3 cumulative Authorized and issued—334,470 shares, stated at	16,724,000	16,724,000
$.60 cumulative Authorized and issued—239,418 shares, stated at	2,394,000	2,394,000
Common stock, par value $1 per share Authorized and issued—3,457,335 shares	3,457,000	3,457,000
	22,575,000	22,575,000
Capital surplus	808,000	808,000
Retained earnings	4,666,000	23,583,000
	28,049,000	46,966,000
Less 15,500 common shares in treasury, at cost	117,000	117,000
Total stockholders equity	27,932,000	46,849,000
Total liabilities and stockholders equity	$127,810,000	$130,229,000

The accompanying notes are an integral part of these financial statements.

[fol. 1389]

EXHIBIT "A"

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Statement of Consolidated Income

	1962	1961
Net revenue from advertising, circulation and other sources	$149,284,000	$176,963,000
Costs and expenses		
Production and delivery	106,591,000	116,492,000
Selling, general and administrative	58,280,000	62,672,000
Depreciation and depletion	5,456,000	5,634,000
Interest	1,673,000	1,169,000
Recoverable federal income taxes	(3,799,000)	—
	168,201,000	185,967,000
Loss from operations	18,917,000	9,004,000
Gain on sale of securities in associated companies	—	4,810,000
Net loss for the year	$ 18,917,000	$ 4,194,000

Statement of Consolidated Retained Earnings
For Year Ended December 31, 1962

Balance at beginning of year	$23,583,000
Net loss for the year	18,917,000
Balance at end of year	$ 4,666,000

The accompanying notes are an integral part of these financial statements.

OPINION OF INDEPENDENT ACCOUNTANTS

To the Stockholders and Board of Directors
The Curtis Publishing Company

In our opinion, the accompanying statements present fairly the consolidated financial position of The Curtis Publishing Company and its domestic subsidiaries at December 31, 1962 and the consolidated results of their operations for the year, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. The accounts of two subsidiaries are maintained on a cash basis; however, memorandum entries have been applied to the cash basis accounts in the accompanying statements to state them on the accrual basis. Our examination of these statements was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

PRICE WATERHOUSE & CO.

Philadelphia
February 18, 1963

[fol. 1390]

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Notes to 1962 Financial Statements

Basis of consolidation

The financial statements include the accounts of The Curtis Publishing Company and its domestic subsidiaries. The Company's other subsidiaries, wholly owned and situated in Canada, are Curtis Distributing Company, Ltd. and T. S. Woollings and Company, Limited.

Accounts receivable

Customers	$ 17,440,000
Less allowance for doubtful accounts	286,000
	17,154,000
Recoverable income taxes	4,136,000
Nonconsolidated Canadian subsidiaries	829,000
	$ 22,119,000

Inventories

Paper and other materials and supplies, stated generally at the lower of cost or market	$ 12,484,000
Publications in process, manuscripts, etc., stated at cost	5,928,000
	$ 18,412,000

Investments and advances

Nonconsolidated Canadian subsidiaries	$ 2,043,000
Other companies, at cost	1,022,000
	$ 3,065,000

The Company's aggregate equity in the net assets of its Canadian subsidiaries exceeded the carrying value of its capital investment by approximately $174,000, based on current rates of exchange at December 31, 1962. No dividends were received by the Company from its Canadian subsidiaries in 1962.

Property, plant and equipment, at cost

Land	$ 2,333,000
Buildings	38,440,000
Machinery and equipment	102,155,000
Timberlands and wood rights	1,664,000
	144,592,000
Less depreciation and depletion	82,909,000
	61,683,000
Construction in progress	2,942,000
	$ 64,625,000

At December 31, 1962 the Company was lessee under long-term leases with aggregate annual rentals of approximately $1,200,000.

Long-term debt

The Curtis Publishing Company	
6% subordinated income debentures, due 1986 (less $635,000 debentures in treasury at par value)	$ 9,970,000
4½% notes to others, due $800,000 annually in 1963 and 1964, $500,000 in 1965 and the remainder in 1966	2,300,000
Instalment purchase contract payable to supplier, due $11,000 monthly including 4½% interest through July, 1967	616,000
New York & Pennsylvania Co., Inc.	
First mortgage 3¼% bonds, due $375,000 quarterly through October 1, 1965	4,125,000
Notes to banks with interest at ½% over prime rate, due in quarterly instalments beginning October 1, 1963 in amounts equal to 1/40 of the principal to the date the first mortgage bonds are paid in full and 1/20 of the principal thereafter; guaranteed by The Curtis Publishing Company	3,000,000
	20,011,000
Less long-term debt due within one year	2,593,000
	$ 17,418,000

Under the terms of the first mortgage bonds, New York & Pennsylvania Co., Inc. mortgaged its property, plant and equipment and assigned the shares of stock representing investments in its domestic subsidiaries. Under the terms of the notes to banks there are certain restrictions relative to the payment of dividends by New York & Pennsylvania Co., Inc., so that at December 31, 1962 consolidated retained earnings are not available for payment of dividends.

Subscription contract deferrals

Subscription contract deferrals represent the unearned portion of gross subscription revenues less related commission expenses stated at estimated amounts allocable to future periods. The balance of such deferrals has been increased by $1,600,000 at December 31, 1961 with an increase in accounts receivable to reflect the unpaid portion of pay-during-service contracts from independent agencies.

Contingent liabilities

The Company is contingently liable in respect to sundry tax claims, lawsuits, and other matters incident to the ordinary course of business. The eventual liability, if any, is not readily determinable but in the opinion of counsel is not material. At December 31, 1962 the Company was guarantor for $1,035,000 on obligations of nonconsolidated affiliates.

Stock options

On December 6, 1962 the Board of Directors of the Company adopted a Restricted Stock Option Incentive Plan, subject to approval by the stockholders. Under the terms of the proposed Plan, a maximum of 300,000 shares of common stock will be reserved for issuance under the Plan from time to time. Options under the Plan will be granted by the Board of Directors to officers and other key employees at an option price per share which will be the lesser of (1) 85% of the fair market value on the date of grant, and (2) 85% of the fair market value on the date upon which the option is exercised.

Mr. Culligan, President of the Company, has been granted options for 50,000 shares of common stock at an option price of $6.8875 per share (95% of the fair market value on the date of grant) exercisable cumulatively as to 20% of such shares in each year commencing January 1, 1963 to July 8, 1967.

Mr. Clifford, Executive Vice President of the Company, has been granted options for 20,000 shares of common stock at an option price of $6.32 per share (85% of the fair market value on the date of grant) exercisable as to 25% of such shares from May 1, 1963 to January 1, 1964, 50% in 1964, 75% in 1965, and all such shares from January 1, 1966 to October 15, 1972.

Of the foregoing 70,000 shares, 15,500 of the shares under option to Mr. Culligan are available from common stock held in the Company's treasury and the options for the remaining 54,500 shares were granted contingent upon approval of a proposed increase in authorized common stock by the stockholders.

Dividends in arrears

Including the dividends accruing January 1, 1963, the Company is in arrears in payment of cumulative dividends on prior preferred stocks as follows:

	Per Share	
$3.00 cumulative	$5.25	$1,756,000
.60 cumulative	1.05	251,000
		$2,007,000

Federal income taxes

At December 31, 1962 the consolidated group had unused operating loss carryovers aggregating approximately $22,380,000 and unused investment tax credits of $363,000.

[fol. 1392]

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 24
[fol. 1393]

Father Is a Football Coach

By JEAN BUTTS JONES,
as told to Furman Bisher

The author, daughter of Georgia's Wally Butts, reveals what it's like to be raised in a football family. "If I had to start over," she says, "I'd still be the daughter of a coach. But it can be an awful million on a girl's romantic life!"

GUS PANOUARELLA PHOTOS

Wally Butts at his Athens, Ga., home with his daughter, Jean, now a coach's wife. "To marry an underprivileged high-school coach!" he exploded, when Jean got engaged. "That's going too far!"

ABOUT THE AUTHOR

Twenty-two-year-old Mrs. Jean Butts Jones is the daughter of one football coach and the wife of another. Her young husband, Frank Jones, coaches the high-school team in Decatur, Georgia, while her father is the famous Wally Butts, dean of the rugged Southeastern Conference, now in his sixteenth season as head coach at the University of Georgia.

Jean is the "middle" daughter in the Butts family of three girls, and with the possible exception of Wally, she has been the most sports-minded person in the household. As a Georgia coed she was the only girl in her gym class who could do ten push-ups. In football season she helped the Georgia cause along as a cheerleader.

Jean majored in journalism at college, and after graduation got a job with the Atlanta Journal. In addition to her work as a newspaper reporter, she sometimes speaks at high-school football banquets. In her speeches she takes much the same light, whimsical line as her father, whose Southern humor is famous at after-dinner speeches all over the country.

—*The Editors.*

Butts girls—Jean, Faye and Nancy—visit their dad at the practice field. Jean claims that those "only hearts" who play college football are afraid to show any interest in a coach's daughter.

WHEN I announced to my family last year that I planned to marry a high-school football coach I had been dating a few months, everyone was pleased except my father, who went up in a puff of smoke. "Marrying any football coach is bad enough," he said in a volcanic mood, "but to marry an underprivileged high-school coach, that's going too far."

My father, Wallace Butts, has been a football coach since 1928, the last sixteen years at the University of Georgia, in Athens. I consider him an authority on matters of football, and on the field he has an extensive reputation as a taskmaster. But he found out you can't coach love, and, to prove it, a few weeks later he marched down the aisle of the First Methodist Church in Athens to give me away to that "underprivileged" high-school coach.

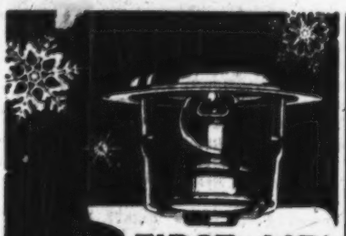
First, let me set the record straight. My husband, Frank Jones, is not an underprivileged coach. His teams at Decatur High School, in a suburb of Atlanta, have won three region championships in a row and twice got to the Georgia state semifinals play-off, each time losing by one point. In two seasons his team lost only one regularly scheduled game. Actually, I think my father was flattered that, after observing a coach's life from the inside for the greater part of my twenty-one years, I should still be brave enough to marry one.

I've heard him say many times, "I know the futile feeling of a high-school coach. I was one myself for ten years, and when I found I was on a dead-end street, I happened to get a college break. But there are still only a hundred good coaching jobs in the country. The field is too limited. You meet a lot of nice people, but you never make any money."

My father is a renowned pessimist, but really, I don't think that coach Wallace Butts or any member of his family has any grounds for complaint. If I had a chance to start over again, I'd still choose to be the daughter of a football coach and the wife of one. I didn't marry

(Continued on Page 170)

1057



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DOLE
THERMOSTATS

FATHER IS A FOOTBALL COACH

(Continued from Page 37)

Frank Jones because he was a football coach, but it didn't hurt his chances any. When I thought about marrying Frank, I remembered something important. Daddy was installing the split-T formation at Georgia, and Frank had coached the split-T several years, so I knew they'd have something in common.

It worked out just beautifully. It's awfully pleasant to sit around and listen to the menfolk talk about overshifting and the option play and brush-blocking and such. A lot of wives wouldn't appreciate it, but when you're raised in a football family it comes just as naturally as matters of the church come to a preacher's family.

A football family doesn't live or die with each victory or defeat, but winning does improve the atmosphere around the house considerably. It isn't, however, quite so serious as Frank made it out to be just before we were married. His team had lost heavily by graduation, and the material looked rather poor for the 1953 season.

In a very serious mood one day, he said to me, "I'm awful sorry our first year will have to be a losing year." As it turned out, it wasn't, but I still chuckle inside when I think of this coach-husband being so greatly concerned about how many games he would win for his bride.

I got my indoctrination early in the vagaries of the coaching family's life. Here's something they say happened when I was only three years old—I remember little about it myself.

Daddy was coaching at Male High, in Louisville, Kentucky, at the time. The big game with Manual High was coming up, and already in those days the name of Wallace Butts was becoming synonymous with pessimism. He had been moaning low around the house all week, telling anybody who would listen to him, "Well, if we lose this one, I guess we'll have to pack up and get out of town."

Male High did lose. I was too little to go to the game, and when they came home and I heard the bad news and saw the sorrowful expressions on their faces, I went up to my room in tears. When my mother came up she found me packing my dolls and clothes. I had taken my pessimistic papa at his word. I was getting ready to get out of town.

We have been a rather fortunate family as football fortune goes. There has been none of the gypsy life for us, here one year and there the next, none of the continual moving and living from one job to the next that is the lot of some coaches. But there have been rough times, like 1951. That was one of daddy's hardest seasons. The Georgia squad was inexperienced and slow. Some businesses he had an interest in, including a restaurant in Athens, took a bad turn. Everything went wrong at the same time, except a sophomore quarterback named Zeke Bratkowski. Fortunately, Zeke came through in a spectacular way, and eased the pain of a season that ended with five victories and five defeats.

In 1953, daddy experienced another season of depression, though by this time I was gone from the family circle and had the problems of my own coach on my mind too. Georgia won only three games and lost seven, the worst record in daddy's whole coaching history. But this distressing season had a positive rather than negative effect. It was plainly evident that Georgia just didn't have the material. Instead of starting a fire-the-coach campaign, Georgia supporters rallied together in the biggest wave of college spirit the state has ever known.

We Buttses have been lucky like that from the start. The game that sent me to my room packing at three was the only one daddy lost to Manual High in three seasons in Louisville, where his record was so impressive that he was hired as an assistant coach at Georgia in 1938. He was appointed head coach in 1939, and since that time his teams have won 104 games, lost fifty-two and tied seven. They have played in seven bowl games and won the Southeastern Conference championship three times.

Daddy was born and grew up in Milledgeville, Georgia, and in February, 1929, he eloped with his home-town sweetheart, Winifred Taylor. He was just out of Mercer University, where he had been a 165-pound end, and was on his first job at Madison A. & M., in Madison, Georgia. He returned to Milledgeville in 1932 to coach at Georgia Military College, a prep school. With the family now increased by two—my older sister, Faye, and myself—we moved to Louisville in 1935. There the third daughter, Nancy, arrived. Then came the final move, back to Georgia and the state university, and here the four Butts women seriously began the process of bringing up father.

There's a tradition, it seems, that football coaches never have sons—they lean predominantly toward the production of daughters. You might think these daughters would have easy access to the manly beasts their fathers coach, but it doesn't work out that way. Being a coach's daughter can be an awful millstone on a girl's romantic life.

A coach's daughter is the last girl in the world a football player is likely to show any interest in, for fear that the other boys will accuse him of playing politics. But if one does happen to be so bold, he is (1) afraid to come around to the house, (2) watching himself like a hawk to keep from violating training rules, and (3) about as much at ease as an escaped convict calling on the sheriff.

On the practice field, you see, my father is as intense as a drill sergeant. He expects his players to work as hard as he is willing to work. The players expect him to be just as tough around home, which is a laugh. We Butts girls always have had him under control, and the tough-taskmaster characterization seems unreal to us.

I have always been a worshiper of the handsome, heroic athlete, but as I grew up, my romantic opportunities with members of the football team were seriously limited by fear of the coach. On bowl trips or away from home, dates came easily with them. But in Athens the players kept their distance, because it meant coming to the house for me or bringing me home.

If they could come around in a group, players were much more at ease, although this didn't always work either. One night I had a little party for some girl friends and their dates, most of them football players. As daddy came in simply to say hello in his most polite manner, one of the boys was so frightened he jumped over a sofa and ran out into the yard to escape.

It hasn't been so hard on Nancy, the youngest, for she has had the benefit of observing her two older sisters. Besides, she's a brash teen-ager who says what she thinks and flinches before no one. Daddy has often said that she is his best critic.

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Write subscribers' names and addresses on plain paper and mail with your own name and address and full remittance. Offer good in Continental U.S. only, until March 31, 1955. Sorry, no corn popper sets may be sold for cash.

CURTIS CIRCULATION COMPANY
772 Independence Square, Phila. 5, Penna.

[fol. 1394]

1058

"What do you think about your sister marrying up with a football coach, Nancy?" he asked her, driving to town one day.

"Well, we've had to put up with you," she said, "and it hasn't been too bad."

"How do women go around picking a husband, anyway?" daddy said. "Don't you think she could do better? That fellow wouldn't win any beauty contest, you know."

"Well, look who's talking! You're a good daddy, I'll give you credit for that, but you're no raving handsome beast yourself. Besides, you wouldn't know anything about love and romance, so why don't you leave those things to the women in the family?"

Nancy has had her trying moments, though. A couple of years ago she was beauty queen of the sophomore class at Athens High School, but on the day of her selection she came home in tears. One of the judges had been Bob West, the captain of the football team, and some of the catty numbers around school had been whispering that Nancy won it in a "fix." She was grief-stricken.

Daughters can be a coach's asset in the process of player recruiting. A constant battle goes on the year round for the high-school football stars who have college ability. All of us have pitched in to give daddy a hand, though I can't honestly say that we have ever been the lone determining factor.

> The only man in history who never looked at another woman was named Adam.
>
> —CARL ELLSTAM.

Once I thought I was going to be, and I threw myself into the case with enthusiasm. The player was a handsome young tackle from Ohio. He played the piano beautifully and he had wonderful manners. Mother thought he was something sensational, and daddy thought so, too, though their perspectives were miles apart.

Finally, the boy smiled across the piano at me, like Liberace, and said he'd come to Georgia if I'd promise to date him. I did my part. I promised, and the tackle came to Georgia, but something happened that was entirely out of my hands. They found out he was ineligible for some reason or other, and the tackle eventually transferred to a school out West.

Many times I've wished I had been born a boy, so I could have played football and helped daddy. I've always done the next best thing. I had an awful scrap with a boy when I was in the fourth grade. He said some things about daddy that weren't nice and I popped him. They sent him to the principal's office and let me go free.

When I was a student at Georgia—Faye and I both attended the university, and Nancy will too—I was a cheerleader. I majored in journalism to help him with his propaganda. Now, on the Atlanta Journal, I'm on the city staff rather than in the sports department, but I do write a series of features each fall weekend about bitter rival Georgia Tech. These pieces take the form of "scouting letters" to daddy.

Right after my wedding, Bobby Dodd, the head coach at Georgia Tech, quipped at a banquet, "Coach Butts is using unfair tactics. He's training his daughters to be newspaper reporters to get all the people on his side, and marrying them off to football coaches to get all the players." I hope it works, I might add.

Football coaching is a twelve-month grind that hits a peak of pressure in September, October and November. We have always tried to make life around the house as easy and as pleasant for our coach Butts as possible, but it's difficult with daddy. Relaxation never has been a natural thing with him. He works as hard at relaxing as some people do at work.

We did get him off to St. Simon's Island on the Georgia coast last summer, and each morning at the miserable hour of four o'clock we arose to go deep-sea fishing with him. He got sick every time he went out, and we wound up doing most of the fishing. After a few days of these predawn sleep wreckers, we began to investigate. We found out that he really didn't give a hang for deep-sea fishing. He had been showing enthusiasm for it just to please us. That ended the deep-sea excursions and we all resumed our delightful sleep, with which the vacation became a vacation again.

He isn't much for swimming either. Once we gave him two dazzling new swim suits for Father's Day. A bright high-school prospect hit town that same weekend. I asked the prospect if he'd like to go for a swim, and when he said he didn't have a suit with him, daddy gave him both of his new ones.

Once, about five years ago, mother decided that he needed a new hobby that would completely captivate him. She selected golf for him, and gave him a set of the finest new clubs she could find. This was not a good idea, for he doesn't like to do anything he can't do well, and so he played with feverish intent at becoming a good golfer. He was knocking himself out, working on his woods, practicing his irons, haunting driving ranges by day and night. Finally, after six or seven months, mother convinced him he should give it up. It had ceased to be a hobby any more. It had become his master, and he was a slave to his passion for the game.

There is no escape for any football coach from the natural hazards of his profession, such as antagonistic alumni, ticket moochers, anonymous telephone callers, doting parents of players—especially mothers—and sidewalk quarterbacks. In that terrible 1951 season we tried to get him to have an on-and-off switch installed on the telephone or to have an unpublished number, but he wouldn't have any part of it.

"Part of my job is talking to the people who are interested in football at Georgia," he said. "They wouldn't be calling if they weren't interested. I can spot the phonies and I can hang up on them, but I'll still give them the chance to call."

Another big problem is last-minute calls for game tickets. Often close friends are just as guilty as anybody. A couple of years ago an old acquaintance who should have known better phoned the day before the Georgia-Georgia Tech game, the state's football World Series, and asked for twenty-two tickets. There not only wasn't an extra ticket at our house, there wasn't one in town. Daddy told the man, an influential Georgia alumnus, that asking for twenty-two tickets was one of the best jokes he'd heard in a long time, but if the man would settle for twenty less, he could take care of him.

Then he came begging to the woman in his life. Only Faye had extra tickets

"Gee, boss, I think you're swell..."

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and she'd been planning for weeks to take two friends with her.

"But this is important," daddy pleaded. "This is for ——, and it might be bread and butter in our mouths. You don't want to see your poor old daddy cold, hungry and penniless just because you wouldn't let him have two little old football tickets back in 1952, do you?"

"I'll let you have them for twenty-five dollars," Faye said.

"But that's scalping," daddy hollered, "and you know I don't approve of scalping!"

"I don't approve of fathers' taking advantage of defenseless daughters either. I think I'm being quite reasonable. I know of some tickets that are selling for fifty dollars a pair. Twenty-five dollars is my price. Take it or leave it."

Reluctantly daddy dug into his pocket and shelled out the twenty-five dollars; then turned around and let the "influential alumnus" have them for game price. We have never let him forget the time he was ticket-scalped by his own daughter.

Game days are always hectic days at our house, a twelve-room red-brick place on a large, shady block of Highland Avenue in Athens. Every bed is always filled, and relatives and friends drop by in a steady stream from Friday night until late into Sunday morning.

The football Saturday usually begins with daddy arising at 6:30 A.M. He never sleeps very well the night before a game. Mother gets up and has breakfast with him, but there isn't much conversation. Some days he is uncommonly cheerful—this mood usually coincides with games which Georgia has been picked to lose decisively. He'll read the morning paper—he follows the newspapers avidly—then drift away without saying good-by to anybody. We won't see him again until we arrive at the stadium, and then our view of him is no better than any other spectator's.

After the game we never know what to expect. If Georgia has won, usually droves of miscellaneous people show up to offer congratulations. If Georgia has lost, only the people who were invited to dinner show up, and they are customarily full of patronizing condolences.

I can't rightfully say that the family suffers as hard through the actual game as daddy, for he is one of the worst sufferers in the coaching business. For the longest while he had a habit of chewing sprigs of grass during the game, like Nebuchadnezzar, the king of Babylon. His stomach began to bother him, and while daddy thought it was being caused by defeat, his doctor told him it was grass. Then he switched to chewing gum. He breaks up the sticks into little pieces and eats—not chews—them during a game.

While he is having his troubles on the field, his family every so often is having trouble of its own in the stands. The worst of these occasions took place while Georgia was losing a heartbreaker to Alabama, 14–7, at Athens in 1949. Everything seemed to go wrong for Georgia that day, and a very fat man sitting directly in front of me decided it was daddy's fault.

"Let's get rid of Wally!" he hollered. No matter what happened, that was his cry. "Let's get rid of Wally!"

Now I realize, of course, that neither my father nor any other football coach ever will achieve universal popularity, even if he should win them all, but it does grate somewhat on the tender nerves of a loving daughter to hear her old man attacked like a baseball umpire. All the while this fellow was bellowing at my father I'd been eating peanuts and placing the hulls on his hatbrim. When he took his hat off, the hulls fell down his back and inside his coat and in his eyes, and he turned furiously on me.

"Yes, I did it," I told him, "and I'm glad. That's my father you've been shouting at, and we love him. Besides, we like to eat, and we can't if he hasn't got a steady job."

He really was a very nice man. He spent the rest of the afternoon apologizing to us. "It isn't that I don't like coach Butts," he said, "but it's just because I love Georgia so much I hate to see them lose." And I guess that's the way it is with most football fans.

It's still pretty hard on a coach's family in a losing season, though.

As you can imagine, daddy is very sensitive to defeat. After the Orange Bowl game in 1949 daddy just wouldn't budge from his room. Georgia had won the Southeastern Conference championship and had been favored to beat Texas, a three-time loser, on New Year's Day. With no pressure on, the loose Texas team won, 41–28—the only major bowl game daddy ever lost. Daddy was simply crushed. They always throw a big postgame party for the players and coaches at a night club in Miami, but daddy refused to go. While mother dressed in her prettiest evening gown, daddy crawled into bed, and nobody could reason with him.

After a while there was a knock on the door, and when mother opened it, there stood Frank Leahy, of Notre Dame, one of daddy's closest friends, and two Catholic priests. They were so appropriately solemn that it looked as if they had come to administer last rites. Mother started laughing, and then daddy, and then all of us. That broke the spell. Daddy got up and dressed and went off to the party to face the music.

Many of his players think of him only as a football coach. If they could see him around the house, those Georgia Bulldogs would never believe it. While he has never washed a dish in his life and couldn't fry an egg without an instructor, he is otherwise a well-domesticated animal.

He loves to show up at mother's teas and stand in the receiving line. When I had parties, he always joined in to help with the serving. It gave him a chance to act cute. He has always lavished gifts on us, and I must say that he's much better about sizes than mother.

There seems to be something magnetic about his personality that attracts characters of all types and all descriptions. This is perhaps native in all football coaches, but in coach Butts and family the characteristic appears to be overdeveloped. Even our cooks have been characters, such as the one who had to resign to have her ninth child without benefit of a husband.

For years and years the leading symbol of undying loyalty at Georgia has been a flap-mouthed Negro waterboy-trainer named Clegg Stark, who doesn't know his own age or how long he has been there. They say that Clegg once was able to throw a football the length of a field. The late Grantland Rice prevailed upon him to demonstrate his mighty arm when Georgia played New York University in New York some years ago. He so amazed the sports writers that several of them wrote at length about the fabulous Negro waterboy from Georgia.

Clegg is held in such esteem by past Georgia football players that they raised a fund to buy him a new house. Then came time for the touching presentation, and old Clegg, wearing his red-and-black Georgia sweater, stood there with his head bowed in humility, occasionally wiping away a dripping tear. Then he stepped forward to make his acceptance speech.

"I sho' do appreciate this from you boys," he said. "But who's gonna pay the tax on it?"

Daddy has had his player characters, too, not the least of whom was a flat-footed, slope-shouldered halfback from Ohio. This player had great talent, but he almost drove daddy wild with his flightiness.

Now, a player's problems are the coach's problems, too, no matter how personal they may be. Romance-stricken Georgia players have come by home many a time to tell daddy they wanted to get married. I've seen the terrified bride-elect sit in the parlor while daddy grew furious with the player in the den. He has always maintained that marriage and college don't mix, mainly for financial reasons. Sometimes daddy has been able to restrain romance, but more times than not he has been the loser.

One day in the spring of 1941, this flat-footed, slope-shouldered boy came by daddy's office and told him he was quitting football. "I want to live a normal student's life," he said. "I want to have some time for a girl friend, like the other fellows on the campus."

This set off another explosion by coach Butts. Spring practice opened without the boy among those reporting, and daddy was resigned to losing him. About a week later, though, the boy came sidling into his office and wanted to know if he could rejoin the team.

"I don't know," daddy said. "I'll have to take a vote of the squad to see."

I'm not sure of this, but I've got a hunch that when the boy went out one door, daddy rushed out the other to hold his ballot. And when the players elected to take the boy back, I'm sure it saved daddy from having a heart attack, for the boy was Frank Sinkwich, in daddy's own estimation the greatest player he ever coached.

Another great one was Charley Trippi, the big star of the only perfect season—1946—that Georgia has had in modern times. Trippi, now with the Chicago Cardinals, was a cold-blooded businessman both on and off the field. But he was a tremendous athlete who could do everything well, and that season he was an overwhelming All-American selection.

Looking back on it all, I can't contend that I've been especially blessed by being a football coach's daughter. Coaches don't make the best fathers in the world, because you don't get to see enough of them.

The months from September to December you may as well scratch off. If you are with him, he's got his mind on 600 other things and seldom knows you're alive. But I don't care to trade my pessimistic papa in on a new model.

Life in a coach's family, with all its hazards, has given me something extra. We've had our trips to the Rose Bowl, to the Sugar Bowl, to the Orange Bowl; and we've had our parties and rubbed shoulders with celebrities. I got one of the greatest thrills of my life when Joe E. Brown introduced me to some friends in New York as "Miss Butts, whom I met in Atlanta." If I hadn't been the coach's daughter, he'd never have remembered me. Other children envied us and our "connections" and "influence" with the coach, and I always felt the envy was justified. I'd have envied them if they'd been in my place.

As a coach's wife now, I find myself living through many of the same joys and agonies I saw my mother experience. She suffered silently with Georgia, but I die violently with Decatur High School. I'm a nervous bundle of screams and hollers and other assorted noises during a game. In football matters my father's nature dominates me. We're both pessimistic. We both feel that anybody who isn't for you is agin you. We both hate to lose, passionately. They call him "The Little Round Man" and me "The Little Round Girl."

Eventually, though, I feel that the lady in me will take over and I shall become the exemplary wife of a football coach. I have been exceedingly well trained for the position. THE END

[fol. 1396]

1960

In United States District Court
Plaintiff's Exhibit No. 25

Locker-room session between the halves of the Georgia-Chattanooga game. The air of gloom was not justified by the final score: Georgia 12; Chattanooga 6.

[fol. 1397]

Georgia Plays for Keeps

By FRED RUSSELL and GUY TILLER

Despite a so-so season this year, few coaches can match the success of Wally Butts, whose teams have smashed their way to six bowl games in eight years. He is a hard-driving perfectionist who is either loathed or loved.

ONE Saturday in 1947, Wally Butts, the exacting drillmaster of University of Georgia football, was attempting to build a fire under a subpar team which had lost the week before to Kentucky by 26–0. After concluding one of the most emotional appeals of his hard-driving career, Wally asked Jules Verne Sikes, then Georgia end coach and now University of Kansas head coach, to check the squad's reaction.

Sikes casually fell in alongside Bob Walston, a freshman halfback upon whom much of Georgia's success depended that day against the Oklahoma Aggies. They strolled toward the players' entrance, through which Georgia players must never walk, but sprint.

"You're all set to give 'em hell, aren't you, Bob?" Sikes asked.

Walston, a cool performer from Columbus, Ohio, looked Sikes straight in the eye, as is demanded of all Georgia players when addressing a coach, and gave the obvious reply, "Yes, sir, Coach Sikes."

Then, before he streaked onto the stadium turf, Walston whirled and said to Sikes, "But if we get near that Aggie goal line, you better send in Coach Butts. He's really ready."

Walston, now an ace Georgia end, wasn't wisecracking about his coach, whom he both fears and respects. None of Wally Butts' strictly disciplined players would dare take such a liberty. Walston was simply stating a fact. On the day of a game, Coach James Wallace Butts, Jr., is always "up"—so highly keyed, in fact, that he avoids his players as much as possible, for fear that he will cause them to become too taut.

Nor would Walston's idea of inserting Coach Butts in the line-up sound too farfetched to those who have seen Wally, at forty-four years of age, bulldoze one of his huge athletes in demonstrating the proper blocking form.

Butts is a stocky, powerful man, built along the lines of a fire hydrant. He stands only five feet, six inches, but weighs 195 muscled pounds. This coach, whose 1948 Georgia team won the Southeastern Conference championship, is such a fanatic on physical conditioning that until 1942 he held daily wrestling matches with giant freshman coach Quinton Lumpkin, six feet two, 225 pounds. Only Lumpkin's entrance into the Navy stopped the bruising sessions. Then Wally took to doing five miles of road work daily. He's always ready. When Georgia lost to Kentucky again in the fourth game of the current season—this time 25-0—Butts was in shape to carry the ball himself, and probably considered doing so.

PHOTOGRAPHY BY FRANK ROSS

Wally Butts has been going hard from his small boyhood in Milledgeville, Georgia, where he was born on February 7, 1905. "Wally's father was, and still is, in the business of felling trees, moving safes, transporting homes to new locations and almost any other type of handy-man job," declares Jere Moore, editor of the local newspaper. "When Wally was knee-high to a cat, he helped his father. He was so busy helping his father that he never had time to get into any mischief or hang around any of the town's joints. When he was a tiny shaver he would spend what few free moments he could squeeze out of his father playing football by himself. He drove himself at a killing pace even then, for his one desire was to be a football star. He finally interested other kids in playing with him, and, although he was one of the smaller boys, he controlled the games. If a big boy picked on a smaller lad, he had to whip Wally. Very few ever achieved that."

When Butts first reported as a kid candidate at Georgia Military College, then a prep school, he was so small that other boys reached over his head into the grab bag of equipment. Butts didn't get a stitch.

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But he turned up the next day in tennis-shoes and a pair of faded pants, stuffed and stitched with cotton by his mother. Another little obstacle, having to milk nine of his father's cows every afternoon after practice, didn't stop him from making the team.

Later, as an end at Mercer University, a Baptist school in Macon, Georgia, he became captain in 1927 and was chosen for the All Southern Intercollegiate Athletic Association team. Bernie Moore, present commissioner of the Southeastern Conference, coached Wally at Mercer. Moore later had such All-American flankmen as Gaynell Tinsley and Ken Kavanaugh at L.S.U., but he still ranks Butts as the best he ever saw at the vital assignment of blocking the opposing tackle.

However, Wally's greatest eminence has come as a coach. He has produced six bowl teams at Georgia in the last eight years. Listen to Notre Dame's Frank Leahy, addressing the Athens Touchdown Club in 1947: "I do not say this for home consumption; I have said it in Chicago, in New York and everywhere I have been asked about my fellow coaches. There is no finer coach in college football than Wallace Butts. There are no better drilled or better disciplined football teams in America than Georgia's."

Leahy and Butts are fast friends. They met at a high-school clinic in Texas in 1942. Each was deeply impressed with the other's offense and defense, and they soon became intimates. Butts annually spends a few weeks in South Bend during Notre Dame's spring practice; when Georgia plays a bowl game, Leahy usually is in Butts' room after each daily practice session.

Rival coaches point out that Notre Dame and Georgia pass patterns bear a striking resemblance. It is also significant that Notre Dame and Georgia both are using a new huddle formation this season, in which the players group themselves like this:

QB

LT LG C RG RT

LE LH FB RH RE

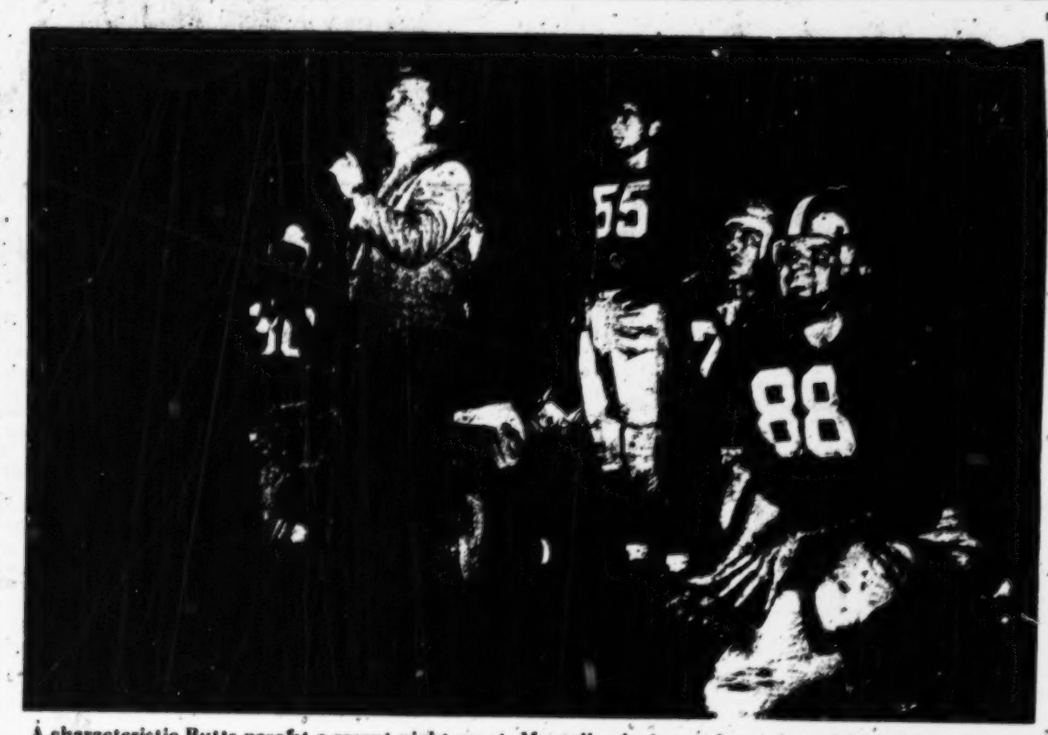
After studying the defense, the quarterback turns, faces his teammates—who are looking toward the line of scrimmage—and calls the play. Advantages: It is more orderly than the normal huddle; it is easier to spot a fatigued or injured player; the players do not lean on each other; all can see the lips of the quarterback; and an assistant coach moving up and down the side lines can easily detect confusion among the team or spot any player who might be arguing with the quarterback.

There is at least one coach who says the Butts-Leahy co-operation goes further than huddles, pass patterns, new defensive strategy and cannily designed trap plays. Paul (Bear) Bryant, of the University of Kentucky, declares, "Every time I line up a truly great high-school player to come here, my hottest competition for him comes from Notre Dame. When we sign a boy to a Southeastern Conference grant-in-aid, we send his name to the commissioner, Bernie Moore, and all schools in the S.E.C. get a list of the boys who have signed with other schools. I believe Butts tips off Leahy on the top boys."

Wally Butts started coaching in 1928 at a small Georgia prep school, Madison A. & M. He tested his players' abilities by scrimmaging with the squad regularly until darkness called a halt. After developing a Southern prep championship team at Madison, he went in 1931 to his home town of Milledgeville to coach his own alma mater, Georgia Military College. After running up a record of thirty-seven victories and only three defeats, Wally moved in 1935 to Male High, in Louisville, Kentucky, where, in addition to coaching, he taught history. Here, too, Butts was successful.

His chance to join a college coaching staff came in 1938, when Harry Mehre left the University of Georgia for the University of Mississippi. Despite Mehre's record of defeating Yale five times when Old Eli was famous for more than saddle shoes and crew cuts, plus his feat of losing only twice in ten years to Georgia's traditional state rival, Georgia Tech, the university alumni kept grumbling for a conference championship and a bowl team.

Butts applied for the Georgia head-coaching job. A member of the university's athletic board asked Wally, "What system do you use?" Butts replied tartly, "I use the color system. I tell the boys simply to go out and knock down everybody not wearing our colors."



A characteristic Butts pose at a recent night game. Mentally playing each man's position, the coach chews grass, moans when a player drops a pass, and despairs when the quarterback calls the wrong play.

Butts did not get the No. 1 job, but he was hired as an assistant coach. Joel Hunt, who had been L.S.U.'s backfield coach, took the top spot, but after a mediocre season and several months of exposing his direct personality to ruffled alumni, Joel was paid off. Butts appealed to the athletic board to grant Hunt a hearing. When this plea was turned down, Wally accepted the head-coaching job himself for 1939.

He inherited a squad short of talent and short of breath. The latter was corrected immediately by a spring-practice grind that started in January and lasted until June, with only Sundays and a few other days off.

"Nobody was in shape when we started," recalls Wyatt Posey, now head coach at South Georgia Junior College, in Douglas.

"But everybody was in shape when it ended. The boys were weeded out from the men quickly. I bet half the original squad quit. They just wouldn't pay the price. That session darn near killed me, but, as trite or silly as it may sound now, it made a man out of me."

The summer following this back-breaking practice stretch was no vacation for Coach Butts and his chief assistant, J. B. Whitworth. Georgia was mired in red ink, but George C. Woodruff, wealthy Columbus, Georgia, alumnus and a former Bulldog head coach, backed up his confidence in Butts with a loan that allowed the athletic association to keep the sheriff away. Butts and Whitworth could entice few of the Southern prep

(Continued on Page 125)

Wally Butts, who is a fanatic on conditioning, weighs the team daily before and after practice. He frequently prescribes lighter practice-field work and more milk for a player needing additional pounds.

GEORGIA PLAYS FOR KEEPS

(Continued from Page 29)

sensations to join a losing Georgia team, so they headed into Pennsylvania and Ohio on a campaign that was Sherman's march to the sea in reverse.

Paul Jenkins, then coaching at Wally's old stand, Male High, tipped Butts about a halfback in Youngstown, Ohio. Paul could not remember the boy's name. The entire sports world found it out two years later, when Fireball Frankie Sinkwich started leading Georgia out of the gridiron swamps. To make certain that Sinkwich did not get homesick, Butts brought along Frankie's buddy, George Poschner, who developed from a fourth-string halfback on the freshman team into an All-Southeastern end.

Wally's first Bulldog team in 1939 was not a success from a victory standpoint, losing to Furman, Holy Cross, Kentucky, New York University, Auburn and Georgia Tech. But the freshman team, liberally sprinkled with Pennsylvania and Ohio boys, went undefeated and was hailed as a point-a-minute whirlwind.

Butts' coaching record since 1939 is among the nation's best. His fabulous freshmen of 1939 won the Orange Bowl bid as juniors and trounced Texas Christian University, 40–26. Georgia wrecked unbeaten Georgia Tech, 34–0, in 1942 to win the Southeastern Conference championship for the first time in history. This brought an invitation to the Rose Bowl, where U.C.L.A. was toppled, 9–0.

In 1943 Butts opened practice with a squad of seventeen-year-olds and 4-F's. With no reserve military unit at Georgia, Butts' 1943–44 record of thirteen victories and seven defeats is an often overlooked high light of his career.

Charley Trippi returned from the service in time to spark the 1945 team to an Oil Bowl triumph over Tulsa, 20–6. Then Georgia went undefeated and untied in 1946, for the first time since the 1896 team won four games without a loss. Trippi and a sophomore quarterback, John Rauch, set the pace as the Bulldogs squeezed past North Carolina, 20–10, in the Sugar Bowl.

Without Trippi, Georgia dropped four games in 1947, but played Maryland to a 20–20 deadlock in the Gator Bowl at Jacksonville. Last year Butts had his third S.E.C. title-winning team. He suffered his first bowl loss, though, when Texas won out in the fourth quarter at the Orange Bowl, 41–28.

Georgia isn't playing four of the highest-ranked teams in the Southeastern this year—Tulane, Vanderbilt, Tennessee and Mississippi—and, although protests by Butts that he has the worst material in the conference are exaggerated, the Bulldogs are not probable contenders for the championship. However, Butts went into this season with a record—including bowl games—of seventy-nine victories, twenty-seven losses and three ties in ten years at Athens.

Except for the morning of the Georgia-Georgia Tech game, when he adopts an aggressive, coldly calculating attitude, Butts continuously moans that he cannot possibly win the next game. He has to this day never admitted having better material than even one opponent. Carter (Scoop) Latimer, who should have known better, once allowed himself to be a silent audience while Butts' tears splashed all over a Greenville, South Carolina, hotel room. Georgia's 1946 team was undefeated and favored to scatter little Furman all over Greenville. But, after listening to Wally, Latimer returned to his sports desk on the News and pounded out a column predicting that Furman would score an upset victory. The score: Georgia 70, Furman 7.

After one late-September scrimmage this year, Butts made, among others, the following characteristic remarks to newspapermen: "There is not an end on the field who can block a tackle. . . . Our quarterbacks are a joke. . . . We can't possibly develop a running game without better blockers at guard. . . . I'll probably get fired after this season. . . . I could run better than most of

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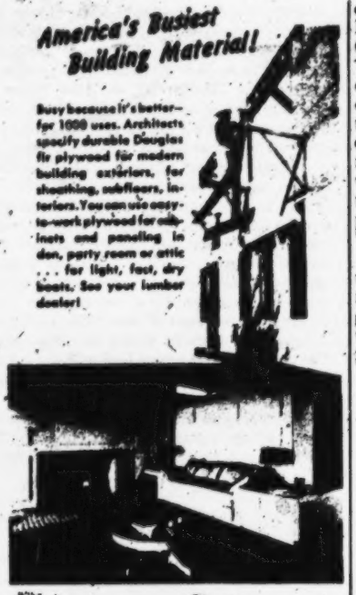

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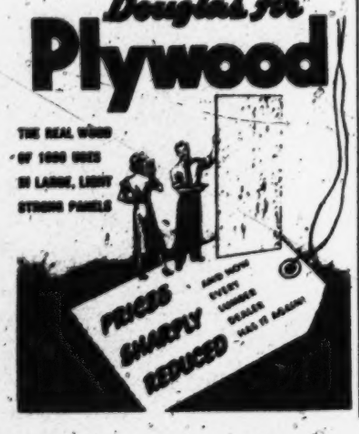

our backs, and I'm an old man. And I'll be much older before poor ole Georgia finishes this season."

Despite his excitement and temper displays at practice, Butts is at his quietest—though churning inside—on the morning of a game. Then his greatest concern is about the weather. "Some mornings he has made me call the weather bureau ten times, though they told me the same thing every time," reports Louis Trousdale, a former aide. "Coach always wants a dry track."

Butts' concern over the weather is understandable. The Bulldogs always fill the air with forward passes. Georgia gained 2101 yards on aerials in 1942, when Sinkwich's heaves alone accounted for 1392 yards, and Lamar (Race Hoss) Davis set a national record by averaging 28.5 yards per catch. The Georgia kid team in 1943 produced Johnny Cook, a seventeen-year-old whose tosses netted 1007 yards. In 1945, Reid Moseley, a Bulldog end, led the nation in most yards for a receiver, 662. Georgia set another conference mark in 1946 when twenty-three passes were fired for touchdowns and Trippi and Rauch completed 54.4 per cent of their tosses. Rauch gained more than 1300 yards in both 1947 and 1948 on passes.

Bo McMillin, former Indiana coach who now directs the professional Detroit Lions, explains it this way: "When Wally was on the All-Star coaching staff with me in Chicago, he drew up a few of his intricate pass patterns. Another member of the staff said he doubted the plays would work because he did not believe four receivers could get out in the open on almost every pass play. Wally said that if his poor little boys down in Georgia did it, he couldn't understand why a bunch of All-Stars couldn't. We did, and we beat the pros."

Butts points out quite truthfully and without the slightest hint of modesty that Georgia's three great All-American backs, Sinkwich, Trippi and Rauch, all were fine passers when they left Athens, but none was a good passer when he first enrolled.

Ed Danforth, sports editor of the Atlanta Journal, discussing this fact, says, "Sinkwich couldn't even throw

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IS Joseph Stalin a ruthless dictator—or merely "good old Joe," a prisoner of his Politburo comrades? Does he mean what he says about Russia's plans—or is he bent on Sovietizing the world? Can we come to a working understanding with him—or must millions continue to fear the oft-threatened "frightful collision" between Soviet Russia and the capitalist world?

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Walter Bedell Smith

in next week's POST

[fol. 1400]

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a spiral. Bill Hartman, the backfield coach, and Butts labored long to develop his ability to pass. What I think finally spurred him on to becoming the finest passer in the South was the fact that the opposition was playing practically an eight-man line against him in every game.

"About Trippi, he had more natural ability than the other two. He could throw mechanically, but he was not naturally talented at picking out pass receivers. When Trippi first came to Athens, he threw with his weight improperly distributed, and he threw a ball that was difficult to catch.

"But, to my mind, Rauch is the crowning achievement of the intensive coaching by Butts. John came to Georgia as a runner and had never played the T formation. Wally was suffering a wartime shortage of material and decided that Rauch was the best quarterback prospect. Then he worked daily all summer in 1945 to develop Rauch into a passer. John became the finest passer in the Southeastern Conference last year."

The boys, none of whom had been sizzling high-school stars, agree with Danforth.

"I owe everything I accomplished in football, and a lot more, to Coach Butts," Sinkwich declares. "I had to learn the hard way"—Sinkwich once went on strike against practicing daily—"but he taught me to become part of a team. He and Bill Hartman taught me to pass. I never would have been effective as a runner if I had not learned to throw."

Sinkwich was paid $20,000 for his first season with the Detroit Lions and became the most valuable player in the National Professional League in 1944.

Trippi is even more emphatic. "Coach Butts is such a perfectionist that he would improve any boy," Charley says. "He alone made me an All-American. People ask why I returned to Georgia instead of entering pro football when I was discharged from the Army. I know what many of them think"—that Trippi was rewarded handsomely by Georgia alumni—"but I shook hands with Coach Butts in his office the day I left to enter the service and I told him then that I would come back and play for him if he needed me, even if I was in the Army ten years. If it hadn't been for Georgia and Coach Butts, I never would have had a chance at an education . . . and the opportunity to play college or pro football."

Trippi signed a four-year contract with the Chicago Cardinals, calling for $100,000. In the spring, he coaches the Georgia baseball team.

Rauch, who is now in his first pro season with the New York Bulldogs, says, "Coach Butts spent more time with me individually than most coaches spend with entire squads. He taught me the T offense and he taught me how to pass. I'm grateful that I was picked on some All-American teams, but they should have picked Coach Butts."

Butts draws criticism from some sources—mostly supporters of rival teams—for bringing in so many boys from the North. His stock answer to such talk is, "I don't care where the boy comes from, how he spells his name or whether he is Croatian or an Australian. All I ask is that he be loyal to Georgia, be proud of that red jersey, and try like hell to get the ball over the goal line."

The mass migration of Northern athletes to Georgia dates from 1939. Since Sinkwich and Poschner, there have been few Georgia freshman teams without a boy from the Youngstown, Ohio, neighborhood. Contacts through these boys and their coaches naturally have led enterprising Georgia talent scouts to other Ohio towns.

Pennsylvania boys started heading to Athens at the behest of the late Harold Ketron, a Georgia alumnus who owned a soft-drink bottling plant at Wilkes-Barre. A former Bulldog football player, Ketron met and admired Coach Butts. So he began to scout high-school prospects in the Wyoming Valley, one of the nation's richest beds of football talent. Trippi, George Young, Andy Dudish, Joe Tereshinski and several others were the trail blazers Ketron sent down as the Bulldogs established a coal-country beachhead.

This year, however, Georgia's freshman team includes twenty native sons. "Northern high-school boys usually are older and therefore stronger and more mature," Butts says, "but the improved high-school coaching in Georgia and the establishment of a full four-year course in all Georgia high schools have strengthened football in the state. There are more fine prospects coming up this year than ever before. It will not be long before our squad can be composed almost entirely of Georgia boys."

Butts, whose four principles of winning football are, in the order of their importance, discipline, conditioning, fundamentals, and pass patterns, is definitely a two-sided personality. Away from football, he is a quiet person whose rare speech is heard in a soft drawl. Despite his strength, his handshake is firm only when compared to a wet shaving brush. He uses no profanity, refuses to touch a cigarette, and imbibes only to the extent of an occasional social drink. His eyesight is poor, but he complains that he does not have time to have glasses properly fitted. Today he's still using a pair that he borrowed last summer from a friend in Chicago to read a menu. He forgets where he last deposited his raincoat, perhaps it was San Francisco, and he buys from four to six hats each year because he cannot remember where the last one is parked.

Such absent-mindedness vanishes at the drop of a halfback. Wally cannot sleep during the football season. He drives himself, as he does his players, to the verge of, but never over, the breaking point. He has student managers keep a record of every play used in scrimmage. Then he memorizes this information to determine which halfback runs which play best, after what sequence a particular play is most effective, and which defensive man makes the tackles on each play. He also insists on regular time trials for the players to see if any have gained or lost speed.

Grades of every member of the varsity and freshman squads are checked periodically, and he orders tutors for those who lag behind in the classrooms. His players must weigh daily before and after practice. He frequently prescribes lighter practice-field work and more milk for a player he thinks needs more pounds. All the single players live in one dormitory, and their specially prepared menus are checked by Wally.

Butts is aggressively independent in seeing that his athletes get the best keep. When overcrowded dormitories threatened to bring a university regulation of four boys to a room, Wally objected strenuously, announcing that if necessary he would install the football players in Athens hotels. This prompted a student to quip, "Why

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[fol. 1401]

1065

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doesn't the university get up a football team of its own and play the athletic association some Saturday? They would beat us, but it would be interesting."

Some players who have served under Butts declare that their love of football was killed by the driving pace at Athens. One ex-Bulldog says, "He is not patient enough with young boys. Too much skull busting goes on. He has made stars out of mediocre high-school players, I'll admit, but I think he has ruined many others by driving them too hard and making them quit. I quit because I didn't get any pleasure out of football."

Probably the most consternation Butts ever caused among his players was when he broke into tears following the Georgia team's great second-half comeback to beat Alabama, 21–10, in 1942. One of the Northern boys on the squad later described it as "the most unbelievable thing I ever saw. It was like watching one of these Confederate monuments weep."

Such a forceful, demanding, dedicated person as Butts is either loathed or loved. On his 1941 team, Frank Sinkwich played, wearing a mask to protect a fractured jaw, and George Poschner with a broken arm in a cast covered with soft rubber. In a later season, Johnny Rauch was to wear a mask to shield a shattered cheekbone. All three begged to play.

Georgia football players are allowed no drinking water during practice or games. When there are substitutions, the men must sprint on and off the field. Nor do Georgia teams sit or sprawl on the ground during time-outs. They stand erect.

In Wally's first season as head coach in 1939, Georgia lost to N.Y.U., 14–13. That set Butts to thinking about extra-point specialists. Since then, the Bulldogs have never lost a game through inability to convert. They have won three by such a margin and tied two. "Too much is at stake on that extra point," Butts says. "We try to develop a boy who does nothing else. We don't want to risk him to injury by playing him during the regular game."

Leo Costa did play twenty-eight seconds in his opening game as a sophomore in 1940, but after that he did nothing but kick extra points. Since time is out when the conversion is tried, Costa finished his career in the Rose Bowl with a total of only twenty-eight seconds' official playing time. Yet he had scored in every game Georgia had played for three years, since no team ever kept Sinkwich and Company from scoring at least one touchdown.

Coach Whitworth, who once kicked an Alabama field goal in the Rose Bowl, is the extra-point instructor. To cure the kicker from watching the flight of the ball, much as a golfer raises his head to watch a drive, Whitworth makes the specialists pick up blades of grass before they look up. Costa always contended that he never saw one of his kicks split the uprights. By the end of the season there is a bare spot in front of each goal post at Athens, where Georgia kickers snatch up the grass after each boot, practice or game.

Billy Bryan kicked twenty-nine conversions in 1944. Then came George Jernigan, the Springfield, Tennessee, rifle. Jernigan was the conference's fourth-leading scorer in 1946 with a record number of conversions, forty-seven. He missed only five. The year before, he kicked thirty-seven out of forty-four.

Whitworth didn't come up with a specialist in 1947 and 1948. Joe Geri, his best kicker, was also one of the best ball carriers. Geri kicked twenty-four out of twenty-eight two years ago, and last season was the S.E.C.'s highest scorer with thirty-six extra points in forty attempts, plus nine touchdowns. This year Butts and Whitworth have another boy who does nothing for his bread and butter but sock that extra point. His name is Wayne Haskins, a 136-pound Lewisburg, Tennessee, sophomore whose right arm was permanently damaged in a hunting accident. Butts, who is extra sympathetic to any crippled person, because his youngest daughter Nancy once suffered paralysis, gave Haskins a scholarship. At first the boy only knew how to kick wearing G.I. shoes.

"He'll make it," Coach Whitworth emphasizes. "He's a game little rascal and he's finally got used to those shoes with the cleats."

Butts' daughter Nancy is twelve. He is the father of two other girls, Winifred Faye, nineteen, and Martha Jean, seventeen. "They all look like their mother, thank goodness," he exclaims. Mrs. Butts is the former Winifred Kaye Taylor, a home-town girl whom Wally married in 1929.

Most football fans, including hundreds of rabid Georgia alumni, see Wally only when he is on the banquet circuit or at civic-club meetings. Here he is a showman. He wails about poor Georgia's inferior material, brags about the fine players other schools are getting; then, after this bit of sabotage, tells delightful stories.

"Sinkwich never would have done anything without my coaching," he lulls his listeners. "Why, in 1941 he ran the same play wrong three times against Florida. I yanked him out of there, gave him the devil and told him what he was doing wrong. Then I let him go back in there. On the first play he ran for a touchdown. That's what great coaching will do." Before the crowd can react to such shameless egotism, Butts adds, "Oh, yes, that's what great coaching will do. He ran the darn play wrong again. But he scored."

Wally Butts is a controversial and a contradictory figure. He has on three occasions kicked outstanding players off the squad for smoking, then turned around and restored their scholarships in order that they might finish their education. But they never played another minute of football. In one such case of a war veteran, Butts attempted to sell the press the idea that the boy had quit football because of ulcers. The boy spilled the beans.

Wally's first contract at Georgia has never expired. The athletic board keeps adding years and dollars to his original pact, and he now has ten seasons to go at what is estimated to be a salary of $17,500. He will, of course, say the figure is much lower.

Butts never misses an opportunity to low-rate his prospects, as he did in 1946 when the Washington Touchdown Club honored him and Trippi. Gen. Maxwell D. Taylor, then West Point superintendent, told the Washington audience that football would be de-emphasized at Army.

When Butts arose to speak, he turned to General Taylor and said, "I don't blame you, general. If I had lost Blanchard, Davis and Tucker, I'd de-emphasize football too. In fact I am just losing Trippi, and I think Georgia might be better off to quit entirely."

Nobody expects Butts to change his ways. He will continue, during the progress of a game, to chew grass, moan when a player drops a pass, throw his arms heavenward when the quarterback calls the wrong play, and frantically wave on the ball carrier when he breaks into the open field.

His players will be disciplined to the point of permanency. Spec Landrum, now an assistant coach at Atlanta's Roosevelt High, tells how indelible an impression Butts makes on his players. "Allen Bloodworth played for Coach Butts at Georgia Military," Spec relates. "Bloodworth later played for Mercer, then became a businessman at Macon. One day he saw Coach Butts walk onto the practice field at Mercer. Coach Butts then was at Georgia and had absolutely no connection in any way with Bloodworth. But when he saw Butts, Bloodworth quickly ground out his cigarette."

Later joshed about it, Bloodworth said, "I knew Coach Butts wasn't in charge of me any more, but I had been one of his boys and I was afraid that he might think he was still in charge. I'd never smoke in front of him."

THE END

"Darn! Just when I get situated, they call the half."

THE SATURDAY EVENING POST

[fol. 1402]

1066

[fol. 1403]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 26

October 22, 1962

Mr. J. D. Bolton
Academic Building
The University of Georgia
Campus

Dear J. D.:

I enjoyed riding to the game with you and Kathryn.

By way of explanation, I did not get back to your car because I was sick at the game—a nervous stomach or something related. Red Leathers came by the press box, to see Harry Mehre and I caught a ride with him.

I was sorry I did not make a better contribution to recruiting but did not feel up to the occasion.

I was sorry about the game. Our first drive was great to watch. The Bulldogs will be alright if all of us "Keep the faith".

Sincerely,

Wallace Butts
Director of Athletics

WB:dm

[fol. 1404]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 27

April 27, 1962

Mr. J. D. Bolton
Academic Building
The University of Georgia
Campus

Dear J. D.:

I think it an unfair deal for you to turn down my expense account to General Neyland's funeral.

He is one of the outstanding men developed in the Southeastern Conference. If I had not gone to the funeral, Johnny had planned to send two members of the coaching staff and their expenses would have been paid by the University of Georgia.

Sincerely,

Wallace Butts
Athletic Director

WB:dm

[fol. 1405]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 28

October 22, 1962

Coach Johnny Griffith
Head Football Coach
The University of Georgia
Campus

Dear Johnny:

I had to leave today (Sunday) for Hattiesburg, Mississippi. I am sorry I did not see you.

Do not worry too much—everything will be alright.

Our first drive was great.

Sincerely,

Wallace Butts
Director of Athletics

WB:dm

[fol. 1406]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 29

February 26, 1963

Coach Johnny Griffith
Head Football Coach
The University of Georgia
Campus

Dear Johnny:

I hope you have a great year in football. You and your staff deserve the good breaks and I hope "the ball will bounce the right way for you".

Sincerely,

Wallace Butts

WB:dm

GEORGIA VERSUS ALABAMA

THE STORY OF A COLLEGE FOOTBALL FIX

A SHOCKING REPORT OF HOW WALLY BUTTS AND "BEAR" BRYANT RIGGED A GAME LAST FALL

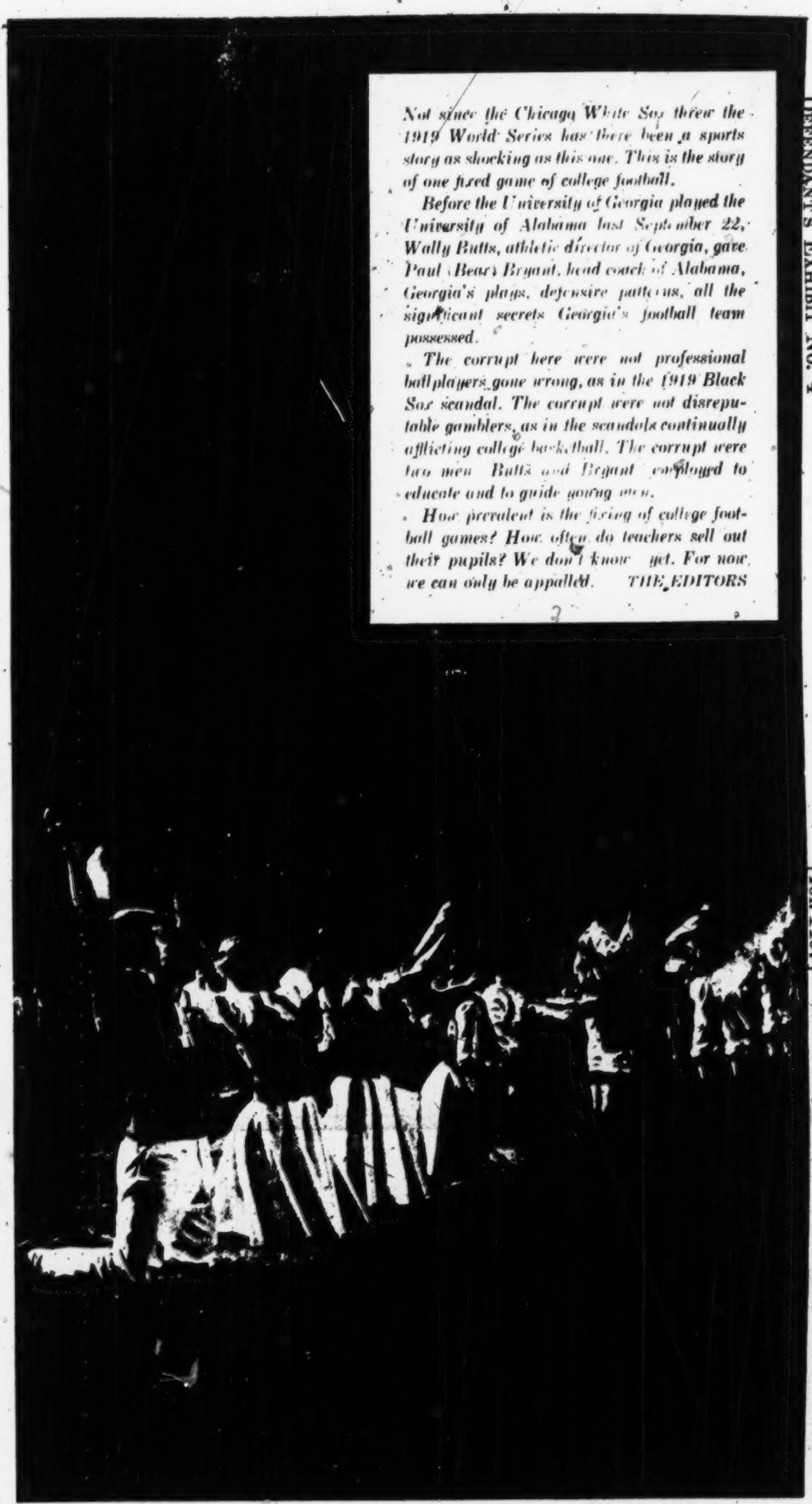
By FRANK GRAHAM JR.

Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men Butts and Bryant employed to educate and to guide young men.

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know yet. For now we can only be appalled. THE EDITORS



On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

IN UNITED STATES DISTRICT COURT
DEFENDANT'S EXHIBIT No. 4
[fol. 1407]
1071

On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up his telephone and dialed the number of a local public-relations firm. The number was Jackson 5-3536. The line was busy, but Burnett kept trying. On the fourth or fifth attempt he had just dialed the final number when he heard what he later described as "a series of harsh electronic sounds," then the voice of a telephone operator said:

"Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"

And then a man's voice: "I'll hold, operator."

Like most males over the age of four in Atlanta, George Burnett is a football fan. He realized that he had been hooked by accident into a long-distance circuit and that he was about to overhear a conversation between two of the colossi of Southern football. Paul (Bear) Bryant is the head coach and athletic director of the University of Alabama, and Wallace "Wally" Butts was for 22 years the head coach of the University of Georgia and, at the time of this conversation, the university's athletic director. Burnett ("I was curious, naturally") kept the phone to his ear. Through this almost incredible coincidence he was to make the most important interception in modern football history.

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Bryant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said. "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller," and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

Through some curious electronic confusion, George Burnett, calling his friend Milt Flack, had hooked into the call Wally Butts was making from a rear office in Flack's suite. He was the third man, the odd man. But he was not out.

Putting the pieces together

In the next few hours Burnett tried to piece together what he knew of Georgia football. Butts, a native of Milledgeville, Georgia, had joined the university coaching staff as an assistant in 1938. A year later he was named head coach. For 20 years he was one of the most popular and successful coaches in the South. Then prominent University of Georgia alumni abruptly soured on him, and on January 6, 1961, he was replaced by a young assistant coach named Johnny Griffith. Butts, filed away in the position of Georgia's athletic director (which he had held along with his coaching job for some years), was outspokenly bitter about his removal from the field.

Burnett knew, too, that Butts recently had been involved in a disastrous speculation in Florida orange groves. Butts had lost over $70,000 because, as someone put it, "you couldn't grow *cactus* on that land." One of his partners in the deal was also an associate of Milt Flack at a public-relations firm called Communications International, the office Burnett had been trying to call when he hooked into the Butts-Bryant conversation.

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes away in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

Eight days later, on September 22, the Georgia team traveled to Birmingham to play Alabama before a crowd of 54,000 people at Legion Field. Alabama hardly needed any "inside" information to handle the outmanned Bulldogs. Bryant, one of the country's most efficient and most ruthless coaches—he likes his players to be mean, and once wrote that football games are won by "outmeaning" the other team—had built a powerhouse that was in the middle of a 26-game winning streak. Alabama was the defending national champion, combining a fast-charging and savage-tackling defense with an effective attack built around a sensational sophomore quarterback named Joe Namath. The Georgia team was composed chiefly of unsensational sophomores.

Various betting lines showed Alabama favored by from 14 to 17 points. If a man were to bet on Alabama he would want to be pretty sure that his team could win by *more* than 17 points, a very uncertain wager when two major colleges are opening the season together and supposedly have no reliable line on the other's strengths and weaknesses.

Bryant, before the game, certainly did not talk to the press like a man who was playing with a stacked deck.

"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) snapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

"The Georgia backfield never got out of its backfield," one spectator said afterward. And reporter Jesse Outlar wrote in Atlanta's Sunday *Journal* the following day: "Every time Rakestraw got the ball he was surrounded by Alabama's All-American center Lee Roy Jordan and his eager playmates."

Georgia made only 37 yards rushing, completed only 7 of 19 passes for 79 yards, and made its deepest penetration (to Alabama's 41-yard line) on the next to the last play of the game. Georgia could do nothing right, and Alabama nothing wrong. The final score was 35–0, the most lopsided score between the two teams since 1923.

It was a bitter defeat for Georgia's promising young team. The 38-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned. Asked about the game by reporter Jim Minter, he said: "I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. "'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32–6.)

Only one man in the Georgia camp did not despair that day. Asked by reporter

Wally Butts, former athletic director of Georgia: He gave away Georgia plays, defense patterns.

Head coach Paul (Bear) Bryant of Alabama. He took plays for his defending national champions.

George Burnett of Atlanta: He overheard critical long-distance call.

[fol. 1408]

1072

Solemnly Wally Butts leads a Georgia football team in locker-room prayer.

Downcast coach Griffith slouches near bench as Georgia team is slaughtered.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential*."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furore, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

"You know, Bob," Burnett said, after they had talked business for a while, "there's something that's been eating me up for a long while. I was going to tell you about it at the time, and then I decided to keep quiet. But I think you should know this, being a friend of Johnny Griffith."

After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go ahead but to try to keep his name out of it. Powerful men in Georgia might be offended if Wally Butts was hurt, and Burnett did not want to jeopardize his own career just when things were beginning to break nicely for him.

But like so many others, Burnett found that there is no such thing as a little involvement. Griffith pressed to meet him, and nervously Burnett agreed. In the middle of January he met with Edwards and Griffith in the Georgia coach's room at Atlanta's Biltmore Hotel. Simultaneously a general meeting of the Southeastern Conference coaches was taking place at the Biltmore.

The Georgia-Alabama game had been forgotten by most of the coaches and athletic officials present. A popular topic of conversation was a late-season game between Alabama and Georgia Tech, in which Bryant's long winning streak had been broken.

Alabama, a five-point favorite, had trailed 7–6 with only a little more than a minute to play. Then Alabama made a first down on the Georgia Tech 14-yard line. Since Bryant had a competent field-goal kicker, the classic strategy would have been to pound away at the middle of Tech's line, keeping the ball between the goalposts and, on third or fourth down, order a field-goal try. (Alabama had defeated Georgia Tech on a last-minute field goal in 1961.) Instead, Bryant's quarterback passed on first down. The pass was intercepted, and Georgia Tech held the ball during the game's waning seconds, thus scoring last season's greatest upset.

During the January conference at the Biltmore, Bryant was frequently kidded about that first-down pass.

Away from the bars and the crowds, in Griffith's room the talk was only of Georgia-Alabama. Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Suspicions confirmed

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left. "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to

Head coach Johnny Griffith of Georgia's beaten Bulldogs: "I never had a chance."

remain in his job. On January 28 a report reached the newspapers that Butts had resigned. At first it was denied by Butts and the university. A few days later it was confirmed with the additional news—that Butts would remain as athletic director until June 1 so that he could qualify for certain pension benefits. Rumors flooded Atlanta. One of the wildest was that Butts was mysteriously and suddenly ill and had entered the state hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game.

But if Butts was seen publicly, events involving him remained closely guarded secrets. Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University of Georgia. There he met Dr. O. C. Aderhold, the university president. Burnett's story was carefully checked. He then agreed to take a lie-detector test, which was administered by polygraph expert Sidney McMain, in the Atlanta Federal building. Burnett passed the test to everybody's satisfaction.

Phone-company check

Next an official of the Southern Bell Telephone Company checked and found that a call had been made from the office of Communications International to the University of Alabama extension noted by Burnett on his scratch pad. This information corroborated Burnett's statement that the call had been made at about 10:25 in the morning and had lasted 15 or 16 minutes.

"I jotted down the time when the call was completed," Burnett said. "It was 10:40. This is an old navigator's habit, I guess. For instance, I know that I was shot down over Saint-Vith at exactly 10:21, because when the bombardier called 'Bombs away!' I looked at my watch and wrote down the time. A few seconds later we got hit."

University officials still nursed reservations about Burnett's story because of the fantastic coincidence that had enabled him to overhear Butts's call. Then, during one of the many conferences he attended in attorney Barwick's office in the Rhodes-Haverty Building, a second coincidence, equally odd, cleared the air. Barwick placed a call to Doctor Aderhold at the university. Suddenly, Barwick and Aderhold found themselves somehow braided into a four-way conversation with two unknown female voices. The two men burst into nervous laughter. Burnett's story gained a little more credence.

February 21 was a painful day for George Burnett. He was summoned once more to Barwick's office, because Bernie Moore, the commissioner of the Southeastern Conference, "wanted to ask some questions." On Burnett's arrival he found not only Moore but Doctor Aderhold, two members of the university's board of regents, and another man identified as Bill Hartman, a friend of Wally Butts.

From the start, Burnett sensed a mood of hostility in the air. The ball was carried by one of the members of the Georgia board of regents, who confronted Burnett with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END

Butts and Bryant meet as friends, exchange warm greetings before the Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1960.

[fol. 1411]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 11

April 2, 1963

I, M. H. Blackshear, Jr., Deputy Comptroller General, hereby certify that the attached document is a true and correct copy of an original document on file in the Office of the Comptroller General, Ex Officio Industrial Loan Commissioner, this 2nd day of April, 1963.

(Signed) M. H. BLACKSHEAR, JR.

Wallace Butts
Statement of Financial Position
July 17, 1961

ASSETS

Cash on Hand and in Bank	4,825.00	
Marketable Securities	52,662.00	(1)
Real Estate (2 houses and 3 lots)	20,000.00	
Investments in Closely Held Corporations	93,500.00	(2)
Residence and Furniture	90,000.00	(3)
Automobiles	8,300.00	(3)
Cash Surrender Values of Life Insurance (Approx.)	80,000.00	
Total Assets	349,287.00	

LIABILITIES AND NET WORTH

Liabilities:		
Notes Payable - National Bank of Athens	34,500.00	
Notes Payable - Citizens & Southern National Bank	6,799.00	
Notes Payable - Bank of Gray	7,500.00	
Loans Against Cash Surrender Values of Life Insurance	65,000.00	
Mortgage Payable - Residence	13,500.00	
Note Payable - First National Bank and Trust Co.	16,000.00	143,299.00
Net Worth:		
Wallace Butts, Net Worth		205,988.00
Total Liabilities and Net Worth		349,287.00

(1) Includes 7,000 shares of Continental Enterprises Stock, and 1,300 shares of Georgia International Life Ins. Co. Stock

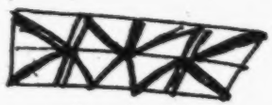
(2) Orange River Groves, Inc. - $78,500.00 (Notes Receivable and Stock)
Hollywood Estates, Inc. - 15,000.00
$93,500.00

(3) Fair Market Values

Prepared From Information Furnished:

Wallace Butts
Wallace Butts

Thomas L. Williams CPA
Thomas L. Williams, Certified Public Accountant



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1491

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Greatest - In - Histon

Compliments H. E. KNIGHT
BANNER PRINTING SERVICE, Conley, Ga. PHONE 622-4353

Fakestraw to Rt.

Optional LEFT Pass

IF can Block man on corner Keeps Running

Well Disiplined Ba

Club -

Added Two Coaches

Compliments H. E. KNIGHT
BANNER PRINTING SERVICE, Conley, Ga. PHONE 622-4353

on Side guard pulls on Sweep –

Don't over shift.

Woodard commits Fast – Safety Man

Weak Defense any body except Blackburn

Baer / Slot Rt

Split Rt Endout

Long Count Left Half in motion

Best since Trippi

Porter Field

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Baer on a Hook on Goal Line

Slot to Rt

Ends Normal (3 yds)

Rt half Back on Fly - Lt. Half Back

G. B. Gives to L.H.

L. G. Pulling Blocks on Corner -

Compliments H. E. KNIGHT
BANNER PRINTING SERVICE, Conley, Ga. PHONE 622-4353

Slot or Wide Slot till Goal Line

Can't Quick Kick

Slot Rt - Rt Half On Fly Screen to him

29-0 Series Baer catches Everything they Throw

Compliments H. E. KNIGHT
BANNER PRINTING SERVICE, Conley, Ga. PHONE 622-4353

Slot Rt

LT End out 15 yds

Go Drop End Over Go Curl in with Tackle (Defense)

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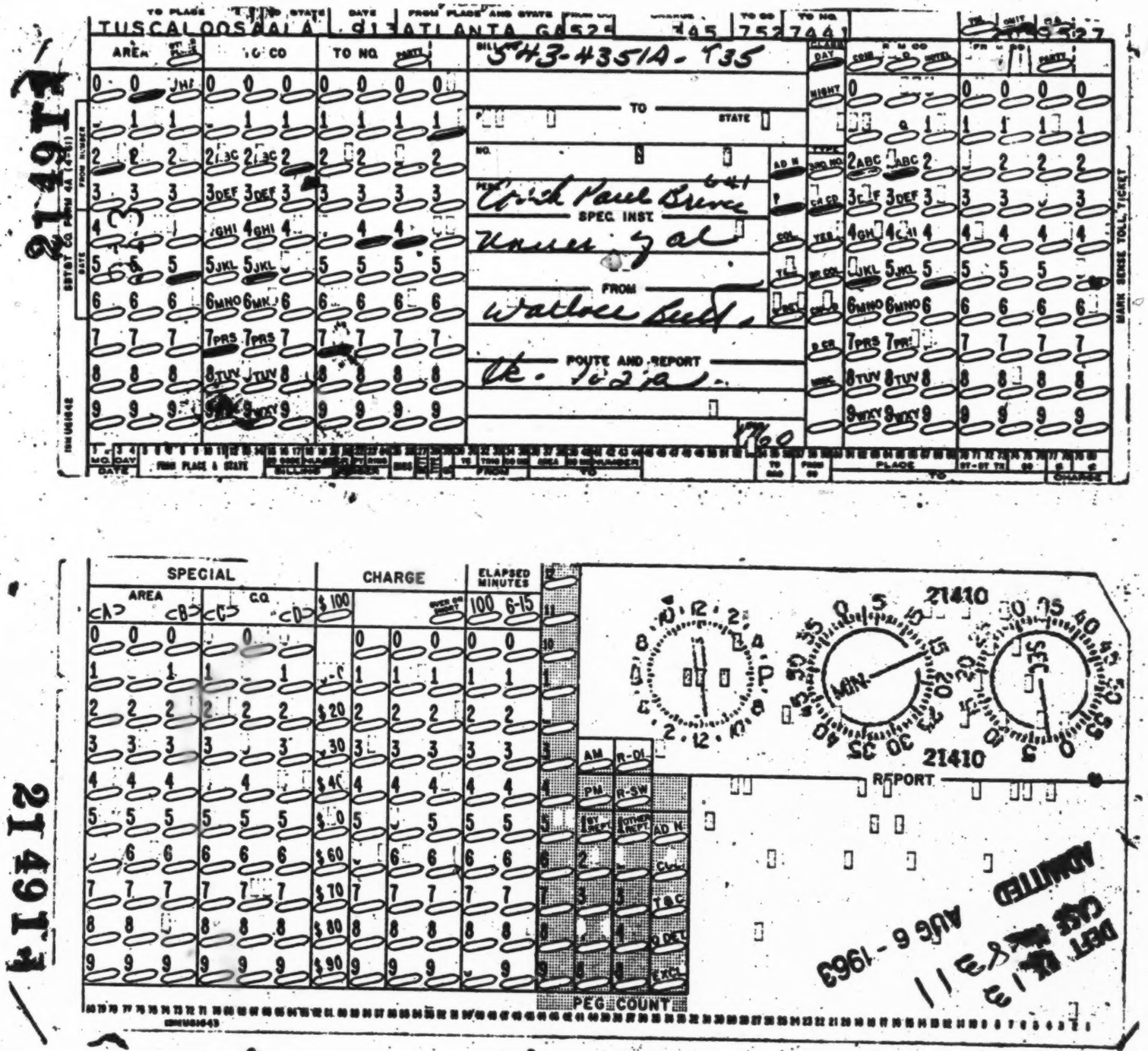
Give Ring Sundae

-6 41 - 4th Traffic Officer

10-40 AM - Sept 13-1962

To. 5-3 536

Compliments H. E. KNIGHT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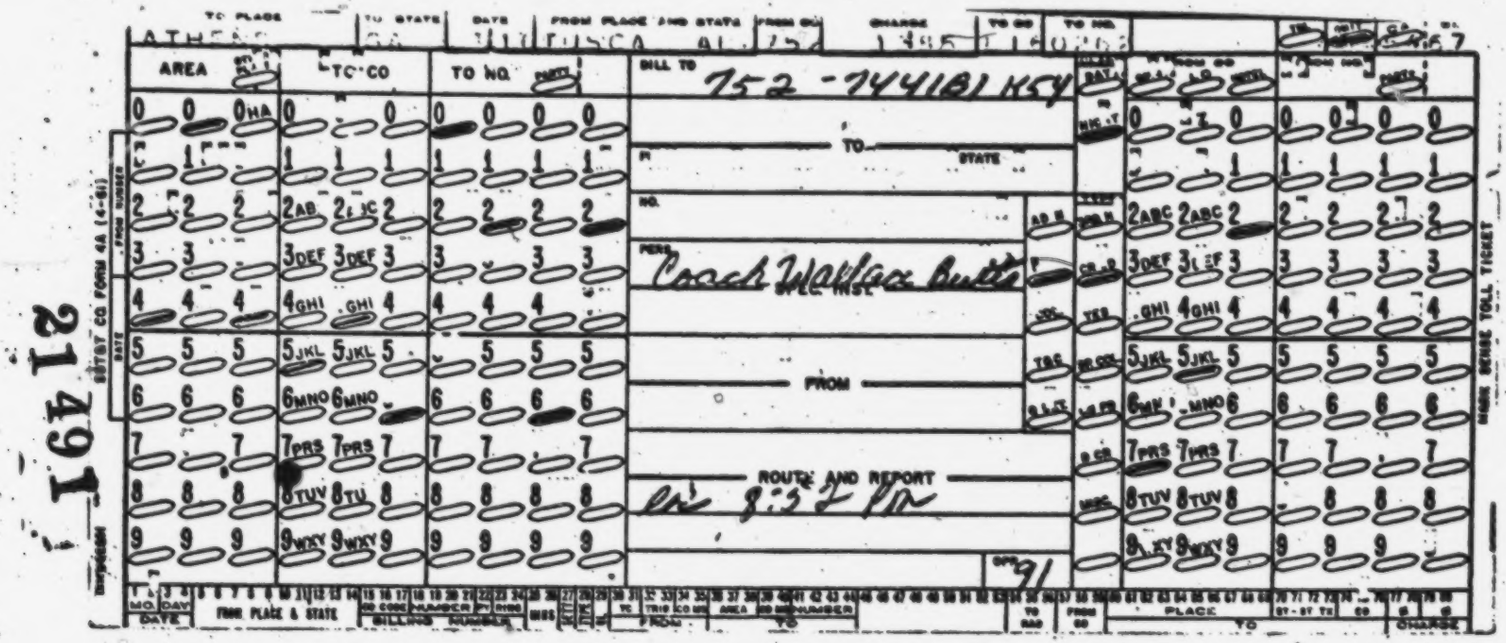
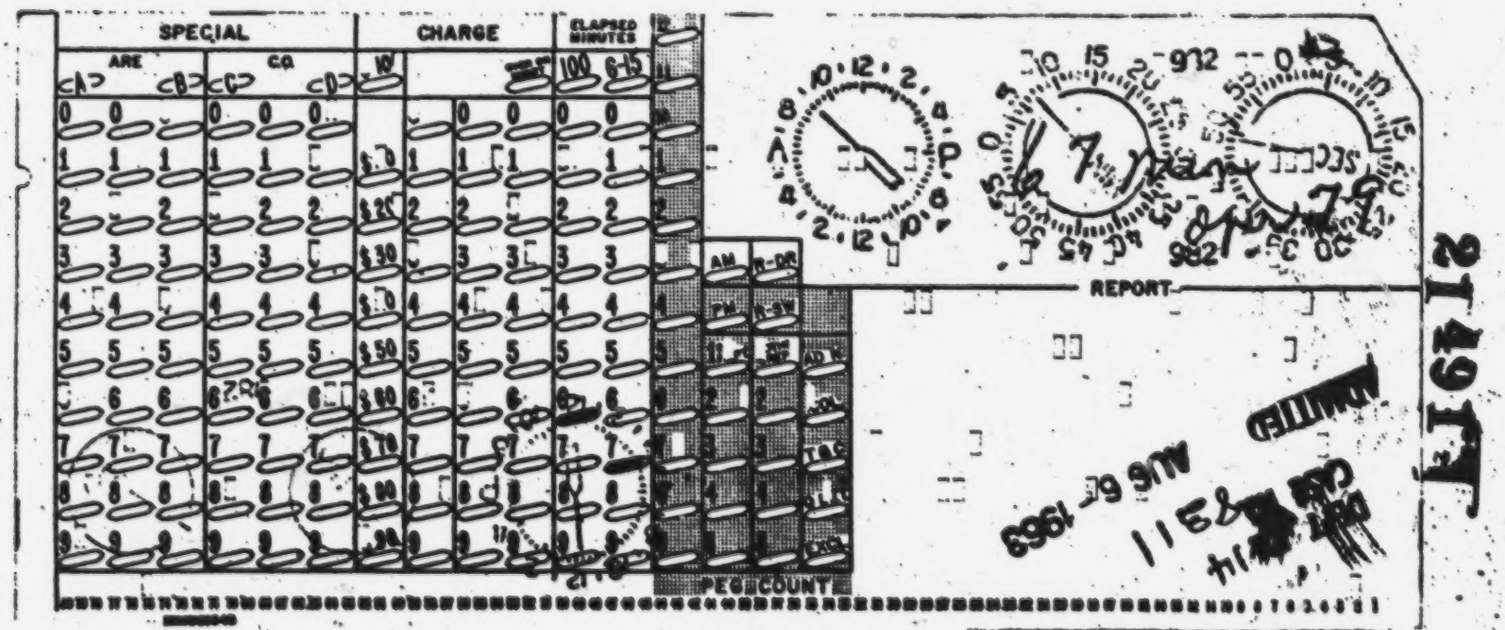
IN UNITED STATES DISTRICT COURT
DEFENDANT'S EXHIBIT No. 14

[fol. 1417]





[fol. 1418]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 19

Athens, Georgia
March 26, 1963

Mr. James H. Therrell
Assistant Attorney General
For the State of Georgia

After viewing the alleged notations made by George Burnett while listening to an alleged telephone conversation between Wallace Butts and Bear Bryant on September 13, 1962, it is my opinion, as one of the coaches of the University of Georgia football team, that if such information was given to Coach Bryant before the opening game of the season, it conveyed vital and important information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team and could have affected the outcome of the game on September 22, 1962.

(Signed) JOHN W. GREGORY
John W. Gregory

[fol. 1419]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 20

Athens, Georgia
February 23, 1963

Dr. O. C. Aderhold, President
The University of Georgia
Chairman of the Athletic Board

Dear Dr. Aderhold:

During the past two years, I have developed business interests. I find that I am having to devote more time to these interests. It is for this reason that I submit my resignation as Athletic Director of the University of Georgia, effective February 29, 1963.

I am grateful to you and the members of the Athletic Board for your cooperation through the years.

Yours very truly,

(Signed) WALLACE BUTTS
Wallace Butts
Athletic Director

[fol. 1420]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 21

UNIVERSITY OF ALABAMA

UNIVERSITY, ALABAMA

Office of the
President

March 6, 1963

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Confidential

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer the Rules Committee the defenses used by Coach Bryant, L.S.U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be [fol. 1421] expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

[fol. 1422] Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially yours,

(Signed) FRANK A. ROSE
Frank A. Rose
President

FAR/mhp

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 34

The following portion of the Constitution and By-Laws of The National Collegiate Athletic Association was introduced in evidence without objection and admitted as Defendant's Exhibit No. 34:

Section 6 (a) of Article III which is as follows:

"Section 6. Principles of Ethical Conduct.

(a) Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics, and students competing in intercollegiate athletics shall deport themselves with honesty and sportsmanship at all times to the end that intercollegiate athletics, as a whole, their institutions and they, as individuals, shall stand for the honor and dignity of fair play, and the generally recognized high standards associated with wholesome competitive sports. (Adopted: 1/11/52)."

[fol. 1423] Also the following paragraph of the Official Procedure Governing The National Collegiate Athletic Association Enforcement Program, which was likewise introduced as a part of Defendant's Exhibit No. 34, which was admitted without objection:

"Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen."

[fol. 1424]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia.

PRINTED SUPPLEMENTAL RECORD ON APPEAL

[fol. 1425]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPELLANT'S ADDITIONAL DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 30, 1964

In accordance with Rule 23 of the Rules of this Court, Appellant hereby designates the following portions of the supplemental record in this case, which were forwarded to the Clerk of this Court in connection with Appellant's Appeal from the denial of its Motions for a New Trial Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure:

1. Defendant's Motion for a New Trial Pursuant to Federal Rule of Civil Procedure 60(b), with Exhibits A, B and C (filed February 28, 1964).

2. Entire deposition of Dr. Frank A. Rose, taken in the case of *Paul Bryant* v. *The Curtis Publishing Company,* No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 8, 1964.

3. Entire deposition of Dr. Frank A. Rose, taken in the case of *Paul Bryant* v. *The Curtis Publishing Comany,* No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 17, 1964.

4. Entire deposition of Mrs. Marian H. Park, taken in the case of *Paul Bryant* v. *The Curtis Publishing Company,* No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 8, 1964.

[fol. 1426] 5. Order of the District Court denying Defendant's Motions for New Trial pursuant to Rule 60(b), Federal Rules of Civil Procedure (filed April 7, 1964).

6. Notice of Appeal from denial of Defendant's Motions under Rule 60(b), Federal Rules of Civil Procedure (filed April 10, 1964).

Submitted by:

Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303. Jackson 2-7420.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DESIGNATION BY APPELLEE OF ADDITIONAL MATTERS TO BE INCLUDED IN THE RECORD—Filed May 4, 1964

Appellee, as authorized by Rule 23(a) of this Court, designates the following additional matter to be printed in the record in this action, in addition to the portions of the supplemental record in this case which were designated by [fol. 1427] Appellant as transmitted to the Clerk of this Court by letter from counsel for Appellant dated April 29, 1964:

1. Plaintiff's Response to defendant's Motions for New Trial under Federal Rule of Civil Procedure 60(b), filed in the office of the Clerk of the United States District Court, for the Northern District of Georgia, on March 6, 1964.

Respectfully submitted

William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Wallace Butts, Appellee.

Of Counsel: Troutman, Sams, Schroder & Lockerman, 1605 William Oliver Bldg., Atlanta, Georgia 30303.

[fol. 1428]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8311

WALLACE BUTTS, Plaintiff

versus

THE CURTIS PUBLISHING COMPANY, Defendant.

DEFENDANT'S MOTIONS FOR NEW TRIAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)—Filed February 28, 1964

I.

Defendant, having recently discovered evidence, which, although in existence at the time of trial, could not have been discovered by the exercise of due diligence, and which bears directly on the crucial issue in this case and is so significant that it would probably change the result if a new trial were granted, hereby moves this Court pursuant to Rule 60(b) (2) of the Federal Rules of Civil Procedure to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. As more specifically set forth in paragraphs 2 through 11 hereof, it is now established that the testimony of two key witnesses of plaintiff, given in the trial of this action, was false in that:

[fol.1429] (a) Dr. Frank A. Rose, in a deposition taken in an action then pending in the United States District Court for the Northern District of Alabama, entitled Paul Bryant v. Curtis Publishing Com-

pany, Civil Action No. 63-166, has, under oath, recanted and contradicted his testimony in this action that he dictated the letter dated March 6, 1963, to Dr. O. C. Aderhold (Exhibit D-21), a copy of which is attached hereto and made a part hereof as "Exhibit A", hastily, because he was catching the 8:40 A. M. flight to Washington, D. C. in order to attend a meeting of the American Council on Education.

(b) Dr. Frank A. Rose's testimony in this action that Exhibit D-21 was a hastily dictated, error-laden letter, has been shown to be false by the testimony, under oath of his secretary, Marian Park, given by deposition in said Bryant action, and corroborated by her shorthand notes contemporaneously made, that Exhibit D-21 was the fifth in order of thirty-two (32) letters "slowly and thoughtfully" dictated by Rose on the morning of March 5, 1963, and by a typed draft of a letter from Rose to Aderhold, dated March 5, 1963, found in the files of Rose, which is substantially but not entirely the letter identified as Exhibit D-21.

(c) The trial testimony of both Dr. Frank A. Rose and Paul Bryant that Bryant at no time remembered the telephone call to Butts of September 16, 1962, has been shown to be false by a letter from Bryant to Rose, dated February 28, 1963, which Rose has admitted, [fol. 1430] under oath, in the aforesaid deposition that he received. In said letter Bryant stated he remembered said telephone call "very well", as well as the subject matters of the call.

2. At the trial of this cause, defendant contended that the allegedly libelous statements contained in an article published in its publication THE SATURDAY EVENING POST entitled "The Story of a College Football Fix" were true and that in fact Wallace Butts, Athletic Director and former football coach of the University of Georgia, had given information on Georgia football plays to Paul Bry-

ant, Athletic Director and football coach of the University Alabama, immediately prior to the September 22, 1962, Georgia-Alabama football game.

3. Defendant introduced uncontradicted records of the Southern Bell Telephone Company which established that Butts and Bryant prior to the football game between the University of Georgia and the University of Alabama, were participants in a fifteen-minute telephone conversation on Thursday, September 13, 1963, and a sixty-seven minute telephone conversation on Sunday, September 16, 1962.

4. Defendant then called George Burnett, a witness who testified that he overheard the telephone conversation on Thursday, September 13, 1962, and that during said conversation Butts in fact gave information on Georgia football plays to Bryant.

5. Defendant then called J. D. Bolton, Comptroller of the University of Georgia, a witness who testified that during the course of the University of Georgia's investigation, Butts, when confronted with the evidence of George [fol. 1431] Burnett, said: "No doubt the guy heard what he said he heard."

6. In their testimony at trial, both Butts and Bryant refused to admit that they had engaged in said telephone conversations, and thus that no information concerning Georgia football plays had passed from Butts to Bryant.

7. As further proof of the fact that Butts had indeed given information concerning Georgia's football plays to Bryant, defendant produced Exhibit D-21, the letter dated March 6, 1963, from Dr. Frank A. Rose, President of the University of Alabama, to Dr. O. C. Aderhold, President of the University of Georgia, wherein Rose stated that Bryant admitted that Butts had given him information on Georgia football plays during the two telephone conversations.

8. Plaintiff then called Rose as a witness in an effort to explain away the damaging effect of Exhibit D-21.

9. The recently discovered evidence which is the basis for this motion completely repudiates the trial testimony of both Bryant and Rose on the following points:

a. At trial, Rose testified that Exhibit D-21 was not an accurate representation of Bryant's statements because the letter was dictated hurriedly on the morning of March 6, 1963, and was not corrected by anyone since Rose had to catch an 8:40 A. M. airplane to Washington, D. C. for a meeting of the American Council on Education. Rose's unequivocal testimony was:

> "A. . . . I told Dr. Aderhold that I would be unable to give him an immediate report of my conversation [fol. 1432] with Coach Bryant, as I had to go to New York City to attend a meeting of the National Foundation for Infantile Paralysis, would be gone most of the week, which I was. I returned on Thursday evening, was tied up in conferences all day Friday, and then had to leave again Monday morning to go to Washington for a meeting of the American Council on Education, and I wrote to Dr. Aderhold that morning before I left.
>
> • • • • •
>
> "Q. There was identified here yesterday a document, Exhibit No. D.21, being a letter to Dr. O. C. Aderhold, dated March 6, 1963, signed Frank A. Rose, from the office of the President, University of Alabama. The original at the moment is not available. I want to ask you some questions about that, if you recognize it as a letter from you to Dr. Aderhold—
>
> "A. Yes, sir.
>
> "Q. —or a copy of a letter?
>
> "A. This is a copy of the letter I dictated to my secretary on the morning of March the 6th, before I left to go to Washington. I had to catch a plane at 8:40

and hurriedly dictated this letter. I did not have time to read it after dictating it. She signed it, was to confer with Coach Bryant and ask him if this was a good interpretation of the conversations that we had. Coach Bryant was out of the City, and she signed it and sent it on to Dr. Aderhold." R. 1415-1416.

• • • • •

[fol. 1433] "Q. Is it your testimony—is it your testimony or is it not that you dictated the letter and your secretary signed it before you saw the letter written? Is that right?

"A. Yes, sir. And she was to check it with Coach Bryant to see if this was a good representation of our discussion.

"Q. Did she check it?

"A. No, sir. He was out of town, and I had told her to get it off that day, and she went ahead and sent it." R. 1457-1458.

Subsequent to trial, the deposition of Rose (filed contemporaneously herewith and made a part hereof) and his secretary, Marian Park, were taken in the action brought by Bryant referred to above. At said depositions, Rose and his secretary testified that Exhibit D-21 was not dictated on March 6, 1963, and Rose admitted that he was incorrect in testifying at trial that he had to catch an 8:40 A. M. airplane for Washington, D. C. on March 6, 1963:

"Q. Now, you stated previously in your testimony in Atlanta that the letter was dictated in a hurry on the morning of March 6th as you had to catch an 8:40 plane to Washington; is that correct?

"A. That's what I stated, but I didn't have my date book there with me previous to leaving here." Dep. 90.

• • • • • •

"A. Well, on checking my calendar before leaving here to go to Atlanta, I looked at March 6th and saw Washington there on my calendar, and took it that

that was the destination. The plane leaves here in the [fol. 1434] morning at 8:40 to go to Washington and New York and other places. But I am not positive that this was where I went; I am not positive that I dictated the letter that morning. Now, also, in my testimony, I said on Monday, Monday is the 4th. But, I didn't have my date book with me at the trial to check out the dates, and as I told you, I was going through two crises at that time as far as the University was concerned, and all I did was quickly refer to my calendar and saw that Washington was on March 6th; but, that meeting probably had been changed to our Friday meeting in Washington, which I met with Mr. Bennett, or it could have been that I went to Washington. I don't know, but during that period, during the period of January—of February, March, April, May, June, I took many trips to Washington, and over the State of which there are no records. Nothing on my calendar to designate that, because many of them were confidential trips to try to work out some of these problems that we have here at the University.

"Q. Doctor, is it fair to say that you cannot state, under oath, that you went to Washington on the morning of March 6th?

"A. I am saying that I am not sure.

"Q. And that when you said under oath in Atlanta that you did that, that it may be incorrect?

"A. It could be incorrect because I didn't have my date book. But, to me it is immaterial. I dictated the letter to my secretary hurriedly. I told her to check with Coach Bryant. I left this office to go somewhere, and during the interval, she typed the letter and tried [fol. 1435] to get in touch with Coach Bryant. He was out of town. She went ahead and mailed the letter. I didn't sign it, I didn't read it before it went out, and I left this office and I don't know exactly where I went. My calendar said March 6th I went to Washington.

"Q. Let's go back for a moment.

When did you dictate the letter?

"A. I am not sure when I dictated the letter.

"Q. Now—

"A. I thought looking on my calendar in August that I dictated the letter on Monday morning, March 6th; but, March 6th was Wednesday morning, and all I did was look at March 6th in August before I went over to Atlanta. I saw Washington there, and I thought that was the morning that I dictated the letter and went to Washington. On checking my secretary's notes, she had there that I dictated the letter on Tuesday morning. She states that she could be in error, that it could have been Monday morning. But, apparently now it looks as though I dictated the letter on Tuesday morning and left to go somewhere.

"Q. And Tuesday would be March 5th?

"A. Yes, sir." Dep. 91-93.

"Q. Am I correct that it is now your best recollection that the letter was dictated on Tuesday, March 6th [5th]?

"A. I don't have any recollection about it at all. I don't know when it was dictated. Now, my secretary's notes show that it was dictated Tuesday, March 5th, in the morning. She said, and Mr. Bennett says that I left here on Tuesday morning. No one knows where I was going. I have no record of it. This is not unusual, because during this period I made many confidential trips. Sometimes I would tell Mr. Bennett and [fol. 1436] sometimes I wouldn't tell him.

"Q. It is true your expense records show no trips for March 4, 5, and 6?

"A. There is no expense record for any of these confidential trips.

"Q. I understand that, but I am asking, do your records show any trips, not whether you made any trips, but do your expense records show any trips for March 4, 5, and 6?

"A. I don't think so." Dep. 104.

After a court order was secured in the Bryant case requiring Rose to answer the vital question as to his whereabouts on March 5, 1963, he testified at a subsequent deposition on January 8, 1964, a copy of which is filed contemporaneously herewith and made a part hereof:

"Q. —you were asked this question: 'This trip that commenced on the morning of March 5, do you have any idea how long it took', and I believe you answered, 'No, sir, I don't. I cannot tell you exactly.'

"'Q. Do you know how you traveled', and you answered, 'No, sir.'

Now, you previously answered you did not know where you went on this occasion, is that correct, sir?

"A. Now, where are you on here, what page?

"Q. 138.

"A. 138.

"Q. The last—

"A. Yes.

"Q. —complete answer on that page.

"A. I am not sure where I went.

[fol. 1437] "Q. I want to pick up there, if I may.

"A. All right.

"Q. Do you have any recollection, Dr. Rose, of where you went on that date on March 5th?

"A. Mr. Embry, I don't know what legal term or what a lawyer means by 'recollection.' If you are talking about a guess, I can make a guess. I have done everything I can from checking my notes, notebook, my wife's notebook and talking with members of my staff trying to ascertain exactly where I went that day." Dep. 2-3.

Rose's secretary testified in her deposition in the Bryant case (a copy of which is filed contemporaneously herewith and made a part hereof), that Exhibit D-21 was dictated slowly and thoughtfully and was the fifth letter in a series

of thirty-two which took almost one hour and a half to dictate. (Dep. pp. 11-13). Rose's correspondence file contains a carbon copy of an apparent earlier draft of Exhibit D-21, dated March 5, 1963 (a copy of which is attached hereto and made a part hereof as "Exhibit B"), which differs slightly from the March 6 letter Dr. Aderhold received, and yet Rose's secretary testified at her deposition in the Alabama case that no draft was prepared:

"Q. Do you recall whether Mr. Bennett made any changes in the letter?

"A. I know of no changes that were made in the letter.

"Q. Anyone make any changes in the letter?

"A. No, sir." Dep. 18.

• • • • •

"Q. The letter was typed up in final form?

"A. Yes, sir. Now, right here I notice I made two sentences here. Occasionally he will dictate long in- [fol. 1438] volved sentences and I will cut it down into two shorter sentences and I may have done that in this first paragraph.

"Q. You would do that when you transcribe the letter?

"A. Yes, sir.

"Q. As you read from your notes, part of your secretarial job is to make slight changes necessary in grammar?

"A. Yes, sir.

"Q. No first draft or anything shown to anyone on this letter?

"A. No, sir.

"Q. You are absolutely certain?

"A. Yes, sir." Dep. 20.

When Mrs. Park read her stenographic notes of the March 6 letter at her deposition, they corresponded more nearly to the March 5 draft than to the actual letter of March 6. (Dep. pp. 7-10).

b. At the trial, Bryant denied that he had made the statements attributed to him in Exhibit D-21. He testified that he was unable specifically to recall either of the two telephone conversations in question and therefore did not remember what matters he and Butts had discussed. In regard to the Sunday, September 16, 1962, call, Bryant testified:

"Q. It is also related or set forth in the article that on Sunday, September 16, 1962, you and Coach Wallace Butts had another telephone conversation, which, I believe the Post states, was initiated by you. You familiar with that general statement as it appears in the Post?

[fol. 1439] "A. I am familiar with it, but I do not remember whether or not I made the call, but according to the telephone company's records, again, the call was made." R. 540.

• • • • •

"Q. Has it occurred to you to check up on the length of this telephone conversation you had with Coach Butts on September the 16th?

"A. It has.

"Q. How long was it?

"A. According to the record I got, sixty-seven minutes.

"Q. And you don't remember anything about it?

"A. I don't remember when or which one. Insofar as the football game, my vivid memory, I went over the notes up there this morning. Outside of that I hadn't even looked at them since the game or the movie.

"Q. You put this call in to Coach Butts, didn't you?

"A. I don't know.

"You don't remember whether you—

"A. I don't know the call was placed.

"Q. You don't remember whether you—don't remember anything that was said?

"A. I remember plenty of things that were said sometime, sir. I don't even know the call was made. I

am not sure all these notes weren't made after the call was made." R. 593-594.

* * * * *

[fol. 1440] "Q. As a matter of fact, you called him on September 16; that is your evidence, isn't it?

"A. I don't know that I called him. According to the telephone records somebody called him, and I supposed—I probably did, but I don't know that, sir." R. 600.

Furthermore, in addition to the three excerpts from the evidence of Bryant given at the trial, in three other instances he testified that he did not remember the telephone call in question. (R. pp. 560, 582-583 and 602.) Rose testified that he had interrogated Bryant on several occasions between February 24, 1963, and March 6, 1963, and that Bryant was never able specifically to recall either of the telephone conversations or what was discussed. Concerning the Sunday call, Rose stated under oath:

"A. Coach Bryant told me that night that he didn't remember calling Coach Butts back.

"Q. Well, where did you get—where did you get the date September 16th, and who from?

"A. He told me that he could have called him back, and then I checked our records and there was a call to Athens, and I asked him if he could have made that call, and he still couldn't remember whether he made that call or not." R. 1436-1437.

However, a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, states that Bryant remembered very well calling Butts on a Sunday in the middle of September and discussing the new interpretation of the piling-on rule and two pass "routes". This letter, which is attached hereto and made a part hereof as "Exhibit C", was discovered by defendant on October 2, 1963, pur-[fol. 1441] suant to a Notice to Produce in the Bryant case. It in part provides as follows:

"We were able to find a record of only three calls from me to the person in Athens. The first was on September 9th; the second on September 14th; and the third on September 16th.

• • • • •

"I like to think that these calls were fruitful so far as our program is concerned; *particularly, the one the middle of September on a Sunday, because I remember very well that this gentleman discussed in detail with me the new interpretation of the piling on rule and warned us to warn our team to be very careful or either we might lose a good player early like LeRoy Jordan or some other aggressive defensive man. On that particular date, we also discussed at length some coaching points on some pass routes that although we were using we had had very little success with.*" (Emphasis added).

Despite the fact that Rose admitted he received the said letter, dated February 28, 1963, from Bryant prior to March 6, 1963 (Rose-Alabama Deposition, pp. 81-82), he still maintained throughout his testimony at said deposition that Bryant reported to him throughout Rose's investigation of the matter and even more recently that he had no recollection of the Sunday call:

"Q. Did you also, in the course of this meeting, ask him [Bryant] if he had called Mr. Butts on September 16th, 1962?

[fol. 1442] "A. Yes, sir.

"Q. What was his answer?

"A. And he did not recall whether he had made that call or not, but stated that he could have made the call, that there had been several calls made to Coach Butts and to other coaches and that he could look that up and find out whether he had made that call or not." Dep. 43-44.

• • • • •

"Q. Now, did he give you any explanation as to why he might have called Mr. Butts back on the 16th?

"A. He said that the only reason that he could, and he didn't recall that he had called him back, that he could have called him back, would have been that Coach Butts did not understand some of the questions that he was raising, and was to try to think about it or find out what he was talking about, and that he was to try to get in touch with him; but, he didn't recall whether that had been done, or whether that was it or not." Dep. 53.

• • • • •

"A. . . . that he [Bryant] doubted seriously that he had called Coach Butts back, though there was a telephone charge to that." Dep. 85.

• • • • •

"A. . . . it was during the period of February 24th to March 6th, that I talked to Coach Bryant on those [fol. 1443] two other occasions, but I am not certain. But, I think it was, because I was away from the office an awful lot immediately following that.

"Q. Now, during those subsequent conversations, did Mr. Bryant tell you that he had found there had been a call charged to him to Coach Butts in Athens?

"A. I believe he said that there had been a call charged to the Department, but that he did not recall talking to him specifically himself on that particular time.

"Q. Did he state to you at that time whether he knew what was discussed in that subsequent call on September 16th?

"A. No, sir, except he went over what you and I have gone over that they could have talked about, these rule interpretations, the Butt blocking and Head blocking, and so forth and so on.

"Q. In other words, what he said was there is a call, I don't know whether I made it or not, I don't know

what I talked about, if I did make it, but what I might have talked about was rule interpretations, ticket sales and Continental Enterprises?

"A. Yes, sir. That's pretty much it.

"Q. How, did he later—strike that.

And was that the state of your information at the time you decided to write Mr. Aderhold?

"A. Yes, sir.

"Q. In other words, up to the time you wrote Dr. Aderhold, Coach Bryant had never informed you that they had made a call on September 16th; is that correct?

"A. That's correct.

[fol. 1444] "Q. And he never told you what he talked about on those dates, because he didn't remember what he talked about; is that correct?

"A. That's correct." Dep. 88-90.

* * * * *

"Q. Now, when you—you remember when you gave your deposition in the Butts case on May 27, 1963?

"A. Yes, sir.

"Q. You were asked about that deposition in Atlanta, and you stated at that time, that is at the time you gave the deposition, you did not know for certain if Bryant had called Butts on September 16th, or what had been talked about?

"A. Yes, sir.

"Q. Now, is that correct, that at that time you gave your deposition you did not know for sure that Bryant had called Butts or what was talked about?

"A. I wasn't certain. I thought at that time that he had called, but I wasn't certain.

"Q. Were you certain at the time you gave your testimony in Atlanta in August of this year, or of last year?

"A. I thought so, and I am still not certain today.

"Q. In other words, you are not certain today that Coach Bryant called Coach Butts on September 16, 1962, or what they talked about?

"A. No, sir, because Coach Bryant said he is not certain." Dep. 120.

• • • • •

[fol. 1445] "Q. Did Coach Bryant tell you, before this letter was written, that he did not know whether he had made the September 16th call to Coach Butts?

"A. He said he didn't remember it, but he said he could have done it.

"Q. Did he also say he didn't remember what was discussed?

"A. Yes, sir.

"Q. Am I correct in understanding that is what he has told you up to the present time?

"A. That is what he told me just recently again.

"Q. But he doesn't remember the calls and he doesn't remember what was said?

"A. All he remembers is that they talked many times about all of these things, but that he doesn't remember specifically.

"Q. Either the call or what was talked about?

"A. Yes, sir." Dep. 132-133.

• • • • •

"Q. Coach Bryant ever admitted to you that he did call Coach Butts on September 16, 1962?

"A. No, sir.

"Q. Did he ever admit to you what he talked about on that date, September 16, 1962?

"A. No, sir, but he did tell me that he could have called him and this could have been what they talked about; but, he didn't know for sure." Dep. 137.

10. Therefore, on the crucial issue of whether Butts gave Bryant information on Georgia football plays, plaintiff was able to override Bryant's admission in Exhibit D-21 that

[fol. 1446] Butts had in fact given him such information, by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter and Bryant's total lack of recollection concerning the telephone calls, when, in fact, defendant's newly discovered evidence establishes that Bryant did specifically recall receiving information about football plays from Butts during one of the telephone calls, that Exhibit D-21 was a careful and thoughtful letter, and that someone reviewed the draft of such letter dated March 5 prior to its becoming the crucial letter of March 6.

II.

Plaintiff, having filed a document on January 30, 1964, repudiating his prior consent for a reduction in the jury's verdict, defendant hereby moves this Court pursuant to Rule 60(b) (3), (4) and (6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. On January 14, 1964, the Court entered an order granting the defendant's motion for a new trial "unless the plaintiff, Wallace Butts, within twenty (20) days after the service of this order, shall, in a writing filed with the Clerk of the United States District Court for the Northern District of Georgia, remit all the punitive damages awarded above the sum of $400,000."

2. On January 20, 1964, the plaintiff, Wallace Butts, filed a document entitled "Consent of Wallace Butts to Remit" pursuant to which he stated that he remitted all punitive damages awarded above the sum of $400,000.

3. The Court, on January 22, 1964, set aside the previous judgment of August 20, 1963, for the plaintiff in the amount [fol. 1447] of $3,060,000 and entered a new judgment in the amount of $460,000, based upon the plaintiff's "having filed with the Clerk of this Court a writing remitting all of the punitive damages awarded above the sum of $400,000."

4. Subsequent to the filing of defendant's notice of appeal on January 24, 1964, the plaintiff filed a document on January 30, 1964, praying that the Court of Appeals restore the original award of $3,060,000, as the plaintiff had "yielded to the mandate of the District Court and remitted in writing" all punitive damages awarded by the jury above the sum of $400,000.

5. As the plaintiff by the aforesaid document filed January 30, 1964, either revoked his consent for a reduction of the verdict by $2,600,000 filed January 20, 1964, or is maintaining by such pleading that his consent was never voluntarily given for such reduction, the judgment entered by the Court on January 22, 1964, should be vacated, since no valid consent to a reduction of the jury's verdict has been filed by the plaintiff pursuant to the Court's order of January 14, 1964, that portion of the Court's order of such date granting the defendant's motion for a new trial should be allowed to become operative.

A hearing upon these motions is respectfully requested.

Welborn B. Cody, Attorney for Defendant

[fol. 1448] *Duly sworn to by John J. Runzer, jurat omitted in printing.*

[fol. 1449]

EXHIBIT "A" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

Deft's. Ex. 21

Case 8311

Admitted Aug. 15, 1963

University of Alabama
University, Alabama

Office of the
President

March 6, 1963

Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

[fol. 1450] Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

[fol. 1451] Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me for sharing this information, I am

Most cordially yours,

(Signed) Frank A. Rose
Frank A. Rose
President

FAR/mhp

EXHIBIT "B" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

COPY COPY COPY

March 5, 1963

Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised at our meeting in Birmingham. I have talked with Coach Bryant on at least two occasions and as best as I can ascertain this is the information that I have received.

[fol. 1452] Coach Butts has been serving on the football rules committee and at a meeting held last summer of the rules committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting and Coach Butts had told Mr. Bryant that the University of Georgia had several plays that would severely penalize the Alabama team and not only would cause LeeRoy Jordan, an Alabama player, to be expelled from the game but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring additional injury to

a player. Coach Bryant asked Coach Butts to check on that and he would call back on September 16. This he did.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubted it seriously. He did say that [fol. 1453] it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it, he, too, has decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you, but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially,

Frank A. Rose
President

FAR/mhp

[fol. 1454]

EXHIBIT "C" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

University of Alabama
Department of Athletics
University, Alabama
February 28, 1963

1961

The Crimson Tide — National Football Champions

Dr. Frank Rose
President
University of Alabama
University, Alabama

Dear Dr. Rose:

We were able to find a record of only three calls from me to the person in Athens. The first was on September 9th; the second on September 14; and the third on September 16th. He must have telephoned me some during that period because I am sure we talked more than that. As a matter of fact, over the years, I have talked with him by phone some eight or ten times per year. I might add, I have done the same thing with other coaches, Duffy Daugherty, Bud Wilkinson, Darrell Royal, and Bobby Dodd, for instance.

There were two additional calls made to Athens; one from our Publicity Department on September 11 and one by an Assistant Coach on September 27.

I like to think that these calls were fruitful so far as our program is concerned; particularly, the one the middle of September on a Sunday, because I remember very well that [fol. 1455] this gentleman discussed in detail with me the new interpretation of the piling on rule and warned us to warn our team to be very careful or either we might lose a

good player early like LeRoy Jordan or some other aggressive defensive man. On that particular date, we also discussed at length some coaching points on some pass routes that although we were using we had had very little success with. This man over the years had had tremendous success with the passing game; in particular, these two routes and after leaving these coaching points we began to use the two particular passes often, including one for the clutch Touchdown against Tennessee in Knoxville the third week in October.

Again, I want to say that I have for years discussed football; ours, his football with this man and like to feel that I would still have that privilege because I have a great deal of respect for his knowledge of the game, particularly the passing game.

Respectfully yours,

(Signed) PAUL BRYANT
Paul Bryant
Director or Athletics

PB:mp

[fol. 1456]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS FOR NEW TRIAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)—Filed March 6, 1964

In response to defendant's motions for new trial filed on February 28, 1964, plaintiff, Wallace Butts, respectfully shows:

I.

All of defendant's allegations relating to certain so-called "recently discovered evidence" are specifically denied and, at most, constitute a continuation of defendant's manifest design to trifle with this Honorable Court.

1. To argue, as defendant does, that the evidence in question "would probably change the result if a new trial was granted" is untenable and ridiculous. Said evidence and particularly the letter from Paul Bryant to Dr. Frank A. Rose dated February 28, 1963 and attached to defendant's motions as Exhibit 3, actually sustain the fact that at no time has Wallace Butts ever acquainted Paul Bryant with any plays or formations to be used by a University of Georgia football team against the University of Alabama. Arguments are supposed to be supported by fact. The facts are dead against defendant, and defendant knows it.

Furthermore, the purported significance attached by defendant to this so-called "recently discovered evidence" cannot be reconciled with defendant's action in paying Paul Bryant $300,000, tax free, to dismiss his libel suit growing [fol. 1457] out of this identical Saturday Evening Post article when *at that very time* defendant had all of this "recently discovered evidence" in its possession.

2. The scurrilous and unwarranted assertion that the testimony of witnesses Paul Bryant and Dr. Frank A. Rose given at the trial of this case "was false" is specifically

denied and is absolutely unsupported. To thus falsely, inexcusably, and publicly accuse two innocent individuals is just another manifestation of defendant's proudly admitted editorial policy of "sophisticated muck-raking".

3. To say under oath, as defendant has in its said motions, that this alleged "recently discovered evidence" (as weak and irrelevant as it is) "could not have been discovered by the exercise of *due diligence*" is entirely and patently false. Defendant states on page 11 of its said motions that the aforementioned innocuous letter from Paul Bryant to Dr. Rose, dated February 28, 1963, "was discovered by defendant on October 2, 1963 pursuant to a Notice to Produce in the Bryant case". Defendant gives no reason or excuse for not using the same type process to obtain access to this letter prior to the Wallace Butts trial by exercising the same "due diligence" it boasts it used prior to the date scheduled for the Paul Bryant trial. This, for sure, clearly demonstrates that defendant exercised about as much "due diligence" in this regard as it did in attempting to ascertain the truth before it published its libelous article in the March 23rd issue of the Saturday Evening Post.

II.

Defendant's second ground in its motions for new trial is as equally lacking in merit as the first and all allegations [fol. 1458] contained therein, being purely legal conclusions, are expressly denied.

The substance of defendant's argument is this: Plaintiff's unconditional "consent" to the remittitur, i.e. the reduction in the amount of the punitive damages award, is no consent at all because plaintiff later decided to file a cross-appeal and ask the Court of Appeals to reinstate the original award or increase the amount by which the Trial Court reduced such award. But, defendant argues, one cannot file a cross-appeal in such a situation. Thus we find ourselves in the anomalous position of defendant contending that

what it says is an invalid and illegal cross-appeal taking precedence over and thereby nullifying a perfectly valid and legal remittitur. We respectfully submit that if, as a matter of law, plaintiff cannot cross-appeal after accepting a remittitur, then the proper forum to urge this point is in the Court of Appeals and not here.

Wherefore, having fully responded, plaintiff prays that said motions be summarily dismissed.

Troutman, Sams, Schroder & Lockerman, William H. Schroder, Allen E. Lockerman, T. M. Smith, Jr., Attorneys for Plaintiff.

1605 William-Oliver Bldg., Atlanta 3, Georgia.

[fol. 1459] *Duly sworn to by William by H. Schroder, jurat omitted in printing.*

[fol. 1459a]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

[Title omitted]

DEFENDANT'S ADDITIONAL MOTION FOR NEW TRIAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60 (b)—Filed March 23, 1964

Because of the drastic change in the law of libel and the constitutional restrictions placed upon an action for libel brought about by the Supreme Court's recent decision, on March 9, 1964, in the case of *New York Times Company* v. *Sullivan*, 32 U.S. Law Week 4184 (March 10, 1964), the defendant hereby moves this Court, pursuant to Rule

[File endorsement omitted]

60 (b) (6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. The verdict and judgment in this case awarded plaintiff damages for injury to his reputation as a football coach on account of statements made by defendant concerning plaintiff's actions while acting as Director of Athletics of the University of Georgia. The Director of Athletics of the University of Georgia is a public official: *Page* v. *Regents of University of Georgia,* 93 F.2d 887 (5th Cir., 1937) (reversed in 304 U.S. 439 upon other grounds).

2. Said *New York Times Company* v. *Sullivan* case held that the constitutional guarantees provided by the First and Fourteenth Amendments prohibit a public official from recovering *any* "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of [fol. 1459b] whether it was false or not."

3. The following portions of the instruction given by the Court to the jury constitute error in that the Court stated that general damages could be recovered by the plaintiff without the plaintiff being required to prove the existence of "actual malice" on the part of the defendant:

> "I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication." R. 1624.
>
> "As the publication was libelous per se, I charge you that malice is to be inferred. However, the exist-

ence of malice may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence [fol. 1459c] of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact." R. 1630.

4. Applying the constitutional standards enunciated in the said *New York Times Company* v. *Sullivan* case, the proof presented in the instant case to show actual malice on the part of the defendant lacks the "convincing clarity", which such constitutional standards demand, and thus such evidence cannot sustain the judgment entered for the plaintiff. There was no evidence introduced in the instant case to prove that the statements made in the article defendant published in the March 23, 1963 issue of "The Saturday Evening Post" concerning plaintiff were made with knowledge on the part of the defendant that they were false, or with a reckless disregard of whether they were false or not. On the contrary, plaintiff proved in his own case that the Post editors responsible for the publication of the story—Blair and Thomas, R. 1024—were satisfied of the truthfulness and accuracy of the story. R. 1038, 1137-1138.

Therefore, the instant case was clearly tried upon unconstitutional assumptions, the correct principle unfortunately not being announced until after the trial by the Supreme Court's landmark decision in the *New York Times Company* v. *Sullivan* case. As Mr. Justice Goldberg recognized in that case, "we are writing upon a clean slate."

A hearing upon this Motion is respectfully requested.

[fol. 1459d] Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, Jackson 2-7420.

Certificate of Service (omitted in printing).

[fol. 1460]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

WALLACE BUTTS, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, Defendant.

OPINION AND ORDER—APRIL 7, 1964

Defendant, on February 28, 1964, under Rule 60(b) (2), Federal Rules of Civil Procedure, 28 U.S.C.A., filed a motion for a new trial upon the ground of the discovery of new evidence, contending that such evidence conclusively demonstrates the falsity of the testimony of two of the plaintiff's witnesses, Dr. Frank A. Rose and Coach Paul Bryant, and strongly supports the defense of justification. The motion is also based upon alleged conduct of plaintiff in attempting to avoid the conditions on which defendant's motion for a new trial was denied and a judgment in plaintiff's favor was granted.

Thereafter, defendant filed an additional motion for a new trial pursuant to Rule 60(b), Federal Rules of Civil Procedure, because of a change in the law of libel and the constitutional restrictions placed upon an action for libel

by virtue of the United States Supreme Court decision of March 9, 1964, in the case of *New York Times Company* v. *Sullivan.*

Even though a final judgment had been entered in the case at hand and an appeal from such judgment has been perfected by the filing of a notice of appeal, this District [fol. 1461] Court retains jurisdiction to consider and deny such motions under Rule 60(b). See *Ferrell* v. *Trailmobile, Inc.* (5 C.A., 1955), 223 F. 2d 697.

The gist of Part I of the first motion is that there is substantial variance between the testimony of Dr. Rose and Coach Bryant in their testimony at the trial of this case and depositions which were later given by Dr. Rose and his secretary, Mrs. Marian H. Park, in an action pending in the Northern District of Alabama in the case of *Paul Bryant* v. *Curtis Publishing Company,* Case No. 63-166, which testimony by deposition was taken on January 8, 1964.

In attempting to sustain its plea of justification, the defendant introduced at the trial of this case a letter dated March 6, 1963, written by Dr. Rose, as President of the University of Alabama, to Dr. O. C. Aderhold, as President of the University of Georgia. The letter concerns certain telephone calls relating to conversations on new football rule changes which had transpired between Coach Bryant and plaintiff Butts. At the trial, Dr. Rose in his testimony, in attempting to explain the contents of the Aderhold letter, stated that the letter was hurriedly dictated on the morning of March 6, 1963, and signed by his secretary, Mrs. Park, as he (Dr. Rose) was attempting to catch an early morning plane for Washington, D. C., to attend a meeting of the American Council on Education.

In the depositions taken in the *Bryant* case, defendant shows that Dr. Rose did not go to Washington, D. C., on the date of March 6, 1963, nor was the letter hurriedly dictated as there was a previous draft of the Aderhold letter, dated March 5, 1963, which draft was substantially the same as the contents of the March 6, 1963, original letter mailed and received by President Aderhold.

[fol. 1462] The defendant further asserts that Dr. Rose, in his testimony at the trial testified that Coach Bryant told him he did not remember the call of September 16, 1962, to Coach Butts in Athens, Georgia, although he could have made it, and even though Rose had interrogated Bryant several times between February 24, 1963, and March 6, 1963. However, by a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, Bryant, in this letter, informed Rose that he remembered the call to Butts in the middle of September very well, and that although Rose admitted receiving the letter dated February 28, 1963, prior to March 6, 1963, Rose still maintained throughout his testimony in said deposition that Bryant reported to him through all the investigation that he had no recollection of the Sunday, September 16, 1962, telephone call to plaintiff Butts.

Defendant contends that on the issue of the letter (Exhibit D-21) plaintiff was able to explain away the contents of the letter by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter, and Bryant's total lack of recollection concerning the telephone call, when in fact the newly discovered evidence establishes that Bryant did recall the Sunday telephone call and that the letter was not a hasty, error-laden letter, but was a careful and thoughtful letter, and that someone received the draft of such letter dated March 5, 1963, prior to its final draft on March 6, 1963.

The phrase "newly discovered evidence" refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant. In the case of *Chemical Delinting Company* v. *Jackson*, 193 F. 2d 123, 127, the Fifth Circuit Court of Appeals has held:

> [fol. 1463] "The motion must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that

it is material; and must show that such evidence will probably produce a different result."

See also *King* v. *Leach* (5 C.A., 1942), 131 F. 2d 8.

The evidence clearly shows that the letter from Bryant to Rose was in existence in the latter part of February, 1963. The evidence further shows that the draft of the letter from Rose to Aderhold was in existence prior to March 6, 1963. Under the liberal discovery rule provided by the Federal Rules of Civil Procedure, the defendant could have obtained all of this evidence which it now has available prior to the trial of this case in August, 1963. No facts have been shown by the movant here from which this Court may infer reasonable diligence on its part.

Even assuming the evidence could not have been produced at the trial in August by due diligence—inferences not fairly conveyed by the record—the evidence now presented tends merely to affect the weight and credibility of the evidence of Dr. Rose and does not constitute a proper basis for a new trial. See *English* v. *Mattson* (5 C.A., 1954), 214 F. 2d 406, 409; *Grant County Deposit Bank* v. *Greene*, 200 F. 2d 835.

After considering the "newly discovered evidence" presented in the motion at hand, and from this Court's review of all the evidence presented at the trial of the case, even if all the testimony entered at this hearing on the motion [fol. 1464] had been presented at the trial in August, this new evidence affecting the credibility of Dr. Rose would not have changed the verdict in this case. See *Chemical Delinting Company* v. *Jackson*, supra, and *English* v. *Mattson*, supra.

The second ground advanced by the defendant for a new trial under Rule 60(b) is to vacate the judgment entered against the defendant and to grant a new trial because after the plaintiff had filed his written consent to the remittitur (this consent still being on file) that, to the defendant's motion for a new trial, the plaintiff has filed a notice of cross-appeal. The question of the cross-appeal

and the merits thereof are not for decision by this trial Court, but is a matter to be considered on appeal. See *Woodworth* v. *Chesbrough,* 244 U.S. 79, 61 L. Ed. 1005.

The thrust of defendant's additional motion for a new trial under Rule 60(b) is based upon the recent decision of the United States Supreme Court, rendered on March 9, 1964, in the case of *New York Times Company* v. *Sullivan.* The Supreme Court's ruling in the *Times* case, speaking through Mr. Justice Brennan, held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The contention of the defendant is that the *Times* case is controlling for the case at hand, and that under this motion the previous judgment should be vacated and a new trial [fol. 1465] granted. In order that a prior decision of a court shall govern, such prior decision must be in point, and as a test in determining whether the adjudicated case is a precedent, such case should be measured by a similarity to the second case in its controlling facts. See *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 97 L. Ed. 54.

In the *Times* case, the Supreme Court held actual malice must be proved to recover general damages in actions of libel brought by public officials against critics of their official misconduct. However, the concurring opinion of Justices Goldberg and Douglas stated:

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech."

In the present motion at hand, the defendant contends that plaintiff's action comes under the *Times* ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 107-709(6). Just where in the ranks of government employees the "public official" designation extends, the Supreme Court in the *Times* case did not de- [fol. 1466] termine.[1] The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located at Athens) and the Georgia School of Technology (located at Atlanta) control the athletic programs of the

[1] In Footnote 23 of the majority opinion, it was stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, ..."

two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see *Page* v. *Regents of University System of Georgia,* 93 F. 2d 887, 891-892. As was stated in the *Page* case, the "coaches" are also members of the faculty. [fol. 1467] Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of "public officials" to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on "a business comparable in all essentials to those usually conducted by private owners" [2] he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia* v. *Blanton,* 49 Ga. App. 602(4); *Board of Education of Doerun* v. *Bacon,* 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the "public official" designation beyond that contemplated by the ruling in the case of *New York Times Company* v. *Sullivan,* supra.

If it were conceded that plaintiff Butts was a "public official", the case of *New York Times Company* v. *Sullivan*

[2] See *Allen* v. *Regents of the University System of Georgia,* 304 U.S. 439, 451.

would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves "actual malice"—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Italics supplied.) In the trial of this case, there was ample evidence from which a jury could [fol. 1468] have concluded that there was reckless disregard by defendant of whether the article was false or not. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts* v. *Curtis Publishing Company,* 225 F. Supp. 916.

For the reasons stated above, the defendant's motions under Rule 60(b) to vacate the judgment entered against the defendant are denied.

This the 7th day of April, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 1469]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 10, 1964

Notice is hereby given that Curtis Publishing Company, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, Atlanta Division, dated and filed on April 7, 1964, denying defendant's Motions under Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the judgment entered in this case and to grant a new trial.

Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, JA 2-7420.

Clerk's Certificate (omitted in printing).

[fol. 1471]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

No. 63-166

PAUL BRYANT, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY,
a corporation, Defendant.

STIPULATION

It Is Stipulated and Agreed by and between the parties through their respective counsel that the deposition of Dr. Frank A. Rose, may be taken before Carmen Zegarelli, Commissioner, at the University of Alabama, Tuscaloosa, Alabama, on the 8th day of January, 1964.

It Is Further Stipulated and Agreed that the reading of and signature to the deposition by the witness is waived, said deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

It Is Further Stipulated and Agreed that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial or at the time said deposition is offered in evidence, or prior thereto.

[fol. 1472] It Is Further Stipulated and Agreed that notice of filing of the deposition by the Commissioner is waived.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
No. 63-166

PAUL BRYANT, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY,
a corporation, Defendant.

Tuscaloosa, Alabama
January 8, 1964

Before: Carmen Zegarelli, Commissioner.

Appearances:

Mr. William S. Pritchard and Mr. Winston B. McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, Birmingham, Alabama, appearing for the Plaintiff.

Mr. James Runzer of the firm Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania; and Mr. Roderick MacLeod, Jr., of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, appearing for the Defendant.

Mr. James J. Bennett, University of Alabama, Tuscaloosa, Alabama, appearing for Dr. Frank A. Rose.

[fol. 1473] I, Carmen Zegarelli, Court Reporter and Notary Public, State of Alabama at Large, Acting as Commissioner, certify that on this date as provided by the Federal Rules of Civil Procedure of the United States District Court and the foregoing stipulation of counsel, there came before me at the University of Alabama, Tuscaloosa, Alabama, beginning at 9:30 a. m., Dr. Frank A.

Rose, witness in the above cause, for oral examination, whereupon the following proceedings were had:

Mr. MacLeod: We have the usual stipulation, that it is not necessary to state objections except as to the form of questions, and any other objections can be made at the time the deposition is used at the trial?

Mr. Pritchard: We will so stipulate, except we reserve the right to object and seek a ruling by the court as to any question that we deem would be improper in a deposition at any time prior to the trial and including the time of trial.

Mr. MacLeod: All right.

Mr. Runzer: Has the witness been sworn?

The Reporter: Yes, sir.

Dr. Frank A. Rose, being duly sworn, was examined and testified as follows:

[fol. 1474] Examination.

By Mr. Runzer:

Q. Dr. Rose, as you are aware, you have had your deposition taken at least once before and I am here to ask you a great deal of questions about some matters we are concerned with.

If you don't understand anything I say, or you don't hear me or you feel I am going too fast, I want you to tell me that and stop me, because we all have lots of time, although I understand that you have to leave at 1 o'clock for an appointment in New York. We have plenty of time, and we don't want you to get confused or misinterpret anything I say. I want you to stop me at any point if you don't feel it is clear to you.

A. Yes, sir.

Q. It is also understood that you are under subpoena for this deposition and because of a previous commitment, we will adjourn at 1 o'clock, and if examination is not complete, we will continue it.

Mr. Pritchard: We do not make any such agreement as that. We want you to complete your examination now.

Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Pritchard: Let's quit talking, all of this speech making, let's ask the questions and get the answers down, that's the purpose of the deposition, you know.

Mr. Runzer: Are you finished? I said it is understood [fol. 1475] that we will adjourn at 1 o'clock if we are not through, because you have a previous commitment, and meet again Wednesday of next week at this office at 10 o'clock; is that understood?

A. Yes, sir.

Q. And you are still under subpoena to appear here at that time, and place?

A. Yes, sir.

Q. Give us your full name, please?

A. Frank A. Rose.

Q. What does the A stand for?

A. Frank Anthony Rose.

Q. Your address?

A. President's Office, University, Alabama.

Q. Your home address?

A. President's Mansion, University, Alabama.

Q. And you are the President of the University of Alabama?

A. That's correct.

Q. And you have been since what year, sir?

A. Since September 5, 1957.

Q. And prior to your employment here, where were you employed?

A. President of Transylvania College at Lexington, Kentucky.

Q. What is your educational background?

A. I graduated from Transylvania College in 1942, and Transylvania Seminary in 1946, and did Graduate Work at the University of London in 1950.

Q. You are known as Dr. Rose, do you have a PhD Degree, sir?

A. No.

Q. Is that an Honorary Degree?

A. I have five Honorary Degrees from five Universities and Colleges.

[fol. 1476] Q. But, your only degrees are from Transylvania College and Transylvania Seminary; is that correct?

A. Yes, sir.

Q. Did you get any degree from the University of London?

A. No, sir.

Q. What type of work did you do at the University of London?

A. Graduate work in Philosophy.

Q. Now, you recall back in February, 1963, you received a phone call from the President of the University of Georgia?

A. Yes.

Q. You recall the date of that?

A. No, sir. It was a few days before February 24th, I believe it was. Let me check just a minute.

Q. Let the record show the witness is referring to a calendar book?

A. It was a few days prior to Sunday, February 24th.

Q. By a few, you mean two or three days?

A. I think it was more than that, because he wanted to meet on, I believe, on a Friday, and I couldn't meet on Friday because I had agreed to go to the Alabama Press Association Meeting in Montgomery on Friday, the 22nd. So, we agreed we would meet on Sunday, February 24th.

Q. Are you certain that he asked you to meet on Friday, the 22nd?

A. Well, he wanted to meet on another date and I am pretty sure that was Friday the 22nd. That is the reason I couldn't attend, because of my commitment, and it may have been he wanted to meet on Saturday, but I was going

over to Lake Martin with my family on Saturday, February 23rd.

[fol. 1477] Q. Where were you when you received this telephone call?

A. I was here in this office.

Q. And Dr. Aderhold state where he was?

A. No, he did not.

Q. I want you to tell me exactly what Dr. Aderhold told you that day?

A. I don't know that I could tell you exactly, but I can give you pretty much the meaning of the conversation.

Mr. Pritchard: I am going to interpose an objection there at this point that that is totally irrelevant and immaterial in this cause, and I want that to appear in the record.

Mr. Runzer: You certainly have the right to make your objection.

Mr. Pritchard: Thank you for your courtesy. Go ahead with your examination, if you will.

Q. Will you answer the question, please?

A. Yes. He called and asked if I could see him one day that week, and I think it was on either Friday or Saturday, but I think it was Friday, the 22nd.

I explained to him that it would be impossible because of commitments that I had, but I did inform him that I could see him on Sunday morning, February 24th. He said, well, that he would be over and meet with me in Commissioner Bernie Moore's office. I asked him what was the nature of the meeting. He said it was confidential, but that he would like to say that it might involve an ethical matter.

Q. Who suggested Mr. Moore's office as a place of the meeting?

A. He did.

[fol. 1478] Q. Did he indicate to you that Mr. Moore would be present at the meeting?

A. Yes, sir.

Q. Did he indicate that anyone else would be present at the meeting?

A. No, sir, he did not. It was my understanding that no one else was to be present.

Q. Is that something he told you or was that the understanding you carried away from the conversation?

A. When he said it would be a confidential meeting, it was my understanding that Commissioner Moore, Dr. Aderhold and I would be the only ones there.

Q. Did he ask you to bring anyone else to the meeting?

A. No.

Q. And gave you no indication of what it was except that it was an ethical matter?

A. That he would say it might be called an ethical matter.

Q. Have we now exhausted everything that you discussed in that telephone conversation?

A. Yes, sir.

Q. What time was the meeting set for?

A. 9 o'clock Sunday morning.

Q. Dr. Aderhold ever call you before to set up a meeting?

A. No, sir.

Q. So, this would be an unusual occurrence for you?

A. Yes, sir.

Q. Now, the meeting was held where?

A. Was held in Commissioner Moore's office in the Redmont Hotel.

Mr. Pritchard: It wasn't there, was it?

[fol. 1479] Mr. Runzer: Just a moment. It is only fair if you don't know a specific fact or don't remember, it is agreeable for you to say so.

A. Wherever Commissioner Moore's office is, I think it is the Redmont Hotel.

Q. In Birmingham?

A. Yes, sir.

Q. Between the day of the telephone call and the time of the meeting, did you discuss Dr. Aderhold's phone call with anybody?

A. No, sir.

Q. When did you leave Tuscaloosa to go to Birmingham for the meeting?

A. I left about 7:30 Sunday morning, February 24th.

Q. Did you drive down there?

A. Yes, sir.

Q. Drive yourself or someone go with you?

A. I think I drove myself.

Q. And did you go straight to the meeting?

A. Yes.

Q. And who was present when you arrived at Commissioner Moore's office?

A. When I first arrived, no one was present. I went down and sat down in the lobby and waited and then Commissioner Moore came in and I waited until he had time to open up his office and then went up and just a few seconds after I arrived there, Dr. Aderhold and Mr. Cook Barwick came into the meeting.

Q. Just a moment.

Let's go back a moment. You were in the lobby and Commissioner Moore came in?

A. Yes, sir.

Q. Did you have any conversation with him in the lobby?

A. No.

[fol. 1480] Q. Did he see you?

A. No, I don't think so.

Q. You waited a few moments for him to open his office?

A. That's right.

Q. What floor is his office on?

A. I can't recall.

Q. Is it upstairs?

A. Yes, it is upstairs.

Q. Did you ride up on the elevator with him?

A. No; I rode up on the elevator by myself.

Q. You went in, and sat for a few minutes; you said for a few minutes you and Commissioner Moore were there by yourselves; is that correct?

A. No. By the time I got my hat and coat off, Dr. Aderhold and Mr. Barwick came in.

Q. In the interval before Dr. Aderhold and Mr. Barwick arrived, did you have any conversation whatsoever with Mr. Moore?

A. I may have had conversation, but as far as talking about this matter, it wasn't discussed until Dr. Aderhold and Mr. Barwick came in.

Q. Do you recall now what that conversation with Mr. Moore was?

A. No, sir.

Q. All right.

A. I am not even sure that there was a conversation.

Q. Now, I assume then Dr. Aderhold and Mr. Barwick also took their coats and hats off?

A. Yes.

Q. And does Mr. Moore's office have an outer room and inner room?

A. Yes, sir.

Q. And did you proceed from the outer room into the inner room?

[fol. 1481] A. Yes, sir.

Q. Was there any conversation in the outer room at all prior to the meeting?

A. I don't recall. There may have been greetings, but I am sure that's all there was to it.

Q. Now, all four of you went into Mr. Moore's inner office?

A. Yes.

Q. Is that his personal office, do you know?

A. Yes.

Q. As opposed from the secretary's office?

A. Yes.

Q. Now, did Mr. Moore sit in his usual seat behind his desk?

A. I am not sure. I think he sat over to the side of his desk.

Q. Did Mr. Barwick and Dr. Aderhold sit together?

A. Yes. Well, they sat adjoining one another over to the side. I sat directly in front of the desk and took notes from the outside of the desk. Commissioner Moore, I think, was sitting over here (indicating).

Q. That would be in the left side of the desk as you face it?

A. I am sorry, I can't tell you all of those details. He would have been in my left.

Q. And Dr. Aderhold and Mr. Barwick would have been to your right?

A. Dr. Aderhold sat over there and—

Q. And also would be to your left, sir?

A. To my left (indicating).

Mr. Runzer: Off the record a minute.

(Off the record discussion.)

Q. All right, continue please.

[fol. 1482] A. Mr. Barwick sat next—between Dr. Aderhold and me.

Q. Now, who opened the meeting?

A. I believe that the first thing that was said was Commissioner Moore informed all of us that he had received a telephone call from Mr. Furman Bisher, one of the Sports Writers of one of the Atlanta papers telling him that he knew of the meeting and would like to be informed after the meeting was over of our discussion that we had had. And Commissioner Moore asked how he knew of the meeting and he did not comment.

And, at that time, I looked at Dr. Aderhold, because it had been my feeling that it was a confidential meeting and Dr. Aderhold, I think, may have been a little surprised about it, too. And, Mr. Cook Barwick said, I am sure that the finger must point to me, as I represent Mr. Furman Bisher as his personal attorney, but I do not represent him in the case for the Saturday Evening Post. This had to do with the first suit that Coach Bryant had filed against the Saturday Evening Post and Mr. Bisher for an article

under the title of Speaking Out or something to that effect, that the Saturday Evening Post carried. And this upset me a great deal, because we had had over problems with Mr. Bisher and he had written some very difficult things about the University of Alabama and made some insinuations that were unjust and this disturbed me that he would know that we were going to be in this meeting, which Mr. Cook Barwick assured all of us that he had not discussed this meeting with Mr. Bisher.

Q. Now, at this point, am I correct in assuming that you still did not know what the subject matter of the meeting was?

A. No, sir.

Q. You say no, sir; you mean that I am correct in saying that?

[fol. 1483] A. I did not know what the subject of the meeting was; yes, sir.

Q. What was the next thing that was said?

A. Then, I believe that Dr. Aderhold proceeded to inform me the purpose of the meeting.

Q. What did he tell you, sir?

A. Well, I can give you, in essence, what he said to me, and that was that there had been a telephone call to Coach Bryant from Coach Butts in which it had been overheard by a man by the name of Burnett in which Coach Butts had given to Coach Bryant some of the plays and pattern plays of the University of Georgia prior to the Alabama-Georgia Football Game in September, 1962. And, that they had talked with Mr. Burnett about the matter and felt that Mr. Burnett was telling the truth. I was led to believe either by word or by insinuation that Mr. Burnett was a reputable man. There was no doubt that he had heard everything that they had told me regarding plays, two or three players, and other things relating to the game.

Q. Let me stop you there for a moment. What was your personal reaction upon hearing this?

A. Well, I was tremendously shocked and greatly disturbed because I had a lot of confidence in Dr. Aderhold.

I had a lot of confidence in just meeting Mr. Cook Barwick and being—although I must say I had some reservations about him after he informed me of his relationship with Mr. Furman Bisher and the fact that Furman Bisher knew about the meeting that we were having.

Q. Now, is it at his point that you began to take notes as you told us before?

A. I began to take notes when Dr. Aderhold began talking.

Q. Do you still have a copy of those notes?

A. No, sir, I do not.

[fol. 1484] Q. Now, going back a moment. You say you have given us the essence of the conversation because I assume you don't recall the exact words at that time?

A. No, sir, and I don't think any man could.

Q. All right.

Well, trying to distill it down, would it be fair to you to say that you were told that it had been overheard that Mr. Butts gave Mr. Bryant information about the Georgia team which might have been of some value in preparing for the Georgia-Alabama game?

A. That's right.

Q. And as you said, you were shocked or stunned by this information?

A. Yes, sir, very much so.

Q. Did Dr. Aderhold or Mr. Barwick go into any of the details of the exact information that was allegedly passed?

A. Yes, sir. They gave me essentially the information that I read later in this Saturday Evening Post article.

Q. Have you ever compared the so-called Burnett notes with the information that was given you by Dr. Aderhold and Barwick that day?

A. No, I haven't.

Q. Are you generally familiar with the contents of the Burnett notes?

A. Yes, sir.

Q. And would it be fair to say then that the information they gave you paralleled the information that is contained in the Burnett notes?

A. Pretty much and a little bit more.

Mr. Pritchard: I want to here and now object to the attorney using the statement the information which they gave him when, as a matter of fact, it was merely statements [fol. 1485] they made to him, and not information but merely statements that they were repeating that they had heard from someone rather than the term information, because there is no information about it. In my opinion I think that was misleading and improper.

Q. Now, I think he was saying that the information that was being passed to you by Dr. Aderhold and Mr. Barwick was a little more than was contained in the Burnett notes; is that correct?

Mr. Pritchard: I renew my objection to the use of the word information. It was merely hearsay of the purest type, it is a matter of hearsay rather than information.

Q. Would you go ahead and answer?

A. Yes, sir. Either Dr. Aderhold or Mr. Cook Barwick said that it appeared to them from the statement that they had that this was going to be a scandal that was much larger than the Black Socks Scandal.

Q. And by that I assume they were referring to the 1919 baseball scandal?

A. I suppose that was it.

Q. All right.

A. And that Mr. Barwick was in a lawyer's office in Atlanta a few days after talking with Mr. Burnett and that Furman Bisher and young Roderick Beddow came into the office and stated that they understood that there was a check, a photostatic copy of a check in the amount of $10,000.00 written by Paul Bryant to a gambler in which he supposedly bet on a football game. And I made inquiry as to what game that could have been, and Mr. Cook Bar-

wick explained to me that it was the Georgia Tech-Alabama Football Game of 1962, in which we lost that ball game by one point. I asked—

Q. You say we, you refer to the University of Alabama?

[fol. 1486] A. University of Alabama.

Q. All right.

A. And I asked how that could be, and he said, well, Coach Bryant could have ordered his quarterback to call a field goal play rather than a passing play in which the ball was intercepted.

Q. This information that we were just discussing, namely this information relating to the Georgia Tech Game was not part of what Mr. Burnett was supposed to have overheard?

A. That is true.

Q. Now, do you remember whether Commissioner Moore said anything during this meeting?

Mr. Pritchard: That's the purest form of hearsay and I think it is a pure waste of time and money to attempt to examine a witness about—

The Witness: I don't know whether—

Mr. Runzer: I— Just a moment, Doctor. Unfortunately, as good a reporter as Mr. Zegarelli is, I don't believe he can get more than one at a time.

Mr. Pritchard: I object. It is the purest form of hearsay.

Mr. Runzer: I might add it is for the doctor's accommodation that if you wish to make a continuing objection, you certainly have the right to make any objection you want to.

[fol. 1487] Mr. Pritchard: I propose to exercise it too, so go ahead.

Mr. Runzer: Would you read the question, please.

(Question read.)

Q. Doctor, would you answer that question?

A. I do not recall what he said, but we all discussed the points that had been raised and talked about, including Commissioner Moore.

Now, did you take notes of the specifics of the information that was supposedly overheard by Mr. Burnett?

A. Yes, sir. I would say that I had about four small pages of notes contained in about four or five points that they had specifically raised which I used in my discussion with Coach Bryant when I met with him to talk to him about the accusation.

Q. Let me digress for a moment, Doctor.

Do you have any background in football at all?

A. Just sandlot football.

Q. By that, you mean you played sandlot football?

A. Yes, sir.

Q. Have you ever coached a football team?

A. Yes, sir, at one time during the war they couldn't get a coach at this high school nor an acting principal nor a dramatic coach, and I assumed all of the roles. But, I don't believe that I won but one ball game.

Q. What was the name of the high school?

A. Nicholasville High School, Nicholasville, Kentucky.

Q. How many years did this situation go on?

A. I believe—let me see. That would have been two or three years; I am not sure, may have been a little longer.

Q. This was during the war years?

A. Yes, sir.

[fol. 1488] Q. That would be in the early 40's?

A. No, sir. It would have been in the middle 40's, I believe. I think it was 1943 to 1945, or 6, somewhere right in there.

Q. And in an effort to perform this role, did you try to educate yourself in this new business?

A. Yes, sir. I tried to, but I couldn't do it. I had to rely on some of the Alumni of the school and the former coach who had to give up the job because he had additional duties, he worked out the formations for me, and the boys explained to me what they were the year before. There were only 75 boys in the high school, and they wanted to play and the superintendent of schools asked me if I would

supervise it. They weren't interested in winning, they were just more interested in having recreation.

Q. Excuse me.

Was the name of that Nicholasville?

A. Yes, sir. I believe it has been changed to Jessamine County.

Q. Spell that.

A. J-e-s-s-a-m-i-n-e.

Q. That's in Tennessee?

A. No, in Kentucky.

Q. Excuse me, Kentucky.

A. Nicholasville, Kentucky.

Q. All right, Doctor.

One other question while we are digressing.

Have you ever, during the course of this event which would date sometime from the middle of February, 1963, to date, retained either Mr. McCall or Mr. Pritchard, as your attorney?

A. Well, I have talked to them on many occasions and received counsel from them. I haven't formally retained them, but I have used them as my counsel.

[fol. 1489] Q. Now, how long did this meeting on the 24th last?

A. I would have to guess, sir. But, I would say about an hour and a half, to two hours.

Q. And have we exhausted the subject matter of that meeting?

A. As much as I recall, and as well as I recall.

Q. Now, you made a statement over in Atlanta when you testified that this matter was one of the most disturbing things that had ever occurred to you in College Administration?

A. Yes, sir, it was.

Q. And that is a true statement?

A. Yes, sir.

Q. And coupling that with your remark of a few moments ago that you were upset and stunned, I assume this was a matter of great information to you?

A. Yes, sir.

Q. Now, did Dr. Aderhold say or Mr. Barwick say why they were informing you of the information?

A. Well, they wanted Dr. Aderhold and wanted me to co-operate with them on making an investigation of the matter and we agreed that I would and that they would continue and that we would share information that we obtained from time to time.

Q. Then, would it be fair to say that you were asked to conduct an investigation from the point of view, from the geographical point of view from the University of Alabama?

A. I don't know that I was specifically asked to conduct an investigation, but it was expected that I would.

Q. And did you indicate that—

A. And understood that I would, and I indicated I would.

Q. In other words, regardless of whether it was a request made of you, it was agreed among the group that you would conduct an investigation here in Tuscaloosa?

[fol. 1490] A. Yes, sir.

Q. And part of your investigation would be to find out whether Coach Butts had given any significant information to Coach Bryant for the Georgia-Alabama Game; is that correct?

A. That is true; yes, sir.

Q. And that is what you set about to do when you left the meeting?

A. Yes, sir.

Q. And did you state any concrete steps to this group that you would take in conducting this investigation?

A. No, sir, I did not, not that I recall.

Q. Let's try to test your memory a moment.

A. We may have—no, sir, I don't believe that we did.

Q. Did you say that you would discuss it with any specific individual in the University Administration?

A. No, sir, but I think this was understood that I would talk to people about it.

Q. Would you say that it was understood or did you say that you would?

A. No, sir. I just told them that I would look into it and let them know.

Q. Did you say that you would discuss it with the University Attorneys?

A. No, sir.

Q. Are you certain about it?

A. I am not positive, but I can't imagine that I would say that. I don't see the reason at that time for saying that.

Q. Now, where did you go—strike that.

Did you leave first from the meeting?

A. Yes.

Q. All right.

A. We thought it would be best, because if we all did leave together in the event that a newspaper reporter might see us, he would begin to ask questions about it.

[fol. 1491] Q. And I assume, during the course of this meeting as you indicated, you asked questions about things, about this material?

A. Sir?

Q. You asked questions of Dr. Aderhold and Mr. Barwick?

A. Yes, sir.

Q. Were you told that Mr. Burnett had taken a lie detector test?

A. I believe that I was told that at that meeting. If I wasn't told that at that meeting, I learned it later.

Q. You don't recall whether you learned it at that meeting or not?

A. I think I did learn it at that meeting.

Q. When you learned he had taken a lie detector test, did they also tell you that he had passed the lie detector test?

A. Yes. When I learned of the lie detector test given Mr. Burnett, I was told that he had passed it.

Q. Were you also told at this meeting that he had given an affidavit as to this information?

A. I don't recall, sir.

Q. Now, it was agreed then that you would leave separately so as to throw any newspaper man off the scent?

A. Yes, sir.

Q. Did you go directly back to Tuscaloosa?

A. Yes, sir.

Q. What time did you arrive back there?

A. I would say sometime between 12 and 1 o'clock.

Q. Now, during the course of this meeting, did you indicate that there would be some difficulty in your doing something in that coming week because of other commitments?

A. Yes, sir. I told them that I had to be in Washington and New York and Chicago for a meeting. Dr. Aderhold [fol. 1492] stated that he too was supposed to go to the meeting in Chicago, and that it was agreed that as soon as I got some information that I would share it with him and he would share information that he had with me.

Q. Did you make any remarks as to the whereabouts of Coach Bryant during this meeting?

A. I don't recall.

Q. Well,—

A. I didn't know what his schedule was and I didn't know whether he was here or whether he was away.

Q. So, then, you couldn't have made a remark as to where he was?

A. Sir?

Q. You couldn't have made a remark as to where Coach Bryant was?

A. It may be that I could have, yes, sir. It may have been at that time that I knew where he was. I just don't recall.

Q. You don't recall?

A. No, sir.

Q. Now, you drove straight home and got in Tuscaloosa some time around 12 or one o'clock; is that right?

A. Sometime between 12 and 1 o'clock.

Q. Am I also correct that during this meeting you were never shown the so-called Burnett notes?

A. No, sir.

Q. What did you do when you got home?

A. Well, I was so upset about the matter that I went upstairs and sat down and thought about it for awhile, and then my wife called me down to lunch and I went down and had a very light lunch and went back up and thought about it some more.

Then I decided the best thing for me to do was take a nap and then think about it when I was more refreshed and relaxed.

Q. And did you do that?

[fol. 1493] A. Yes, sir.

Q. All right.

A. After taking a tranquilizer and I slept for about an hour.

Q. Excuse me.

Is it your custom to take a tranquilizer?

Mr. Pritchard: We object to that. My gracious sakes alive, we are here to try a lawsuit.

Mr. Runzer: Let me finish the question, please.

Mr. Pritchard: I am going to object to the pure waste of time.

Mr. MacLeod: You have your objection.

Mr. Runzer: The question is not over yet, with all due respect to you, Colonel Pritchard.

Mr. Pritchard: I object on the grounds the question is incompetent, irrelevant, immaterial, as to whether or not he took a tranquilizer before or after he took his nap, or if he took them on any other occasion. I want to say it is merely a waste of time in an effort to get into the record testimony that has no bearing on the issues to be tried in this case.

Mr. Runzer: Do you make any objection—

[fol. 1494] Mr. Pritchard: That's my objection in the record, please.

Mr. Runzer: I am sure he has gotten it down.

Q. Doctor, I will finish the question.

Did you take a tranquilizer because of the upsetting nature of this news, or is it your custom to do that?

A. Because of the upsetting nature of the news.

Q. You answered the question, thank you, Doctor.

I assume when you awoke you began to think about this matter again?

A. Yes, sir. I thought about it from about 2:30 to 3 o'clock until about 5 and I thought of it from every angle that I possibly could. I thought about the people that I should see first, and by 5 o'clock came to the conclusion that the thing for me to do is confront the man that had been accused.

Q. That was your final conclusion of this thought process; is that correct?

A. Yes, sir.

Q. Would you run down for me in brief fashion exactly what your thought process was. You said you considered whom you would consult with, who are you speaking of?

A. Well, on most of the problems that arise at the University, I talk with Mr. Jefferson Bennett, the Administrative Vice-President of the University.

Q. And this is the gentleman that is seated to my right here?

A. Yes, sir.

And I usually, in athletic matters, usually consult Mr. Jefferson Coleman, who was former business manager of Athletics at the University, and who is now Director of Alumni affairs. I usually consult Mr. Ernest Williams who is a member of the executive committee of the Board of [fol. 1495] Trustees. And I felt, in this situation, after thinking it through, that I owed it, a thing of this serious a nature, to talk to the man that had been accused first.

Q. What, in your mind, was Coach Bryant accused of at this point?

A. In my mind he was accused of having received information from Coach Butts that would affect the outcome of the University of Georgia-Alabama Football Game.

Q. And this was an accusation that you were setting out to investigate?

A. Yes.

Q. Now—

A. And it was insinuated either consciously or unconsciously on the part of Mr. Barwick and Dr. Aderhold that it might be a great deal more serious than the receiving of information that might affect the outcome of the ball-game.

Q. Now, if you will tell me, did you then proceed to get in touch with Mr. Bryant?

A. Yes, sir. I called Mr. Bryant around 5 o'clock.

Q. Where did you reach him?

A. At home and told him that I would like to have him meet me in my office at 7 o'clock. He told me that he would be glad to do so and he came to my office at 7 o'clock.

Q. Let me stop you there a moment.

Did you give him any indication as to why you wanted to meet him?

A. No, sir.

Q. You said, just meet me at 7 o'clock at my office?

A. Yes, sir.

Q. And he said he would?

A. Yes, sir.

Q. Up to this point, how would you describe your relationship with Mr. Bryant, a friendly one?

[fol. 1496] A. Yes, it is a friendly relationship; however, it is the same relationship that exists between me and all of my staff members, personal relationship.

Q. There is a personal relationship?

A. Yes, sir.

Q. Now, he came to your office at 7 o'clock?

A. Yes, sir.

Q. By your office, you mean the room we are seated in right now?

A. Yes, sir.

Q. Now, between the time you left the meeting and the time that Coach Bryant arrived here, did you discuss the matter with anyone else?

A. Yes. I believe that I told my wife what Dr. Aderhold and Mr. Barwick had told me, and I believe that I discussed with her the people that I should talk with first and it was also her thinking that I should talk to the man first that had been accused.

Q. But, outside of your wife, you had discussed the matter with no one before the meeting with Coach Bryant?

A. No, sir.

Q. Now, the two of you were alone in this room?

A. Yes, sir.

Q. Was anyone in the outer office?

A. No, sir.

Q. Did you sit in the chair where you are sitting right now?

A. Yes, sir.

Q. That's the one behind the desk?

A. Yes, sir.

Q. Where did Coach Bryant sit?

A. He sat on my left where Colonel Pritchard is sitting facing me. Over on my right facing me, I get confused; I am lefthanded.

[fol. 1497] Mr. Runzer: Off the record.

(Off the record discussion.)

Q. So, Coach Bryant sat at the corner of the desk at your right?

A. Yes, sir.

Q. And at this time, did you have in your possession the notes that you had made?

A. Yes, sir.

Q. Who opened the meeting?

A. I did.

Q. What did you say?

A. I tried, as best I could, to relate to him the information or statements that Dr. Aderhold and Mr. Cook Barwick had given to me regarding his conversation with Coach Butts.

Q. Did you start off by giving it in conclusion form or did you give it—give him the specifics of information that was supposedly passed?

A. I don't recall, but I believe that I gave him the points that I had taken down of what I had considered the essence of the meeting and related it to him as best I could, the story from the beginning to the end as it had been given to me.

Q. Now, during this initial remark by you, did you tell him that he was accused of receiving information from Mr. Butts that could affect the outcome of the Georgia-Alabama Game?

A. Yes, sir.

Q. Did he allow you to talk interrupted—uninterrupted, excuse me?

A. Well, at each point I would ask him questions about it. I wanted to know if he had talked to Coach Butts, what was the nature of the conversation, and then I went down each point talking to him about that.

[fol. 1498] Q. Did you tell him first then that he was accused of receiving information that could affect the outcome of the game?

A. Yes, sir.

Q. Did he make any remark when you said that?

A. He was tremendously shocked and upset about it, too, and asked me to go ahead and tell him everything that had been said, and I did. And then, we discussed it point by point after that.

Q. Just so that it is clear in my mind, the first thing you told him he had been accused of receiving information from Mr. Butts that could affect the outcome of the football game; is that correct?

A. I don't know what it was exactly in that manner, sir. I did reveal to him that Coach Butts supposedly called him and called him from off of the football field and gave him information about the University of Georgia.

Q. And this was about the first thing that you said to Mr. Bryant in this office that night?

A. Yes, sir.

I got down to it rather quickly.

Q. And then, although he was shocked, he asked what was the nature of the information he was supposed to have received; is that correct?

A. Yes, sir.

Q. And then you discussed—went through the points you had taken notes of at the meeting that morning; is that correct?

A. Yes, sir.

Q. When you finished going through the points, did he let you go through them without making any remark or did you stop on each one?

A. I don't exactly recall. I think that we discussed the overall accusation. He said that he had talked to Coach Butts on many occasions on many subjects as he did to [fol. 1499] many coaches, those with whom he played on his schedule, and those whom he didn't play.

Q. Did you ask him whether he had—whether he had received a phone call from Mr. Butts on September 13th 1962?

A. Yes, sir.

Q. What was his answer to that question?

A. He said he didn't know, but he would be glad to look it up, that he come to him several times in the last—during that period and he talked to several other coaches during that period, but that he was sure that his record or telephone bills would show whether he had talked, and he would be glad to look it up on that specific date.

Q. Just so we are perfectly clear, we are talking about a call on September 13th, when Mr. Butts called Mr. Bryant. Did he say his records would show that?

A. No. I believe that had to do with his call that he was supposed to have made back to him.

Q. That's what I had thought, you had misunderstood my question.

My question is, did you ask him whether he had received a call from Mr. Butts on September 13th, 1962?

A. He did not specifically remember that call though he did say that Wally Butts had called him and that he had

called Wally Butts and that they had talked on several occasions about many things. But, he did not specifically remember that call.

Q. Did you also, in the course of this meeting, ask him if he had called Mr. Butts on September 16th, 1962?

A. Yes, sir.

Q. What was his answer?

A. And he did not recall whether he had made that call or not, but stated that he could have made the call, that there had been several calls made to Coach Butts and [fol. 1500] to other coaches and that he could look that up and find out whether he had made that call or not.

Q. That was the call he was going to check on his telephone bill record?

A. Yes, sir.

Q. The September 16th call?

A. Yes, sir.

Q. Did you discuss with him the specific points that Mr. Burnett was supposed to have overheard?

A. Yes, sir.

Q. Do you remember what any of those points were?

A. I will try to recall them to the best of my ability. There has been quite a bit of time that has gone by.

Q. Yes, sir.

A. And I try—these were the points that Dr. Aderhold and Mr. Barwick had raised, and this was what I was trying to do in my letter, to the best of my ability to interpret.

Q. Did you take notes of your meeting with Coach Bryant?

A. Yes, sir. I took a few notes down on the notes I had taken up there.

Q. Of course, they are also gone now?

A. Yes, sir.

Q. Now, proceed; you were telling us what you were saying?

A. He said that they could have talked about many things, one that they talked about primarily was—that he had talked to him about a great deal about the inter-

pretation of new football rules, that he was concerned about that. Neither he nor his staff fully understood the rules. He stated that they could have—

Q. Let me stop you at each point, sir.

I think it would be more orderly if I did. You say that [fol. 1501] Mr. Bryant said that they could have talked about rules or rule interpretations; is that correct?

A. Yes, sir.

Q. I want you to be sure, in your own mind, did he say they could have talked about that?

A. Yes, sir.

Q. Or did talk about it?

A. No, sir. He said that they could have, and he was sure that they had from time to time discussed it. He said that he was greatly concerned about some of the interpretations, and that Coach Butts had been on a National Rules Committee and that he wanted to get from him as much as he could about some of these things. He said—he was trying to interpret for me the telephone call, if he had made one back, you see, or if Coach Butts had called him, that they could, at that time, have talked about Continental Enterprises.

Q. Let me stop you one minute. Let's try to stick to the rule changes or interpretations?

A. Yes, sir.

Q. Is it correct that they could have talked about it, not that they did talk about it?

A. On these specific telephone calls?

Q. That's right.

A. Yes, sir.

Q. Did he not say on the 13th of September, 1962, or 16th of September, 1962, that we did discuss rule interpretations?

A. No, sir, but they had discussed them during recent time, during that period there.

Q. This was presented to you as a possibility, as something that could have been discussed during the so-called telephone conversations?

A. Along with several other things.

Q. I understand that. We are dealing with one at a time. [fol. 1502] Mr. Bryant said this is one of the things that could have been discussed?

A. Yes, sir.

Q. What is the next thing that could have been discussed?

A. Could have discussed Continental Enterprises in which he had some stock and that I believe he said he had made some money and that he had lost some money on this stock and that Coach Butts probably was closer to it or knew more about it than he did and this was one of the things they could have talked about, because they had discussed this within a period of time during that time period.

Q. Did you—

Mr. Pritchard: Please, don't interrupt the witness. Go ahead, Doctor.

A. He said they could have talked about the tickets because Georgia had not sold all of the tickets they had to the football game, and that he needed tickets and was very much interested in selling all of the tickets to the game. I think this pretty much was some of the things he said they could have discussed.

Q. Now, did Coach Bryant deny to you that he had ever received any information about Georgia Football from Mr. Butts?

A. Specific techniques or plays?

Q. You told him that he was accused of receiving information from Mr. Butts about Georgia Football that could affect the outcome of the game?

A. The 1962 team?

Q. That's correct.

A. Yes, sir.

Q. Now, did he deny that?

A. Yes, sir.

[fol. 1503] Q. What were his words?

A. He said that's ridiculous.

Q. Now, you say then that he said they could have talked about rule changes, Continental Enterprises, and ticket sales; is that correct?

A. Yes, sir.

Q. Now, how long did this meeting take?

A. Lasted about three hours.

Q. All right.

A. And I asked him many, many questions, every question that I could possibly think about that would have any bearing on the telephone call that Coach Butts supposedly made to him and that he supposedly made to Coach Butts.

Q. Did you ask him if he and Mr. Butts ever discussed any football plays?

Mr. Pritchard: That's repetitious. We have been over it at least—the record will bear me out, we have been over it at least three times, and it is a useless waste of time to ask him the same question three times. I object, it is purely repetitious and a waste of time.

Mr. Runzer: Your objection is in the record. Would you please answer the question? Read the question, please.

(Question read.)

A. Of the 1962 Georgia team?

Q. No, just any football plays?

A. Yes.

Q. What did he say?

A. He considered himself one of the best defensive football coaches in America and he considered Coach Butts one of the best offensive coaches in America, and that on many [fol. 1504] times that he had shared defensive techniques with Coach Butts as Coach Butts had shared offensive techniques with him, just as he had the same discussions with Bud Wilkerson of Oklahoma and Coach Royal of Texas and other coaches and he named others that I have forgotten.

Q. Am I correct in saying that he said he did discuss football plays with Coach Butts?

A. Not in the telephone conversation, the plays of the Georgia 1962 team. He stated in that that he was concerned about some of the rule interpretations that had been raised at the meeting of the coaches of the Southeastern Conference sometime during the summer in Birmingham, and the statements that had come to him that Mr. Gardner had informed the officials to watch some of the techniques of some of the teams in the Southeastern Conference, including the University of Alabama, that he was primarily concerned with such things as Butt blocking and Head blocking, and that Coach Butts probably knew more about the interpretation of these things than anybody else, and that he knew that he had several discussions with Coach Butts on this.

Q. Now, my question, Doctor, is, did he admit that he discussed offensive plays with Mr. Butts?

A. No, sir.

Q. He did not admit that?

A. No, sir.

Q. Did you raise with him the point of information the notes that a player named Woodward committed himself too quickly?

A. I asked him—I told him that I had in my notes that Dr. Aderhold and Barwick said that this was supposedly discussed and he said he knew nothing about this. I said, well, could you try to explain to me what it would mean and he tried to explain to me what it would mean. But, he knew nothing about any individuals or anything that had to do [fol. 1505] with that. But, he said that in explaining some kind of technique they could have talked about movements of players but he said as far as any specific individuals, no.

Q. Now, my question is, did you ask him whether he heard Coach Butts say that Woodward commits himself too quickly?

A. He said he did not.

Q. He did not?

A. Yes, sir.

Q. You certain that is what he said in response to that question?

A. Yes, sir.

Q. Did he ever indicate that he didn't understand the use of the phrase, Woodward commits himself too quickly?

A. Let me put it this way. I don't recall exactly what he said, but he did not recall any names or any discussion of that. But, he did try to explain to me on my further questions what it would mean.

Q. In other words, he did understand what the use of the term, Woodward commits himself too quickly means?

A. Yes, but he didn't recall that there was ever any discussion.

Q. I understand he didn't say it was discussed, but he did understand what the term, Woodward commits himself too quickly means?

A. Yes.

I think he would understand what anyone committing himself—I mean, he said to me, specifically, that no names could have been discussed, because he didn't even know anything about the name.

Q. I understand that, but he did tell you that he did understand what that term meant, that Woodward committed himself too quickly?

A. Yes, sir.

[fol. 1506] Q. Now, did he give you any explanation as to why he might have called Mr. Butts back on the 16th?

A. He said that the only reason that he could, and he didn't recall that he had called him back, that he could have called him back, would have been that Coach Butts did not understand some of the questions that he was raising, and was to try to think about it or find out what he was talking about, and that he was to try to get in touch with him; but he didn't recall whether that had been done, or whether that was it or not.

But, he did say that there was some things they had talked about or could have talked about that he did not understand.

Q. And these things concerned what?

A. Concerned rule interpretation.

Q. Did he ever say—

A. New rule interpretation.

Q. Did he ever tell you that he called Butts back because Butts was going to check on a play that Butts had used?

A. He didn't say that specifically, but he did talk about the techniques, the interpretation of the techniques.

Q. Did he ever tell you that he called Butts back because Butts was checking on information about a play that Butts had used in the past?

A. He didn't use the word play. This was my interpretation of it, but he did talk about the techniques.

Q. In other words, he did not say that he called Butts back to get information about a play that Butts had used?

A. No, sir.

Q. Are you saying no, he did not say that?

A. No, he did not say that specifically.

Q. Did he tell you—excuse me.

In the course of this conversation, I assume Mr. Gardner's visit was also discussed?

[fol. 1507] A. Yes, sir.

In fact, he was the one that told me about it, Mr. Gardner's visit.

Q. That is, Mr. Bryant is the one that told you about that?

A. Yes, sir.

Q. Up to that point, until he told you, had you known that Mr. Gardner had been here?

A. No, sir.

Q. All right.

A. And there was no reason for me to know that Mr. Gardner had been here. Coach Bryant did tell me that he had gotten permission from Commissioner Moore to ask Mr. Gardner to come here and that Commissioner Moore said that he could have that permission to do it, and that the Southeastern Conference or Commissioner Moore's office would pay his expenses for the visit.

Q. Did he tell you, during the course of this meeting, that he changed his defensive techniques as a result of these conversations with Gardner and Butts?

A. Yes, sir; but he said that he and his coaches still were not clear on some of the interpretations of the new rules regarding the techniques, but that they had done the best that they could and that they sat around tables and drawing boards and that Mr. Gardner went over several of these things and that they still were not completely clear on it, but were most anxious that we not have any problems which we had had with Georgia Tech in 1961.

Q. But, you say he did tell you that as a result of talking with Mr. Gardner and Mr. Butts, he did change his defensive techniques?

A. Yes, sir, that he had made some changes in his techniques that would have penalized the Alabama team.

Q. And these were defensive techniques?

A. Yes, sir.

[fol. 1508] Q. And these changes were made as a result of his conversation with Mr. Gardner and Mr. Butts?

A. And the meeting in Birmingham of the Southeastern Conference Coaches where this was discussed, which Commissioner Moore informed me that Coach Bryant asked more questions than all the other coaches, because he was really concerned about it, and this was the reason he consented to have Mr. Gardner come because he did not want Alabama to get any adverse publicity on penalties.

Q. Did he tell you when he made these changes on defensive techniques?

A. No, sir.

Q. Did he tell you that he had learned anything different and changed his techniques from Coaches Gardner and Butts?

A. I would say if he made changes, he did. He didn't specifically say that, but that was the interpretation I got.

Q. In other words, from what he said, you understood him to say that he did learn something from Gardner and Butts that made a change in his defensive techniques?

A. Yes, sir.

Q. Did he say that in talking to Mr. Butts that it prevented Alabama from being penalized?

A. Not that I recall.

Q. Did he say that as a result of talking with Mr. Butts he got information that favored Alabama?

A. I asked him that question, and he said that he may have, but he doubted it seriously.

Q. He said that he may have, but that he doubted it seriously?

A. Yes, sir.

Q. Is that his exact quote, as you recall it?

A. Well, I don't know that that is his exact quote, but this is my interpretation.

[fol. 1509] Q. Did he say that the visit of Gardner and his conversation with Butts prevented him from using illegal plays?

A. Yes, sir.

Q. During the course of the conversation, did he say that if Lee Roy Jordan had been expelled from the game, he might have lost that football game?

A. He used that as an illustration. This was the illustration that he used.

Q. Tell me what he said. What was the illustration?

A. I asked him to try to explain to me just what he was talking about in our defensive techniques and interpretation of the rules and he tried to explain to me what it might have meant if Lee Roy Jordan butt blocked or head blocked. Now, I still don't know what that means.

Q. In other words, he did say to you that if Mr. Jordan had been expelled from the football game, it could have cost Alabama the football game?

A. He said it could have. I don't know if he specifically put it in that way, but that was the interpretation that I put on it, and I think most of us that knew the team that Alabama had at that time, if we lost the best defensive man that we had on the team, that we would have been in serious trouble.

Q. Now, did he say that they discussed what could happen with the offensive plays of any school and the defensive plays of Alabama if they were illegal?

A. I don't recall specifically his just making that pointed statement, but in the overall discussion, this was what came out of it.

Q. All right.

A. That if we used any illegal defensive techniques or tactics that it could cause an injury to a boy like the Holt-Granning incident with Georgia Tech. It could cause us to be seriously penalized. It could cause us to get the bad [fol. 1510] publicity from the Georgia papers which we had been receiving for almost a year and that he was greatly concerned about that.

Q. Well, then, he did say that the discussion with Butts concerned the offensive plays of any schools and defensive plays of Alabama; is that right?

A. Yes. This would have to be in regard to the change of techniques and rules interpretation.

Q. But, he did state what I just said; is that correct?

A. I don't think he came right out and said that exactly as you put it, but this was the interpretation I got out of it.

Q. What did he say?

Mr. Pritchard: I object to that as being five times that question has been asked and the witness has answered it fully and clearly and concisely and it is a pure waste of time. It is repetitious and I object to it.

Q. Would you answer the question, now, please, sir?

A. I can't tell you exactly what he said, but I can tell you the interpretation that I got from him and the discussion that we had.

Q. By interpretation, you mean what he said?

A. I can tell you what my interpretation of the conversation with him was and that was to the effect that if he used illegal offenses that it could seriously penalize the University by bad publicity and might lead to the injury of another player.

Q. But, did he say that the conversation with Butts revolved around the offensive plays of any school and the defensive plays of Alabama if they were illegal?

A. Yes, and he said that he had to know this part of it, that he considered Coach Butts the leading offensive Coach in the country and that he considered himself the best defensive Coach.

[fol. 1511] Q. Did you discuss, during your conversation with Mr. Bryant, that Mr. Burnett said he overheard specific Georgia plays being mentioned?

A. Yes, sir. I told him, and he said that was ridiculous.

Q. He denied that happened?

A. Yes, sir.

Q. Did you tell him that specific formations of the Georgia team were discussed by Mr. Butts?

A. No, sir.

Q. You did not say that?

A. No, sir.

Q. Now, if the meeting started at 7, it took about three hours, you said?

A. Yes, sir.

Q. Presumably it was over in the neighborhood of 10 o'clock?

A. Yes, sir.

Q. At the end of your conversation, did you consider your investigation complete?

A. No, sir.

Q. Was anything left for Coach Bryant to do?

A. Yes, sir. He was to go and get from his files or to get Mr. Callahan to get from his file the telephone calls that had been made from his office from a period of August 1st until October 1st.

Q. And did you plan to do anything else yourself?

A. Yes, sir.

Q. What did you plan to do?

A. I planned to discuss it with Mr. Bennett and with Mr. Coleman, former business manager of Athletics and a

member of the Athletic Committee and with Mr. Williams, a member of our Executive Committee.

Q. Now, I understand that during the week following this Sunday meeting, you had out of town commitments in Chicago, Washington, and New York?

[fol. 1512] A. I will have to consult my book. Is that all right?

Q. Certainly, sir.

This would be the week of February 24th, 1963?

A. Yes, sir. I left for Washington on February 25th, Monday; February 25th. I attended a meeting of the Commission on Accreditation in Washington on Tuesday, February 26th.

Q. Let me stop you here a moment. You left on Monday the 25th; is that correct?

A. According to my book, I did. I couldn't swear to it, but I am sure because the meeting started at 9 o'clock on Tuesday, February 26th, and there is no other way I could have gotten there that early in the morning.

Q. Do you recall what time you left Tuscaloosa that morning?

A. Usually the plane leaves at 8:40. At that time, it was leaving at 8:40 in the morning and then it left at 2:20 in the afternoon.

Q. Are these times from Tuscaloosa or Birmingham?

A. From Tuscaloosa.

Q. And do you recall whether you caught the morning or afternoon flight this Monday?

A. I think I caught the morning flight, the 8:40 flight.

Q. And where—

A. But, I am not positive about that.

Q. Where does that flight stop? Does it stop in Birmingham?

A. I believe at that time it was stopping in Birmingham and I don't know whether I took it from Tuscaloosa to Birmingham and caught another plane out of Birmingham, of whether I went to Atlanta and caught a plane out of Atlanta.

Q. Which line is it that flies the 8:40 out of Tuscaloosa?

A. Southern. That's the only line we have coming in here. Now, it could have been I could have taken the [fol. 1513] University plane or I could have used some other plane, because—but, I think that morning I took the Southern 8:40 flight out of there.

Q. And you don't recall whether you changed planes in Birmingham or not?

A. No, sir, or Atlanta.

Q. You retain your ticket intineraries?

A. No, sir. After I make out my expense account, I throw away the papers.

Q. And your recollection is that you got into Washington what time?

A. I am sorry, I can't answer that question.

Q. Did you have any business in Washington preceding the meeting of the Commission of Accreditation?

A. I could have.

Q. Do you recall?

A. No, sir.

Q. Now, you say you might not have taken the Commercial Flight you might have taken the University Flight?

A. Yes, sir.

Q. What type of plane is that?

A. That is a Cessna 310 Twin Engine.

Q. Who flies it?

A. Different people. Sometimes we use pilots out of Dixie Air, sometimes we use students, sometimes I get pilots that are friends.

Q. Now, I think you also said that there was another possibility as to how you could have traveled on the 25th?

A. Yes, sir. I used planes of friends of mine from time to time to go to different places. I used Gulf States Paper Company's plane.

Q. What type of plane is that?

A. That's an Aero Commander Twin Engine.

Q. Have a regular pilot for that plane?

A. Yes, sir.

[fol. 1514] Q. All right.

A. I used Mr. Winston Blount's.

Q. Would you spell that for the Reporter, please?

A. B-l-o-u-n-t.

He is a member of our Board of Trustees.

Q. What type of plane is that?

A. Lockheed Lodestar.

Q. Who flies that plane?

A. He has pilots, he has two or three planes.

Q. All right.

A. I used Mr. Bill Sellers.

Q. How do you spell that?

A. S-e-l-l-e-r-s.

And I used single engine plane of Mr. Harry Pritchard, Neal Morgan, anybody that is an Alumnus of the University that has a plane that I can get on.

Q. Is it your recollection that on this trip you took the commercial Line?

A. I think I took the Commercial Line that morning.

Q. You attended the meeting in Washington on Tuesday of the Accreditation Committee?

A. The title is the Commission on Accreditation of Service Experiences. It has to do with courses with the Military at colleges and universities and centers, Educational Centers around the world.

Q. Now, on that Monday which would be the 25th, did you do any further work on this Butts-Bryant matter?

A. I don't recall whether I did or not.

Q. Did you discuss it with anybody that day?

A. I don't recall. It may have been that I called Mr. Luther Callahan, our comptroller, and asked him to get me the telephone records. But, I don't believe that I discussed it or the reason why with anyone.

Q. In other words, on this Monday which would be the [fol. 1515] 25th, you may have asked Mr. Callahan to forward you some telephone records?

A. Yes, sir, and have it in my office when I return.

Q. But you are not sure you did that?

A. No, sir.

Q. But, you discussed with no one else other than the possible exception of Mr. Callahan, this matter?

A. I am pretty sure I didn't, because I didn't discuss it with you, Mr. Bennett, until Friday, did I?

Q. Now, did you discuss it with anyone either in person or by correspondence or over the telephone while you were in Washington?

A. No, sir.

Q. Were you in Washington all day Tuesday?

A. Yes, sir.

Q. Did the meeting take all day?

A. I think it took until about 4 or 5 o'clock in the afternoon.

Q. Do you remember the names of any other individuals that were at the meeting?

A. No, sir, but I can get them for you.

Q. What type of individuals—

A. I know the people that were on the committee. I don't know whether they were present there or not. They were University Presidents and Deans.

Q. Was it a large committee?

A. Yes, sir.

Q. About how many, roughly?

A. Again, I am going to have to guess. I would say about thirty and it was composed of Military Personnel, too, out of the Pentagon.

Q. From Washington where did you go?

A. To New York City.

Q. And when did you leave Washington, do you recall?

[fol. 1516] A. I think I left Tuesday, the 26th, but I am not sure. But, I think that is when I left.

Q. How did you get from Washington to New York?

A. I flew on a plane.

Q. Commercial Plane?

A. Yes, sir.

Q. And what was your business in New York?

A. I was to attend the meeting of the National Foundation which used to be the National Foundation for Infantile Paralysis. I am not sure they had a quorum and had a meeting at that time, because there had been several times that I had gone up and at the last minute people would have to cancel out and they wouldn't have a quorum and they would change the meeting. But, that meeting was set and that was the purpose of my going to New York.

Q. Now, is this a Committee or Commission or Board of Trustees, or what of his organization?

A. Board of Trustees.

Q. How many are on it?

A. I think twelve.

Q. Who are they?

A. Mr. Basil O'Connor is the Chairman, Mr. Tom Russell of Alexander City is on it now, I don't believe he was on it then. The Provost of the University of Chicago, is on it, and I don't recall his name. There are several others that I just don't specifically recall.

Q. Now, you don't recall whether they had a meeting on that Wednesday or not; is that correct?

A. No, sir, I don't recall. I just don't know, because there were, during this period—see, this would have been my first meeting. I had been up for four meetings and one or two of them were changed because they didn't have a quorum and I would get a call from down here at the office telling me that the telegram had come stating they couldn't [fol. 1517] have the meeting the next morning because they had cancellations.

Q. How long did you remain in New York?

A. According to my schedule, I remained there until Friday morning, March 1st. But, Mr. Bennett can help me refresh my memory on this, because instead of going to Chicago, we decided that we should have a meeting in Washington, and we met in Washington on March 1st; isn't that true?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. All right. You may answer.

A. I recall, to the best of my memory, that I came down to Washington on Friday, March 1st, and had a series of meetings in Washington.

Q. Now, these meetings were unconneeted with the Bryant-Butts affair?

A. Yes, sir.

Q. And during the course of this week, had you done anything on the Bryant-Butts affair?

A. Nothing except just to think about it, and kind of organize what I had in my mind. I am pretty sure that during that week I tried to reach Dr. Aderhold and was unable to reach him.

Q. By telephone?

A. Yes, sir.

Q. Now, the meetings on Friday, the first was Washington?

A. Well, there weren't any meetings. These were visitations to try to get some grant contracts for the University.

Q. Perhaps I should change it. This Friday, these appointments you had in Washington—

A. I wouldn't say they were appointments. We did see [fol. 1518] people, we got appointments, but none were set.

Q. When you refer to we, you are talking about yourself and Mr. Bennett?

A. Yes, sir.

Q. During the course of that day, did you discuss the Butts-Bryant affair with Mr. Bennett?

A. Yes, sir.

Q. This was the first time you discussed it with him?

A. Yes, sir, I believe it was.

Q. What did you say to him?

A. I told him of my visit with Dr. Aderhold and Mr. Cook Barwick in the office of Commissioner Moore. I told

him of my three hour session with Coach Bryant. We discussed the whole thing. He asked questions, and we looked at questions and discussed how best to proceed and decided that we both would think about it further and decide where we were going to go from there.

Q. Did Mr. Bennett contribute any information to the investigation that you did not know up until that time?

A. No, sir.

Q. Would it be fair to say that your meeting with Mr. Bennett was more in the line of consulting with another person's opinion that you respected to decide what should be done?

A. Yes, sir.

Q. In other words, it was you that gave information to Mr. Bennett; is that correct?

A. Yes, sir.

Q. And he was giving you his advice or opinion on how it should be handled?

A. Yes, sir.

Q. Did you return to Tuscaloosa that day, Friday?

A. Again, I am not certain. I think that we returned on Friday evening or on Saturday, but I just don't know.

[fol. 1519] Mr. McCall: Mr. Runzer, it is now 11 o'clock. Could we have a five minute recess?

Mr. Runzer: Certainly.

(Short intermission.)

Mr. Runzer: Would you read the last question and answer, please?

(Question and answer read.)

Q. Regardless of whether you returned Friday night or Saturday morning, up to this point, you have discussed the matters with Mr. Bryant, Mr. Bennett and possibly with Mr. Callahan. Had you discussed this with anybody else up to the point you returned to Tuscaloosa?

A. I am not sure somewhere in this time period or some-

time between then and my time of answering Dr. Aderhold's letter, I discussed it with some members of the Athletic Committee.

Q. Was it discussed in person?

A. Yes, sir.

Q. They were not on any of these trips with you?

A. No, sir.

Q. So, then, it could not have been before you came back to Tuscaloosa?

A. I am not sure, sir. It could have been before I left Tuscaloosa or it could have been the following time that I returned to Tuscaloosa. But, sometime in there before writing Dr. Aderhold, I discussed this with members of The Athletic Committee.

Q. This trip to New York, were you alone?

A. Yes, sir.

Q. I mean, were you alone?

A. Yes, sir.

[fol. 1520] Q. I mean, other than the other people on the plane?

A. Yes, sir.

Q. You had no one to accompany you?

A. No, sir.

Q. Now, when you got back, which was either Friday evening or Saturday, which would be March 2nd—

A. Yes, sir.

Q. You stated that somewhere in here you believe you discussed it with members of your Athletic Board?

A. Yes, sir. Sometime either before leaving or before writing Dr. Aderhold, I just don't know when that was.

Q. Well, now, who did you discuss it with specifically?

A. I discussed it with Mr. Jeff Coleman who had been business manager of Athletics. I believe that was his correct title.

Q. All right.

A. Also Assistant and had been Assistant Athletic Director, I believe, who is now the—Secretary to the Ath-

letic Committee. I discussed some time in that period with Mr. Ernest Williams, a member of the Executive Committee of the Board of Trustees, I believe. I am not sure about this, that also during this time I discussed it with Dr. Sharpton, who is Chairman of the Athletic Committee, though I am not sure.

Q. Were all of these personal discussions, that is, face to face?

A. Yes, sir.

Q. Going back to Mr. Coleman for a moment—

A. Now, I am not sure that Mr. Williams—I am not sure I discussed it person to person with him, or over the telephone.

Q. You sure Dr. Sharpton and Mr. Coleman was a face to face discussion?

A. Yes, sir.

Q. You certain you talked to these people before you [fol. 1521] wrote the letter to Dr. Aderhold?

A. Yes, sir.

Q. That would pin it down to February 24th and March 6th, between that time?

A. Yes, sir.

Q. Would you give me the discussion you had with Mr. Coleman?

A. I don't recall, frankly, what I said to him. I think my discussion was along the lines of reporting to him what Dr. Aderhold reported to me, and what Coach Bryant had reported to me, and to get their thinking about it to see just what they thought and whether—from Mr. Coleman, whether Coaches talk to other Coaches about tickets.

Q. What did he say?

A. He said he had been in charge of tickets at the University and it wasn't anything unusual for coaches to talk many times previous to any game about tickets, particularly when it wasn't a sell-out. He said that he knew that Wally Butts was an authority on football rules and football interpretations and Coaches did discuss these things.

Q. Are you speaking about rule changes when you say these things?

A. Rule changes, yes, sir. And, I don't recall whether it was then or later I asked him because of his close personal relationship to Commissioner Moore to go and talk to him about it and to get his interpretation and information that he had. But, sometime during my investigation, either before writing Dr. Aderhold, or after, I asked Mr. Coleman to do this, and he did.

Q. Did he report back to you before you wrote Dr. Aderhold?

A. I don't recall.

Q. What did he report back to you in any event?

A. He reported back to me the fact that Mr. Moore had, previous to our meeting with Dr. Aderhold and Mr. Bar- [fol. 1522] wick in his office on Sunday, February 24th, had been in a meeting in Atlanta or somewhere in Georgia, may have been Athens, with Dr. Aderhold and Mr. Barwick, and I believe a man by the name of Hardiman, who is an Alumnus of the University, but I am not positive about that. And I am not positive about this, but that also Commissioner Moore had talked with Mr. Burnett and that Commissioner Moore was continuing his investigation and had not reached any definite conclusions at that time, but would share, from time to time, information that he might get.

Q. Now, your conversation with Dr. Sharpton, what did that consist of?

A. My conversation with Dr. Sharpton was pretty much along the lines of reporting to him what had happened.

Q. Does that also hold true for Mr. Williams?

A. Yes. Mr. Williams also, and to ask him whether he thought that I should call an executive committee meeting or meeting of the Board of Trustees to discuss it with them.

Q. Now, with the exception of Mr. Coleman—strike that.

Did Dr. Sharpton or Mr. Williams give you any information which you did not already have?

— A. Mr. Williams was Treasurer of the University for ten years, and, of course, was responsible for paying all of

the bills and the operation of the Athletic Department. He knew that coaches called one another often before ball games to discuss tickets and different arrangements, and that it wasn't anything unusual to him that Coach Bryant and Coach Butts would have talked.

Q. Would it then be fair to say that Mr. Williams and also Mr. Coleman corroborated the fact that Coaches do discuss matters like tickets before a football game?

A. Yes, sir.

[fol. 1523] Q. But, did not give you any independent information that you did not already have?

A. Not on this specific thing.

Q. Did they give you any other specific independent information?

A. Nothing that I didn't already know or had learned and that is that the coaches from schools on our schedule or outside of our schedule talk to one another often.

Q. Now, when was the next time you saw or talked or heard from Mr. Bryant after your February 24th meeting?

A. When I returned to my office, I believe that was the time. I am not sure, but sometime during the period of my meeting—sometime during the period of my talking with Coach Bryant on that Sunday evening of February 24th, and my writing Dr. Aderhold, Coach Bryant furnished me with a letter in which he listed the calls that he had made to Athens.

Q. Now, did he give you that letter on the Monday after the meeting which would be the 24th—the 25th?

A. I don't know, sir.

Q. Well, was the letter predated or postdated in any way?

A. No, sir. The letter apparently, I guess, I don't recall, was dated the day he wrote it. But whether he wrote it—had it written early that morning and sent it right on over by one of the members of his staff, I don't know.

Q. What I mean to say is, the letter, for example, was dated the 27th of February. You did not receive it then on the 25th?

A. No, sir, why would I?

Q. I am trying to find out when you did receive it, Doctor, and you say you have no independent recollection; is that correct?

A. No, sir. I don't know exactly when I received it, but [fol. 1524] I received it sometime from the time I talked to him on Sunday night and before I wrote Dr. Aderhold, because it was—it was in a letter to Dr. Aderhold that I stated to him that Coach Bryant did call Coach Butts and I shouldn't have done that, because I am not sure that he did.

Q. Well,—

A. But, the phone calls from the office showed that there was a call to Athens.

Q. You got a letter, you say, sometime in the period between February 24th and March 6th, from Mr. Bryant?

A. Before I wrote the letter to Dr. Aderhold.

Q. Sometime in that period you got a letter?

A. Yes, sir.

Q. Am I correct in my understanding your recollection was that you believe it was here when you got back from this trip; is that right?

A. Yes, sir.

Mr. Runzer: Would you mark that Defendant's Exhibit 1, please, sir.

(Whereupon, said document was received and marked "Defendant's Exhibit 1 to the Deposition of Dr. Frank A. Rose" and a photostatic copy is submitted in lieu of the original and is attached to the deposition.)

Mr. Runzer: Do you want to see it?

Mr. Pritchard: Yes, sir, if you offer it. You go right ahead.

[fol. 1525] Mr. Runzer: I would like to have the letter back.

Mr. Pritchard: Oh, I beg your pardon.

Q. Doctor, I show you a letter which is marked as Defendant's Exhibit I on stationery, I believe, of the Athletic Department of the University of Alabama under date of February 28, 1962, and ask you if that is the letter of Mr. Bryant to which you just referred? Excuse me, Doctor, but we are getting on to 1 o'clock.

Mr. Pritchard: We decided to cancel out 1 o'clock and go right on through.

Mr. Runzer: Please don't interrupt.

Mr. Pritchard: We decided to go on.

Q. Is that correct, doctor?

A. Yes, sir.

Q. Let's get one thing at a time. We are cancelling the 1 o'clock deadline?

A. Yes, sir.

Mr. Pritchard: We want to get through right now.

The Witness: I would like to get through.

Mr. Runzer: I can't blame you, Doctor. I want to make sure.

[fol. 1526] Q. Let me ask you a different question, Doctor. Let me put the letter aside.

A. I think that's the letter I received. I don't think I received another one. However, it is a longer letter than I thought.

Q. Let's ask the question this way.

Is it your opinion that when you returned from this trip which was to New York and Washington, there was a letter from Coach Bryant?

A. Yes, sir.

Q. I assume you read that letter?

A. Yes, sir.

Q. And also during this time it is your best recollection after you discussed the matter with Mr. Coleman, Dr. Sharpton and Mr. Williams?

A. I am pretty sure. I am not certain, but I think it was during this time that I did.

Q. All right.

Now, did you have any discussion over this week-end with Mr. Bryant?

A. I am not sure.

Q. Well, now, in your previous testimony in Atlanta, you said that you talked with Mr. Bryant twice after your initial meeting. Could you tell me when those conversations took place?

A. No, sir, I don't know when it was.

Q. Do you now recall whether you talked to him twice more or not?

A. Yes, sir. I talked to Coach Bryant twice after my Sunday evening talk, but when it was, I don't know exactly.

Q. Were these face to face meetings?

A. One was face to face, and the other one, I believe, was on the telephone. Both of them may have been face to face.

[fol. 1527] Q. Now, what was the conversation in the first subsequent conversation with Mr. Bryant?

A. I don't recall exactly. I do know that I wanted to know more about the telephone calls. I wanted to know about Coach Butts' call to him, and whether he had made a call himself to Coach Butts. And I believe it was at that time, I am not certain, that he informed me that he had discovered, since our initial talk, that he couldn't have received a telephone call in which Coach Butts called him from Athletic Field, because they didn't have practice that day and that he doubted seriously that he had called Coach Butts back, though there was a telephone charge to that.

Q. Now, when is the next time you talked to him?

A. I just don't recall.

Q. What was said?

A. I am sure it had to do further with his thinking about the telephone conversation and what they discussed.

Q. Was he any more definite as to whether the calls were or were not made?

A. No, sir.

Q. Was he any more definite as to what was or was not said?

A. No, sir, but he was—he became more and more of the opinion that it had to do with the interpretation of these rule changes, because this had been one of his real great concerns, but he wasn't positive.

Q. In other words, he still wasn't sure what was discussed?

A. No, sir.

Q. But, his opinion was now that he probably talked about rules and changes in rules?

A. Yes, sir.

Q. Did he rule out the fact that he might have talked about the ticket sale?

A. No, sir.

[fol. 1528] Q. He did not rule that out?

A. No, sir.

Q. Did not rule out the possibility of talking about Continental Enterprises?

A. No, sir.

Q. These were the only three discussions you had with Mr. Bryant between 2-24-63 and the writing of the letter to Dr. Aderhold?

A. I am not sure whether those additional two came before the writing of the letter. They may have come even after that, I am just not sure because, you see, I was looking into this problem over a period of several weeks, and I just don't recall exactly, but, I—

Q. Doctor, I just wanted to try to jog your memory. I realize this happened sometime ago, and been a lot of things that have happened; but, on page 1414 of the record in the trial in Atlanta, you were asked this question. "Did you, after that particular meeting in your office on Sunday, February 24th, talk to Coach Bryant again on several occasions?" And your answer is recorded here as, "Yes, sir. I talked to him twice after that before I wrote to Dr. Aderhold." Now, I want you again to try to think. Did you talk

to Coach Bryant three times in all between the meeting of the 24th with Mr. Moore, Mr. Barwick and Dr. Aderhold and the letter that you wrote to Dr. Aderhold on March 6th?

A. Let me look at my calendar. You see, the problem that I have, sir, is we were going to—we were under a Federal Court Injunction to integrate the University of Alabama and we had applications and this is a rather serious problem too. And during this same period we had two applications for March 23rd enrollment of two Negro students in Huntsville, Alabama, and we had applications for enrollment here in the summer for the summer term on the main campus and it was during the same period [fol. 1529] that we are talking about now, about this investigation, that I was going through all the problems, meeting with the Governor, meeting with Board members, meetings with various people on the whole problem as related to the University Student Faculty, and this is why I find it difficult to pin myself down to dates, because it is just almost impossible to carry those two burdens and remember specific times and specific dates. I would say now, looking at my calendar, that I—that it was during the period of February 24th to March 6th, that I talked to Coach Bryant on those two other occasions, but I can not certain. But, I think it was, because I was away from the office an awful lot immediately following that.

Q. Now, during those subsequent conversations, did Mr. Bryant tell you that he had found there had been a call charged to him to Coach Butts in Athens?

A. I believe he said that there had been a call charged to the Department, but that he did not recall talking to him specifically himself on that particular time.

Q. Did he state to you at that time whether he knew what was discussed in that subsequent call on September 16th?

A. No, sir, except he went over what you and I have gone over that they could have talked about, these rule

interpretations, the Butt blocking and Head blocking, and so forth and so on.

Q. In other words, what he said was there is a call, I don't know whether I made it or not, I don't know what I talked about, if I did make it, but what I might have talked about was rule interpretations, ticket sales and Continental Enterprises?

A. Yes, sir. That's pretty much it.

Q. Now, did he later—strike that.

And was that the state of your information at the time you decided to write Dr. Aderhold?

[fol. 1530] A. Yes, sir.

Q. In other words, up to the time you wrote Dr. Aderhold, Coach Bryant had never informed you that he had made a call on September 16th; is that correct?

A. That's correct.

Q. And he never told you what he talked about on those dates, because he didn't remember what he talked about; is that correct?

A. That's correct.

Q. On the basis of this information, and the telephone record, you proceeded to try to write the letter to Dr. Aderhold?

A. Yes, sir.

Q. Now, you stated previously in your testimony in Atlanta that the letter was dictated in a hurry on the morning of March 6th as you had to catch an 8:40 plane to Washington; is that correct?

A. That's what I stated, but I didn't have my date book there with me previous to leaving here.

Q. Excuse me.

Will you answer the question first?

Mr. Pritchard: I suggest that he is entitled to answer the question in his own way.

A. I am going to answer the question.

Mr. Runzer: Would you read the question. I don't think you understood the question. You can make whatever explanation you want to.

Mr. Pritchard: Don't cut him off or try to.

[fol. 1531] Mr. Runzer: Just a moment. Would you read the question back, Mr. Zegarelli?

(Question read.)

A. Yes, sir, that is what I stated.

Q. Is that a correct statement?

A. Well, on checking my calendar before leaving here to go to Atlanta, I looked at March 6th and saw Washington there on my calendar, and took it that that was the destination. The plane leaves here in the morning at 8:40 to go to Washington and New York and other places. But I am not positive that this was where I went; I am not positive that I dictated the letter that morning. Now, also, in my testimony I said on Monday, Monday is the 4th. But, I didn't have my date book with me at the trial to check out the dates, and as I told you, I was going through two crises at that time so far as the University was concerned, and all I did was quickly refer to my calendar and saw that Washington was on March 6th; but, that meeting probably had been changed to our Friday meeting in Washington, which I met with Mr. Bennett, or it could have been that I went to Washington. I don't know, but during that period, during the period of January—of February, March, April, May, June, I took many trips to Washington, and over the State of which there are no records. Nothing on my calendar to designate that, because many of them were confidential trips to try to work out some of these problems that we have here at the University.

Q. Doctor, is it fair to say that you cannot state, under oath, that you went to Washington on the morning of March 6th?

A. I am saying that I am not sure.

Q. And that when you said under oath in Atlanta that you did that, that it may be incorrect?

[fol. 1532] A. It could be incorrect because I didn't have my date book. But, to me it is immaterial. I dictated the letter to my secretary hurriedly. I told her to check with Coach Bryant. I left this office to go somewhere, and during the interval, she typed the letter and tried to get in touch with Coach Bryant. He was out of town. She went ahead and mailed the letter. I didn't sign it, I didn't read it before it went out, and I left this office and I don't know exactly where I went. My calendar said March 6th I went to Washington.

Q. Let's go back for a moment.

When did you dictate the letter?

A. I am not sure when I dictated the letter.

Q. Now—

A. I thought looking on my calendar in August that I dictated the letter on Monday morning, March 6th; but, March 6th was Wednesday morning, and all I did was look at March 6th in August before I went over to Atlanta. I saw Washington there, and I thought that was the morning that I dictated the letter and went to Washington. On checking my secretary's notes, she had there that I dictated the letter on Tuesday morning. She states that she could be in error, that it could have been Monday morning. But, apparently now it looks as though I dictated the letter on Tuesday morning and left to go somewhere.

Q. And Tuesday would be March 5th?

A. Yes, sir.

Q. March 5th, 1963?

A. Yes, sir.

Q. Are you still saying it was dictated on a morning?

A. Yes, sir.

Q. You are certain of that?

A. Yes, sir, I am positive.

Q. You certain it was dictated hurriedly because you had to leave?

A. Yes, sir.

[fol. 1533] Q. Are you saying you had to leave to catch this 8:40 plane?

A. I am not sure, but that's the time that the plane leaves, if I was going to Washington. I am not sure I went to Washington.

Q. Let's go back a moment. Where did you dictate the letter?

A. Here in this office.

Q. You were in that chair? (Indicating)

A. Yes, sir.

Q. Was the secretary in here?

A. Yes, sir.

Q. That's a Mrs. Park?

A. Yes, sir.

Q. Does she take hand transcription?

A. Yes, sir.

Q. You did not dictate to a machine?

A. No, sir.

Q. Now, tell me something about the letter, Doctor? Was it a difficult letter to write?

A. Yes, sir, it was.

Q. Would I be correct then in assuming, like most of us, you just didn't sit down and dictate a difficult letter in a hurry or right off the top of your head?

A. I had one a great deal of thinking about this and tried to organize it as a layman and from the interpretation and the conversation I had with Coach Bryant, to send a letter to another layman, a University President, to try to answer some of the questions that he had raised in the meeting that I had.

Q. Well, did you dictate it all in one uninterrupted sentence?

A. Not in one uninterrupted sentence.

Q. I said uninterrupted sitting?

A. I dictated the letter uninterrupted.

[fol. 1534] Q. In other words, it wasn't a holding dictation, you didn't stop to think about it?

A. I did the best I could in writing it, yes, sir. I just didn't go right down the line on it, I did the best I could.

Q. I am trying to find out if you did your thinking before you dictated it?

A. I did some of it to try to get it into points to interpret for Dr. Aderhold some of the questions that he had raised.

Q. Did you have, when you were doing the thinking or dictating, the notes that you had taken in the meeting with Mr. Moore, or the meeting with Mr. Bryant?

A. No, sir.

Q. You had destroyed those?

A. I don't know what I did with the notes. Apparently I had placed them in my holder here, and I just don't know. I looked for them everywhere.

Q. You did not have them at the time you dictated the letter?

A. No, sir.

Q. Or at the time you were preparing to dictate the letter?

A. No, sir.

Q. Now, let me ask you again. Did you have to stop in the middle of your dictation to consider what you were going to say next?

A. I guess as you would on any letter that you are writing. You just—I am not one of these rapid fire people who dictate fast.

Q. In other words, you didn't have a prepared script with you, in effect, to read to your secretary?

A. No, sir.

Q. You were composing this as you went along?

A. Yes, sir.

Q. Although you had done some organizing before hand?

[fol. 1535] A. In my own mind; yes, sir.

Q. Any written summary or outline?

A. No, sir.

Q. How long would you say it took you to dictate the letter?

A. Oh, ten or fifteen minutes.

Q. Is that an unusually long period for one letter for you?

A. Important letters, no. It is about right. I wasn't attempting to write any legal document or any letter to be used in a court trial or anything like that.

Q. It was an important matter, an important letter, wasn't it?

A. It was an important letter to try to answer some of the questions in my layman's language of what Dr. Aderhold had raised.

Q. And the question that Dr. Aderhold raised was whether or not Mr. Bryant had received information from Mr. Butts which could affect the outcome of the Georgia-Alabama Football Game?

A. Yes, sir.

Q. That is the question you were trying to answer?

A. Yes, sir.

And I think in my letter it is quite evident, taking the letter in total, that I answered that question that at that time I was convinced that he had not received any information that affected the outcome of the game.

Q. Now, is it your testimony today that after the dictation you had to leave the office?

A. Yes, sir.

Q. How long did you remain in the office after you dictated the letter?

A. I just don't know.

Q. Was it dictated during normal business hours?

A. Early in the morning.

[fol. 1536] Q. During normal hours?

A. She usually comes, on days that I have to dictate, a few minutes early and particularly if I have got to leave. But, normally we start dictating at 8 o'clock, and this is before other people get into the office, and dictate until around 9:30 or 10 o'clock.

Q. What office hours—what are Mrs. Park's normal hours?

A. From 8 o'clock or 8:15, I forgotten exactly which, to 4:45 with an hour and a half for lunch.

Q. Did she come in early this particular day?

A. It was my recollection that she did, because of things that were piled upon the desk and other correspondence and things like that.

Q. Now, you, of course, had a chance on numerous occasions since this letter was dictated to examine the letter?

A. I don't know about numerous occasions, I think I read it four or five times.

Q. Is the letter transcribed as you dictated it regardless of whether your dictation is correct?

A. To the best of my thought, it is pretty much what I dictated to Mrs. Park.

Q. In other words, any errors in the letter were not errors of Mrs. Park?

A. Well, I haven't examined it for errors. I do think that it is unfortunate that I, as a layman, used the word plays instead of the techniques and that I didn't use more care in preparing it. But, it was, as I say, just a letter from one University President to another about a field that neither one of us are very familiar with.

Q. My question is, Doctor, if there are any errors in the letter, they are errors of the Secretary?

A. No, sir.

Q. Are there some secretarial errors?

A. I don't know.

[fol. 1537] Q. Would you examine the letter and show me any places where it was transcribed differently than you dictated?

A. I don't think I have to read it for you. I think I could say, as to the best of my memory, this is what I dictated to Mrs. Park. I can't swear that it is exactly what I dictated to her, but I think this is pretty much my dictation and at that time, my best interpretation.

Q. This refers to your letter dated March 6th, addressed to Dr. Aderhold, President of the University of Georgia?

A. That's correct.

Q. So that to the best of your recollection, any errors in the information which is recorded here were errors that

were made by you or because something that happened to you and not Mrs. Park?

A. Yes, sir.

Q. Was the letter typed while you were in the office?

A. No, sir, I don't think so, because I think I left immediately after finishing dictation.

Q. Did you—had you ever discussed, before this letter was written, this matter with Mrs. Park?

A. Sir, I didn't get your question.

Q. Had you ever discussed the Butts-Bryant matter with Mrs. Park before this letter was dictated?

A. No, sir.

Q. By discussing, I mean dictated anything to her that would let her know what this is about?

A. No, sir, not that I recall.

It may be that she—I am pretty sure that she saw Coach Bryant's letter.

Q. Now, did you tell her that this was an important letter when you dictated it?

A. No, sir, I don't believe I did.

Q. Then, as far as she was concerned—

A. But, I did tell her that I wanted her to be sure to [fol. 1538] call Coach Bryant and ask him if this was a good interpretation of our discussion in answer to the questions of Dr. Aderhold.

Q. Had you attempted to check your thinking with Mr. Bryant before you dictated the letter?

A. No, sir.

Q. Except for the three conversations you had with him, you hadn't contacted him?

A. No, sir.

Q. No, sir; I am right, is that what you are saying?

A. Yes, sir.

Q. Now, you don't recall now where you were going when you left the office the day that this was dictated?

A. I thought, sir, I was going to Washington when I testified over in Atlanta, because, as I said, I just checked my calendar early before I left. You may recall I was called back from Mexico to testify.

Q. For the record, Doctor, I was further away from Atlanta than you were at any time during the proceeding, and I know nothing except what I read in the Record.

Would you read the last question back?

(Question read.)

A. No, sir, I don't. I thought when I testified that I was going to Washington, but I am not sure.

Q. Now, we do not know now when we said it was dictated on Monday, March 6th, that was an error; is that correct?

A. Yes, sir. Now, I know it was.

Q. Because Monday was the 4th?

A. Yes, sir.

Q. Does your calendar show any engagement for the 4th of March?

A. No, sir.

Q. Show any engagement for the 5th of March?

[fol. 1539] A. Yes, sir.

Q. What engagements do you have there?

A. I can't tell whether I met them or not, because as I said, during this period I had many engagements with particular individuals that I made. I met with Dean Bidgood.

Q. Would that have taken place in his office?

A. Yes, sir.

Q. Did you have a time down for Dean Bidgood?

A. I have a time of 11 o'clock, but I don't think I met with Dean Bidgood that morning. I had a Staff Meeting at 2 o'clock and 4 o'clock, but I don't think I had those meetings that day.

Q. Am I correct that it is now your best recollection that the letter was dictated on Tuesday, March 6th?

A. I don't have any recollection about it at all. I don't know when it was dictated. Now, my secretary's notes show that it was dictated Tuesday, March 5th, in the morning. She said, and Mr. Bennett says that I left here on Tuesday morning. No one knows where I was going. I have no rec-

ord of it. This is not unusual, because during this period I made many confidential trips. Sometimes I would tell Mr. Bennett and sometimes I wouldn't tell him.

Q. Is it true your expense records show no trips for March 4, 5, and 6?

A. There is no expense record for any of these confidential trips.

Q. I understand that, but I am asking, do your records show any trips, not whether you made any trips, but do your expense records show any trips for March 4, 5, and 6?

A. I don't think so.

Q. Have you had an opportunity to review them?

A. I believe I have asked my secretary to review them.

Q. All right.

A. And I believe I asked the comptroller to.

[fol. 1540] Q. Now, you don't recall now where you were going when you left on the day you dictated this letter?

A. No, sir, but I don't think that's important. I think the important thing is, I say it over again, I dictated that letter hurriedly. I told my secretary to call Coach Bryant and check on it and get it out to Dr. Aderhold as soon as possible.

Q. But, you don't recall where you were going when you left?

A. No, sir.

Q. Now, you stated in Atlanta you were going to Washington to a meeting of the American Council on Education?

A. Yes, sir. I had just returned the night before or morning before I left here from Mexico City, and then took the University plane, I think, to Atlanta to get there to testify by 11 o'clock in the morning and I believe I was up all night trying to get back from Mexico. I am not sure, but I think it was; I got a phone call to be there at 11 o'clock, I remember that.

Q. Did you have to go to a meeting on March 6th, in Washington, for the American Council on Education?

A. I was supposed to go to Washington for a meeting

on March 6th. I don't know whether it was for this special committee on the Accreditation of Service Experiences or not.

But, at that time, that would have been pretty much the meeting; but looking back on my calendar, I find that I did go there on Tuesday, February 26th, for the meeting. So, apparently I had that meeting confused with the meeting I had in Washington the week before.

Q. Is the American Council on Education and this Accreditation thing the same thing?

A. The Commission on Accreditation for Service Experi-
[fol. 1541] ences is a Commission of the American Council on Education.

Q. And where would the meeting take place?

A. It would be held in Washington.

Q. Where in Washington?

A. At the American Council building.

Q. Which is located where?

A. I don't know. It is on Massachusetts Avenue, I think. I can get it for you.

Q. Is it a building with a name, or do they rent offices in a large building?

A. No, sir. They have their own building.

Q. Presumably then it would be listed in the street directory in Washington?

A. Yes, sir.

Q. Now, do you know how long you were away when you left on this trip?

A. No, sir, I don't.

Q. And you don't know what you did?

A. No, sir.

Q. And do you know who you talked to?

A. No, sir.

Q. Do you know what you talked about?

A. No, sir.

Q. Has Mr. Bryant ever informed you that he called Mr. Butts on September 16th?

A. No, sir.

Q. You stated in Atlanta that this was a surmise because the record showed such a call; is that still your understanding?

A. Yes, sir, and I believe Coach Bryant. I believe that in talking with Coach Bryant, not long ago, that he told me he is till not sure he was the one that called.

Q. Now, when were you advised that the letter to Dr. [fol. 1542] Aderhold had been made public, or at least gotten available to the public?

A. I got a telephone call and I don't know when, but it was when the attorney general of Georgia was making his so-called investigation, a news analyst on one of the radio or television stations called me and told me he had seen the letter, and would I care to comment on it. I told him no, that I didn't have anything to say, that I was surprised that Dr. Aderhold would take a confidential letter from me and make it public and to try it in the public when it wasn't written as a legal record and wasn't written to be used for a legal purpose. It was my best interpretation, as a layman, of my discussion with Coach Bryant.

Q. Did you later discuss with Dr. Aderhold, that the letter had been subpoenaed from him?

A. I called him.

Q. Did he tell you that?

A. Yes, sir.

Q. Now, subsequently on March 23rd, 1963, the Birmingham Post carried a statement concerning that letter reportedly to be written by you; is that correct?

A. Is that statement about techniques?

Q. Yes, sir.

A. Yes, sir.

Q. And in all fairness to you, Dr. Rose, I think we should make sure we are talking about the same thing.

I am referring to a statement as follows: "The substance of any letter to Dr. Aderhold is accurate and correct. This letter was my personal and first response to the first conference held between President Aderhold, Commissioner Bernie Moore and me.

It was an attempt on my part to relay in laymen's language the substance of the telephone conversations between Coach Bryant and Butts after a preliminary examination of the facts by me. It was understood by all parties that I [fol. 1543] was to continue, and I have done so, a complete, thorough and exhaustive investigation of the extremely serious charges directed against Coach Bryant and Coach Butts.

Since the latter was a purely preliminary, personal communication between Dr. Aderhold and me, I did not take the time to verify in explicit detail either the exact sequence of events or the interpretation of my layman's language as it relates to the technical phrases used by coaches and athletic directors in modern day football. The substance of my letter is accurate.

Coach Butts and Coach Bryant were discussing the impact of rules changes on the defensive and offensive techniques employed in the Southeastern Conference, particularly as they relate to the Alabama Squad in its forthcoming season, including its opener with the University of Georgia.

In my letter, I say they discussed offensive and defensive plays. The appropriate phrase should have been, and still remains, techniques.

Now, there was more to the statement than that, but is that the statement?

A. Yes, sir, and I wrote it right here by longhand on this desk.

Q. Did you consult with anybody on that?

A. Mr. Jeff Bennett.

Q. Did he assist you in the drafting of that?

A. Made two or three corrections.

Q. Obviously then, you must have learned of the publication of your letter to Dr. Aderhold prior to March 23, 1963?

A. I just don't know, sir.

Q. Well, your statement appeared in the Birmingham Post on March 23rd, 1963; is that right?

A. I am not even sure about that.

Q. It did appear on March 23, 1963?

[fol. 1544] A. Then, if it did appear, then, apparently, I wrote that statement on the 22nd, I believe; I am not sure.

Q. Certainly you would have written the statement before it appeared in the Birmingham Post?

A. Yes, sir.

Q. And certainly would seem rational that you knew the Aderhold letter had been published before you wrote that statement; would that be correct?

A. I don't know whether the letter had been published, but Dr. Aderhold, I called and he informed me that afternoon that it had been.

Q. Let me rephrase it then. The statement was written after you learned that Dr. Aderhold's letter had been subpoenaed and was now apparently in the hands of the television people?

A. Yes, sir.

Q. Now, in the interval between learning this and the writing of this statement, did you consult with Coach Bryant?

Mr. McCall: We want to interpose an objection to any question about that newspaper report which occurred after the article printed in the Saturday Evening Post of March 23rd after the article had gone to Press, which under the undisputed evidence in the case, shows that it went to Press on or about March 3rd, 1963?

A. May I, off the record, ask one question?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Mr. McCall made an objection, which I believe was on the record. I hope so, anyway.

In the interval between learning of the publishing of the [fol. 1545] Aderhold letter or being informed by the Doctor that the letter had been subpoenaed and the dating of the statement that appeared in March 23rd Birmingham Post, March 23, 1963, did you consult with Coach Bryant?

A. I am pretty sure I did. I am not certain of it. I am pretty sure sometime in here I had—yes, sir; I think I did.

Q. Did you discuss your letter with Dr. Aderhold?

A. With Coach Bryant?

Q. Your letter to Dr. Aderhold with Coach Bryant?

A. Yes, sir, but he said he hadn't seen the letter that I sent to him.

Q. Now, the statement we just read points out, as I think you said a mistake in the letter in the use of the word plays when it should have been techniques; is that correct?

A. Yes, sir.

Q. Who was the one who told you that was a mistake?

A. I believe that was at the time I called Coach Bryant and read the letter to him; I am not sure. He said that just isn't right. This isn't what I told you. He said we never talked about plays. He said we talked about techniques and we talked about things that would have been illegal in rule interpretation. I believe that that was the day that I read the letter to him.

Q. So, it was Coach Bryant that pointed out to you that there was a mistake in the letter?

A. I am not sure, but I think it was Coach Bryant.

Q. And there may be others?

A. Could have been. I just don't know. I still continue to say plays and I don't know that much difference about it.

Q. But, whether Mr. Bryant was the first or not, you did say he pointed out to you the letter was wrong?

A. Yes, sir.

Q. And was your subsequent statement which appeared in the Birmingham Post, March 23, 1963, drafted in reliance [fol. 1546] on the information that Mr. Bryant had given you in this recent conversation with him?

A. Partly.

Q. What other basis?

A. On my reading the letter and the information that I had gotten between that time of writing it and what I had and as I said, in consultation with Mr. Bennett.

Q. Now, in discussing this letter with Mr. Bryant, he pointed out to you there was an error in it. Did he still say he was not sure whether they talked about the rule changes?

A. He said to me, Dr. Rose, you really did not understand. I am a damn poor coach to not to be able to keep my President better informed on football than you are. That's a very poor interpretation of our conversation.

Q. Well, was he still saying that he did not recall what was talked about in the conversation with Mr. Butts?

A. He said that. He said to me that he didn't know what he talked to him about. This is what he told me that afternoon. He said, I told you it could have been and tried to explain, but he said I am a poor coach—

Q. In other words, he was still telling you he did not know specifically what was talked about and that rule changes was one of the things that could have been talked about?

A. Yes, sir, and about which he was really concerned, and that Coach Butts had the knowledge and explanation.

Q. And did he also again repeat he might have talked about the ticket sales and Continental Enterprises or other investments?

A. No, sir.

Q. In other words, he just said we could have talked about rules changes?

A. He didn't—we didn't even discuss that. He was so [fol. 1547] upset over the poor job I had done answering the letter, we just didn't talk about it.

Q. What exactly did he say then? Maybe I misunderstood you?

A. He said that the letter was all wrong, that I misinterpreted what he said to me, and tried to explain that he could understand how I got some of this misinformation, but it was a very poor interpretation of his conversation with me.

Q. When did you learn the date of—when did you learn that a call had been made from Tuscaloosa to Athens on the 16th, not who made it, but that a call had been made?

A. I still don't know who made, and I don't know exactly where I learned about the call.

Q. Who told you, Mr. Callahan or Mr. Bryant?

A. I am not sure. Mr. Callahan gave me some information; Coach Bryant gave me some information; I just don't know.

Q. Did Coach Bryant ever tell you which rule interpretation he was concerned about?

A. He tried his best to explain it to me, and even tried to show me. But, I mean, I just couldn't understand it all. I know what blocking is, and I know what tackling is, but I don't know what butt blocking is and I don't know what head blocking is, and I don't know what is legal and what is illegal, and all of the rules they have in scientific football today.

Q. Now, the statement says that Mr. Butts and Mr. Bryant were discussing the new type of rules of offensive and defensive rules?

A. This is my interpretation.

Q. Is that a correct statement? They were discussing the impact of rules on offensive and defensive plays?

A. I don't know. That's what Coach Bryant said they could have been talking about.

[fol. 1548] Q. This is what Coach Bryant said they could have been talking about?

A. Yes, sir.

Q. Then, it would be incorrect to say that they were talking about it?

A. Yes, sir; but you have to understand the problem that we had with the Georgia Tech incident, and with the publicity that followed the Holt-Granning incident in which the Granning boy got his jaw broken. Coach Bryant was humilitated, he was castigated, nastiest things that could possibly be written about a man were written. It was a reflection upon me and my integrity and academician as University President. There was a statement to the effect, in a sports writer's column in Atlanta, that it was nothing more than a football factory, there were nasty letters

written to me from prominent citizens in Atlanta who had just read and understood one side of it, and I had told Coach Bryant that I did not want another incident like this to happen again, and that I meant it. That this was a University, a good academic institution, and that this institution could not take that kind of publicity and maintain its academic standards.

Q. Well, in your opinion, were not the charges that were made against Mr. Bryant growing out of the Butts affair more serious than those growing out of the Holt-Granning incident?

A. Yes, sir.

Q. Far more serious?

A. Yes, sir, but I think, sir, that the charges that grew out of the conversation between Coach Bryant and Coach Butts was started and deliberately perpetrated by the same man that started the whole fuss over the Darwin Holt-Chuck Granning incident.

Q. Now, you also say in the statement that much of the Bryant-Butts conversation related to explanations of [fol. 1549] changes which Bryant proposed to introduce to his team at the suggestion of Mr. Gardner?

A. Yes, sir.

Q. Where did you get that information?

A. This was in our discussion which he explained to me that Mr. Gardner came to the University of Alabama at his request with permission of Commissioner Bernie Moore. His reason for inviting Mr. Gardner was following a conversation he had with Coach Butts in August, and I believe in Buffalo, New York, at a Coaches meeting, a Coaching Clinic, and again at a Clinic in Atlanta; and then following a meeting of football coaches of the Southeastern Conference, and his ability to understand the new interpretations. And that when he told me that this one thing was one of the things they could have been talking about, and knowing his concern about it, this was the reason I used that statement in my letter.

Q. In other words, that information came from Coach Bryant; is that correct?

A. My interpretation of what Coach Bryant had said to me.

Q. Now, when you—you remember when you gave your deposition in the Butts case on May 27, 1963?

A. Yes, sir.

Q. You were asked about that deposition in Atlanta, and you stated at that time, that is at the time you gave the deposition, you did not know for certain if Bryant had called Butts on September 16th, or what had been talked about?

A. Yes, sir.

Q. Now, is that correct, that at that time you gave your deposition you did not know for sure that Bryant had called Butts or what was talked about?

A. I wasn't certain. I thought at that time that he had called, but I wasn't certain.

[Vol. 1550] Q. Were you certain at the time you gave your testimony in Atlanta in August of this year, or of last year?

A. I thought so, and I am still not certain today.

Q. In other words, you are not certain today that Coach Bryant called Coach Butts on September 16, 1962, or what they talked about?

A. No, sir, because Coach Bryant said he is not certain.

Q. Now, prior to your deposition being taken, did you discuss the matter with anyone, that is, your deposition being taken back in May, 1963?

A. Did I discuss what, sir?

Q. The testimony or the incident with anyone in preparation for that deposition?

A. That morning we took it in your offices, didn't we?

Mr. McCall: Yes, sir.

A. And I came up to ask you—see, I never have given a deposition before and never been in court before. I wanted to know what to expect, and that's all these gentlemen told

me, to try to remember, to the best of my knowledge, and that's what I tried to do.

Q. Did you ever discuss your pending testimony with Mr. Bryant?

A. No, except he was up for—to give his deposition that day and we rode up in the car together. But, we didn't discuss any details of it.

Q. Were you in the same room at the time they were going over your testimony with you?

A. I don't believe so. Were we? I just don't know.

Mr. Runzer: Excuse me again, Dr. Rose. They can't [fol. 1551] answer. If you don't know, it is perfectly proper for you to say that.

A. I don't know.

Q. You don't recall?

A. I believe that he was asked to go outside.

Q. Did you testify before the Alabama State Legislature in this investigation?

A. Yes, sir.

Q. Do you recall when that was?

A. No, sir. I might can look it up.

Q. Would you please, sir?

A. Would you have the date when that was?

Q. If you are asking me, the answer is no, I do not.

A. No, sir, I don't have it on my book.

Q. Prior to your deposition being taken in May, 1963, did you have any conference with Mr. McCall?

A. May when?

Q. Your deposition taken May 27, 1963?

A. Yes, sir. May 16th.

Q. Where did that conference take place?

A. I am not sure. I think here, I am not sure though.

Q. Just you and Mr. McCall present?

A. No, sir. Mr. McCall and Coach Bryant.

Q. And what was discussed? Was the letter discussed at that meeting?

A. I don't know, sir.

Q. You don't have any recollection?

A. No, sir.

Q. Did you make any notes?

A. No, sir.

Q. Did you subsequently get a copy of any one else's notes?

A. No, sir.

Q. Are you certain about that?

A. Well, I am not sure.

[fol. 1552] Q. I might warn you, Doctor, don't answer so hastily, it pays you to think?

A. I just don't—

Q. I will ask you the question again.

Did you receive a copy of anyone else's notes?

A. I just don't know, I may have.

Q. Did you review—

A. I do believe on one or two times after meetings that Mr. McCall sent me copies of letters or wrote me a letter, but I am not sure about that.

Q. Did you read those letters?

A. Yes, sir.

Q. Did you read the same memos or notes that were attached to them?

A. Yes, sir.

Q. Did they accurately reflect the discussion that you had had?

A. I don't know, sir, because this was when I was really getting down to the real crisis of the integration problem.

Q. Now, getting back to the letter for a moment, the first sentence says, "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions." Is that sentence correct?

A. I think it is.

Q. And that is your best recollection today?

A. Yes, sir.

Q. Next sentence is, "As best as I can ascertain, this is the information that I have received."

Was that sentence correct?

A. Yes, sir.

Q. New paragraph. "Coach Butts has been serving on the football rules committee and at a meeting held last summer of the rules committee the defenses used by Coach [fol. 1553] Bryant, LSU and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays."

Is that correct?

A. Now, Coach Bryant informed me later that that was not what he had told me. He said that he told me that there had been changes in rule interpretation and that Commissioner Gardner, Commissioner of the Officials had told the officials to be sure and watch Alabama, Tennessee and LSU and somebody else, because they had been violating these rules.

Q. So, that second paragraph of your letter is incorrect?

A. Yes, sir.

Q. Third paragraph.

"Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause Lee Roy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team?"

Is that correct?

A. That is not a correct statement.

Q. In what respect is it incorrect?

A. It is incorrect there in that I was trying to reveal to Dr. Aderhold what Coach Butts was trying to explain to Coach Bryant what was wrong with his illegal defenses, were we playing any team, but I was trying to pinpoint, for Dr. Aderhold, about the University of Georgia, and he wasn't talking about the University of Georgia, he was talking about any team that Alabama would play.

Q. Let's take it apart.

[fol. 1554] Did Coach Bryant tell you that Coach Butts had discussed this, referring to rule changes, with Coach Bryant?

A. Coach Bryant said this could have been what they were talking about. They talked about it many times.

Q. One of the things they could have talked about?

A. Yes, sir.

Q. And did Coach Bryant tell you that the two were together where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team?

A. He told me they were at something which they discussed the illegal defenses that Coach Bryant was using, and then demonstrated to him plays or techniques, I keep saying plays, I mean techniques, offensive techniques that could cause the University of Alabama to be seriously penalized and probably lose the services of a player. Coach Bryant said a player like Lee Roy Jordan.

Q. Are you certain now that Coach Bryant told you that Coach Butts discussed offensive techniques which could cause Alabama to be penalized?

A. He wasn't talking about the University of Georgia's offenses. I used the term in there to relate it to Dr. Aderhold. He was talking about any offensive play in which Coach Bryant would use an illegal defensive play and Coach Bryant told me at that time over the years he and Butts had talked about these things.

Q. Did Coach Bryant say that Coach Butts said there were offensive techniques of any school that could cause Alabama to be penalized or cause a player like Lee Roy Jordan to be expelled?

A. In answer to Coach Bryant's wanting to know what the rule interpretation was.

Q. Oh, he did say that?

A. That was my interpretation, what Coach Bryant said to me.

[fol. 1555] Q. You heard what he said, you were sitting in the room?

A. Yes, sir, but I didn't understand it, I still don't.

Q. What I am trying to find out, did you understand Coach Bryant to say that Mr. Butts told him that there were offensive techniques of any types that could cause Alabama to be penalized or a player like Jordan to be expelled from the game?

A. Under the new rule interpretation.

Q. And that is what Coach Bryant told you that Coach Butts said?

A. That they could have been talking about it if they were discussing it over the telephone, but Coach Butts had said it to him at the meeting where they were talking about this thing.

Q. Fourth paragraph.

"Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14th he called Coach Bryant and told him."

Is that a correct statement?

A. No.

Q. In what respect is it incorrect?

A. It is incorrect in that he wanted to know about the new rules interpretation, how it affected his defenses, some offenses in which we might be found guilty of illegal defenses, and Coach Bryant said that he knew that over the period of the summer that there were some rules changed that had to do with a defense on an end run or something, and I saw it explained on television one night, but I still don't understand it, and that—and that he had tried to get Coach Butts several times to remember exactly what the offense was that would cause the illegal defensive technique to be used.

Q. Did Coach Bryant tell you that he asked Coach Butts to let him know what the offensive techniques were?

[fol. 1556] A. Well, he said that if he did call, and if he did call him back, that this would have been one of the

things that he could have talked to him about; he didn't say specifically; no, sir.

Q. Continuing from the letter, the last portion, "And on September 14th he called Coach Bryant and told him." Is that a correct statement?

A. Was there a call on September 14th? I have been so confused about these dates?

Q. I am asking you, sir, if it is a correct statement?

A. I am not sure, but taking that Coach Butts did call Coach Bryant on the 14th, of course, Coach Bryant said this could have been one of the things that he called him about.

Q. Where did the September 14th date come from that is in your letter?

A. Apparently in my notes.

Q. Which were taken in your meeting—

A. With Mr. Aderhold.

Q. Do you recall they used the date September 14th?

A. There was some confusion about it. I think the dates that I had when I got back here were not—not exactly the dates that corresponded with telephone conversations. I mean, with telephone records, but they were close and I didn't know exactly.

Q. Are you saying there was a confusion about the date in the meeting there at Commissioner Moore's office?

A. No, sir. I just wrote down the dates that were given.

Q. Were the dates given to you in that meeting, September 14th?

A. That's the only place I could have gotten it.

Q. Next sentence. "There was a question about another one of the offensive plays of the Georgia team that could [fol. 1557] seriously penalize the Alabama team, and bring on additional injuries to a player. Tell me, did Coach Bryant tell you that?

A. No, sir, but this was one of the things that he tried to explain to me on that end play, and defensive techniques

where he said that Lee Roy Jordan would, instead of rushing in would pull out and run out to the end. Now, I don't know what that means, but I did see it explained on a television program, it looked pretty good to me then; but, I still don't know anymore about it.

Q. All right.

Let's go on. "Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16th," is that correct?

A. Coach Bryant said that could have been what the call was about, but he wasn't sure. He wasn't even sure he made the call.

Q. That is an incorrect statement, that last statement?

A. Yes, sir, but my best interpretation of what the calls were.

Q. Did Coach Bryant tell you, before this letter was written, that he did not know whether he had made the September 16th call to Coach Butts?

A. He said he didn't remember it, but he said he could have done it.

Q. Did he also say he didn't remember what was discussed?

A. Yes, sir.

Q. Am I correct in understanding that is what he has told you up to the present time?

A. That is what he told me just recently again.

Q. But, he doesn't remember the calls and he doesn't remember what was said?

A. All he remembers is that they talked many times [fol. 1558] about all of these things, but that he doesn't remember specifically.

Q. Either the call or what was talked about?

A. Yes, sir.

Q. Next sentence.

"It was then that Coach Bryant changes his defenses and invited Mr. George Gardner, head of the Officials of

the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses." Is that right?

A. That's wrong. He had Commissioner Moore bring Gardner here before.

Q. Is it correct that he changed his defenses?

A. He said that he and his coaches decided that they had better change some of their techniques.

Q. So that the word defenses should be defenses techniques?

A. Yes, sir.

Q. And also correct the date of Mr. Gardner's visit?

A. Yes, sir. I believe that was sometime in August, but I am not sure about that.

Q. That would explain then the next sentence where you say this, "This Mr. Gardner did the following week." That's also incorrect?

A. Yes, sir, but I want to say this; that Coach Bryant wasn't even clear in his own mind about that.

Q. All right.

"The defenses were changed, and Coach Bryant was grateful to Coach Butts for calling this to his attention."

Is that a correct statement?

A. I asked him, well, do you think that you got anymore information from him? He said, well, there is no doubt it has been most helpful and that anytime you do not get yourself penalized or any boy is hurt, all coaches are concerned about players, and their being hurt. And he went on to talk about how unfortunate it was that Chuck Granning [fol. 1559] had gotten hurt and his concern about it, and his concern about his own boys.

Q. Well, is the statement, the defenses were changed, and Coach Bryant was grateful to Coach Butts for calling this to his attention; is that correct?

A. The defensive technique, but the statement like it is is not exactly correct.

Q. It should be defensive techniques?

A. Yes, sir.

Q. With that addition, it would be correct?

A. My interpretation of what Coach Bryant was stating to me, yes.

Q. That would be correct as you understood Coach Bryant to tell you?

A. Yes, sir.

Q. The next sentence.

"Coach Bryant informs me that calling this to his attention may have favored the University of Alabama Football team, but that he doubts it seriously", is that correct?

A. This was after an interrogation like you are giving me that I just kept pressing him on it, but Coach Bryant had every confidence that while he was glad there wasn't any penalties or any serious penalties in the game, and no public criticism of the game in terms of what the sportswriters over there called hard-nose football and roughness, that he didn't need any information to beat the University of Georgia.

Q. Well, was it correct that Coach Bryant informed you that calling this to his attention may have favored the University of Alabama Football team, but he doubts it seriously?

A. Yes, sir; that's correct.

Q. Next sentence. "He, meaning Coach Bryant, did say that it prevented him from using illegal plays after the new change of rules." Is that correct?

[fol. 1560] A. Yes, sir.

Q. Now, skipping down, I see we are getting on to your deadline.

You say, "Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information, I would appreciate your furnishing me with it as I am not only anxious to work with you, but to satisfy my own mind."

Is that correct?

A. Yes, sir.

Q. Now, Doctor, several times during the course of your previous testimony you indicated that you feel you could write a better letter or clearer letter after having the benefit of talking to people and understanding the matter better?

A. Yes, sir, but I still don't think, sir, that I could write a legal document on it, or anything that would prove any points in court or have any substantial changes. I think in that letter I have conveyed to Dr. Aderhold that I have looked into the accusations that he has made, and that I cannot find the evidence that he was looking for and that there was no rigging or fixing that football game.

Q. Are you saying that you couldn't write a clearer letter of March 6th?

A. I think I could write a more correct letter and use better terminology, but I still don't think that I could write a letter that you couldn't sit there, as a legal mind, and pick to pieces, because I haven't had any legal training. I am not a scientific football coach. My field is philosophy and theology. That's the reason I have members of the staff to take care of these departments.

Q. Coach Bryant ever admitted to you that he did call Coach Butts on September 16, 1962?

A. No, sir.

[fol. 1561] Q. Did he ever admit to you what he talked about on that date, September 16, 1962?

A. No, sir, but he did tell me that he could have called him and this could have been what they talked about; but, he didn't know for sure.

Mr. Runzer: Excuse me. Off the record.

(Off the record discussion.)

Q. Doctor, before we stop, you are aware that we asked for your calendar book and some of your checks?

A. Yes, sir. Here it is, and here are my checks. I will need those checks for income tax purposes.

Q. I was going to suggest, and in view of your time deadline, if the Court Reporter photostats that material, we won't have to have those and could return those to you.

Mr. Pritchard: Perfectly willing to do so.

A. How do we handle it?

Mr. Pritchard: Give it to him right now.

A. This is all I have got.

Q. Doctor, just a few more infamous questions. This trip that commenced on the morning of March 5th, do you have any idea how long it took?

A. No, sir, I don't. I can't tell you exactly.

Q. Do you know how you travelled?

A. No, sir.

Q. You do not know where you went?

A. I am not sure where I went.

Q. Where do you think you went? What is your best recollection?

A. That has to be confidential.

[fol. 1562] Mr. Bennett: Could we go off the record?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Doctor, is it my understanding, from your off the record statement, that these—this trip had nothing to do with the Butts-Bryant incident?

A. Yes, sir.

Q. And that you consider the matters that you discussed and the people you discussed them with confidential?

A. Yes, sir.

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Dr. Rose, where did you go when you left the University on the morning of March 5th?

Mr. Bennett: Now, at that point, you have been advised by me that you are free to refuse to answer on the grounds that your trip had nothing at all to do with the matter at issue and involves your confidential relationship as President of the University of Alabama.

Q. You do so refuse to answer on that basis?

A. Yes, sir.

Q. Who did you see on that trip?

Mr. Bennett: Same advice.

A. I refuse to answer that,

[fol. 1563] Mr. Runzer: Off the record.

(Off the record discussion.)

Q. How long did the trip take?

Mr. Benhett: Same objection, and can you just repeat the same grounds for refusal each time?

Mr. Runzer: And you do refuse to answer on advice of counsel?

A. Yes, sir.

Q. Were your expenses reimbursed to you through the University for these trips?

A. No, sir.

Q. You absorb them yourself?

A. Yes, sir.

Q. Do you remember the means of transportation you used?

Mr. Bennett: Same objection.

A. I don't believe I will answer that.

Mr. Bennett: Same grounds.

Q. You refuse to answer?
A. Yes, sir.
Q. Do you recall the name of the places that you went to?

Mr. Bennett: Same advice and same grounds.

A. I refuse to answer.
[fol. 1564] Q. Will you tell us the name of the Hotel or Motel where you stayed—

Mr. Pritchard: Same objection.
Mr. Runzer: I would appreciate it—
Mr. Pritchard: We object to it.
Mr. Runzer: I would appreciate it—
Mr. Pritchard: You have got enough to test your question, go ahead.
Mr. Runzer: I—
Mr. Bennett: Let the record show he refuses to answer on the same grounds.
Mr. MacLeod: Let him finish.
Mr. Pritchard: I object to it.
Mr. Runzer: Not in the middle of my question.
[fol. 1565] The Witness: When you present this to the judge, will we have an opportunity to present—
Mr. Pritchard: We will be right there, don't worry.
The Witness: Will this be a public hearing or can you get—
Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Bennett: If we can make certain, back on the record, that he refused to answer the last question on the same grounds that we resaid it before.

Q. Doctor, I would just like to go briefly into the background of your relationship with Mr. Bryant prior to his coming to the University, that is, the University of Alabama. When did you first meet him?
A. The first year that he became President of the University of Kentucky.

Q. The first year he became President?

A. I mean, Coach at the University of Kentucky and I believe that was 1946 or '47.

Q. Did you meet him in a business way?

A. No, sir, at a social gathering at a country club.

Q. Did a personal relationship develop out of this meeting?

A. No close personal relationship. I knew him and went to his ballgames and would see him from time to time and we had mutual friends.

[fol. 1566] Q. Did you ever entertain he and his wife in your home?

A. No, sir.

Q. He and his wife ever entertain you in their home?

A. No, sir.

Q. Did you continue to have a relationship with him when he went to Texas A & M?

A. No, sir.

Q. Ever correspond with him?

A. No, sir.

Q. Did you meet him during that period?

A. No, sir.

Q. Now, am I correct that you are responsible for bringing him to the University as football coach?

A. Yes, sir.

Q. How long had you been President when he arrived?

A. I was elected President on September 5th, 1957, and I made trips down every week to the University, but I remained on as President of Transylvania until December 10th, I believe it was, of 1957, as President of Transylvania. Then, I made trips back and forth from here and made administrative decisions, and during this period I obtained the resignation of the coaching staff and assumed the responsibility of employing a new coach and Athletic Director and coaching staff. I employed him on December 1st, 1957, effective January 1, 1958.

Q. And where was he employed at the time you secured him, do you know?

A. Texas A & M at College Station, Texas.

Mr. Runzer: Doctor, you can make your plane.

A. Bless your heart.

[fol. 1567] Mr. Pritchard: Thank you all.

Further Deponent Saith Not.

Certificate

State of Alabama,
Jefferson County.

I hereby certify that the above and foregoing deposition was taken down by me in shorthand, and the questions and answers thereto were reduced to writing under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the cause, nor am I in anywise interested in the results of said cause.

.....

Commissioner-Notary Public

[fol. 1568]

IN THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

CONTINUED DEPOSITION OF DR. FRANK ANTHONY ROSE—
Filed February 28, 1964

Continued Deposition of Dr. Frank Anthony Rose, resumed in the above-styled cause on the 17th day of January, 1964, commencing at 3:45 p.m. at Tuscaloosa, Alabama, pursuant to recess of said deposition on the 8th day of January, 1964, and following the order of the Honorable H. H. Grooms, District Judge, pertaining to the examination of said witness.

APPEARANCES

Mr. Winston McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, and Mr. Francis Hare, Sr., of the firm Hare, Wynn, Newell & Newton, City Federal Building, Birmingham, Alabama, for the Plaintiff.

[fol. 1569] Mr. Eric Embry, of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, for the Defendant.

Mr. James Bennett, Attorney at Law, Tuscaloosa, Alabama, appearing for the witness.

Reported by
Jerry L. Rotruck

Deposition

FRANK ANTHONY ROSE, recalled as a witness, being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Examination by Mr. Eric Embry:

Q. To refresh your recollection, Doctor, going back to the occasion of the prior questioning—you have a copy of that I see that Mr. McCall is giving to you—at page 138 of the deposition which was on the 8th day of January of this year—

A. Yes, sir.

Q. —you were asked this question: "This trip that commenced on the morning of March 5, do you have any idea how long it took", and I believe you answered, "No, sir, I don't. I cannot tell you exactly."

"Q. Do you know how you traveled", and you answered, "No, sir."

Now, you previously answered you did not know where you went on this occasion, is that correct, sir?

A. Now, where are you on here, what page?

Q. 138.

A. 138.

[fol. 1570] Q. The last—

A. Yes.

Q. —complete answer on that page.

A. I am not sure where I went.

Q. I want to pick up there, if I may.

A. All right.

Q. Do you have any recollection, Dr. Rose, of where you went on that date on March 5th?

A. Mr. Embry, I don't know what legal term or what a lawyer means by "recollection." If you are talking about a guess, I can make a guess. I have done everything I can from checking my notes, notebook, my wife's notebook and talking with members of my staff trying to ascertain exactly where I went that day.

Q. Have you been able to determine in order to form any recollection of your own as to where you did go on that date?

A. I wouldn't say recollection, but if you want me to guess, I can guess where I went.

Q. Well, if you define your best recollection as a guess it is all right with me, just whatever any of us can draw upon in our minds or intellects as we best recall what we did and when we did it. That is the context I am asking you this in.

A. Yes, sir. I would guess that I went to Montgomery.

Q. Montgomery, Alabama?

A. Yes, sir.

Q. Now, on that occasion do you know how you traveled? Do you have any recollection as to how you traveled?

Mr. McCall: We object.

[fol. 1571] Mr. Bennett: At this time, Dr. Rose, I would advise you that as I remember the order of the court at the hearing of this week on this matter it extended only to the question of your recollection as to where you went, not as to mode of transportation or who you saw or where you stayed, but to what city did you go?

By Mr. Embry:

Q. I don't interpret it that way. Of course, this is a matter that would probably be some point of contention between the attorneys in the case, but my understanding of the intent of the judge's order is that if you do have any recollection of where you went that I am permitted reasonable bounds of inquiry as to place, time and situation in order to identify the places you may have been.

A. I have not found out any information that would tell me definitely where I was that day, but I am having to guess at it, and I would guess that it was Montgomery.

Q. Do you have anything to which you can make reference to refresh your recollection, an appointment calendar?

A. I had an appointment calendar. You have it now.

Q. Yes, sir.

A. There was not anything there.

Q. Do you have any other thing of that nature that would serve to refresh your recollection?

A. No, sir. I have tried to find everything that I possibly could.

Q. Do you have any recollection as to who accompanied you?

A. No, sir.

Mr. McCall: Objection.

[fol. 1572] The Witness: I would have to guess at that. I just don't know.

By Mr. Embry:

Q. Do you have a recollection whether or not you, on advice of counsel, are willing to disclose? Do you have any recollection as to what mode of transportation you used?

Mr. McCall: I object on the ground it is repetitious.

Mr. Embry: I am asking if he has a recollection. I am not asking what it is.

Mr. McCall: I object on the grounds it is repetitious. You asked do you know how you traveled and he answered no, sir, on page 138, and I object on the grounds it is a repetitious question and it has already been answered in the record.

By Mr. Embry:

Q. You have had an opportunity, I assume, between the 8th and today, as you have stated, to check references in order to refresh your recollection.

A. Yes, sir.

Q. And in light of that I am asking you whether you do have any recollection, not what your recollection is, but whether you have a recollection as to what mode of transportation you used.

A. No, sir, I don't.

Q. You do not?

A. No, sir.

Q. Do you have any recollection as to whom you saw on the occasion of the visit?

Mr. Bennett: At this point I would advise you that as [fol. 1573] I understand the direction of the court on this particular part of the motion being heard filed by counsel for the plaintiff that you are not required to answer that question.

Mr. Embry: Do you decline on the advice of your attorney to answer.

Mr. McCall: We further object on behalf of the plaintiff on the grounds it goes beyond the scope of the examination and is contrary to the specific instructions of Judge Grooms.

By Mr. Embry:

Q. I just want to know if the Doctor declines to answer on the advice of this attorney, Mr. Bennett?

A. Yes, sir.

Q. Do you have any recollection as to the places, physical places—

Mr. Bennett: As to this point again—

By Mr. Embry:

Q. —at which you visited.

Mr. Bennett: At this point again I would advise that you have the right to decline to answer under the ruling of Judge Grooms for the same reasons outlined in the earlier advice to you.

By Mr. Embry:

Q. Do I take it that upon such advice to you that will be your answer and that you will decline?

A. Yes, sir.

Q. Do you have any recollection whether you stopped at a hotel or motel or a place of lodging on that occasion?

Mr. Bennett: If I might make a short rendition, you are advised as to the same question for the same reasons.

[fol. 1574] By Mr. Embry:

Q. Do I take it that upon such advice you should not answer say it and I will take that is your answer to decline to answer us.

A. All right.

Q. Do you have any recollection as to whether you visited any dining establishments or a restaurant on that occasion?

Mr. Bennett: Your advice is the same for the same reason.

By Mr. Embry:

Q. Do you have any recollection whether you had occasion to stop at a filling station or such a place as a filling station?

Mr. Bennett: Your advice is the same for the same reason.

By Mr. Embry:

Q. Or any other place of public service?

Mr. Bennett: Same advice.

By Mr. Embry:

Q. Do you have any recollection as to whether you visited any state offices of the State of Alabama on that occasion, and, if so, do you have a recollection of what offices you visited?

Mr. Bennett: Your advice is the same for the same reasons, Dr. Rose.

By Mr. Embry:

Q. Do you have any recollection of the names and identities of any persons you saw on that occasion?

Mr. Bennett: Your advice is the same for the same reason, Dr. Rose, that this was a content of a hearing of earlier this week.

[fol. 1575] Mr. Embry: We will conclude on that.

Further deponent saith not.

Certificate

State of Alabama,
Jefferson County:

I, Jerry L. Rotruck, a Court Reporter at Birmingham, Alabama, do hereby certify as follows:

That I correctly reported in shorthand the foregoing deposition of Dr. Frank Rose at the time and place stated in the caption hereof;

That the witness was by me duly sworn and was examined by counsel;

That I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages 2 to 8, both inclusive, contain a full, true and correct transcript of the testimony of said witness on said occasion;

That I am neither of counsel nor of kin to any parties involved in this matter, nor in any manner interested in the result thereof;

That the reading and signing of the deposition by the witness was waived by counsel and the witness.

This 23rd day of January, 1964.

Jerry L. Rotruck, Court Reporter.

[fol. 1576]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

STIPULATION—Filed February 28, 1964

It Is Stipulated and Agreed by and between the parties through their respective counsel that the deposition of Mrs. Marian H. Parks may be taken before Carmen Zegarelli, Commissioner, at the University of Alabama, Tuscaloosa, Alabama, on the 5th day of January, 1964.

It is further stipulated and agreed that the signature to the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

It is further stipulated and agreed that it shall not be necessary for any objections to be made by counsel to any question except as to form or leading questions, and that counsel for the parties may make objections and assign [fol. 1577] grounds at the time of trial or at the time said deposition is offered in evidence, or prior thereto.

It is further stipulated and agreed that notice of filing of the testimony by the commissioner is waived.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Tuscaloosa, Alabama

DEPOSITION OF MRS. MARIAN H. PARK
TUSCALOOSA, ALABAMA, January 8, 1964

Before: Carmen Zegarelli, Commissioner.

APPEARANCES:

Mr. William S. Pritchard and Mr. Winston B. McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, Birmingham, Alabama, appearing for the plaintiff.

[fol. 1578] Mr. James Runzer, of the firm Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania, and Mr. Roderick MacLeod, Jr., of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, appearing for the defendant.

Mr. James J. Bennett, University of Alabama, Tuscaloosa, Alabama, appearing for Mrs. Park.

I, Carmen Zegarelli, Court Reporter and Notary Public, State of Alabama-at-Large, Acting as Commissioner, certify that on this date as provided by the Federal Rules of Civil Procedure of the United States District Court and the foregoing stipulation of counsel, there came before me

at the University of Alabama, Tuscaloosa, Alabama, beginning at 2:00 p.m., Mrs. Marian H. Park, witness in the above cause, for oral examination, whereupon, the following proceedings were had and done:

MARIAN H. PARK, being first duly sworn, testified as follows:

Examination by Mr. Runzer:

Q. Mrs. Park, I am going to ask you questions, if you don't understand me, because my voice is starting to fail, if you don't hear me, stop me and make me ask it again. I want you to understand my questions before you begin to answer it.

A. Yes, sir.

Q. Now, Mr. Bennett, who represents you, has said that you will waive the signing of this deposition; is that correct?

A. What does that mean, Mr. Bennett?

[fol. 1579] Mr. Bennett: That means that you not require the deposition to be sent back to you for you to read and does not require your signature.

The Witness: Well, the last deposition was sent back to me.

Mr. Bennett: The other deposition that was taken today the same stipulation has been entered into and I just advise you to accept it.

The Witness: All right, I do.

Mr. MacLeod: We have the same stipulation and agreement as to objections that we had with Dr. Rose's deposition, that is, that it is not necessary at this time to state objections to questions except as to form of the questions.

Mr. Pritchard: Yes.

Mr. Runzer: And any objections can be made as appropriate at the time of the deposition is used.

Mr. Pritchard: That's agreeable.

Q. Would you give us your full name, please, ma'am.

A. Marian H. Park.

Q. Are you Dr. Rose's personal secretary?

A. Yes, sir.

[fol. 1580] Q. Now, I understand you have brought with you today your notebook containing the letters that were dictated to you somewhere in the vicinity of March 4, 5 and 6 of 1963; is that correct?

A. Yes, I have.

Q. Have you located in that book the notes of a letter dated March 6, 1963, addressed to Dr. Aderhold, President of the University of Georgia?

A. Yes.

Q. Would you open to those notes, please. Now, does your notebook indicate the day on which it was dictated?

A. Yes, it does. That is about the fifth letter on March 5th.

Q. Does your notebook indicate the time of the day it was dictated?

A. No, sir, it does not.

Q. Are you able to figure, from going back through your notebook, the time that it was dictated?

A. No, sir, I cannot.

Q. Do you have any independent recollection of the time of day it was dictated?

A. No, sir, I just can't recollect.

Q. Do you recall the letter being dictated?

A. Yes, sir, I do.

Q. Did it strike you as an unusual letter when you took it?

A. Well, the only thing unusual about it was that Dr. Rose asked that it be confidential, which I have in my notes here, and that it be mailed as soon as possible.

Q. Do you recall whether Dr. Rose and you had any conversation about the letter either before, during or after the dictation?

A. No, sir.

Q. You do not recall?

A. We did not have any.

[fol. 1581] Q. Would you read the stenographer the notes as you have them there?

A. Yes, I will.

Dr. O. C. Aderhold, President.
University of Georgia.
Athens, Georgia.

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised at our meeting in Birmingham and have talked with Coach Bryant at length on two occasions and as best I can ascertain this is the information that I have received.

Coach Butts has been serving on the Football Rules Committee and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, Louisiana State University, and Tennessee, were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting and Coach Butts had told Mr. Bryant that the University of Georgia had several plays that would severely penalize the Alabama team and not only would cause Leroy Jordan, an Alabama player, to be expelled from the game, but it could severely injure one of the offensive players of the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were and on September 14th he called Coach Bryant and told him. There was a question about another [fol. 1582] one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player and Coach Bryant asked Mr. Butts to check on that one and he did. Just a moment. Check on that one and he did call back on September—

wait just a minute. To check on that one and he did and called back on September 16th. It was then that Coach Bryant—this is a new paragraph.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, head of the officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses which Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new changes of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusation and as I understand it he too has decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information I am

[fol. 1583] Most cordially yours

Frank A. Rose.

Mr. Runzer: Now, Mr. Reporter, would you read that back to Mrs. Park so she will be certain of her transcription, and will you follow his reading against your notes so there is no mistake talking about the same letter.

(Whereupon, said letter was re-read by the reporter to the witness.)

Q. Did Mr. Zegarelli read back the letter the way it is contained?

A. Yes, he did.

Q. At several points punctuation is indicated in your notes?

A. Yes, sir.

Q. That was dictated?

A. No, sir.

Q. Those were your additions?

A. Yes, sir.

Q. And the paragraphing also your addition?

A. I don't recall, sir. Sometimes he dictates paragraphs and sometimes I use my own judgment in making the paragraphs.

Q. You recall this letter being dictated?

A. Yes, sir.

Q. Was it a—did it strike you he was dictating easily or was it a letter he was struggling with?

A. Well, Dr. Rose always dictates very slowly and thoughtfully and I don't recall having the feeling that he was struggling with it.

Q. Would you say there was anything different about [fol. 1584] his manner of dictation with this letter than any other letter that he writes?

A. No, sir, I don't think so.

Q. Now, did I understand you to say that he told you he wanted this letter to go out as soon as possible?

A. Yes, sir.

Q. Did he also tell you to check with Mr. Bryant before the letter went out?

A. Yes, sir, he did.

Q. Do you recall that you started transcribing it right away or did something else transpire?

A. No. I apparently did not, because the letter was dated March 6th.

Q. Now, does your book indicate that other letters were dictated to you on the 5th?

A. Yes, sir.

Q. How many more letters after this one?

A. May I count them?

Mr. Runzer: Off the record.

(Off the record discussion.)

A. Twenty-seven.

Q. Twenty-seven after this letter?

A. Yes, sir.

Q. And this was the fifth letter he dictated that day?

A. Yes, sir.

Q. That would be 32 letters that were dictated?

A. Yes, sir.

Q. Do you recall how long it took to dictate those letters?

A. No, sir, I don't.

Q. Can you give me any estimation from your notes how long it would take, in your best estimate, a matter of hours? [fol. 1585] A. Well, I would say between maybe an hour and an hour and a half.

Q. Were they dictated in one long session or was he interrupted?

A. I don't recall.

Q. Do you recall how long he stayed in the office after the letters were dictated?

A. No, sir, I don't. I just don't recall.

Q. Did he tell you any of these other letters had to be gotten out right away?

A. I don't have any indication on my notes and don't recall.

Q. Would you ordinarily write on your notes if he told you that?

A. Yes, sir.

Q. This is the only letter that was dictated to go out in a hurry; is that correct?

A. Yes, sir.

Q. And do you remember the time of day on March 5th it was dictated?

A. I assume that it was in the morning.

Q. Well, now, ma'am, when you say assume, do you recall?

A. No, I do not recall, except that Dr. Rose usually dictates first thing in the morning.

Q. In other words, it is his usual custom to dictate then?

A. Yes, sir.

Q. Did he plan to be out of the office that day?

A. The best of my knowledge, he left the office.

Q. When did he return?

A. Now, I did not see him on the 6th. He could have possibly have been in the 7th; I just don't recall.

Q. Any letters in your book indicating letters on March 4th?

[fol. 1586] A. Yes, sir.

Q. How many letters did he dictate on March 4th?

Mr. Runzer: Let the record show that the witness is referring to her stenographic notebook.

A. Twenty-six.

Q. Now, when is the next dictation after March 5th?

A. March 14th.

Q. Could you show me where you indicate the date on your book?

A. Yes, sir.

Q. 3/5/63?

A. It will either be right here or here (indicating).

Q. And you put that on each page?

A. No, I do not, just when I start the dictation.

Q. And you do not make other entries of the date until the date changes?

A. That's correct.

Q. Do you recall where the doctor went on March 5th?

A. I do not.

Q. Did he not tell you?

A. No, sir.

Q. Now, was the letter dictated in this office?

A. Yes, sir.

Q. Dr. Rose was seated in the chair where you now are?

A. That's correct.

Q. And you don't recall how long it took you to get to the transcription?

A. No, sir, I don't.

Q. Did you start on the letter to Dr. Aderhold first?

A. I don't recall.

Q. In any event, you did ultimately begin to transcribe it?

[fol. 1587] A. Yes, sir.

Q. Did you read the letter back to Dr. Rose after it was dictated?

A. No, I did not.

Q. Does he ever ask you to read letters back to him?

A. Very seldom.

Q. Now, where did you transcribe the letter?

A. At my desk.

Q. Which is in the next room here?

A. Uh-huh.

Q. Is it still the same desk now?

A. Yes, sir.

Q. Same typewriter?

A. Yes, sir.

Q. With the exception of whatever age was done in the last six months it is exactly as it was at that time?

A. Yes, sir.

Q. You typed it from the notes you just read?

A. Yes, sir.

Q. Do you remember the day you transcribed it?

A. Well, the letter is dated the 6th. Our mail is picked up here in this office around four o'clock in the afternoon. Occasionally I will transcribe letters after the mail is picked up and date them for the next day because they won't go out until then; I can't remember.

Q. So, based on your custom it would have either been transcribed after four o'clock on the afternoon of the 5th or sometime during the day of the 6th?

A. That's correct.

Q. Can you explain if it was dictated to you in the morning why it took so long?

A. I can't, unless I had something to do in here in the office.

Q. You can't recall why it took you so long?

A. No, sir.

[fol. 1588] Q. When the letter was transcribed, I assume you proofread it for typographical errors?

A. Yes, sir.

Q. Do you recall that?

A. No, it's just habit.

Q. Did the letter have to be retyped?

A. I don't recall that.

Q. Do you think you could recall it if you had to?

A. I doubt it.

Q. When you proofread, do you proofread for grammar, punctuation or spelling, or do you try to improve Dr. Rose's syntax?

A. As far as I am capable, I try to send out a letter that is grammatically correct and correct in context.

Q. Did you make any changes in this letter?

A. Not that I remember, no.

Q. Now, did you show the transcribed letter to anyone?

A. I may have shown it to Mr. Bennett, but I can't say that I actually did. Occasionally if there is a letter—for instance, I couldn't get in touch with Coach Bryant, I knew a letter had to go out, I might have shown it to Mr. Bennett; I don't recall.

Q. You do not recall whether you did that or not?

A. No, sir.

Q. Do you recall whether Mr. Bennett made any changes in the letter?

A. I know of no changes that were made in the letter.

Q. Anyone make any changes in the letter?

A. No, sir.

Q. When you transcribed this from your notes, you attempted to get in touch with Coach Bryant?

A. Yes, sir.

Q. By telephone?

A. Yes, sir.

Q. And you were not able to do so?

[fol. 1589] A. No, sir.

Q. Who did you talk to, do you know?

A. No, sir, just the girl who answers the phone in the Athletic Department.

Q. Were you informed where he was?

A. No, sir.

Q. Were you informed how long he would be away?

A. I probably did inquire.

Q. So, then, after you were informed you couldn't get in touch with Coach Bryant, you may have shown it to Mr. Bennett?

A. Yes, sir.

Q. You showed no one else?

A. No, sir.

Q. No one including yourself made any changes in the letter?

A. No, sir.

Q. Was the letter that went out dated March 6th that I show you which was attached as Defendant's Exhibit 8 to your previous deposition, look that over, is that a copy of a letter that you typed up and sent out?

A. Yes, sir, it is.

Q. Now, Dr. Rose has told us that he had to leave in a hurry. So, I assume he didn't dictate any first draft or anything of that nature?

A. No, sir.

Q. The letter was typed up in final form?

A. Yes, sir. Now, right here I notice I made two sentences here. Occasionally he will dictate long involved sen-

tences and I will cut it down into two shorter sentences and I may have done that in this first paragraph.

Q. You would do that when you transcribe the letter?

A. Yes, sir.

Q. As you read from your notes, part of your secretarial job is to make slight changes necessary in grammar?

[fol. 1590] A. Yes, sir.

Q. No first draft or anything shown to anyone on this letter?

A. No, sir.

Q. You are absolutely certain?

A. Yes, sir.

Q. The letter was sent out presumably the 6th, that's the date?

A. Yes, sir.

Q. I presuppose no copy was made of this letter?

A. No, sir.

Q. It is usual procedure here to make copies of letters, isn't it?

A. Usually.

Q. Any specific reason why no copy was made in this case?

A. None, except Dr. Rose told me not to make a copy.

Q. In other words, the reason you did not make a copy was because Dr. Rose told you not to?

A. Yes, sir.

Q. If it had been left to you, you would have made a copy?

A. Yes, sir.

Q. Did you retain any copy of this letter in your file?

A. No, sir.

Q. And so I am perfectly clear, this represents what you typed up from your notes?

A. It does.

Q. No one made any changes?

A. No, sir.

Q. No one read over any draft and dictated a new version?

A. No, sir.

Q. Did you read any over, any draft, and retype it?

[fol. 1591] A. No, sir. I say that, I don't recall, but I just never do that.

Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Pritchard: We are going to object to encumbering this record with any letters in that notebook saving except they be letters that shed some light on the controversy here or that would be material evidence in the trial of this cause.

Mr. Bennett: Off the record.

(Off the record discussion.)

Q. In the course of those other 31 letters that were dictated on March 5th, is there any other letters to an individual which would relate to the so-called Butts-Bryant affair?

A. I see none other except one addressed to Bernie Moore, Commissioner Moore of the Southeastern Conference in which Dr. Rose informs him that: I got in touch with Coach Bryant in Washington and he informs me that he can meet with us on Tuesday, March 12, at 10:00 a.m. in my office. I sincerely hope that this meets with your schedule.

Q. Excuse me. Did you just recite the actual wording from your notes?

A. Yes.

Q. Would you repeat it, I missed it.

Mr. Bernie Moore
Commissioner
Southeastern Conference
[fol. 1592] Redmont Hotel
Birmingham, Alabama

My dear Bernie:

I got in touch with Coach Bryant in Washington and he informs me that he can meet with us on Tuesday, March 12,

at 10:00 in my office. I sincerely hope that this meets with your schedule.

Looking forward to seeing you soon, I am

Most cordially,

Q. Did you try to get in touch with Coach Bryant in Washington the day this letter was dictated?

A. No, sir, I did not.

Q. Well, I would like to place in the record the addresses of the other letters that were dictated on the date of March 5th.

Mr. Bennett: Marian, at this point, I am going to advise you that if your testimony would show that none of those other letters are related to the Bryant-Saturday Evening Post matter, you can refuse to testify on the ground that it is not related to the matter at issue.

Mr. Runzer: Of course, we take the position that the discovery of this correspondence may give us some indication of Dr. Rose's whereabouts which is of issue in the case.

Mr. Pritchard: And further we want to object on the grounds it is purely prejudicial. Sheds no light on the con- [fol. 1593] troversy here and Dr. Rose's private correspondence which in no way relates to the controversy here and would not be material in any sense of the word, we object to going into his private and personal business which in no way is concerned with the trial of this cause.

Mr. Bennett: My advice was based on the assumption that this other correspondence is not related to this matter and I assume that is the same basis of your objection.

Mr. Pritchard: Exactly.

Mr. Bennett: Then my advice still stands.

The Witness: That the only letters that relate to this case—

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Will you state the names of the addressees of the other letters that Dr. Rose dictated on the day of March 5th?

Mr. Pritchard: We re-interpose the same objection and I advise you that you certainly don't have to answer the question unless the Court tells you to.

Mr. Bennett: I advise you can refuse to answer this [fol. 1594] question on the ground that your testimony would not bear any relationship to the matter at issue.

Mr. Pritchard: Purely a private correspondence of Dr. Rose. It is not fair for us to question with whom he is corresponding.

Q. Would you read from your notes the body of the 30 other letters that were dictated on March—

Mr. Bennett: Once again I advise you can refuse to answer this question on the ground that your response would bear no relationship to the matters at issue and are concerned with the private business of Dr. Rose as President of the University.

Q. Would those letters, when transcribed, show the date of their transcription?

Mr. Bennett: You can answer the question.

A. Yes, they would.

Q. All right. Now, I will ask you to produce the transcribed copies of those letters.

Mr. Bennett: Once again, I advise you you can refuse to produce the transcribed copies of the 31 other letters on the ground they have no bearing on the matter at issue and only concern Frank Rose as President of the University.

Q. Do you have available a copy of the letter of Mr. Moore that you previously read from?

Mr. Bennett: You can answer.

A. Yes, sir, I do.

[fol. 1595] Q. Do you have any objection to showing us that?

A. No, sir.

Mr. Runzer: Let the record show that the witness is leaving the room to obtain a copy of the letter.

(Witness leaves room.)

Mr. Runzer: Let's identify the notes as Defendant's Exhibit 1, and we will make this two. Mr. Reporter, would you mark the notebook as Defendant's Exhibit No. 1 to Mrs. Park's deposition?

Mr. Bennett: Now, let's go off the record, if I might.

Mr. Runzer: Sure.

(Off the record discussion.)

Q. Mrs. Park, you were subpoenaed to bring here today your notebook. Is that the notebook in front of you?

A. It is.

Q. Would you hand it to me, please, ma'am?

Mr. Bennett: I will advise you that you can refuse to hand to him the full notebook providing your testimony would show that only the two letters previously referred to have any bearing on the matters at issue and that the others are concerned with the other responsibilities and private affairs of Dr. Rose.

Mr. Pritchard: And I want to suggest to you, in view of [fol. 1596] the attorney's attitude about it to take it away, it would be a mistake on your part to hand it to him and I will so tell the Judge.

Q. Do you refuse to give me the book that has been subpoenaed?

Mr. Bennett: I advise you that you have the right, if you choose to do so, and I have advised you on the ground which you refuse to do so.

The Witness: Just the two letters that concern this case, the one to Dr. Aderhold and the one to Commissioner Moore.

Q. Have you looked through that entire book? Can you state here and now that those are the only two letters that concern the Butts-Bryant incident?

A. I have looked through the transcription of the fourth and the fifth. The next date is the 14th. I have not looked at that.

Q. Have you looked at any time preceding the 4th?

A. I believe that's the first transcription in the book.

Q. And you do not refuse on the advise of counsel to hand me that book that was subpoenaed here today?

Mr. Bennett: You have that right under my advice to you.

A. Except for the two letters, I refuse to do so.

Q. Will you hold the book, since it's been subpoenaed, I ask you to hold it until the judge makes a determination.

A. Yes, sir, indeed I will.

Q. And you will see that no one else will take it?

A. Yes, sir.

Q. Where will you keep it?

A. I will lock it in my desk.

[fol. 1597] Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Runzer: And you refuse us the right to mark the exhibit, Exhibit 1, not to look at, but have it marked?

Mr. Bennett: At this point I would remind you of your right to refuse to offer the entire notebook in response to the question based on the assumption that the entire book would reveal the only two letters that you have testified to. If you are not certain of that and you cannot state that your testimony would so show, you should now examine the letters from the 14th on in order to make certain that the position you have taken, that you refuse to produce the entire notebook is well taken.

Mr. Pritchard: And I suggest you do it now.

Mr. Bennett: Let the record show that she is now examining that portion of her notebook from March 14th, '63, to the end.

The Witness: This is a letter here, Mr. Bennett, that Dr. Rose received expressing confidence in Coach Bryant.

Mr. Bennett: Any response to that sort of letter?

The Witness: Yes, sir.

[fol. 1598] Mr. Bennett: That is a letter related to the Coach Bryant-Saturday Evening Post affair which will be the third one.

Mr. Runzer: Will you permit her to testify to that, details of that letter?

Mr. Bennett: I wouldn't advise her not to, no, sir.

Q. What is the date of that letter?

A. I should put it on every page, shouldn't I? I think it is the 22nd. The 22nd of March.

Q. 1963?

A. Yes, sir.

Q. Who is the letter addressed to?

A. Dr. Harold G. Martin
Minister
Mount Vernon Methodist Church
2400—24th Avenue North, Box 5281
Birmingham 7, Alabama.

You already have a copy of this letter which was in the letters I carried to Birmingham.

Q. Will you read it into the record now, please, ma'am?

A. Dear Harold:

I received your good letter of March 20th and appreciate the kind things you had to say regarding your confidence in Coach Bryant. There is no doubt in my mind that Coach Bryant has represented the University of Alabama in the finest way and that this is an effort on the part of the Saturday Evening Post to try to destroy him.

[fol. 1599] Because the Georgia people made so much over the fact of Mr. Burnett taking a lie detector test, Paul Bryant asked on his own to take the test in order that there would be no doubt regarding the whole incident.

Thanking you for writing me and wishing everything for you, I am

Most cordially,

Frank A. Rose.

Q. I assume the witness is still looking through the letters.

A. Yes, sir.

Mr. Bennett: Yes.

A. This is another letter of which you have a copy in your possession.

Q. The date of the letter, please, ma'am?

A. The 22nd. Was that the last date I gave you? Yes, March 22nd.

Q. Yes, ma'am. Who is it addressed to?

A. Mr. J. N. Groinger.

Q. All right. Would you read that?

A. Mr. J. N. Groninger
563 Downer Place
Aurora, Illinois

Dear Mr. Groninger:

I received your letter of March 18th and I appreciate your writing me regarding the recent story in the Saturday Evening Post. Coach Bryant and Coach Butts have entered suits against the Saturday Evening Post that will involve [fol. 1600] Mr. Burnett and I have no doubt in my mind that they are going to win their cases.

Thanking you for your—it doesn't look like a letter, I can't read what it is, wishes. May I continue reading now?

Q. Yes.

A. Here is another one, same date, March 22nd.

Mr. Stephen H. Alex
Town Center Plaza
1000—6th Street Southwest
Washington 24, D. C.

Dear Stephen:

I received your gracious letter of March 18 and it was a real pleasure hearing from you again. I can think of no better group I would rather have behind me at this time than the Dragoons, D-r-a-g-o-o-n-s. This is a very personal letter, because they are the finest damn people I know anywhere, particularly at times like this.

The whole thing is beginning to clear up and from three separate—there is a word here I can't read, investigations, it appears that an effort has been made by a sports writer to take his vengeance out on Coach Bryant that has been building up over a period of years through a national magazine. Great damage has been done to Coach Bryant and the University but we are getting so much support from other national magazines and people across the country it may be that we can reclaim some of our prestige.

Thank you for your good letter and hoping to see you sometime soon, I am

[fol. 1601] Most cordially. Now, we start backwards. Another letter on the 22nd to the Honorable Gessner T. McCorvy.

Honorable Gessner T. McCorvy
P. O. Box 1070
Mobile, Alabama.

Mr. Bennett: Could the record at this point show that Mr. McCorvy is Chairman Pro-Ten with the University of Alabama?

Mr. Runzer: Certainly. No objection.

A. Dear Mr. McCorvy:

I received your letter of March 20th regarding Bear making the proposed announcement that he and Coach Butts did not talk on the telephone and this has been discussed with Mr. Winston McCall and Coach Bryant on

the day we made our television appearances. We discussed it at great length and Mr. McCall thought it would serve the best interest of Bear's case if nothing more was said than had been said at the present time. However, I will discuss this with Bear today and if he should decide to go ahead I'm sure you will hear about it.

Thanking you for calling this to my attention, I am

Most cordially,

Frank A. Rose.

[fol. 1602] Another letter on the 22nd.

Mr. Edward P. Curkuff
11 Kerney Street
Oneonta, New York

Dear Mr. Curkuff:

I received a copy of your letter to the Saturday Evening Post dated March 31st in which you praised them for their story in the March 23rd issue. You may be assured that Mel Allen, who has been one of our active alumni does not share the view which you have taken and I am disappointed that alumnus of the University of Alabama which subscribes to the philosophy that a man is guilty before his defense has been offered.

I assure you that five responsible agencies of our Federal Government, the State of Alabama, and the State of Georgia have been conducting a thorough investigation and as of this date have found nothing that would indict Coach Paul Bryant or Coach Wallace Butts in rigging, fixing, or betting on a football game.

I think you should also know that Coach—now, I have Coach B here, at this date, I don't remember which it was. Has a $500,000 libel suit against the Saturday Evening Post on an article that was printed last year that was without foundation or fact and a deliberate effort has been

made—that's Coach Bryant, and are being made to try to fight this case in public to the destruction of the character of Coach Bryant and the integrity of the University.

[fol. 1603] Hoping you will follow the coming events rather carefully in order that you might know the whole truth, I am

Sincerely yours,

Frank A. Rose.

Another letter the same date, the 22nd.

Mr. Marvin J. McGarity
1416 Sutherland Place
Birmingham 9, Alabama

Dear Mr. McGarity:

I received your good letter of March 24th and I want you to know my deepest appreciation for the kind things you have to say about Coach Bryant. All of us feel the same way you do about him and there is no doubt in my mind but that he is one of our finest citizens.

Thanking you for sharing your letter with me, I am

Most cordially.

Now, we go into a long line of letters answering letters about Coach Bryant, copies of which you have. Would you like me to read them just the same?

Q. Yes, I would.

A. Mr. Eddie Leitman.

Q. This is also March 22nd?

A. Yes, sir.

[fol. 1604] Mr. Eddie Leitman
President Student Government Association
University of Alabama
University, Alabama.

Dear Mr. Leitman:

I received your good letter of March 21st enclosing the resolution on behalf of Coach Bryant and I want you to know my deepest appreciation for this action. I am sure your expression of confidence in support of Coach Bryant will mean a great deal to him as it does to all of us who served as his colleagues.

Thanking you for this resolution, I am

Most cordially yours.

Same day:

Honorable George Huddleston, Jr.
Member of the United States House of Representatives.
Washington, D. C.

My dear George:

I received your memorandum with your remarks to the House of Representatives and I want you to know my appreciation for this good thing you have done on behalf of Coach Paul Bryant and the University of Alabama. We will forever remain indebted to you.

Thanking you again for your many services, I am

Most cordially.

[fol. 1605] Another letter the same date.

Dr. Marten ten Hoar
4 Forest Lake Drive
Tuscaloosa, Alabama

Mr. Bennett: At this point let the record show that Dr. ten Hoar is Dean Americus for the College of Arts and Sciences for the University of Alabama.

A. That's spelled with a small t-e-n and capital H-o-a-r. Marten is spelled M-a-r-t-e-n.

My dear Marten:

I received your letter of March 25th and I assure you it came at a time which was a most helpful period. I don't believe I have ever gone through a day as I did yesterday and I hope I shall not have to go through another one in the next few months. However, I believe that everything worked out pretty well and we are about to find the "rat in the woodpile" in Atlanta.

Hoping all is going well with you and Marie and we can get together sometime soon, I am

Most cordially.

On the same day:

Honorable William Inge Hill
P. O. Box 116
Montgomery, Alabama

[fol. 1606] My dear Inge:

I received your gracious letter of March 25th enclosing the resolution from the Montgomery County Alumni Association and I want you to know my deepest appreciation for this confidence you have expressed in Coach Paul Bryant and me. Everyday we continue our investigation confirming the innocence of Coach Bryant and we feel that we are about to get hold of some information that will help us to understand the whole problem.

Thanking you for your continued loyalty and interest in the University, I am

Most cordially.

Another letter on the same day:

Mrs. Elizabeth Gaines Jackson
526—looks like W-i-l-l-a-i-n-t, and I don't have the whole town here. Looks like River Falls, I don't know where the town of River Falls is.

Dear Mrs. Jackson:

Q. Excuse me, is that an Alabama town?
A. I don't think so, no, sir. Do you know, Mr. Bennett?

Mr. Bennett: I can't answer.

A. Excuse me. I don't believe it is an Alabama town.

[fol. 1607] Dear Mrs. Jackson:

I received your letter of March 21st enclosing a copy of your letter to the Editor of the Saturday Evening Post and I have never read anything that was finer nor more incensive than you have written.

I want you to know that we have found nothing after four and a half weeks of investigation that would reveal that Coach Bryant has done anything wrong or unethical. There is no doubt in my mind but that this is an effort to try to destroy an outstanding man.

Thanking you for speaking in our behalf, I am

Most cordially.

This is a letter dated the 29th of March.

Honorable Fred W. Nichols
Circuit Solicitor
City of Tuscaloosa. I don't have it down here. Mr. Bennett—

Mr. Bennett: I can't respond.

A. Tuscaloosa, Alabama.

My Dear Fred:

Is it possible for me to convey to you my deepest and most profound appreciation for taking the time to come to Birmingham and administer the Polygraph test to Coach Bryant and then making a special effort you made yesterday to come to Montgomery to testify before the

[fol. 1608] Legislative Committee. In all my years of public service I have met no one in whom I have greater confidence or respect more than I do you and it was on the basis of this confidence that I informed Attorney General Cook of Georgia that it is my conviction that there is no man better qualified or more honest that could have improved upon the Polygraph test that you gave Coach Bryant. He too was impressed when I informed him about you but apparently let his politics alter his judgment and the integrity.

In order to keep our records official, I would appreciate your sending me a statement for services rendered as I not only feel strongly that you should be compensated but I believe it will help our cause with the Southeastern Conference to keep it professional.

Thanking you again for the good thing you have done on our behalf and on the behalf of justice and fairness, I am

Most cordially yours.

There is a letter on the 29th:

Mr. Ben A. Green, Editor
The Voice of the Tennessee Walking Horse
Shelbyville, T nnessee

Dear Mr. Green:

I received your gracious letter of April 1st enclosing a copy of your address and I want to express to you my deepest appreciation for this good thing you have done on behalf of Paul Bryant. All of us who know him know of [fol. 1609] his integrity and honesty and not have been shaken one bit by the political situation in Georgia.

I am passing on Kipling's quote "IF" for him to hang on his wall.

Thanking you again, I am

Most cordially.

This is a letter on April 9th:

Dr. Curtis Jones
Minister of the Union Avenue Christian Church
St. Louis, Missouri

Dear Curt:

I received your good letter of April 2nd regarding your recent luncheon discussion with Dr. Charles Allen Thomas and I appreciate your expressing concern to me regarding our present football investigation. Needless to say it's been a most difficult period for all of us but a great deal of light has come on the subject in the last few days when Dr. Carmichael, the President of an insurance company in Atlanta revealed that he saw the brief notes taken by Mr. Burnett who accused Coach Butts and Coach Bryant of rigging the football game, stating that the notes were not the same as those in the Saturday Evening Post article and that even Mr. Burnett confessed to him that the two men were discussing illegal defenses which were brought about because of football rule changes. The Justice Department, the Commissioner of the Southeastern Conference and I are now of the opinion that this was an effort on the part of Mr. Furman Bisher, sportswriter, Atlanta Con-
[fol. 1610] stitution, against whom Coach Bryant has a $500,000 suit, to attempt to blackmail and smear Coach Bryant.

Coaches like businessmen, college presidents, and preachers, discuss techniques, tickets, football players and anything else pertaining to their business and this has been confirmed by ten of the leading coaches in America that there was nothing in the notes that would confirm anything illegal or unethical.

Hoping that you will keep this confidential until I make my final report, I am

Most cordially.

Mr. Bennett: Off the record.

(Off the record discussion.)

Mr. Runzer: Show him these intervals that Mrs. Park is referring to her notebook. I think it is only fair to her to show that.

The Witness: That's it. Now, just let me start here at the beginning and it won't take but a minute to do that. This is on the 22nd of February. That's it.

Q. Now, do you have with you the notebook that contains the letters for the first days of March which are not contained in that book? That book started with March 4th, you told me.

A. No. This book starts with the 22nd of February.

Q. And there are no other letters except the ones that you told us, except the ones that are connected with the Butts-Bryant incident?

[fol. 1611] A. That I have in my possession. On the last deposition I gave, I stated I do not ordinarily keep notebooks but for a few months. I think I have them now through August.

Q. And this notebook runs from February—

A. 22nd.

Q. Until—

A. April 16th.

Q. Now, I want to identify this as Defendant's Exhibit No. 1.

(Whereupon, said letter was received in evidence and marked "Defendant's Exhibit No. 1," and is attached to the original deposition of Mrs. Park.)

Q. What is the date in April?

A. Sixth.

Q. Mrs. Park, I show you a letter marked Defendant's Exhibit No. 1, which is a copy of a letter dated March 6th from Dr. Rose to Mr. Bernie Moore. Was that a copy

of a letter that was dictated to you by Dr. Rose and transcribed by you?

A. Yes, sir.

Q. And dictated on the 5th and transcribed on the 6th?

A. Yes, sir.

Q. Where in the order does that come? The letter to Dr. Aderholt was the fifth letter of that day?

A. Yes. Now, I have lost my place. Letter to Dr. Aderholt was the fifth and that is No. 16.

Q. Is this your customary initial on the letter, M/H/P?

A. Yes, sir.

Q. Does anyone else at the University use those initials that you know of?

[fol. 1612] A. Not to my knowledge.

Q. And, of course, F.A.R. stands for Frank A. Rose?

A. Yes, sir.

Q. Dr. Rose told us on the week beginning February 24, 1963, he was out of town most of that week; do you recall that?

A. No, sir, I don't. I will have to look at Dr. Rose's calendar.

Q. Do you recall previous to him writing Dr. Aderhold that he received a letter from Mr. Bryant?

A. No, sir.

Q. If such a letter came in, would you merely place it on his desk for his attention when he came back?

A. Yes, sir,

Q. Would you necessarily even read it?

A. I would unless it were marked personal or confidential.

Q. Does this office date stamp the receipt of letters?

A. No, sir, we don't.

Q. Excuse me one moment, please.

Off the record.

(Off the record discussion.)

Mr. Runzer: I think that will be all.

Mr. Bennett: Off the record a moment.

(Off the record discussion.)

Mr. Runzer: It is agreed that the notes relating to those letters which Mrs. Park read us as relevant events to the Butts-Bryant incident will be produced, photocopied, and [fol. 1613] the other notes will be held by Mrs. Park pending a determination by the Court.

Mr. Pritchard: Correct.

Mr. Runzer: All right, that's all.

Further deponent saith not.

Certificate

State of Alabama,
Jefferson County.

I, Carmen Zegarelli, United States District Court Reporter, Birmingham, Alabama, do hereby certify that I reported in shorthand the foregoing deposition of Mrs. Marian H. Park at the time and place stated in the caption hereof; that said witness was first duly sworn to speak the truth, and nothing but the truth; that I later reduced my shorthand notes to typewriting, or under my supervision, and the foregoing pages, numbered three through 48, both inclusive, contain a full, true and correct transcript of the testimony of said witness on said occasion.

I further certify that I am neither of counsel nor of kin to any parties to said cause, nor in any manner interested in the result thereof.

Official Court Reporter

[fol. 1614]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21491

CURTIS PUBLISHING COMPANY, Appellant,

versus

WALLACE BUTTS, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before Brown, and Bell, Circuit Judges, and Spears, District Judge.

ORDER—Filed August 21, 1964

By the Court:—

It Is Ordered that the letter-request of counsel for appellee to dispense with the requirements of Rule 24 (2) (e) be, and the same is hereby granted.

[fol. 1615]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

MINUTE ORDER RE ARGUMENT AND SUBMISSION—
October 8, 1964

On this day this cause was called, and after argument by Welborn B. Cody, Esq., Harold E. Abrams, Esq. and Philip H. Strubing, Esq., for appellant, and by Allen E.

Lockerman, Esq., and Wm. H. Schroder, Esq., for appellee, was submitted to the Court.

[fol. 1616]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before Rives and Brown, Circuit Judges, and Spears, District Judge.

OPINION—July 16, 1965

Spears, District Judge: This is a libel suit. Curtis Publishing Company[1] published an article in the March 23, 1963 issue of the Saturday Evening Post[2] entitled "The [fol. 1617] Story of a College Football Fix", characterized

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[1] Hereinafter referred to as either "Curtis", "defendant" or the "Post".

[2] Also referred to herein as the "Post".

by the Post in the sub-title as "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall."

On March 25, 1963, Wally Butts,[3] former Athletic Director of the University of Georgia, instituted this action against Curtis. In August, 1963, the case was heard before a jury, which returned a verdict against Curtis for $60,000 general and $3,000,000 punitive damages. Conditioned upon the failure of Butts to remit that portion of the award for punitive damages in excess of $400,000, the trial court granted Curtis' motion for a new trial. At the same time, Curtis' motion for judgment notwithstanding the verdict was denied. On January 22, 1964, after Butts had filed a remittitur, Curtis' motion for new trial was denied, and judgment for Butts in the amount of $460,000 was entered. Thereafter, Curtis filed motions for new trial under Rule 60(b), F.R.Civ.P., which were denied on April 7, 1964. This appeal is taken from the judgment of January 22, 1964, and from the trial court's denial of Curtis' motions for judgment notwithstanding the verdict and for new trial. We affirm.

Curtis publishes various magazines including the Post. Prior to the publication of the story in question, the editor-in-chief, undoubtedly hoping to attract more readers, had decided to "change the image" of the magazine by making it an "expose" type, and embarking upon a policy of "sophisticated muckraking", in order "to provoke people" and "make them mad".[4]

[fol. 1618] The article[5] involved was based upon a claim by one George Burnett that on September 13, 1962 he had

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[3] Sometimes hereinafter referred to as "Butts" or "plaintiff".

[4] See note 25, infra.

[5] The following editorial comment was inserted at the beginning of the story:

"Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

"Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of

accidentally overheard, and made notes of, a long-distance telephone conversation between Butts and "Bear" Bryant, football coach at the University of Alabama, in which Butts divulged certain information about football plays the University of Georgia would use in its opening game against Alabama. Georgia was subsequently defeated 35-0.

About four months after the alleged telephone conversation Burnett contacted various people, including Georgia football coach Johnny Griffith, and then decided to tell his story to the Post. A writer, Frank Graham, Jr., was assigned by the Post to investigate and write the story, and [fol. 1619] an Atlanta sports editor was retained to advise him. Graham never saw Burnett's notes, as they were at the time in the possession of Georgia school officials; he did not interview a witness known by him to have allegedly discussed the notes with Burnett on the same day the telephone conversation purportedly took place; he never viewed the game films; and neither he nor anyone else on behalf of the Post ever contacted Butts or Bryant. He agreed that both he and Curtis knew publication of the article "would ruin Coach Butts' career".

Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled.—THE EDITORS."

In the story itself it is stated, among other things, that "(t)he Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating". Georgia coach Johnny Griffith was quoted as saying bitterly to a friend, "I never had a *chance.*" The next sentence read: "When a fixer works against you, that's the way he likes it."

On March 11, 1963, eleven days before the article was published, Curtis was informed by telegram and letter, both sent by Butts' counsel, of the "absolute falsity of the charges" contained in the proposed story. The record does not disclose that any additional investigation was initiated, and the telegram and letter went unanswered. In addition, a long-distance telephone appeal that the article not be published, made by Butts' daughter prior to publication, was rejected. After the article was published, Curtis refused a demand that it publish a retraction.

The Post took the position from the beginning that the statements made in the article concerning Butts were true, and that because of their nature it had exercised great care by thoroughly checking every significant source of information as to their truthfulness and accuracy, in advance of publication.

Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it [fol. 1620] use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he claimed to have listened in on the conversation.

Both Butts and Bryant testified. Each emphatically denied the charges contained in the article and stated that there was never any conversation between them having as its purpose the fixing or rigging of any football game. Several football players, past and present, expressed their opinions to the effect that the outcome of a football game cannot be rigged or fixed without participation by the players themselves, and that there is no way in which two coaches can rig or fix the outcome of a football game without the players' knowledge. Other "experts" stated their opinion that the information contained in the "so-called" Burnett notes would not be of any assistance at all to the University of Alabama in preparing for its game

with the University of Georgia. In several instances Butts' witnesses denied direct quotations attributed to them in the article.

In an opinion written by the district judge the facts are stated in some detail,[6] and no useful purpose could be served by repeating them here, although portions thereof pertinent to specific issues later discussed may be utilized. It is significant, however, at this point, to say that in view of the verdict it rendered, the jury undoubtedly accepted [fol. 1621] Butts' version that the story was "willfully, maliciously and falsely" published, as a result of which he has suffered substantial injury to his "peace, happiness and feelings", as well as to his "honor, reputation and integrity". As the trial judge saw it: "The article was clearly defamatory and extremely so. . . . The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable."[7] We wholeheartedly agree with that appraisal.

The Issues Presented

Curtis submits twenty-eight specifications of error which are argued in its brief under ten propositions. The issues involved are: (1) Was the article libelous per se? (2) Does the court's judgment violate Curtis' rights under the First, Fifth and Fourteenth Amendments? (3) Did the arguments of Butts' counsel, not objected to at the trial, require a new trial? (4) Did the court err in excluding certain testimony offered to impeach the credibility of Butts and the witness John Carmichael? (5) Were the extrajudicial statements of George Burnett, and the statements made to him by third person, properly excluded? (6) Did the trial court commit plain error in instructing the jury? (7) Did the trial court err in refusing to charge

[6] Butts v. Curtis Publishing Co. (N.D. Ga. 1964), 225 F.Supp. 916.

[7] Id. at 919.

the jury that it should construe Butts' testimony "most strongly against him"? (8) Did the trial court err in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely? (9) Does the "newly [fol. 1622] discovered evidence" offered in Curtis' motion under Rule 60(b), F.R. Civ. P. require a new trial? (10) Is the award of punitive damages so excessive that it cannot be cured by the remittitur?

The Article as Libelous Per Se

The trial judge charged the jury that the article was libelous per se. This was objected to by Curtis on the ground that Butts was not actively engaged in the profession of a football coach at the time of publication, and, that no special damage was shown.[8] Curtis took the same position in its motions for directed verdict and for judgment notwithstanding the verdict.

Curtis' contention in this regard cannot be sustained. This is a *libel* suit as distinguished from a *slander* suit.[9] Under Georgia law, a plaintiff may recover in a libel action where the defamation is apparent from the writing itself, without the necessity of alleging or proving special damages,[10] and it is not necessary that he be engaged in the

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[8] In support of this proposition, Curtis cites—Weatherholt v. Howard, 143 Ga. 41, 84 S.E. 119 (1915); Van Epps v. Jones, 50 Ga. 238 (1873); Mell v. Edge, 68 Ga. App. 314, 22 S.E. 2d 738 (1942); Haggard v. Shaw, 100 Ga. App. 813, 112 S.E. 2d 286 (1959); and Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S.E. 222 (1935). These cases, however, appear to be "delinquent debtor cases" referred to in note 11, infra.

[9] Ga. Code Ann. § 105-701 (libel), § 105-702 (slander).

[10] Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E. 2d 906 (1960), the leading case in Georgia, states that words which, if merely spoken, would not be actionable in absence of special damage, may be libelous when printed if false and tend to injure reputation and bring one into public hatred, contempt or ridicule. Ordinarily, only general damages need be alleged in an action for libel.

[fol. 1623] pursuit of his trade, business or profession at the time of publication.[11]

But even if the law necessitated a showing that Butts was actively engaged in the profession of a football coach [fol. 1624] at the time of publication, we think this requirement has been satisfied.

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[11]Ga. Code Ann. § 105-701, defines libel as the "false and malicious defamation of another, expressed in print . . . tending to injure the reputation of an individual and exposing him to public hatred, contempt, or ridicule . . .", without the requirement that the charges be calculated to injure one in his trade, office or profession. A newspaper libel is described in Ga. Code Ann. § 105-703, as being "any false and malicious defamation of another in any newspaper, magazine or periodical tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule", again without the requirement that the charges refer to one's trade, office or profession. Only in the area of slander is a reference to one's trade, office or profession required. Ga. Code Ann., § 105-702.

The case of Floyd v. Atlanta Newspapers, Inc., supra, note 10, in its definitive statement of the Georgia law of libel explains that written words are sufficient to constitute libel per se if they tend to bring a man into public hatred, contempt or ridicule. Damages will be presumed from the nature of the words themselves and their harmful effect and no proof of special damages is necessary. Where the only possible construction is that the words are libelous per se, upon proof thereof, the only remaining question for the jury is that of damages. See also Restatement of the Law Second, Torts, Tentative Draft No. 11, April 15, 1965, Section 569, wherein Georgia is named as one of the majority of states following this rule, and, as explained in the notes to Restatement of the Law of Torts, 1938, Vol. III, Sec. 569, Comment e, pp. 168-9, it may be libelous to impute misconduct in one's trade, etc., although he is at the time no longer engaged in the pursuit of the trade, business or profession.

Curtis cites many cases in support of its position (see note 8, supra). However, these are part of a group of cases known in Georgia as the "delinquent debtor cases" and, as explained by the Floyd case, stand in a class by themselves, and have no bearing on causes of action other than those involving charges that one owes a debt and refuses to pay, or owes a debt long past due. In this isolated situation the charge is, as a matter of law, uniformly held in Georgia, not libelous per se, and it is in these cases that Curtis finds language to the effect that falsely spoken or written words that do not contain a charge made in reference to one's trade, office or profession are not actionable without proof of special damages.

The story was purchased by Curtis on February 22, 1963. Butts resigned as Athletic Director effective February 28, 1963. The article was published in the March 23, 1963 issue of the Post. Thus it may be assumed that Butts was at least temporarily out of work on the day of publication, but it hardly follows that he had completely abandoned the coaching business.

Actually, Curtis admitted in its answer that Butts "has enjoyed a national reputation as a successful and respected member of the coaching profession", and that he "has been approached and offered employment as head football coach by several colleges and professional football teams in the country due entirely to his reputation as a successful member and leader in his profession." This admission, in and of itself, would indicate a recognition that Butts was still identified with some phase of football activities.

Upon Curtis' insistence, its second defense asserting that the statements contained in the article were true, was held to be a valid plea of justification. By interposing this plea, Curtis admitted a prima facie case,[12] but gained the valuable right to open and close. The complaint alleged that "plaintiff's career *as a member of the football coaching profession* had been ruined and destroyed by this scurrilous and contemptible defamation." (Emphasis supplied.) Without regard to any question as to whether the [fol. 1625] plea constitutes an admission that the remarks were made with malice, it is our view that it necessarily carries with it an admission, not only that the libelous statements were made by Curtis, but also that they were made in relation to Butts "as a member of the football coaching profession". Under all the circumstances, it is untenable to say that simply because Butts was temporarily out of

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[12] See Ga. Code Ann. § 105-708 and § 105-1801; Baldwin v. Davis, 188 Ga. 587, 590, 4 S.E. 2d 458 (1939).

a job at the time of publication, he was not actively engaged in the coaching business as a means of livelihood.[13]

We hold that the trial court correctly charged the jury that the article was libelous per se, and that he did not err in denying Curtis' motions for a directed verdict and for judgment notwithstanding the verdict.

Curtis' Constitutional Rights

Curtis contends that the trial court's judgment violates and abridges its rights of freedom of speech and of the press guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. It relies upon the case of *New York Times Company* v. *Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L.Ed. 2d 686 (1964), decided subsequent to the trial of this case, in which it was held that in order for a public official in a libel suit to recover any damages he must prove that a statement against his official conduct was published "with actual malice—that [fol. 1626] is knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. at 279-80. This holding, says Curtis, "drastically changed the constitutional principles applicable to libel actions", by announcing new safeguards which "make it manifestly clear not only that the rules of law which were applied in the trial of the instant case were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot be permitted to stand".

Countering this, Butts says that the invocation of the constitutional defenses in libel cases has received emphatic and substantial attention by scholars and Courts over the

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[13] In the Missouri case of Clark v. McBaine, 299 Mo. 77, 252 S.W. 428 (1923), at 432, cited by Curtis, the Court stated that though the plaintiff "had been removed as a member of the faculty, . . . his profession, or means of a livelihood, was still that of a professor of law, and a writer of textbooks upon the law, and the gist of his damages . . . consisted of injury done to his standing as a professor and writer of law."

years; that the *Times* case resulted in no fundamental change of law, but merely gave new sanctions to a long standing rule; and that in any event, Curtis did not invoke those defenses even though they are more broadly stated in the Georgia law than in the *Times* case.[14] Moreover, [fol. 1627] Butts emphasizes that the *Times*' constitutional grounds now asserted were not timely raised or preserved below. In fact, they were presented for the first time in the F.R.Civ.P. 60(b) motion filed on March 23, 1964, long after trial.

The record reflects that Curtis did not object to the trial court's instructions.[15] The *Times* case was decided by the Alabama Supreme Court on August 30, 1962. A petition for writ of certiorari presenting constitutional questions identical to those now being urged by Curtis, was filed in the United States Supreme Court on November 21, 1962, four months prior to the filing of the complaint in this

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[14] In support of his position, Butts cites: "Justice Black and First Amendment 'Absolutes'; A Public Interview," 37 N.Y.U.L. Rev. 349 (1962); C. L. Black, Jr., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," Harpers, February, 1961, p. 63; Caldwell v. Crowell-Collier Pub.Co., (5th Cir. 1947), 161 F.2d 333; Sweeney v. Schenectady Union Pub.Co., (2d Cir. 1941), 122 F. 2d 288, aff'd 316 U.S. 642 (1942); Henry v. Collins, 158 So. 2d 28 (Miss. 1963); Louisiana v. Garrison, 244 La. 787, 154 So. 2d 400 (1963); Louisiana v. Moity, 245 La. 546, 159 So. 2d 149 (1963); and other pre-Times defamation cases. He points out that the Supreme Court in Times recognizes that "a like rule" has existed for a number of years in some state courts; that the Kansas Supreme Court, in Kennedy v. Mid-Continent Telecasting, Inc., 193 Kans. 544, 394 P. 2d 400 (Kan. 1964), noted that the Times decision requires no change in the law; that the trial court said (note 23, infra) that Georgia provides this "like rule" by a statute granting a qualified privilege for "comments upon the acts of public men in their public capacity and with reference thereto", citing Ga. Code Ann. § 105-709(6); and that privilege can be lost by proof of actual malice, citing Ga. Code Ann. § 105-710.

[15] See Rule 51, F.R.Civ.P. Also see note 36, infra.

case on March 25, 1963.[16] Certiorari was granted in the *Times* case on January 7, 1963. The jury verdict in the instant case was returned on August 20, 1963, and the trial court's judgment thereon was entered the same day. A Birmingham, Alabama law firm, which represented the New York Times in the case brought against it by Sullivan, also, together with Curtis' General Counsel, represented Curtis in a libel suit Coach Bryant had filed against it in the United States District Court at Birmingham, Alabama. A member of this law firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant, and had talked with the author, Graham, about the matter prior to publication of the story. The same lawyer, together with another member of the firm, [fol. 1628] sat (as did the General Counsel for Curtis) at Curtis' Counsel table throughout the trial of this case.[17]

While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly con-

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[16] We have examined the petition for writ of certiorari presenting the constitutional questions, and find that it was filed by the New York Times Company on November 21, 1962. The brief for respondent in opposition was filed on December 15, 1962, and petitioner's reply thereto was filed on December 29, 1962.

[17] The Birmingham law firm of Beddow, Embry and Beddow, which represented the New York Times in the Supreme Court of Alabama, is also shown to be counsel for the Times in the Supreme Court of the United States. Mr. Roderick Beddow of that firm represented Curtis in the case of Paul Bryant v. Curtis Publishing Company, in the United States District Court in Birmingham, and both he and Mr. T. Eric Embry of that firm sat, along with the General Counsel of Curtis, Mr. Philip H. Strubing, at the Curtis counsel table throughout the trial of this case. Butts' brief states, without contradiction, that Mr. Beddow "initially 'sent them (Curtis) this information' about the alleged telephone conversation and was a principal in the initial work of the author Frank Graham."

cerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*.

The Supreme Court said, in *Michel* v. *Louisiana*, 350 U.S. 91, 99, 100 L. ed. 83, 76 S. Ct. 158 (1955), that "(t)he test (in making a claim to a constitutional right) is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court.'" It then cited the case of *Yakus* v. *United States*, 321 U.S. 414, 444, 88 L.ed. 834, 64 S.Ct. 660 (1944), for the proposition that "(n)o procedural principle is more [fol. 1629] familiar to this court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right."[18]

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[18] Michel v. State of Louisiana, 350 U.S. 91, 76 S. Ct. 158, 100 L. ed. 83 (1955), involved a Louisiana statute requiring any challenge to the composition of a Grand Jury to be made before the end of the term of the Grand Jury, holding that the statute was not unconstitutional, and that since the petitioners had not, under that statute, made timely challenge to the constitutional composition of the Grand Jury, they waived any such right to so challenge the Grand Jury. The court announced that the test was whether the defendant had had a reasonable opportunity to have the issue as to the claimed right heard and determined by the court.

On the other hand, in the case of Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L. ed. 77 (1955), decided at the same time as the Michel case, the state court had refused to consider the defendant's motion to quash the indictment filed before his arraignment on the ground of the composition of the Grand Jury, because, by Georgia practice, objections to the Grand Jury must be made before the indictment is returned. The court held that there had been no waiver there, and that due process had been violated, because defendant, a semi-illiterate Negro, had no counsel until the day after his indictment, pointing out that "the right to object presupposes an opportunity to exercise that right."

In Kewanee Oil and Gas Co. v. Mosshamer, (10th Cir. 1932), 58 F. 2d 711, where the constitutionality of a state statute was

[fol. 1630] It cannot be said that this case falls within the category of those cases cited by Curtis[19] which hold that if subsequent to a trial or hearing, but before a final decision by the trial or appellate court, the fundamental law is changed, it is the duty of the court to apply the law as amended. Those were "exceptional cases", where there was no waiver and the court was satisfied that to do otherwise would result in a "plain miscarriage of justice". In this case, however, even if it is assumed that the basic law has been changed, the situation is quite different. For whatever tactical or other reason[20] Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge,

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raised on appeal, the court stated that "if the constitutionality of a statute is not raised in the pleadings ordinarily it may not be raised at the trial."

Other cases decided by district courts, and holding that constitutional questions ordinarily must be raised at the trial, are: Alexander v. Daugherty (D.C. Wyo. 1960), 189 F. Supp. 956 (only where failure to raise the constitutional question at the trial was due to ignorance, duress or other reason for which petitioner could not be held responsible, may redress be had, and then if "it is made to appear that there had been such gross violation of constitutional right as to deny the defendant the substance of a fair trial"); Houck v. Eastchester P.U. District (D.C. Alaska 1952), 104 F. Supp. 588; Mount Tivy Winery v. Lewis (N.D. Cal. 1942), 42 F. Supp. 636; and White Cleaners and Dyers v. Hughes (W.D. La. 1934), 7 F. Supp. 1017.

[19] Ziffrin, Inc. v. United States, 318 U.S. 73, 87 L. ed. 621, 63 S. Ct. 465 (1943); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 2 L. ed. 49 (1801); and Hormel v. Helvering, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719 (1941), an unusual case in which the Supreme Court allowed the Tax Commissioner to assert for the first time on appeal in the Court of Appeals the taxability of income under another section of the code, but stated that "ordinarily an appellate court does not give consideration to issues not raised below . . . (but) there may be exceptional cases where injustice may otherwise result except where express waiver is given."

[20] Butts thinks it can be inferred that "defendant never considered plaintiff to be in any class of 'public men' so as to make the defense available."

through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading [fol. 1631] even problems of local jurisprudence, Curtis' complete and utter silence amounted to "an intentional relinquishment or abandonment of a known right or privilege." [21]

Without expressing any opinion as to whether *Times* fundamentally changed the substantive law applicable to libel cases, or whether the charge on malice given by the trial court was adequate under *Times*,[22] or whether Butts

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[21] Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. ed. 1461 (1938).

[22] The trial court's charge on malice was, in part, as follows:

> "At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact . . .
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> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred, and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning

was the kind of "public official" contemplated by *Times*,[23] [fol. 1632] or whether a reversal might otherwise be required if the constitutional issues had been timely pre- [fol. 1633] sented, we hold that Curtis has clearly waived

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to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights . . . ."

[23] In a second opinion dated April 7, 1964 (See Butts v. Curtis Publishing Company (N.D. Ga. 1964) ..... F. Supp. ....., at .....), denying Curtis' motions under Rule 60(b), the trial judge gave the following as his views concerning Butts' status as a "public official":

"In the present motion at hand, the defendant contends that plaintiff's action comes under the Times ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 105-107(6). Just where in the ranks of government employees the 'public official' designation extends, the Supreme Court in the Times case did not determine. The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

"Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located in Athens) and the Georgia School of Technology (located in

any right it may have had to challenge the verdict and judgment of any of the constitutional grounds asserted in *Times*.

Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see Page v. Regents of University System of Georgia, 93 F. 2d 887, 891-892. As was stated in the Page case, the 'coaches' are also members of the faculty.

"Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners' he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a state or public educational institution is not that of a public officer or official, but he is merely an employee thereof. Regents of the University System of Georgia v. Blanion, 49 Ga. App. 602(4); Board of Education of Doerun v. Bacon, 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of New York Times Company v. Sullivan, supra."

See also: Martin v. Smith, 239 Wis. 314, 1 N. W. 2d 163, 140 ALR 1063.

The case of Barr v. Matteo, 360 U.S. 564, 3 L. ed. 2d 1434, 79 S. Ct. 1335 (1959), cited in the Times case, held that in the reciprocal situation where two government employees were suing the director of an important United States Government agency for his alleged libelous conduct, the director, a public official, has absolute privilege, regardless of the existence of malice, in defense of the alleged

Curtis contends that the jury arguments of Butts' counsel constituted "significant and fundamental errors which the court may notice without objection".

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libel, although his conduct was within the outer perimeter of his line of duty. The policy of this position is to aid in the effective functioning of government by assuring that government officials shall be free to exercise their duties without fear of damage suits with respect to acts done in the course of those duties.

In cases decided since the Times case, the "public official" designation has not been extended. The court, in the case of Garrison v. Louisiana, 379 U.S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 (Nov. 1964), in reversing the conviction of the New Orleans Parish District Attorney for the criminal defamation of eight judges of the Criminal District Court of the Parish of New Orleans, stated that "the rule protects . . . the free flow of information to the people concerning public officials, their servants . . . ", whatever touches upon "an official's fitness for office is relevant . . . . A candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office". Justice Goldberg, in his concurring opinion, stated that "libel on the official conduct of the governors (of the people) . . . can have no place in our Constitution."

The Second Circuit, in Pauling v. News Syndicate Company, Inc. (2nd Cir. 1964), 335 F. 2d 659, considered the possible extensions of the doctrine of the Times case, stating that a candidate for public office would seem an inevitable candidate for extension, and that once an extension is made, the participant in public debate on any issue of grave public concern would be next in line. Quoting the Times case, the court then said: " 'The profound issues should be uninhibited, robust, and wide-open', now applied to confer immunity on 'vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials', may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The Henry v. Collins and Henry v. Pearson cases, 380 U.S. 356 (1965), reversed a judgment for the plaintiffs on the ground that the lower court's charge to the jury on malice was error under the Times and Garrison cases, thus indicating that a County Attorney and a Chief of Police would come within the privilege. Justices Black, Douglas and Goldberg concurred, not due to the error in the charge, but on the ground that such a suit would violate the First and Fourteenth Amendments under the Times case, where the

The record reflects that Curtis was represented at the trial by several attorneys. One argument for each side was made on Friday and the remaining arguments were completed the following Monday. Much of the argument of which complaint is now made was offered on Friday. Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.

[fol. 1635] The trial court correctly disposed of this matter in the following language:

> "It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial." [24]

If, as Curtis' counsel now claim, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", and "unsworn testimony of counsel", it is inconceivable to us that they would have delayed so long without raising the slightest hint of an

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defendant published his criticism of the plaintiffs' performance of their public duties.

This court in Buckley v. The New York Times (5 Cir. 1964), 338 F. 2d 470, after deciding the case on procedural grounds, stated in dicta that "a judicial determination by this court of the proposition that the principles of (the Times case) should be extended to candidates for public office, must await an appropriate case."

For other cases decided by district courts, see: Smoot v. League of Women Voters of the Grand Traverse Area (W. D. Mich. 1964), 36 F.R.D. 4; and H. O. Merren & Co., Ltd. v. A. H. Belo Corp. (N.D. Tex. 1964), 228 F. Supp. 515.

[24] Supra note 6, at 922.

See also: Fidelity & Casualty Co. of N.Y. v. Williams (5th Cir. 1952), 198 F. 2d 128.

objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought.

Furthermore, after carefully considering the entire record, we do not consider that the arguments belatedly objected to would have required a reversal, even if timely objections had been made. Some of the argument was in- [fol. 1636] vited, but the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama. The editor-in-chief of the Post set the tone and the stage for the attack. He openly boasted that the Post's new policy of "sophisticated muckraking" was the "final yardstick" of editorial achievement since it meant "we are hitting them where it hurts." It was no wonder that the author Graham was equally callous in admitting that he knew that "when this article was published that was the death of Wally Butts in his chosen profession" and that "Curtis Publishing Company knew that when that article was published it would ruin Coach Butts' career." The policy of the magazine so bluntly stated[25] was by itself

[25] In the deposition of Clay D. Blair, Jr., editor-in-chief, it was developed that for the first quarter of 1963, Curtis showed a loss of about $1.1 million, compared to a loss in 1962 for the same quarter of $4.7 million; that in 1960 the amount of advertising revenue was $106 million; that in 1961 the figure had dropped to $86 million; that Blair was made a vice-president of Curtis in June of 1962; that circulation is one of the factors that affects advertising revenues; that demography is important, because "all circulation in Russia would not be appealing to General Motors;" that Blair wrote a memo to his staff, which found its way to a national magazine, in which he was quoted as saying: "The final yardstick is the fact that we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism"; that he was not being facetious when he used the phrase "sophisticated muckraking"; that he meant it when he said it and when he testified; that he was correctly quoted as being

[fol. 1637] more than enough to inflame the jury. Counsel for Butts could only gild the lily.[26]

The Exclusion of Testimony

Butts was asked by Curtis' counsel on cross-examination if he recalled having made a statement over television, on a date prior to the institution of this action, that he "would never at any time and never . . . (had) done anything that would injure the University of Georgia". He responded that he had made a statement to that effect, but that "as far as my services at the University of Georgia are concerned that represents only my opinion". Proffered evi-

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"concerned with the image of the Post and in trying to get a new image, portray a different type of magazine"; that he did change the image of the Post; that the Butts issue was representative of the new type magazine Curtis was interested in publishing; that "we have perhaps come . . . 25 per cent of the way with this issue . . . toward the goal of the magazine that I envision"; that this issue is a step in the right direction; that he was acquainted with the term "muckraking" prior to using it in the interview which led to an article in Newsweek on November 19, 1962; that in the interview with Newsweek he stated that he intended to "restore the crusading spirit . . . the sophisticated muckraking, the expose in the mass magazines . . . to provoke people, make them mad"; that he further stated in the interview: "But careers will be ruined, that is sure", and he could not quarrel with the fact that Butts' career was one of the careers to which reference was made in that statement.

[26] The trial court also pointed out that Butts was unquestionably one of the leading figures in the national football picture; that responsible officials of the Post knew that after the article was published Butts' career would be ruined; that Butts, through his attorney, had notified Curtis before publication that the article was false; that one of Butts' daughters had telephoned long distance to a Post official with a plea that the article be withheld from publication; and that after publication Butts had, pursuant to Georgia law, requested a retraction from Curtis, which was refused. The court then commented that the jury was warranted in concluding from all the facts in the case, including "the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights." Supra note 6 at 919.

dence which Curtis asserts "is replete with incidences of Butts' unfaithfulness and disloyalty to the University of Georgia", was excluded by the trial court. Curtis insists, however, that the evidence should have been admitted, not only to demonstrate Butts' true character, but to impeach his credibility as a witness.

[fol. 1638] We are in agreement with the trial court that proof of Butts' character could be made by reputation only, and that particular acts of misconduct are irrelevant.[27]

The rule that "a party may be cross-examined to bring out matters, even though they may be collateral, which are inconsistent with the testimony given by him",[28] is not applicable here. The answer given by Butts to the question asked by Curtis' counsel concerning a statement previously made out of court, was not such an affirmative profession of faithfulness and loyalty to the University of Georgia, made at the trial, as would open the door, for the purpose of impeachment, in mitigation of damages, or otherwise, to the admission of alleged incidents of "unfaithfulness and disloyalty" to that institution, either by cross-examination of Butts, or by direct evidence from other witnesses.

Complaint is made that Curtis was not permitted to show that Butts had refused to answer certain questions in his deposition, and that evidence offered as to purportedly false testimony given by Butts in his deposition was rejected. Butts' refusal to answer was on advice of counsel. The answers sought were subsequently supplied, but Curtis argues that because of the delay it was denied adequate discovery and thereby "lost valuable time in the preparation of its case".

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[27] Note 6, supra, at 921.

[28] 98 C.J.S. Witnesses, § 399; 3 Wigmore, Evidence (3d ed. 1940), § 1006(2).

The trial judge was clothed with broad discretion in controlling the extent of direct and cross-examination,[29] and [fol. 1639] we cannot say that he abused that discretion in excluding the proffered evidence.

Similarly, we do not think the trial court abused his discretion in refusing to admit evidence that the witness Carmichael, while a minor in Ohio, had been convicted of petty larceny in 1933. The ruling was based upon lapse of time.[30]

Curtis sought to introduce into evidence certain extrajudicial statements made by George Burnett, and statements made to him by third parties. These included inquiries made by Burnett of the telephone operator and her replies thereto,[31] a telephone conversation between Burnett and one Milton Flack, purportedly made immediately after Burnett had overheard a telephone conversation between Butts and Bryant,[32] Burnett's conversation with one Bob Edwards about the notes he had

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[29] See Roberson v. United States (5 Cir. 1957), 249 F. 2d 737; Carpenter v. United States (4 Cir. 1959), 264 F. 2d 565; Poliafico v. United States (6 Cir. 1956), 237 F. 2d 97.

[30] Supra note 6, at 921.

[31] Curtis says this was offered only to show that a telephone conversation between Butts and Bryant had actually taken place. Butts, however, contends no such limitation was placed on this testimony.

[32] Burnett testified that he had been trying to contact Milton Flack by telephone when he intercepted the alleged call between Butts and Bryant, after which he says he hung up the phone and sat for about twenty or thirty seconds before picking up the phone and again calling Flack's number. Curtis wanted to prove that Burnett asked Flack: "Is Wally Butts in your office now Milt", to which Flack is supposed to have replied that Butts was at that time in his office making a telephone call. The court allowed Burnett to state that he called Flack, but excluded as hearsay anything he might have said to Flack.

taken;[33] Burnett's statements at meetings with officials of [fol. 1640] the University of Georgia; and statements of these university officials made in checking Burnett's story at meetings with him.[34] All of these incidents had been reported in the article.

It was, of course, important from Curtis' standpoint that it show its good faith in publishing the article. The proffered evidence would have tended to show that these statements as set forth in the article had, in fact, been made, and we think the trial court should have admitted it for that limited purpose only. However, the full import of most, if not all, of that evidence got before the jury in some form before the trial was concluded.

In any event, none of the testimony involved related to the real "sting of the libel", and we do not consider that substantial error was committed in its exclusion. Curtis had the burden to show more than nominal error to secure reversal for rulings of evidence,[35] and this it has failed to do.

The Jury Instructions

Complaint is made that the trial court committed plain and prejudicial error in instructing the jury. No objections

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[33] Bob Edwards was division manager of the company with which Burnett was connected. Burnett testified that he had a conversation with Edwards on January 4, 1963 about the notes he had taken on September 13, 1962. The court sustained an objection to the conversation itself on the ground that it was hearsay. On cross-examination, Burnett testified that he did not have his notes with him when he first talked with Edwards on January 4, 1963, but did show them to Edwards some two weeks later.

[34] Curtis contends that the investigation conducted by the officials of the University of Georgia would support Burnett's credibility, because it demonstrated his willingness to cooperate, and to have his story questioned.

[35] Rule 61, F.R.Civ.P.; Jennings v. United States (5 Cir. 1934), 73 F. 2d 470, 471.

[fol. 1641] to any instructions were made at the trial of the case.[36] Rule 51, F.R.Civ.P., provides in part that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury."

Full opportunity was afforded counsel for Curtis to make any objections before the jury was permitted to consider its verdict. Under Rule 61, F.R.Civ.P., all errors which could not change the result of the trial, or which did not affect the substantial rights of the parties, are harmless and must be disregarded. No action taken by the court with respect to any instruction now under attack appears inconsistent with substantial justice, or to have affected the substantial rights of the parties, and we agree with the trial court that Curtis may not now complain.[37]

The Refusal to Give Requested Instructions

There is no merit to Curtis' contention that the trial court erred either in refusing to charge the jury that it should construe Butts' testimony most strongly against him, or in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely.
[fol. 1642] The court's charge fully covered the general rules relating to the credibility of witnesses. The question concerning the credibility of any witness, and whether or not he had been successfully impeached, was left entirely to the jury. There was no showing that any witness had knowingly and wilfully testified falsely, and the evidence

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[36] The claim that certain of the jury instructions violated constitutional rights of Curtis is dealt with in this opinion under the heading "Curtis' Constitutional Rights". See notes 15-23, supra.

[37] Supra note 6, at 922.

was more than adequate to support the verdict, even if the jury had completely disregarded the alleged equivocal testimony of Butts.

The "Newly Discovered Evidence"

In its motion for new trial under Rule 60(b) (2), F.R. Civ.P., Curtis contended that new evidence discovered since the trial conclusively demonstrates the falsity of the testimony of two of Butts' witnesses, Dr. Frank A. Rose and Coach Paul "Bear" Bryant, and strongly supports the defense of justification.

The trial court rejected this contention because (1) Curtis had not exercised reasonable diligence, (2) the evidence would merely tend to affect the weight and credibility of the testimony of Dr. Rose, and (3) the evidence would not have changed the verdict in this case.[38]

We are in accord with the trial court's conclusions, and do not find that he has abused his discretion.

[fol. 1643] Punitive Damages

The trial judge gave his reasons for requiring the remittitur of all punitive damages in excess of $400,000.[39] There is not the slightest suggestion that he thought, or even intimated, that the larger award was based on passion or prejudice. On the contrary, fully aware of the distinction between a verdict excessive in amount which may be reduced by remittitur, and one resulting from improper influences such as passion and prejudice which may not be corrected in this way, the judge necessarily rejected the idea that this verdict had been infected by such destructive elements.

The Georgia Code expressly provides for punitive damages.[40] Under Georgia law, three things are left for the

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[38] In his opinion dated April 7, 1964 the trial court fully discussed this matter. (See supra note 23, at 16.)

[39] Supra note 6, at 919.

[40] Ga. Code Ann. § 105-2002: "In every tort there may be aggravating circumstances, either in the act or the intention, and

jury to determine: (1) "when punitive damages shall be allowed"; (2) "the amount of such damages"; and (3) the purpose of the award as "either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."[41] Obviously there are, and can be, no precise standards for these determinations. Not for the first time in the common law tradition, the law turns to the jury. And Georgia prescribes that "(t)he [fol. 1644] measure of . . . punitive damages . . . is to be fixed by the enlightened conscience of an impartial jury."[42] What the "enlightened conscience" of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages.

But, of course, no one would suppose that it is left wholly and solely to the jury. As with every other issue traditionally for jury resolution, the trial judge must still determine whether, as a matter of law, the verdict comports with law. The law recognizes that an award of any type of damages—compensatory or punitive—made by a jury free of bias, may be too small or too large. When that occurs—when the judge concludes that the law regards the verdict as too small or too large—then appropriate action must be taken by the court. Reviewing the amount of the verdict and reaching the conclusion that it is more than the law would permit is not, therefore, the equivalent of the judge's determination that excessiveness is due to a runaway jury, under the spell of passion or bias.

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in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." Also see National Association for the Advancement of Colored People v. Overstreet, ____ Ga. ____, ____ S.E. 2d ____ (No. 22814, April 20, 1965, as modified May 7, 1965). See Division 4, subd. (b) of opinion.

[41] National Association for the Advancement of Colored People v. Overstreet, supra, note 40.

[42] Id.

The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. As to (a), the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was "ample evidence from which a jury could have concluded that there was reckless disregard by [fol. 1645] defendant of whether the article was false or not." [43] Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess.[44] The latter is a permissible course and does

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[43] The trial court said, in its April 7, 1964 opinion (see supra note 23, at 16), that:

> "If it were conceded that plaintiff Butts was a 'public official', the case of New York Times Company v. Sullivan would not permit the vacating of this court's previous judgment, as the ruling in the Times case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice'—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Italics supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. Butts v. Curtis Publishing Company, 225 F. Supp. 916."

[44] State Farm Mutual Automobile Insurance Company v. Scott (5 Cir. 1952), 198 F. 2d 152.

Curtis cites Crowell-Collier Publishing Company v. Caldwell (5th Cir. 1948), 170 F. 2d 941, where this Court held that the refusal to set aside a libel verdict of $237,500 was an abuse of discretion. Judge Hutcheson found that "litigants, witnesses, lawyers and jury seemed to regard the contest as a sporting event, a wager by battle, in which the best battler ought to and would win"; that the trial judge "held himself a little too aloof from the trial . . ., with the result that the trial got out of hand;" and that "when counsel for defendant made vigorous objections to the argument as highly improper, inflammatory, and prejudicial, and requested the court to instruct the jury to disregard them, the court said merely: 'Objection overruled. Request denied. Exception noted' ". Obviously, the same circumstances were not present

not infringe upon the Seventh Amendment's guaranty of a jury trial.[45] In making his determination as to (b), he [fol. 1646] pursued the correct standard of keeping the verdict "within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights."[46] Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts.[47] Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment.

To have granted a new trial might appear to have been an easier way out. But that is really no solution. On a retrial, the judge could not instruct the next jury as to the dollar maximum of any such verdict. So that jury would

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in the instant case, where the judge was in complete control, the trial was conducted in an orderly, efficient and proper manner, and no objections whatever were made to the conduct of the trial, or to the arguments of counsel.

[45] Arkansas Valley Land & Cattle Co. v. Mann, 1889, 130 U.S. 69, 9 S.Ct. 458, 32 L. ed. 854; International Paper Co. v. Busby (5 Cir. 1950), 182 F. 2d 790; United States v. Certain Parcels of Land in Rapides Parish, La. (5 Cir. 1945), 149 F. 2d 81, 83.

[46] Supra note 6, at 920.

[47] Supra note 6, at 919. Butts, in arguing that the district court was far more lenient to Curtis in reducing the award than was justified, said: "The jury in the case at bar recognized that a 100 million dollar corporation with a circulation of between six and seven million copies and a readership of approximately 22,000,000 persons can be deterred by no less than three million dollars as a charge for its misuse of a cherished American freedom —the freedom of every man to live unthreatened by calumny. This jury believed that anything less than this amount would merely add to the audacious course of 'sophisticated muckracking' upon which the Curtis Publishing Company has admittedly set its sights." See also note 26, supra.

be pretty much on its own, under the unavoidably vague, elastic standards prescribed in the Code, as measured by the enlightened conscience of an impartial jury.[48] The trial judge, on the second trial, would then be forced to repeat the process of testing for (a) and (b). If, as urged [fol. 1647] by Curtis, the determination by the judge that the amount is too much, necessarily means a new trial, it is quite possible that the case would never end. Georgia has prescribed the "punishment" for aggravated willful torts. The law ought not to frustrate the vindication of that policy by an unrealistic procedure. The jury verdict, as reviewed and reduced by the trial judge, is the tortfeasor's assurance that such damages will not exceed that which the law would tolerate to achieve the Georgia objective of deterring repetition or compensating wounded feelings.

Conclusion

This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

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[48] See notes 40 and 41, supra.

[fol. 1648] . Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is Affirmed.

In view of our holding, we have given no consideration to Butts' cross appeal.

RIVES, Circuit Judge, dissenting:

Wallace Butts, former Athletic Director of the University of Georgia, instituted this diversity action in the district court against the Curtis Publishing Company, publishers of *The Saturday Evening Post*. The complaint demanded $5,000,000 general and $5,000,000 punitive damages for an alleged libel contained in an article entitled, "The Story of a College Football Fix," which was published in the March 23, 1963, issue of the *Post*. The action resulted in a jury verdict against the defendant for $60,000 general damages and $3,000,000 punitive damages. The district court granted the defendant's motion for a new trial, conditioned upon the failure of the plaintiff to remit that portion of the award of punitive damages in excess of $400,000. The district court was of the opinion that the award of $60,000 for actual damages was not excessive, but the court concluded that the award for punitive damages was "grossly excessive." Pursuant to the district court's order, the plaintiff filed a remittitur and thereafter the district court overruled the defendant's motion for a new trial and entered judgment for the plaintiff in the amount of $460,000. Approximately six weeks after the district court entered judgment, the Supreme Court decided *New York* [fol. 1649] *Times Co.* v. *Sullivan*,[1] and the defendant filed its motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The defendant contended that the previous judgment should be vacated and a new trial ordered in light of the *New York Times Co.* case. The district court denied the motion.

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[1] 376 U.S. 254 (1964). See, generally, Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va.L.Rev. 1 (1965).

It is my view that the district court erred in not granting a new trial in light of *New York Times Co.* If mistaken in that view, I am nonetheless convinced that the part of the judgment awarding $400,000 in punitive damages cannot stand in the light of the first, fifth and seventh amendments to the Constitution.

First, however, let me say that this record makes clear beyond controversy that the questions of fact are for the jury's determination. The district court denied the plaintiff's motion for a directed verdict. Plaintiff's counsel insisted and the following colloquy ensued:

> "Mr. Lockerman: —on the point that the defendant had not, under the evidence that it has shown, proven the truth under the burden that it had of the things that it has said against the plaintiff in this article.
>
> "The Court: Mr. Lockerman, I think it would [be] in error for this Court to withdraw that issue from the Jury."

[fol. 1650] In ruling on the motion for a new trial, however, the district court commented: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." The majority opinion quotes that comment and adds its "Amen" thus: "'We heartedly agree with that appraisal." I do not think that any such appraisal should be made. Even a casual reading of the record demonstrates that the questions of fact should be left to the jury.

I. *Sullivan* v. *New York Times Co.* necessitates reversal of the judgment in toto.

The Supreme Court in *New York Times Co.* v. *Sullivan* held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it

was false or not.[2] The district court did not think the *New York Times Co.* case governed the present action for the reason that the present plaintiff was not a "public official" as contemplated by the *New York Times* rule, and for the reason that ample evidence existed from which a jury could have concluded that there was reckless disregard by the defendant of whether the article was false or not. [R., pp. 1467-68.] The district court stated that "to hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of *New York Times* [fol. 1651] *Company* v. *Sullivan*. . . ." [R., p. 1467.] The plaintiff held to be a "public official" in *New York Times Co.* was Commissioner of Public Affairs, one of three elected Commissioners of the City of Montgomery, Alabama. His duties involved the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.[3] The Supreme Court noted:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department."[4]

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[2] 376 U.S. 254, 279-80 (1964); Garrison v. Louisiana, 379 U.S. 64, 67 (1964).

[3] See New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 256.

[4] *Id.* at 283, n. 23.

It is clear that "public officials" as contemplated by *New York Times Co.* are not limited to elected officials. In *Garrison* v. *Louisiana*,[5] decided subsequent to *New York Times Co.*, the District Attorney for Orleans Parish, Louisiana, was convicted of criminal libel for issuing a statement disparaging the judicial conduct of the eight judges of the Criminal District Court. The Supreme [fol. 1652] Court's decision, which brought the District Attorney's statement within the purview of criticism of the official conduct of "public officials" and entitled to the benefit of the *New York Times Co.* rule, did not hinge on whether the eight judges were elected officials. No mention was made of how the judges obtained their positions. Moreover, it is clear from the Court's statement in *New York Times Co.*, quoted above, that the rule applies to "government *employees.*" The question reserved by the Court was "*how far down* into the lower ranks of government employees the 'public official' designation would extend . . . ."[6] A precise formula for designation of "public officials" for the purpose of the *New York Times* rule was not attempted. Indeed, it is clear from the background and reasons for the rule that to fashion and apply a precise formula for designation of "public officials" for the purpose of the *New York Times* rule would be a formidable, if not impossible, task.[7]

The first amendment secures freedom of expression upon public questions. The constitutional safeguard, the Supreme Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[8] Similarly, "[I]t is

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[5] 379 U.S. 64 (1964).

[6] New York Times Co. v. Sullivan, 376 U.S. 254, 283, n. 23 (emphasis supplied).

[7] Cf. Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 722 (state responsibility under the Equal Protection Clause).

[8] Roth v. United States, 1957, 354 U.S. 476, 484.

a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[9] Mr. Justice Brandeis has stated that "those who [fol. 1653] won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."[10] *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 269-70. As was said in *Garrison* v. *Louisiana*,[11] the First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan* . . . ." It was against this background that the Supreme Court in *New York Times Co.* stated that the newspaper advertisement, which contained an inaccurate description of events occurring in Montgomery in connection with the civil rights movement, was an expression of grievance and protest on one of the major public issues of our time and would seem clearly to qualify for the constitutional protection.[12]

It is therefore necessary to examine the facts and weigh the circumstances to determine whether the allegedly defamed plaintiff is involved in the "conduct of the public business"[13] to an extent which attains constitutional significance.

The plaintiff held his position of Athletic Director of The University of Georgia by reason of a contract with the Board of Regents of the University System of Georgia, which hired him as an employee. [Brief for Appellee, p.

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[9] Bridges v. California, 1941, 314 U.S. 252, 270.

[10] Whitney v. California, 274 U.S. 357, 375-76 (1927) (concurring opinion).

[11] 379 U.S. 64, 75 (1964).

[12] See 376 U.S. at 271.

[13] Garrison v. Louisiana, 1964, 379 U.S. 64, 73.

[fol. 1654] 67.] The plaintiff supervised the scheduling and location of games, planned and budget, attended to the addition of new athletic facilities, supervised ticket sales and prepared plans for band trips and performances. Moreover, he generally supervised "the entire athletic program of the school." [R., pp. 654-55; Brief for Appellee, pp. 69-70.] The education of youth in the State of Georgia is unquestionably a matter of public concern. By his position the plaintiff is intricately involved with a significant public issue, that is, the education of the youth who attend The University of Georgia—a public institution. According to the Duke of Wellington, "The battle of Waterloo was won on the playing fields of Eton." The ever-increasing difficulties to be faced by this nation require the utmost integrity in the training of its youth. I think the plaintiff is a "public official" as contemplated by the *New York Times Co.* decision.

The article, which the defendant published under the subtitle, "How Wally Butts and Bear Bryant Rigged a Game Last Fall," concerned alleged information on Georgia plays given by Wallace Butts to Coach Paul Bryant relating to the University of Alabama and the University of Georgia football game played in Birmingham in September 1962. The article charged Wallace Butts with being corrupt and with betraying his players. It charged that the players were forced into the game like "rats in a maze" and "took a frightful physical beating." In an italicized preface to the article, "The Editors" stated that Wallace Butts and Coach Bryant were participants in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same preface, [fol. 1655] Wallace Butts was relegated to a status worse than that of "disreputable gamblers" and a corrupt person who, employed to "educate and guide young men," betrays or sells out his pupils. [See R., pp. 88-89 (order granting motion for new trial.)]

I think it clear that the defendant's statements are within the purview of criticism of the official conduct of

public officials. As stated by the Supreme Court, "the public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[14]

The district court charged the jury that general damages were recoverable absent proof of actual malice. The plaintiff argues that even if the *New York Times* rule is applicable, the district court's failure to charge that malice is a prerequisite for actual damages is harmless error since the district court charged that actual malice was required for an award of punitive damages and the jury awarded punitive damages. I do not agree that the district court's charge complies with the *New York Times* rule.

In dealing with the question of punitive damages, the district court charged the jury:

> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but [fol. 1656] is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an *intent to injure one*. Malice also denotes a wanton or reckless indifference *or culpable negligence with regard to the rights of others*." [R., p. 1356] (Emphasis supplied.)

I think it clear that the district court's charge does not embrace the *New York Times Co.* definition of actual malice, which is with knowledge that *the statement* was false or with reckless disregard of whether it was false or not. The *New York Times* rule emphasizes "the knowingly false

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[14] Garrison v. Louisiana, 1964, 379 U.S. 64, 76-77.

statement and the false *statement* made with reckless disregard of the truth," [15] and not merely intent to injure the individual or negligent disregard of the rights of others. The necessary requisite to a showing of actual malice under the *New York Times* standard is proof that "the lie . . . [is] knowingly and deliberately published about a public official" or published "with reckless disregard of the truth." [16]

Since the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood, the charge does not comply with the *New York Times* standard.[17]

The majority of this Court have held that the defendant "has clearly waived any right it may have had to challenge [fol. 1657] the verdict and judgment on any of the constitutional grounds asserted in *Times.*" While I respect the judgment of the majority, I do not share that judgment.[18] In short, I do not think the defendant may be said to have waived by "silence" a constitutional right not enunciated at the time; it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision.

In the *New York Times Co.* case, the trial judge charged that the portions of the advertisement in issue were "libelous *per se*," that "general damages need not be alleged or proved but are presumed," that the plaintiff was entitled to recover both such "presumed" and punitive

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[15] *Id.* at 75 (emphasis supplied).

[16] *Ibid.*

[17] Henry v. Collins, 1965, 380 U.S. 356; see Garrison v. Louisiana, 1964, 379 U.S. 64, 73.

[18] It seems to me that to constitute such a waiver there must have been "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 1938, 304 U.S. 458, 464; Fay v. Noia, 1963, 372 U.S. 391, 439.

damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive. The jury awarded damages of $500,000. The questions presented to the Supreme Court in the petition for a writ of certiorari dealt with the *award* of $500,000, the *sufficiency of the evidence* and the lack of proof of *special damages* in light of the first amendment as embodied in the fourteenth.[19] Conspicuously absent is any suggestion [fol. 1658] that the first amendment, as embodied in the fourteenth amendment, requires that a public official must prove *actual malice* against critics of his official conduct.[20]

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[19] In detail, the questions presented were:

"1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a state may hold libelous *per se* and actionable by an elected City Commissioner, without proof of special damage, statements critical of the conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

"2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him and punishable as libelous *per se*.

"3. Whether an award of $500,000 as 'presumed' and punitive damages for libel constituted, in the circumstances of this case, an abridgement of the freedom of the press."

Petition for Writ of Certiorari, p. 2, New York Times Co. v. Sullivan, 1964, 376 U.S. 254.

[20] In three of the 105 pages of their petition for certiorari, counsel dealt with "the doctrine espoused by the court below . . . that a public official is entitled to recover 'presumed' and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to 'injure' him 'in his reputation' or to 'bring' him 'into public contempt' as an official—unless a jury is persuaded that it is entirely true." Except for the statement of the case and facts, malice was mentioned in one sentence. See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 13, New York Times Co. v. Sullivan.

Apparently this is due to the fact that the defendant's objections in the trial court were directed to the absence of a requirement of proof of special damages.[21] Only by looking at the *New York Times Co.* case in retrospect can it be said that the defendant has waived the great constitutional rights contemplated by the *New York Times* rule. But applying the same "retrospective look" to the present case,[22] it is also clear that had the defendant contended the same as did the defendant in the *New York Times* case, *i.e.*, that the first and fourteenth amendments were "infringed by holding the publication libelous and actionable without proof of special damage,"[23] it would not have affected the trial of the present action; for the district [fol. 1659] court ruled, in dealing with the motion for new trial, that the *New York Times* rule was not applicable to the present plaintiff. [R., p. 1467.]

The fact that the present defendant offered no defense under Georgia law, which provides that communications concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions, cannot be said to constitute a waiver of a defense that the plaintiff is a "public official" under the *New York Times* standard. As recognized by the plaintiff, members of the athletic department are, like members of the faculty, "employees" under Georgia law and are not considered in "public office" or "officers."[24] Thus, although the Georgia statute which grants a privilege to "comments upon the acts of public men in their public capacity and with reference thereto"[25] appears as broad, if not broader, than the "public official" as contemplated by *New York Times Co.*,

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[21] See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 8, New York Times Co. v. Sullivan.

[22] In football jargon, "by being Monday morning quarterbacks."

[23] *Ibid.*

[24] Brief for Appellee, pp. 67-69.

[25] Ga. Code Ann., § 105-709(6).

the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered.

Moreover, I think that *Henry* v. *Collins*,[26] reflects that the Supreme Court does not intend to allow the great constitutional rights inherent in the *New York Times* rule to be ignored in a case such as the present one.

In *Henry* v. *Collins*, the most recent Supreme Court decision interpreting the *New York Times* rule, the Court reversed per curiam the judgments obtained by a county [fol. 1660] attorney and a chief of police in their libel actions against the petitioner. The petitioner had charged that his arrest for disturbing the peace was the result of "a diabolical plot." The trial judge had charged "that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed." The Supreme Court reversed since the trial judge's instructions concerning malice did not comply with the *New York Times* rule. The trial of the plaintiff's suit and the decision of the Mississippi Supreme Court affirming the judgments occurred shortly before the Supreme Court handed down *New York Times Co.* Like the present defendant, the defendant in *Henry* raised his first amendment question by a motion for a new trial. However, the defendant in *Henry* filed a motion for a directed verdict at the same time which also raised the first amendment question. Both motions were overruled. Significant is the fact that the constitutional questions raised by the motions were raised for the first time after the close of the plaintiffs' case.[27]

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[26] 1965, 380 U.S. 356.

[27] See Petition for Writ of Certiorari to the Supreme Court of Mississippi, Henry v. Pearson, p. 6. Henry v. Pearson and Henry v. Collins were decided together. See Henry v. Collins, 1965, 380 U.S. 356.

Since the majority of this Court are not of the opinion that the judgment must be reversed, considerations of effective judicial administration do not require me to review the evidence in the present record to determine whether it could constitutionally support a judgment for the plaintiff should the plaintiff seek a new trial.[28]

[fol. 1661] In summary, I think the present diversity action was brought by a public official for criticism of his official conduct; therefore, he was limited to an award of damages for a false statement made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision supervening the district court's judgment, that is, *New York Times Co.* v. *Sullivan.* In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial.[29]

II. That part of the Judgment awarding $400,000 punitive damages violates the defendant's rights under the first, fifth and seventh amendments.

On the question so far discussed, that is, whether *New York Times* v. *Sullivan* necessitates reversal of the judgment in toto, I would concede that there is a debatable issue of waiver on which I differ from the majority. The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion for new trial (R., pp. 46-48).

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[28] New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 284-85.

[29] Sulzbacher v. Continental Cas. Co., 8 Cir. 1937, 88 F.2d 122. It should be noted that the learned district judge in the present case did not deny the defendant's motion for a new trial on the basis that the defendant had "waived" the constitutional rights defined in *New York Times Co.*, but, instead, considered the motion for new trial on its merits. [R. pp. 1464-68.]

[fol. 1662] As to the questions now to be considered, there can be no issue of waiver.

The punitive damages, either as found by the jury or as fixed by the court, are many times greater in amount than the general damages. Under the court's instructions to the jury, the general damages included compensation "for the mental anguish, pain, mortification, and humiliation he has experienced as a result of the publication." (R. 1354) The punitive damages included no element to which the plaintiff was entitled by way of compensation, but, according to the court's instruction to the jury, "the purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award." (R. 1356) The statute which allows the jury to impose punitive damages is Georgia Code Annotated § 105-2002, which reads:

> "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

In the present case "compensation for the wounded feelings of the plaintiff" had been included in the general damages. [See R., p. 1354, quoted *supra.*] The trial court expanded considerably on the alternative purpose "to deter [fol. 1663] the wrongdoer from repeating the trespass"; it included also "a warning to others not to commit a like offense," the protection of "the community," and "an expression of ethical indignation." [See R., p. 1356, quoted *supra.*] The jury was bound to observe the instructions of the court. For the purpose of considering whether the jury's award of punitive damages exceeded constitutional bounds, it is of no moment that it may also have exceeded

the limits set by the statute.[30] The court further instructed the jury that, ". . . if you decide to award punitive damages, the sum you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion." [R., p. 1356.] The jury could reasonably infer that no limit was placed on the exercise of its discretion.

If the defendant corporation had been tried under the Georgia criminal libel statute,[31] it might have been punished by a fine "not to exceed $1,000."[32] As it is; the defendant stands subjected to a judgment of $400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the $400,000 sufficed to express the trial judge's sense of "ethical indignation" while that of the jurors swelled to $3,000,000—3,000 times the [fol. 1664] maximum fine which could have been imposed in a criminal prosecution.

Further, in a criminal proceeding, the defendant was subject to *no* fine unless proved guilty beyond a reasonable doubt, while here the judge charged the jury that ". . . the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true . . . ." (R., p. 1347.)

I would not imply that the return of punitive damages in the ordinary case is constitutionally suspect, for more than a century ago the Supreme Court commented:

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[30] According to the brief of the appellee, plaintiff (p. 86): "It is apparent that the purpose of this Code section in cases of defamation is to deter the defendant from republishing this one particular libel at a later date. It does *not* prevent the defendant from publishing any *other* matter, whether thought libelous of the plaintiff or not." (Emphasis the appellee's.)

[31] Ga. Code Ann. § 26-2101.

[32] Ga. Code Ann. § 26-2101.

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."

Day v. *Woodworth,* 1851, 54 U.S. (13 How.) 362, 370-71. [fol. 1665] The theory of punitive damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.[33] There can be no serious question but that the Georgia statute permitting "additional damages" [34] is constitutional upon its face.

However, as that statute was applied by (1) the court's instructions to the jury, (2) the jury's verdict, and (3) the reduced judgment ultimately entered by the court on motion for new trial, the award of punitive damages in the present case is tantamount to a criminal fine or penalty. As said in the very recent case of *United States* v. *Archie Brown,* U.S. Oct. Term, 1964, No. 399, decided June 7, 1965:

> "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several pur-

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[33] Bryson v. Bramlett, Tenn. 1958, 321 S.W. 2d 555, 557; Margaret Ann Super Markets v. Dent, Fla. 1953, 64 So.2d 291-92; Pratt v. Duck, Tenn. Ct.App. 1945, 191 S.W.2d 562, 564-65; Foster v. Bourgeois, Tex.Civ.App. 1923, 253 S.W. 880, 885, aff'd 259 S.W. 917; 15 Am.Jur. Damages, §266; 25 C.J.S. Damages, §117.

[34] Ga. Code Ann. § 105-2002, quoted *supra,* p. 47.

poses: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

Similarly, in *Trop* v. *Dulles*, 1958, 356 U.S. 86, 96, it was said:

"In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose [fol. 1666] of the statute.[18] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.[19] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[20]

"[18] Of course, the severity of the disability imposed as well as all circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand.L.Rev. 603, 608-610; 64 Yale L.J. 714, 722-724.

"[19] E.g., *United States* v. *Lovett*, *supra* [328 U.S. 303]; *Pierce* v. *Carskadon*, 16 Wall. 234; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

"[20] E.g., *Mahler* v. *Eby*, 264 U.S. 32; *Hawker* v. *New York*, 170 U.S. 189; *Davis* v. *Beason*, 133 U.S. 333; *Murphy* v. *Ramsey*, 114 U.S. 15."

Footnote 18 to the text just quoted makes clear that the enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to a criminal fine.

I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post factor punishment 400 times as great as the defendant could have anticipated [fol. 1667] from the criminal libel statute,[35] and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.[36]

If there should be any doubt that the award of $400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Presumably a person [fol. 1668] charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a rea-

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[35] Ga. Code Ann. § 26-2101; compare art. 1, sec. 9, clause 3 of the Constitution.

[36] See amendment 5 to the Constitution.

sonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70." [37]

For yet another reason the award of $3,000,000 by the jury, or of $400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award.[38] Can any standard be more vague or arbitrary than "an [fol. 1669] expression of ethical indignation" first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.[39]

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[37] See also Cantwell v. Connecticut, 1940, 310 U.S. 296, 306; Near v. Minnesota, 1931, 283 U.S. 697, 713-14, 720-23.

[38] Staub v. City of Baxley, 1958, 355 U.S. 313, 322.

[39] Smith v. California, 1959, 361 U.S. 147, 151; Crump v. Board of Public Instruction, 1961, 368 U.S. 278, 287.

Still further, I submit that the remittitur violates the defendant's rights under the seventh amendment. The trial judge concluded "that the award for punitive damages in this case was grossly excessive. It is the court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00." [R., p. 95] In another part of his opinion on motion for new trial, the district judge commented: "The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained." [R., p. 93.] The district judge's opinion is silent as to the underlying reason for such a grossly excessive verdict. The majority opinion says that ". . . the judge necessarily rejected the idea that this verdict had been infected by such destructive elements [as passion or prejudice]." [Majority opinion, p. 28.] With deference, I submit that that conclusion is not based on the record or on anything said by the trial judge. To the contrary, in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: "Suppose the court should determine that probably a certain portion of the argument was improper, and [fol. 1670] therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again . . . ." [R., p. 1373.]

The majority of this Court labors under a different impression. It several times refers to the defendant's new policy of "sophisticated muckraking" without benefit of what the defendant claimed that it meant by that expression [R., pp. 37-38, 1019.]:

> "Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of 'sophisticated muckraking' in the sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country." [R., pp. 37-38.]

It was, of course, for the jury to say whether the defendant's explanation was true. In any event, I agree with the majority that the expression "was by itself more than enough to inflame the jury." [Opinion, pp. 21-22.] If, as is impliedly conceded, the jury was "inflamed," then was not passion and prejudice the most probable cause for its grossly excessive verdict? The majority continues, "Counsel for Butts could only gild the lily." [Opinion, p. 22.] I am tempted to facetiously comment on their plentiful supply of "gilt," but, in a more serious vein, I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel.

[fol. 1671] The majority says that "some of the argument was invited . . .," but is not more specific as to the particular argument of defendant's counsel which amounted to an invitation. However, the appellee's brief (p. 93) refers to the following:

> "Mr. Cody's exact words were: (R. 1267)
>
> > " 'The point I want to make is that a man [plaintiff] that will go to one of your public officials [Comptroller General], *bet* enough to start into this business and a lot of other businesses while he is charged with the duty of Athletic Director, but it is worse, in order to obtain the license to do that, to misrepresent your financial condition.' (Emphasis added)."

In response, there is attached to appellant's reply brief as Exhibits A and B, the affidavit of Mr. Cody supported by the affidavit of Rufus L. Hixon, the official court reporter. The court reporter's affidavit is to the effect that "after deponent had examined his stenotype notes, he telephoned Mr. Bondurant to state that the word 'bad' had been used by Mr. Cody in his closing argument but that the word 'bet' had been erroneously transcribed." [Exhibit B, p. 8a, Appellant's Reply Brief.]

In addition, I would note that in beginning his argument, counsel for the defendant referred to his attachment to the University of Georgia and to the fact that the trial judge, opposing counsel, and he had received their training in that institution. The arguments of counsel are set forth in the record (pp. 1257-1341). They do not, in my opinion, [fol. 1672] disclose any invitation or provocation to justify or excuse the improper and inflammatory argument of plaintiff's counsel. The following excerpts are only samples of the objectionable parts of that argument, but, I submit, that they speak so loudly as not to require comment:

> "Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. [R., p. 1289]
>
> "...
>
> "Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely [fol. 1673] daughters. What do they care? They have got money; getting money for it.
>
> "...

"I am looking to you for my protection. Heavens (sic) knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them. [R., p. 1319.]

". . .

"I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

". . .

"My time is up, I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating even since it came out, and I have lived in agony along [fol. 1674] with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wallace Butts.

"You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess,

> They will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to old Georgia.'" [R., pp. 1321-22.]

If this dissent serves no other purpose, it will at least preserve for posterity the colorful peroration last quoted. Seriously, it seems to me that "the public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." *N.Y. Central R.R. Co.* v. *Johnson,* 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the $3,000,000 punitive damage verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.[40]

[fol. 1675] It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury.[41] The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.[42]

That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from $3,000,000 to $400,000 represents nothing more specific than the difference between the jury's

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[40] Minneapolis, St.P. & S.S.M. Ry. Co. v. Moquin, 1931, 283 U.S. 520; Brabham v. State of Mississippi, 5 Cir. 1938, 96 F.2d 210; Ford Motor Co. v. Mahone, 4 Cir. 1953, 205 F.2d 267; National Surety Co. v. Jean, 6 Cir. 1932, 61 F.2d 197.

[41] See Dimick v. Schiedt, 1935, 293 U.S. 474, 482-87.

[42] See 6 Moore, F.P. (2d ed.) ¶ 59.05(3); 3 Barron & Holtzoff, ¶ 1305.1; 30 Am.Jur. New Trial, §§ 209, et seq.; 66 C.J.S. New Trial, §§ 209, et seq.

and the judge's sense of "ethical indignation." The jury's verdict cannot be recognized in the final judgment.

I appreciate that in the federal courts the right to a jury trial is to be determined as a matter of federal law in diversity as well as other actions.[43] It is, however, both interesting and instructive to refer to Georgia law. The statute permitting the award of punitive damages,[44] says that " . . . *the jury* may give additional damages . . . . " (Emphasis supplied.) Another statute prescribes: "The question of damages being one for the jury, the court should [fol. 1676] not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Ga. Code Ann. § 105-2015.

It has long been the law of Georgia that "the trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where from the application of the law to the evidence, the excess can be accurately ascertained." Syllabus 4 by the Court, *Central of Ga. Ry. Co.* v. *Perkerson*, 1901, 112 Ga. 923, 38 S.E. 365. That action was for the death of a railroad employee. The plaintiff recovered a verdict for $10,833.33. The trial court ordered a new trial conditioned on the plaintiff's consent to a remittitur of the part of the verdict in excess of $8,500.00, and, upon plaintiff's consent, entered judgment for that amount. On defendant's appeal, the Supreme Court of Georgia reviewed the authorities at length and reversed. A part of its opinion reads:

> "It is manifest that the verdict for $8,500 was rendered by the judge, and not by the jury, and it is im-

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[43] Simler v. Conner, 1963, 372 U.S. 221-22; Ammons v. The Franklin Life Ins. Co., 5 Cir., No. 21418, decided June 28, 1965. Nonetheless, it does seem anomalous for the federal courts to require the state courts to accord the strictest guaranty of jury trial when indicated by a federal statute (*e.g.*, the Federal Employers' Liability Act), and then, in a diversity case to refuse to recognize the requirement of jury trial imposed by a state statute.

[44] Ga. Code Ann. § 105-2002, quoted *supra* p. 47.

possible to ascertain from the evidence in the case how he arrived at that exact amount. It is evident from his order that he was dissatisfied with the verdict, as to the amount of damages found, and that, if he had not thought he had the power of remitting a portion of the damages, he would have set the verdict aside and granted a new trial upon the ground that the verdict was excessive. The judge may have the power to determine that a verdict is grossly excessive, and for that cause to order it set aside, and yet have [fol. 1677] no power to fix the exact amount for which it should stand. 'The power to control does not include the power to find. Like the executive veto, it arrests, but does not by its exercise bestow the power to enact.'"

Even more pertinent is a very recent case where the trial court, with plaintiff's consent, reduced the exemplary or punitive damages awarded by the jury from $4,000 to $1,500. The conditional judgment for new trial was reversed with directions that a new trial be granted. The Court said:

"In determining punitive or exemplary damages it is impossible to lay down any fixed rules for a precise mathematical calculation; 'and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases that this finding should not have exceeded a certain sum, is to invade their peculiar province, and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized either by the words of the law, or by the precedents and practice in such cases.' Savannah, Florida & Western Ry. v. Harper, 70 Ga. 119, 123-124 [citing many other authorities].

"It is our wish to make it clear that nothing held here or in any of the authorities cited is subject to the inference that a trial judge is restricted in the [fol. 1678] exercise of his exclusive discretion to grant or deny a motion for new trial on the general grounds. We do emphasize that where the determining of the amount of a particular class of damages lies exclusively with the jury, the trial court must either grant or deny a new trial on the basis of the jury's award. The trial judge cannot condition the exercise of his discretion in granting or denying a new trial on an acceptance by the parties of a different sum selected by him."

City Motor Exchange v. *Ballinger*, Ga. App. 1964, 138 S.E. 2d 925, 926-27.

The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

Both because *New York Times* v. *Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent.

[fol. 1680]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21491

D. C. Docket No. 8311–Civil Action

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(And Reverse Title)

Appeals from the United States District Court for the Northern District of Georgia.

Before Rives and Brown, Circuit Judges, and Spears, District Judge.

JUDGMENT—July 16, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, Curtis Publishing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Rives, Circuit Judge, dissents.

Issued as Mandate:

[fol. 1681]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

PETITION FOR REHEARING EN BANC AND BRIEF IN SUPPORT THEREOF—Filed August 4, 1965

[fol. 1683] Appellant Curtis Publishing Company respectfully moves the Court to grant a rehearing *en banc* upon the unusually important questions presented and to secure uniformity in the decisions of the Court for the following reasons:

1.

The majority of the panel of this Court found that the Appellant Curtis Publishing Company knowingly and intentionally waived basic rights under the First Amendment even before they were announced by the Supreme Court in *The New York Times Company* v. *Sullivan*, [fol. 1684] 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964). The *Times* decision for the first time extended the protection of the First Amendment to libel. Not even the New York Times' counsel who prepared the petition for certiorari anticipated the grounds on which the Supreme Court ultimately decided the *Times* case. The refusal of the majority to consider these basic constitutional issues is in direct conflict with the decisions of the Supreme Court in *Hormel* v. *Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L. Ed. 1037 (1941) and *Helvering* v. *Richter*, 312 U.S. 561, 61 Sup. Ct. 723, 85 L. Ed. 1043 (1941), and that of this Circuit in *Cobb* v. *Balkcom*, 339 F.2d 95 (5th Cir. 1964) and the cases cited therein.

[File endorsement omitted]

2.

The refusal of the majority of this Court to consider the important constitutional principles announced in *The New York Times Company* v. *Sullivan* is based upon a deciding vote by District Judge Spears. Since Judge Rives' opinion conflicts directly with that of Judge Brown on this issue affecting basic rights under the First Amendment, a rehearing *en banc* should be granted in order that uniformity in the decisions of this Court may be insured. "[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States,* 353 U.S. 901, 77 Sup. Ct. 633, 1 L. Ed. 2d 658 (1957). Rehearings *en banc* have been granted by this Court in many cases in which there was a strong dissent and even without a District Judge casting the deciding vote on the panel. See e.g., *Noah* v. *Liberty Mutual Insurance Company,* 267 F.2d 218 (5th Cir. 1959); *Howard* v. *United States,* 232 F.2d 274 (5th Cir. 1956).

[fol. 1685]

3.

The applicability of the new First Amendment principles of *The New York Times* case to the plaintiff as a "public official" is a question of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance and should be decided by this Court *en banc* in order that the trial courts in this Circuit may be guided thereby.

4.

The affirmance of the unprecedented and excessive award of punitive damages violates Appellant's constitutional rights:

(a) The granting of a remittitur rather than a new trial where the $3,000,000 verdict for punitive damages has been held by the trial court to be "grossly excessive" violated the defendant's right to trial by a fair

and impartial jury, which is guaranteed by the Seventh Amendment.

(b) The award of punitive damages in such an excessive amount is tantamount to a penal sanction which, under *The New York Times Company* v. *Sullivan* case and others, cannot constitutionally be imposed without the procedural safeguards which are required in criminal proceedings and sufficient standards for jury guidance.

5.

The Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings [fol. 1686] and instructions, as well as passion and prejudice, to stand.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J. Bondurant, Thomas E. Joiner.

Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania 19109.

Certificate of Counsel

I, Harold E. Abrams, one of the attorneys for the Appellant Curtis Publishing Company, certify that this Petition is presented in good faith, that it is not interposed for a delay, and that in my judgment it is well founded.

This ..... day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1687] Certificate of Service

It is hereby certified that a copy of this Petition has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ..... day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1695] Brief in Support of Petition for a Rehearing En Banc

I.

The Refusal of the Majority to Consider the Fundamental Constitutional Issues Presented Under the First and Fourteenth Amendments on the Basis of the Subsequent Decision of the Supreme Court in The New York Times Company v. Sullivan Because of the Alleged Waiver of These Basic Rights by the Defendant is Clear Error and Directly Conflicts With the Decision of the Supreme Court in Hormel v. Helvering.

[fol. 1696] In *The New York Times Company* v. *Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court for the first time extended the protection of the First Amendment to libel cases. These new constitutional principles, under which false statements, as well as those which are true, received constitutional protection, unless shown by the plaintiff to have been made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," radically changed the substantive law previously

applicable to libel cases.[1] Until the decision in the *Times* case, the Supreme Court had repeatedly stated that "libelous utterances are not within the area of constitutionally protected speech." *Roth* v. *United States*, 354 U.S. 476, at 483-84, 77 Sup. Ct. 304, 1 L.Ed.2d 1498 (1957); *Beauharnais* v. *Illinois*, 343 U.S. 250, at 266, 72 Sup. Ct. 725, 96 L.Ed.2d 919 (1952); *Near* v. *Minnesota*, 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

Despite the clear applicability of the new constitutional [fol. 1697] principles,[2] the majority refuses to apply them

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[1] The *Times* case forbids the recovery of general or punitive damages unless the plaintiff proves with "convincing clarity," not only that the statements were false, but that they were published with knowledge that they were false or with reckless disregard of whether they were false or not. In the *Times* case, the failure of the New York *Times* to check information in its own files which would have disclosed the falsity of its charges was held insufficient to prove reckless disregard of truth with "the convincing clarity which the constitutional standard demands." In *Garrison* v. *Louisiana*, 379 U. S. 64, 85 Sup. Ct. 209, 13 L. Ed. 2d 125 (1964), proof that the libelous charges were made "without a reasonable belief in their truth" was held insufficient under the *Times* case. It cannot be seriously argued that these decisions did not drastically change the constitutional principles heretofore applicable in libel cases.

[2] Since Judge Rives was prevented by considerations of judicial administration from reviewing the evidence in the present record to determine whether it could constitutionally support a judgment, and since the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the *Post*, the following summary is necessary:

> The defamatory charge in the instant case was that Butts, while Athletic Director of the University of Georgia, gave information about the Georgia football team to the Alabama Coach, Paul Bryant, prior to the Georgia-Alabama game, which was calculated to affect the outcome of the game. There is no evidence to show that the persons in the *Post* organization having responsibility for the publication of the article "knew" that the charges contained in "The Story of a College Football Fix" were false, either at the time of its publication or at any other time. Indeed, the evidence is clearly to the contrary, and it convincingly demonstrates the belief of the

to the present case because of what the majority asserts to be a waiver of these rights by the defendant. This waiver is based on alleged facts, most of which are outside the record, and a consequent finding that Curtis was repre-

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Editors of the *Post* in the truth of the article. (R. 945-46, 957, 1014-15).

Nor is there evidence that the *Post* article was published "with reckless disregard of whether it was false or not." From the outset, *Post* had been interested only in getting the truth of the entire story. (R. 957). *Post* employed Frank Graham, an experienced sports writer, to make a *complete investigation*. (R. 952, 954, 957). Graham was *instructed to* be careful, that this was a big story. (R. 957). He was to proceed with the *utmost thoroughness* (R. 954, 957), to dig to get all available facts (R. 952-53), and to *verify* the story. (R. 926). After Graham had completed the article, he submitted it to Davis Thomas, Managing Editor of the *Post*. (R. 1021). Because of the nature of the charges made in the article, Thomas reviewed the article to make certain great care had been exercised (R. 1015, 1021) and that every significant source of information had been checked in advance of publication. (R. 1014-15). In approving the article for publication, Thomas attached prime significance to the *affidavit* executed by Burnett, which confirmed Thomas' belief in the truth of statements contained in the article. (R. 1015). The article was then submitted to Clay Blair, Editor-in-Chief of Curtis Pub-
[fol. 1698] lishing Company, for his approval. Blair was careful to see that the article had been checked thoroughly as to its truth. (R. 945-46). The article was approved for publication only after Blair was satisfied that the statements contained in the article were true and accurate. (R. 945-46).

The *Post* relied on information given it by George Burnett in which he described in detail the substance of the September 13 call between Wallace Butts and Paul Bryant. This information was reaffirmed in a sworn affidavit signed by Burnett at *Post's* request. (R. 494, 508, 1015). The *Post* also knew that the September 13 call had been confirmed by *long distance records of the telephone company*. (R. 909). The defendant knew that the person who was best able to evaluate this information, Georgia Head Coach Johnny Griffith, had stated his opinion that if such information had been given to Coach Bryant prior to the Georgia-Alabama game, it *could have affected the outcome*. (R. 219, 317, 901). Burnett's story was further confirmed by the knowledge that the

sented in Alabama by the same attorneys who had [fol. 1699] represented the New York Times in the lower courts. On the basis of this novel "finding" the majority imputed knowledge of the yet unannounced constitutional principles of the *Times* case to Curtis' trial counsel.[3] The majority thus held that the constitutional protections afforded by the *Times* case to have been knowingly and in-

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whole matter had *been thoroughly investigated by the University* of Georgia and the Board of Regents. (R. 911). The *Post* knew that in the course of this investigation, Burnett had voluntarily taken and passed a *lie detector* test administered by a recognized expert. (R. 908). The Editors of the *Post* were also aware that Butts, when confronted with the information disclosed by the University's investigation, had *refused to submit to a lie detector test,* and had abruptly *resigned* on the following day. (R. 879).

Further confirmation of the story was provided by the discovery that an outstanding local sports writer, *Furman Bisher,* investigating this matter independently from different sources, had reached substantially the same conclusions. (R. 494). As an additional precaution, however, Bisher was employed to complete the investigation, particularly in talking to University authorities with whom he had more entrees. (R. 494). The final story was later submitted to Bisher, who made no corrections. (R. 518).

It is hardly necessary to argue that appellant's refusal to retract the article on demand was "not evidence of malice for constitutional purposes." 376 U.S. at 286. Indeed, the Supreme Court expressed doubt that a refusal to retract could ever constitute such evidence; certainly it cannot amount to such evidence when other uncontradicted evidence demonstrates affirmatively that the publisher justifiably believed in the truth of the defamatory statement.

The evidence outlined above makes it quite clear that no finding of malice on the part of the *Post* can be sustained under the principles of the *New York Times* and *Garrison* cases.

[3] Appellate courts do not allow a party to depart from the record on appeal by becoming an unsworn witness for his client. See *Lawn* v. *United States,* 355 U.S. 339, 78 Sup. Ct. 311, 2 L.Ed.2d 321 (1958) ("we must look only to the certified record in deciding questions presented"). The obvious reason for such a rule is that the court may be misled to an unsound conclusion. Such is the instant case in which the majority has concluded from unsup-

tentionally waived by the defendant's failure to raise them in a timely manner at the trial.

The majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon "its interlocking battery" of counsel, one of whom also represented the Times in the Alabama courts. Yet, as Judge Rives has emphasized, even the petition for certiorari filed by Herbert Wechsler, the eminent constitutional authority and lead counsel for the New York Times, did not enunciate the constitutional principles which [fol. 1700] were ultimately *decided* by the Supreme Court. Thus, it was impossible for trial counsel to predict the outcome of the *Times* case.

The tortuous theory of "waiver" found by the majority to preclude review is in direct conflict with the decisions of the Supreme Court in *Hormel* v. *Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941), and *Helvering* v. *Richter*, 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941). In *Hormel* v. *Helvering*, supra, the taxpayer sought review before the Board of Tax Appeals of a deficiency which had been assessed against him on the basis of income from a family trust. The Commissioner defended the assessment solely on the basis of Sections 166 and 167 of the Internal Revenue Code. In that proceeding, the Commis-

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ported statements in Butts' brief, which for the most part are not true, that there was "full communication among Curtis' counsel" in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right." As is shown by the attached affidavits of Mr. Philip H. Strubing, Curtis General Counsel; Mr. Welborn B. Cody, leading trial counsel in the Butts case; and Mr. Eric Embry, Curtis counsel in the Bryant libel action in Birmingham, Alabama, the Alabama counsel attended the Butts trial merely as spectators and at no time were they consulted in regard to trial strategy. More important, at no time prior to or during the trial were they asked to, nor did they suggest, the raising of any constitutional defenses. None of Curtis' counsel intended to waive any constitutional defense which Curtis may have had in the Butts case. It is certainly shocking that a party can be deprived of basic constitutional rights upon such a tenuous basis.

sioner was represented by W. Frank Gibbs. Four months prior to the *Hormel* case, the Commissioner, represented by the *same* attorney, W. Frank Gibbs, had successfully asserted a deficiency against income from a similar trust under Section 22(a) of the Internal Revenue Code. *George B. Clifford, Jr.*, 38 B.T.A. 1532, CCH Decision 110,446-B. Notwithstanding this fact, however, no claim under Section 22(a) was made by Mr. Gibbs before the Board of Tax Appeals in the *Hormel* case. On January 31, 1939, the Board of Tax Appeals rejected the Commissioner's position under Sections 166 and 167. *Hormel* v. *Comm'r.*, 39 B.T.A. 244 (1939). Six months thereafter, on July 19, 1939, the *Clifford* decision was reversed by the Eighth Circuit [*Clifford* v. *Helvering*, 105 F.2d 586 (8th Cir. 1939)] and the Commissioner petitioned for certiorari.

On February 26, 1940, while the Commissioner's appeal in the *Hormel* case under Sections 166 and 167 was [fol. 1701] pending before the Eighth Circuit, the Supreme Court decided the *Clifford* case and held the trust income to be taxable under Section 22(a). *Helvering* v. *Clifford*, 309 U.S. 331, 60 Sup. Ct. 554, 84 L.Ed. 788 (1940). Because of the change in judicial interpretation of the *Clifford* case, the Commissioner was permitted to assert liability under Section 22(a) for the first time in the Court of Appeals, notwithstanding the fact that Section 22(a) had not been relied upon before the Board of Tax Appeals. *Helvering* v. *Hormel*, 111 F.2d 1 (8th Cir. 1940). Affirming the decision of the Eighth Circuit, the Supreme Court held, "[*W*]*e are of the opinion that the Court below should have given and properly did give consideration to Section 22(a) in determining petitioner's liability.*" 312 U.S. at 559. (Emphasis added.)

Said the Court:

> "These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose

> sight of the fact that such *appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: . . . [particularly] those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result.* Whether articulated or not, the philosophy underlying the exceptions [fol. 1702] to the general practice is in accord with the statutory authority given to courts reviewing decisions . . . [*d*]*ecisions not in accordance with law should be modified, reversed or reversed and remanded 'as justice may require.'*" 312 U.S. 552, at 557-59 (Emphasis added).

In the companion case, *Helvering* v. *Richter,* 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941), the refusal of the Third Circuit to consider the applicability of Section 22(a) under *Clifford* on grounds that it had not been raised by the Commissioner before the Board of Tax Appeals was reversed by the Supreme Court. See also *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U.S. 205, 212-13, 72 Sup. Ct. 618, 96 L.Ed. 888 (1952). These decisions make it clear beyond dispute that the failure of the defendant to raise the then unannounced constitutional principles of the *Times* case at the trial is not a basis for this Court's refusal to consider these new constitutional issues on appeal. In view of the *a fortiori* decisions of the Supreme Court in the *Hormel* and *Richter* cases, the refusal of the majority to consider these issues is clearly untenable.

The Supreme Court has repeatedly held that, whenever a fundamental change of law occurs between the trial of a case and the appeal, it is the duty of the appellate court to follow the later decision, even though the issue was not raised in the trial court. *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103; 2 L.Ed. 49

(1801); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 61 Sup. Ct. 347, 35 L.Ed. 327 (1941); *Hormel* v. *Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941); *Zeffrin, Inc.* v. *United States*, 318 U.S. 75, 63 Sup. Ct. 465, 469, 87 L.Ed. 621 (1943); *Standard Oil Co. of Kansas* v. [fol. 1703] *Angle*, 128 F.2d 728, 730 (5th Cir. 1942); *United States* v. *Alabama*, 362 U.S. 602, 80 Sup. Ct. 923, 4 L.Ed.2d 92 (1960).

The duty of the appellate court under such circumstances is not discretionary. As Chief Justice John Marshall said in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103; 2 L.Ed. 49 (1801):

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But, *if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.*" 5 U.S. at 110 (Emphasis added).

Only last term the force of these decisions was recognized and applied by the Supreme Court. *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 85 Sup. Ct. 384, 13 L.Ed.2d 300 (1964); see *Linkletter* v. *Walker*, —— U.S. ——, 85 Sup. Ct. 1731 at 1735-36, —— L.Ed.2d —— (1964).

The majority has thus imposed the impossible burden upon trial counsel of raising constitutional defense in the trial court even before its enunciation by the Supreme Court. The most counsel could have said is that, "I object because the procedure in this case violates some constitutional principle which may be decided by the Supreme Court in the *Times* case." He could do no more. Since under Rule 46 of the Federal Rules of Civil Procedure [fol. 1704] the grounds for an objection must be specifically stated, such an objection would present no issue upon which the trial court might rule and would be woefully inadequate to preserve any issue for purposes of an appeal.

As the Supreme Court has said, "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailable on appeal . . ." *Noonan* v. *Caledonia Gold Min. Co.*, 121 U.S. 393, 7 Sup. Ct. 911, 915, 30 L.Ed. 1061 (1887); *Knight* v. *Loveman, Joseph & Loeb*, 217 F.2d 717 (5th Cir. 1954); 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021; 5 Moore, *Federal Practice* ¶46.02.

The authorities are in agreement that the purpose of the requirement of objection in the trial court is two-fold: "(1) to apprise the Court of the litigant's position so that the Court in the furtherance of justice might correct its ruling where shown to be in error; and (2) to permit an opponent to obviate the defect where possible." 5 Moore, *Federal Practice* ¶46.02, page 1902; 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021, at page 310. It is clear that these purposes are not served by the requirement of an objection in the present case. Since the constitutional principles applicable to libel cases had not yet been enunciated by the Supreme Court, there was no occasion to present them to the District Judge for a ruling. Indeed, had any First Amendment question been presented, the District Judge would have been obligated to find, under the prior Supreme Court decisions which were then controlling, that "libelous utterances are not within the area of constitutionally protected speech" (*Roth* v. *United States*, supra), for there was no other authority under the First [fol. 1705] Amendment. As the Fourth Circuit emphasized in *Walker* v. *Peppersack*, 316 F.2d 119 (4th Cir. 1963):[4]

> "Had timely objection been made to the admission of the illegally obtained evidence when it was offered, there is nothing to indicate that the trial court would have excluded it simply because the searching officers had no warrant. Nor is there any reason to believe that Walker would have been successful had he raised the

[4] Overruled on other grounds, *Linkletter* v. *Walker*, —— U.S. ——, 85 Sup. Ct. 1731, —— L.Ed.2d —— (1965).

point on direct appeal. Under the Maryland rule of law, no search warrant was required but this rule was in direct and violent conflict with the later decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (June 19, 1961).

"The classic statement on waiver of constitutional rights is found in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938): 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.' *At the time of Walker's trial and first appeal, it is clear that he did not intentionally abandon a known right since there was then no such right for him to abandon.* That was before the Supreme Court's decision in Mapp." 316 F.2d at 127-28. (Emphasis added).

The Court is not required to speculate as to the possible effect which an objection might have had upon the [fol. 1706] trial in the present case. After the decision of the Supreme Court in the *Times* case, the defendant moved immediately for a new trial based upon that decision. Although the plaintiff argued waiver, the District Judge recognized that there had been no waiver of the defendant's rights under the First Amendment by the failure to make an objection at the trial and considered the constitutional defenses under the *Times* case on the merits. Even though the constitutional principles of the *Times* decision were then known and were specifically stated by counsel, Judge Morgan rejected them on the ground that Butts, the Athletic Director of the University of Georgia, was not a "public official" within the meaning of the *Times* case.

Thus, the defendant has been deprived of a determination of controlling constitutional issues of paramount importance solely on the purely technical basis of its failure to make a formal objection at the trial on the unknown constitutional grounds, even though it is clear from Judge Morgan's later ruling after *Times*, that any such objection would have been completely futile.

Such a rigid adherence to procedural technicalities was condemned by the Supreme Court in *Hormel* v. *Helvering*, supra:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which [fol. 1707] had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." 312 U.S. 552, at 557.

As the Supreme Court recently emphasized in *Fay* v. *Noia*, 372 U.S. 391, 83 Sup. Ct. 822, 849, 9 L.Ed.2d 837 (1963):

> "The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461—'an intentional relinquishment or abandonment of a *known* right or privilege'—furnishes the controlling standard." (Emphasis added).

And it has been repeatedly recognized that *"courts indulge every reasonable presumption against waiver of fundamental constitutional rights."* *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The question of "waiver" presented here is the very antithesis of *Michel* v. *Louisiana*, 350 U.S. 91, 99, 76 Sup. Ct. 158, 100 L.Ed. 83 (1955), relied upon by the majority. The constitutional claim there involved of systematic exclusion of Negroes from juries had been established for more than three-quarters of a century.[5] The defendant's failure to invoke this *established* constitutional right at the trial was [fol. 1708] held to preclude its assertion for the first time

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[5] *Strauder* v. *West Virginia*, 100 U.S. (10 Otto) 303; 25 L.Ed. 664 (1879). See *Norris* v. *Alabama*, 294 U.S. 587, 55 Sup. Ct. 597; 79 L.Ed. 1074 (1935).

on appeal. However, in a series of decisions, this Court, notwithstanding the absence of objections, has repeatedly refused to find a knowing waiver of this established constitutional right. See Judges Rives, Bell and Spears in *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964); Judges Tuttle, Wisdom and Carswell in *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964); Judges Rives, Brown and Wisdom in *United States* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962), cert. den., 372 U.S. 915, 83 Sup. Ct. 717, 9 L.Ed.2d 722 (1963); Judges Rives, Brown and Wisdom in *United States* v. *Harpole,* 263 F.2d 71 (5th Cir. 1958), cert. den., 361 U.S. 838, 80 Sup. Ct. 58, 4 L.Ed.2d 78 (1959). The unwillingness of this Court to find an intentional waiver of established constitutional rights which characterizes these cases is impossible to reconcile with the attenuated theory of waiver which the majority utilizes to bar its consideration of the principles of *The New York Times Company* v. *Sullivan.*

Further, even if the majority were correct in concluding that the defendant had been guilty of some technical procedural default, the *New York Times* case makes it clear not only that the rules of law which were applied by the trial court were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot, consistently with the First Amendment, be permitted to stand. As Judge Rives emphasized:

> "The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision super- [fol. 1709] vening the district court's judgment, that is, *New York Times Co.* v. *Sullivan.* In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial." [6]

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[6] Nor can a waiver of defendant's rights under the First Amendment be inferred from its failure to plead fair comment under

[fol. 1710] II.

The Exorbitant Award of Punitive Damages Even as Reduced by the Trial Court Was So Grossly Excessive as to Violate Defendant's Rights Under the Federal Constitution and Could Not Be Cured by Remittitur.

At the close of the evidence, in the present case, the plaintiff moved for a directed verdict on the issue of liability

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Georgia law. In addition to the deficiencies pointed out by Judge Rives, it is clear that the Georgia fair comment rule added little to this defense of truth. In this respect, the Georgia fair comment was identical to that of Alabama, which was held to be constitutionally insufficient in the *Times* case. Prior to the *Times* case, the law of Georgia, like that of many states, afforded no protection for factual misstatements or errors no matter how innocently such errors may have been made. Under Georgia law, the statutory defense of "fair comment" protected only nonmalicious comments which were *based on facts which were proven to be true.* If any of the underlying facts were untrue, the defense of fair comment was inapplicable and afforded the publisher absolutely no protection, irrespective of his good faith. See e.g., *Barwick* v. *Wind,* 203 Ga. 827, 831, 48 S.E.2d 523 (1948); *Holmes* v. *Clisby,* 121 Ga. 241, 249, 48 S.E. 934 (1904); *Kirkland* v. *Constitution Publishing Co.,* 38 Ga. App. 632, 635, 144 S.E. 821 (1928) (4); Ga. Code Ann. §105-709; Restatement, *Torts* §606. In *Barwick* v. *Wind,* 203 Ga. 827, 831, 48 S.E.2d 523 (1948), the Supreme Court of Georgia said:

> "Section 105-709 declares that 'comments upon the acts of public men in their public capacity and with reference thereto' are deemed privileged communications. However, a *publication of and concerning the acts of public officials, if untrue and libelous, is not afforded immunity under this section of the Code.* While the acts and conduct of public officials are subject to just criticism and comment by the press, the exercise of such right should be unrestricted only where the statements made in the publication are supported by the facts. A public officer has the same right to protection against newspaper libel as a private citizen. Freedom and 'liberty of the press' do not give a publisher the right to publish libelous statements. *Lowe* v. *News Publishing Co.,* 9 Ga. App. 103 (5) (70 S.E. 607); *Horton* v. *Georgian Company,* 175 Ga. 261 (165 S.E. 443)." (Emphasis added).

upon grounds that the defendant had not "proven the truth under the burden it had" of its charges against Butts. Judge Morgan overruled this motion on the express ground that "it would [be] error for this Court to withdraw that issue from the Jury." This contemporaneous ruling of the trial judge and, in the language of Judge Rives, "even a casual reading of the record," demonstrate, beyond dispute, that the issues of fact were properly submitted to the jury which might have found the Post's charges to have been true. Under those circumstances, the jury's award of $3,000,000 in punitive damages, even as reduced by the trial court, is so grossly excessive as to constitute a violation of defendant's rights under the First, Fifth, Seventh, and Fourteenth Amendments. Judge Rives has expressed it far more eloquently than can counsel:

> " . . . The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion [fol. 1711] for new trial (R., pp. 46-48). As to the questions now to be considered, there can be no issue of waiver."

Notwithstanding the absence of any such waiver, however, the majority declined to even discuss the following constitutional questions emphasized by Judge Rives:

> "If the defendant corporation had been tried under the Georgia criminal libel statute, it might have been punished by a fine 'not to exceed $1,000.' As it is, the defendant stands subjected to a judgment of $400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the $400,000 sufficed to express the trial judge's sense of 'ethical indignation' while that of the jurors swelled to $3,000,000—3,000 times the maximum fine which could have been imposed in a criminal prosecution.
>
> "Further, in a criminal proceeding, the defendant was subject to no fine unless proved guilty beyond a

reasonable doubt, while here the judge charged the jury that ' . . . the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true. . . . ' " (R., p. 1347).

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"[t]he enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to [fol. 1712] a criminal fine. I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post facto punishment 400 times as great as the defendant could have anticipated from the criminal libel statute, and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.

"If there should be any doubt that the award of $400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

'What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously . . . " and which allows as punishment upon convic-

tion a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Pre- [fol. 1713] sumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, *the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the* criminal law." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70.' (Emphasis supplied).

"For yet another reason the award of $3,000,000 by the jury, or of $400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award. Can any standard be more vague [fol. 1714] or arbitrary than 'an expression of ethical indignation' first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.

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> " . . . I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel."

The majority concedes that if the unprecedented $3,000,000 punitive damage verdict which Judge Morgan found to be "grossly excessive" was the result of "improper influences such as passion and prejudice," it could not be corrected by remittitur but only by a new trial.

The majority also recognizes that Judge Morgan found the $3,000,000 punitive damage verdict to be "grossly excessive" and that it exceeded by more than six times the $400,000 "maximum which the law would accept." Although Judge Morgan made no finding as to the reason for the gross excessiveness of the verdict, as Judge Rives has emphasized:

> " . . . in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: *'Suppose the court should determine that probably a certain portion of the argument was im-* [fol. 1715] *proper, and therefore the verdict was excessive,* and grant you a new trial on that ground, and then it was tried again. . . . ' [R., p. 1373]."

The cause of the jury's passion and prejudice is not of importance. What is of paramount importance is that, whatever the cause, "no verdict can be permitted to stand which is in any degree the result of appeals to passion and prejudice." *Minneapolis, St. P. & S.S.M. Ry. Co.* v. *Moquin,* 283 U.S. 520, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931).

As this Court held in *Brabham* v. *Mississippi,* 96 F.2d 210, at 213 (5th Cir. 1938):

> "Verdicts made excessive by the passion and prejudice springing from indulgence in the jury room in such

feelings cannot be cured by a remittitur, but only by a new trial."

While the majority blandly asserts that "there is not the slightest suggestion that [the trial judge] thought, or even intimated, that the [$3,000,000] award was based on passion and prejudice" it points to no other basis for this unprecedented award. In *Ford Motor Co.* v. *Mahone,* 205 F.2d 267 (4th Cir. 1963), Judge Parker held the refusal of the trial court to grant a new trial after finding a $234,330 personal injury verdict to be excessive by $100,000, to be an abuse of discretion. He said:

> "Verdicts of juries must be kept above suspicion and a judge should not hesitate to set a verdict aside where it is so grossly excessive as to be explained only on [fol. 1716] the basis of sympathy or prejudice. . . . *Nothing else in the record explains the size of the verdict* which was more than nine times the maximum amount allowed by law of the state for wrongful death." 205 F.2d at 272-73. (Emphasis supplied)

Indeed, the Sixth Circuit considered precisely this situation in *National Surety Co.* v. *Jean,* 61 F.2d 197 (6th Cir. 1932), in which the trial court made a similar finding of excessiveness. After the jury had returned a verdict of $25,000, the trial court ordered a remittitur of $5,000 and overruled the defendant's motion for a new trial. The Sixth Circuit held that in view of the trial court's finding of excessiveness, a new trial, and not remittitur, was the only proper remedy. Said the Court:

> "[A]fter a rather full discussion touching the elements of damage involved, the court concluded that its conscience would rest easy if it should suggest a remittitur of $5,000. The memorandum continued: 'I believe if a remittitur of $5,000.00 be entered I will overrule the motion for a new trial.'

"This was a definite, though indirect, holding that the verdict was excessive, and, although the memorandum contains no specific statement to that effect, we infer that the court ascribed the error to passion, prejudice or caprice as these were the only causes urged as a basis for its action or mentioned in the memorandum. Indeed, an examination of the record discloses no other reasonable explanation for the holding. [fol. 1717] The suggested remittitur was accepted, judgment for $20,000 was entered, and the motion for a new trial was overruled. Appellant excepted and assigned error.

"The granting or denial of the motion was in the sound discretion of the trial court, and is not reviewable except for a clear abuse of discretion [citations omitted], but *we do not find it necessary to determine whether there was such abuse in the present case since the trial court itself evidently found that the excessive verdict was the result of passion, prejudice, or caprice. Our question is whether after such finding the trial court may correct the mistake by the suggestion and acceptance of a remittitur and the answer is that it could not.* See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243; Schendel v. Bradford, 106 Ohio St. 387, 394, 140 N.E. 155. The remedy is a new trial." (Emphasis supplied) 61 F.2d at 198.

As Judge Rives concluded:

" . . . it seems to me that 'public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.' *N.Y. Central R.R. Co.* v. *Johnson*, 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the $3,000,000 punitive damage

verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.

[fol. 1718] Even if the majority were correct in attributing the unprecedented $3,000,000 punitive damage verdict to some other cause, it is, nevertheless, clear that the attempt of the trial court to arbitrarily fix damages at $400,000, without any semblance of a standard to guide it, constitutes a direct invasion of the defendant's right to trial by a fair and impartial jury on the issue of damages which is guaranteed by the Seventh Amendment. As the Supreme Court has said, such a "calculation . . . can be little better than speculation as to the extent of the wrong inflicted upon [the defendant]" *Minneapolis, St. P. & S.S. M. Ry. Co.* v. *Moquin*, 283 U.S. 520, 521-22, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931). This fact was emphasized by Judge Rives:

> "It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury. The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.
>
> "That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from $3,000,000 to $400,000 represents nothing more specific than the difference between the jury's and the judge's sense of 'ethical indignation.' The jury's verdict cannot be recognized in the final judgment."

It is, of course, no answer to suggest that to grant a [fol. 1719] new trial on grounds of gross excessiveness will result in a second trial at which the question may again be presented. As Judge Rives said:

"The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

"Both because *New York Times* v. *Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent."

III

The Majority Has Sanctioned an Excessive Verdict—the Product of Erroneous Trial Rulings and Impassioned Pleas Which Effectively Prevented Defendant From Presenting Its Defense of Truth and Good Faith Position to the Jury.

Throughout the entire trial the Court entered vital rulings against the defendant and allowed Butts' counsel to inflame the jury, all to the prejudice of Curtis and its right to a fair trial on the merits. The detrimental effect upon Curtis' case is apparent when the central [fol. 1720] issue in the case and the parties' contentions in regard thereto are analyzed.

The defendant's liability centered upon the question of whether Butts gave Bryant information about the Georgia football team which could have affected the outcome of the Georgia-Alabama game. George Burnett, the defendant's principal witness, testified that he overheard a telephone conversation between Butts and Bryant during which Butts gave Bryant significant information concerning the Georgia team, and that Butts was going to give further information to Bryant in a telephone conversation to take place a few days later. Records of the telephone company established that these two telephone conversations actually took place.

Although Butts did not deny that the telephone calls took place, he did profess to be unable to recall the nature and substance of them. He even testified that on being shown Burnett's notes he stated that "such a telephone call might have been overheard." (R. 634). His only hope then of successfully negating the Burnett evidence that he gave improper information to Bryant was to convince the jury that he did not do such a thing because of his loyalty and devotion to the University of Georgia. This defense or theme was developed and emphasized throughout the trial by Butts' own testimony,[7] by his own witnesses,[8]

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[7] "Q. Coach Butts, hasn't the University of Georgia been pretty good to you over the years?

"A. Yes, sir; they have given me a wonderful opportunity, and I appreciate it very much, and I might add, I will always be loyal to the University of Georgia, regardless." (R. 685-6).

"Q. Coach Butts, do you recall a statement that you made over television on March the 29th, 1963, as follows:

"'Gentlemen, I came over here today to see the Attorney General of the State of Georgia, Mr. Gene Cook. My express purpose was to check with him things that I had read in the papers and heard on T.V., that in some respects might imply that I had at some time or another been connected with gambling interests. I assured Mr. Cook that I never had been interested in gambling. I have never been interested in associating with people that were known gamblers, and that I would like to repeat that what I have said many times before. My greatest love of all and interest is in the University of Georgia, and I would never at anytime and never have done anything that would injure the University of Georgia, and that is all I have to say.'

"Did you make that statement?

"A. Mr. Cody, I have heard so many statements, and been around you lawyers so much, might be a few words out of line there, but I made a statement to that effect. I would like to say that as far as my services at the University of Georgia are concerned, that represents only my opinion." (R. 692).

As this latter statement was made a mere four days after suit was filed, it shows the early point at which Butts and his counsel conceived their defense.

[8] When John Carmichael, plaintiff's chief witness, was asked on direct examination about his calling Butts in Philadelphia to

[fol. 1721] by the cross examination of defendant's wit-
[fol. 1722] nesses," and, as Judge Rives emphasizes, by his

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inform him of Burnett's report of the Butts-Bryant telephone conversation, Carmichael stated that Butts said there was nothing to the matter because he "would never do anything to hurt Georgia." (R. 345). Carmichael's testimony was:

> "Q. What conversation took place between you can [sic] Coach Butts when he called you back?
>
> "A. Well, I didn't know whether Coach Butts would know who I was or not, at first, so I told him over the phone who I was, and I asked him if he remembered me, and he said: 'Yes, I do, John.' And so then I told the Coach what Mr. Burnett told me on the morning of September the 13th, when he received the telephone call, and I told the Coach what Mr. Burnett had told me that morning on January 30th, what he had done, and the Coach said to me, he said: 'Well, John, I appreciate your calling me, but,' he said, 'I'll tell you this,' he said: 'I am sure there is nothing to it, because I don't know whether I called Coach Bryant or not, but I will tell you this,' he said, 'I talk to a lot of coaches, and I don't remember making a call on that particular day, but if I did,' he says, *'I will assure you there was nothing to it, because I would never do anything to hurt Georgia.'* And he thanked me for calling him, and it was a very short conversation. It only lasted three or four minutes at the most, and that was all there was to that conversation." (Emphasis added.) (R. 845).

Similarly, when plaintiff's witness, William Hartman, was asked on cross-examination whether Butts denied the telephone call, he volunteered:

> "The only thing he denied was that he had ever done anything to hurt Georgia and he repeated that several times." (R. 998).

Seizing upon this opportunity, Butts' counsel, upon redirect examination, questioned Hartman:

> "Q. He [Butts] didn't deny that [he never did anything to hurt Georgia]; he asserted it, did he not?
>
> "A. He asserted it." (R. 999).

After defendant's witness, Dr. Aderhold, had testified that upon being shown Burnett's notes, Butts "indicated that the call was made, and that these items [in the notes] were probably discussed" (R. 1102), Butts' counsel asked Dr. Aderhold:

[fol. 1723] counsel in their closing arguments.[10] It was obvious therefore, that the crucial prop for Butts' case was the proposition that he had always been loyal to and had never done anything to hurt his University.[11] The trial court's refusal to permit cross-examination of the plaintiff or the introduction of evidence to contradict this false

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"Q. Let me put it this way. You did testify he told you and the others he would never do anything that would hurt the University of Georgia, didn't he?

"A. He said, 'I didn't do anything that I thought would hurt the University of Georgia and I never would,' or something to that effect.

"Q. All right, sir. These notes that he had there in his hand, if they contained information that might have helped an opposing coach, that would have hurt the University of Georgia, wouldn't it?

"A. Well, presumably so.". (R. 1139).

Plaintiff's witness, J. D. Bolton, was similarly utilized by Butts' counsel on cross-examination to re-emphasize the same point:

"Q. Going back to the topic I was questioning you about at the beginning of this examination, I have in my hand a transcript prepared by the Court Reporter here of your testimony when you were on the stand last week. This question—I ask you if you remember this question being asked you by Mr. Cody: 'Could you recall for the Jury what comment he did make,' referring to Wallace Butts? Answer by Mr. Bolton: It got down—'It's just conversation, ordinary football talk among coaches, and that you know I would not give Old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia.' Do you remember giving that answer?" (R. 1160).

[10] Butts' counsel completed the theme of Butts' loyalty to the University when in his emotionally charged argument to the jury which described Butts as "Mr. Georgia" (R. 1300), and concluded with:

". . . they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to Old Georgia.'" (R. 1322).

[11] In addition, the plaintiff interjected his "integrity" into the case by his own pleading. See pages 167-68 of Appellant's principal brief.

theme of Butts' unswerving loyalty to the University was clearly error.

The evidence which the defendant offered and which was excluded would have clearly shown that Butts had committed frauds upon the University, and that he was disloyal to the public trust which the University had reposed in him. Every specific act of misconduct offered by Curtis involved a fraud upon the University of Georgia, of which Butts was Athletic Director. Certainly, a man who had charged more than $2,800 of personal telephone calls to his University over a period of approximately sixteen months was not one who had never done anything to hurt the University. Similarly, could a man who carried on an open and notorious relationship with a woman not his wife (and charged a substantial part of the cost of that relationship to his University) be the University's loyal servant who set a fine example for his pupils? As is explained in [fol. 1724] more detail on pages 154 and 155 of Appellant's principal brief and in the Record at pages 822-840, Curtis was denied the right to cross-examine Butts in regard to many instances which would have clearly shown that his principal defense to the Post charge—that he had always been loyal to and had never done anything to harm his university—was false.

The Appellant was also denied its fair right to cross-examine Butts in regard to his deliberate false testimony upon deposition (See Point IV B of Appellant's principal brief) and as to his and his counsel's policy of evasiveness and concealment by Butts' refusal to answer relevant questions on deposition (See Point IV E of Appellant's principal brief). These prejudicial effects were multiplied when Butts' counsel was allowed to "testify" in closing argument as to his good character and truthfulness (R. 1289, 1321) and imply that other witnesses had similarly testified (R. 1290, 1305,[12] 1309.[13])

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[12] "Seated there with him throughout for two weeks has been his lovely wife, Winnie and his three daughters. That is a glowing

Defendant was similarly prevented from attacking the credibility of plaintiff's principal witness, John Carmichael, in regard to his prior convictions and his propensity to give false statements to public officials (Point IV F of Appellant's principal brief). Butts' counsel subsequently stated that it made little difference whether John Carmichael had previously been convicted of crimes and [fol. 1725] given false statements in evaluating his credibility, but at the same time they claimed that the Post officials should not have believed George Burnett, whom they termed a "hot check artist" (Br. 7) and a "man who is always one step ahead of the Sheriff" (R. 1297), because he had been arrested for passing two bad checks. Similarly, the majority infers that Burnett, "who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he claimed to have listened in on the conversation," was not trustworthy.[14] It was, of course, Carmichael who directly contradicted Burnett's testimony in several crucial respects. See Appellant's principal brief at pp. 189-90.

The trial court's totally unjustified refusal upon hearsay grounds to allow Burnett to testify in regard to vital checkpoints in his story bore directly upon the liability as well as the punitive damage aspects of the case.

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tribute, as glowing a tribute as were those four boys coming over here, and the trainer, Sam Richwine, and Charlie Trippi and John Gregory coming over here and showing you what they thought of Wallace Butts."

[13] "Sam Richwine, old Sam, I had never seen him before; he is a trainer over there; he is still working there and in the face of Dr. Aderhold and Bolton. He came over here and stood up and was counted for Wallace Butts."

[14] The majority upheld the exclusion of Carmichael's prior convictions upon a "lapse of time" theory, which is directly contrary to Georgia law. *Woodward* v. *State*, 197 Ga. 60, 28 S.E.2d 480 (1943) ("the fact that the conviction of the crime took place twenty years previously, would not affect the admissability of the evidence"); *Daggett* v. *Sims*, 79 Ga. 253, 4 S.E. 909 (1888). See Appellant's principal brief pages 184-86.

The fact that Burnett took the time and trouble to call back the operator to ascertain that he was connected with the Athletic Department at the University of Alabama and to call Milton Flack to establish for himself that Wallace Butts was in Flack's office shows that Burnett was amazed by the telephone conversation between Butts and Bryant which he had just overheard and desired to check upon it. If Burnett had merely overheard a telephone conversation between these two individuals relating to "rules" or "tickets" he would have probably hung up in the middle of it, or at least not have been concerned enough to double [fol. 1726] check its authenticity. These extrajudicial statements by Burnett could not by any stretch of the law be hearsay, and his report of statements made by the operator and by Flack were not introduced for the truth of the matter asserted, but merely to show that the statements were made. Whether or not the operator and Flack told the truth is unimportant, but the fact that Burnett received such information from them is important to the jurors who had to evaluate his credibility and the Post officials' reasonableness and good faith in believing Burnett. Even though the majority recognized that the trial court should have admitted this evidence because it was "important from Curtis' standpoint that it show its good faith in publishing the article," it in the same breath dismissed the point with the comment of "nominal error."

Instructions given by the trial court to the jury not only protected the plaintiff and his witnesses again and again, but practically amounted to a directed verdict for Butts. Although the defendant specifically requested an instruction to the effect that if Butts' testimony was contradictory, vague or equivocal, it must be construed most strongly against him and subsequently objected to the court's failure to give such charge, the trial court cavalierly dismissed defendant's objection with the statement that it believed it had given the charge in different wording. (R. 1368). A review of the entire charge discloses no language bearing any similarity to the request. See Point VII of Ap-

pellant's principal brief. In this same context, defendant requested the well-recognized and proper instruction that the jury must disregard the entire testimony of any witness whom it finds to have knowingly and wilfully testified falsely. Although the defendant entered proper objec-
[fol. 1727] tion at the conclusion of the court's charge in this regard, the court refused to recharge the jury properly (R. 1367-68). See Point VIII of Appellant's principal brief. Even though the plaintiff's reputation was the basis for the recovery of the general damages he sought, and the defendant introduced the testimony of six members of the University's Athletic Board, including the President of the University, that plaintiff's reputation was bad and that they would not believe him under oath, the trial court, in spite of the fact that the plaintiff offered no evidence of his good reputation, instructed the jury that the plaintiff was presumed to have a good reputation and was "entitled to reply upon his presumption of good reputation." (R. 1355). See Point VI E of Appellant's principal brief. The authorities there cited clearly disclose the rule that in such a situation the presumption vanishes.

The trial court practically directed a verdict for Butts when it informed the jury, not only improperly, but needlessly, that the Post article was "libelous per se" (R. 1348, 1353). This, from a layman's standpoint, left in the jurors' minds only the question of "how much" the damages should be. See Point I B of Appellant's principal brief and Point VII of Appellant's reply brief. The authorities there cited clearly disclose that in a libel action it is never proper (except when a crime is charged, if then) to instruct the jury that a publication is libelous per se. The effect of such a charge in the present case was to instruct the jury that the plaintiff was in the coaching profession at the time of the publication, that he was injured therein, that the publication was false, and that there was malice. Certainly if the meaning of such a charge could be so construed by the jury (even though it could reasonably be construed
[fol. 1728] otherwise), it was erroneous, and because it in-

volved a crucial point in the case, it constituted reversible error. This was another part of the charge to which counsel for the defendant entered a proper objection (R. 1366).

Finally, the court allowed the case to go to the jurors with Butts' counsel's ringing improper arguments in their ears. Not only were counsel allowed to testify as to Butts' good character, truth and veracity, and state that others had similarly done so, but they were allowed to inject improper measures of damages into the case (the Post received a "hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him?" (R. 1321), and "You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain the Saturday Evening Post ever got" (R. 1296), and if "you let them out of this case for five million dollars or less, and boy, it's been worth it to them" (R. 1319), as well as incorrect standards for the imposition of punitive damages ("We have got to stop them now, and you are the only twelve in the world that can stop them" (R. 1319), and "I may be next . . . You may be next; my wife; my children; yourself" (R. 1319), and "There are just thousands and thousands of people who are mad about it" (R. 1297).[15]

On the inflammatory side, as Judge Rives noted, counsel were allowed to introduce such prejudicial remarks as "they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it" (R. 1319); "I think it would teach them that we don't have that kind of journalism down here, and [fol. 1729] we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now" (R. 1321); and "Somebody has got to stop them. There is no law against it, and the only way that type of . . . . yellow journalism can be stopped

[15] Counsel were aided in having the jury utilize incorrect standards for punitive damages by the court's erroneous instructions. See Points IV A, B and C of Appellant's principal brief.

is to let the Saturday Evening Post know that it is not going to get away with it." (R. 1319). See Point III of Appellant's principal brief.

Thus, the above, as well as the other prejudicial errors which are discussed in detail in Appellant's principal brief, certainly could cause the jury to return a verdict against Curtis upon the question of liability as well as for punitive damages in an outrageous amount. The trial judge clearly recognized this to be the fact, as he held the verdict to be "grossly excessive." He sought to cure these errors then by granting a new trial unless the plaintiff remitted all punitive damages in excess of $400,000. The fatal error in the trial court's action in this regard is that the errors committed during the trial cannot be corrected by a mere remittitur. These errors, as is shown above and in Appellant's other briefs, went to the question of liability in this case and, more specifically, whether the jurors believed George Burnett or Wallace Butts and John Carmichael, and the halo which Butts erected to protect his case, as well as to stimulate and inflate punitive damages. These series of circumstances prevented defendant from effectively presenting its defense of truth and its good faith position to the jury.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J. Bondurant, Thomas E. Joiner.

[fol. 1731] Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey, & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing.

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust Bldg., Philadelphia, Pa. 19109.

Attorneys for Appellant.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1732]

State of Pennsylvania
County of Philadelphia

AFFIDAVIT

Personally appeared before the undersigned officer duly authorized to administer oaths, Philip H. Strubing, who, having been duly sworn, deposes on oath and says as follows:

I am a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company* v. *Wallace Butts*, No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. [fol. 1733] T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant* v. *Curtis Publishing Company* in the United

States District Court for the Northern District of Alabama. Mr. Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts* v. *Curtis* case in Atlanta, but only as spectators. They were not consulted concerning the trial strategy of the *Butts* case. Since the *Bryant* v. *Curtis* case was to be tried some months after the *Butts* v. *Curtis* case, we had not at that time commenced active preparation of the *Bryant* case. There were no discussions between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times Company* v. *Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised in the *Butts* v. *Curtis* case. Furthermore, the constitutional questions "vigorously asserted in *Times*" were not those which Curtis now argues. I certainly did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case, and was not aware of the constitutional defense provided by *New York Times Company* v. *Sullivan* until that case was decided by the Supreme Court on March 9, 1964, some six months after the trial of the *Butts* case.

Philip H. Strubing.

Sworn to and subscribed before me, this 2nd day of August, 1965.

John S. Raum, Notary Public.

[fol. 1734]
State of Alabama
County of Jefferson

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, T. Eric Embry, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Birmingham, Alabama law firm of Beddow, Embry & Beddow. I have read the opinion

of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company* v. *Wallace Butts*, No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the opinion of the majority:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

My firm represented the New York Times Company in [fol. 1735] the case brought against it by L. B. Sullivan (*New York Times Company* v. *Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964)) and Curtis Publishing Company in the libel cases brought by Paul Bryant in the United States District Court in Birmingham. I was the member of my firm who handled the representation of these clients in all of these cases. Although Roderick Beddow, Jr. performed some services in the *Bryant* v. *Curtis* case, primarily during my illness in 1963, neither Roderick Beddow, Jr. nor Roderick Beddow, Sr. had any part in the *New York Times* litigation, as Roderick M. MacLeod and I were the only attorneys in our firm who worked on this case. Roderick Beddow, Jr. and I did attend the trial of the *Butts* v. *Curtis* case in Atlanta. However, we did so only as spectators to prepare ourselves for the trial of the *Bryant* v. *Curtis* case which was to be held at a subsequent date. At no time prior to or during the trial did we consult with Curtis' general counsel, Mr. Philip H. Strubing, or with Curtis' trial counsel, Mr. Welborn

B. Cody, or any other attorney representing Curtis in regard to trial strategy or the constitutional questions which we were urging before the United States Supreme Court in the *New York Times* case. We were not asked for our opinion concerning constitutional questions in the *Butts* v. *Curtis* case, and did not volunteer any opinion or suggestion to Curtis' counsel that any constitutional questions be raised in the *Butts* case.

Our principal contentions in the petition for writ of certiorari to the Supreme Court of the United States in the *New York Times* case were (1) that the New York Times Company was not doing business in Alabama, and (2) that since the statements which Times printed referred [fol. 1736] to no individual by name, but simply criticized the Montgomery Police Department which was under the direction of Mr. Sullivan, an elected City Commissioner, such statements could not be considered libelous without violating freedom of the press guaranteed by the First and Fourteenth Amendments. The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented in the Alabama courts nor in the petition for certiorari to the United States Supreme Court.

T. Eric Embry.

Sworn to and subscribed before me, this 30th day of July, 1965.

Mary B. Weatherly, Notary Public.

[fol. 1737]
State of Georgia
County of Fulton

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, Welborn B. Cody, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Atlanta, Georgia law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein. I have represented Curtis Publishing Company in the case of *Curtis Publishing Company* v. *Wallace Butts* since that case was filed in the United States District Court for the Northern District of Georgia. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in this case (No. 21491) and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

[fol. 1738] At no time during the preparation or trial of this case did I consult with Mr. Roderick Beddow or Mr. T. Eric Embry, or any member of the law firm of Beddow, Embry & Beddow, in regard to the constitutional questions being raised in the case of *New York Times Company* v. *Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), nor was I informed of the constitutional issues raised in that case. My only conversations and communications with members of that law firm pertained to factual questions and the taking of depositions in Alabama. Although Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts* v. *Curtis* case in Atlanta, they did so merely as spectators, and not as a part of the trial team in that case, and were not consulted with respect to the trial strategy of the case.

I did not read the petition for writ of certiorari filed by the New York Times in the United States Supreme Court at any time prior to or during the trial of *Butts* v. *Curtis* and was not aware of the constitutional issues being urged in that case. I certainly did not intend to waive any constitutional rights Curtis Publishing Company may have had in its defense of *Butts* v. *Curtis*.

Welborn B. Cody.

Sworn to and subscribed before me this 2nd day of August, 1965.

Julia H. Wooten, Notary Public.

[fol. 1739]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

RESPONSE TO PETITION FOR REHEARING EN BANC—Filed August 23, 1965

[fol. 1740] Comes now Wallace Butts, Appellee, and submits this response to the Petition for Rehearing En Banc heretofore filed by Curtis Publishing Company, Appellant.

1.

In Ground 1 of its petition Curtis contends that the majority of the panel of this Court erred in finding that Curtis waived its right to raise the constitutional defense that plaintiff's action was barred by the First Amendment.

Appellee specifically denies this contention and, in his supporting brief, will demonstrate beyond any doubt that Curtis was fully aware of the existence of and its right to

[File endorsement omitted]

plead the First Amendment as a defense to this libel action and of its obligation to plead it timely if it wished to [fol. 1741] preserve the point on appeal. This is conclusively demonstrated by the fact that Curtis affirmatively raised the First Amendment defense in pleadings filed by it in the trial court in the libel cases of *Bryant* v. *Curtis Publishing Company* pending in the United States District Court, Birmingham, Alabama, in which cases it was represented by the same general counsel who participated so actively in the instant case and whose firm, Pepper, Hamilton & Scheetz, signed those pleadings in *Bryant*. (See sub-paragraphs 3(f) and 3(h) of Exhibit "A" and sub-paragraphs 2(f) and 2(h) of Exhibit "B" attached hereto, each of which is by reference incorporated herein and made a part hereof.) In view of Curtis' latest (and really quite sophomoric) argument that it had no earthly idea "libelous utterances are within the area of constitutionally protected speech" when the *Butts* case was tried, it should be of more than passing interest to note that Curtis, through its same general counsel, first asserted this constitutional defense in *Bryant* on February 26, 1963, which was *one month* before suit was even filed in the *Butts* case. Curtis asserted this First Amendment defense in the second *Bryant* libel suit less than three weeks after it filed its defenses in *Butts* and more than three months prior to trial.

Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times* v. *Sullivan* case by Curtis' local counsel in *Bryant* long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

> "The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

[fol. 1742] For some reason known only by Curtis, it did not avail itself of the right to raise this issue in the instant case but, instead, and notwithstanding its knowledge that both the *Bryant* and the *Butts* cases were practically identical, intentionally and deliberately concluded to allow the *Butts* case to go to verdict and judgment without raising this constitutional question.

The truth of the matter is that Curtis was so determined to defend the *Butts* case on its plea of justification (thereby admitting a prima facie case) and thereby getting the right to open and conclude the arguments, that Curtis elected to and did waive all other defenses available to it including the constitutional grounds, the Georgia statutory privilege of commenting "upon the acts of public men in their public capacity and with reference thereto" (Ga. Code Ann., Section 105-709(6)), lack of jurisdiction, and numerous other affirmative defenses, all of which it raised in *Bryant*. If Curtis' determination to try this case on its plea of justification wasn't behind all this, then what explanation could there possibly be for what the majority found to be so significant when it said:

> "Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he [fol. 1743] claimed to have listened in on the conversation." (Dec. P. 4-5)

Indeed, if Curtis wasn't so positive as to its theory as to how to try this case that it didn't want to clutter up the pleadings by raising the additional affirmative defenses, including the First Amendment, which it raised in *Bryant* (where it wasn't so determined—in fact, so leery of victory

was Curtis in Alabama that it paid that plaintiff $300,000 (R. 1456) not to go to trial), how can one account for the following curious conduct by Curtis as described by the majority:

> "If, as Curtis' counsel now claim, the arguments were, among other things, 'grossly improper and inflammatory', 'intemperate and inexcusable', 'appeals to passion and prejudice', 'corruptions of the evidence', 'completely unsupported by the evidence', and 'unsworn testimony of counsel', it is *inconceivable* to us that they would have delayed so long without raising the slightest hint of an objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the argument objectionable at the time they were delivered, *but made their claim as an afterthought.*" (Dec. P. 20) (Emphasis added)

[fol. 1744] Curtis also contends in Ground 1 of its petition that "the *Times* decision for the first time extended the protection of the First Amendment to libel." Appellee specifically denies this. In the body of its decision the Supreme Court points out that the rule prohibiting a public official from recovering damages in a libel action unless he proves actual malice "had been adopted by the highest courts of numerous states" and "is supported by the consensus of scholarly opinion." *Times* v. *Sullivan,* 11 L. Ed. 2d. 686 at 706-707. As a matter of fact, the decision quoted with approval by the Supreme Court was decided in 1908 (see 11 L. Ed. 2d. 707).

2.

In this ground of its petition Curtis contends that Judge Spears, being a District Court Judge, a rehearing *en banc*

should be granted in order that uniformity in the decisions of this Court may be insured. Appellee specifically denies this contention and shows that:

(1) In this contention Curtis is again back at its old habit in this case of waiting until after the verdict and judgment is rendered against it to make objections or allege constitutional errors. This case was argued before this Court on October 8, 1964, and Judge Spears was sitting as a member of the panel. Mr. Philip H. Strubing, General Counsel of Curtis and Welborn Cody and various other trial counsel of Curtis were present and participated in the argument before this Court on October 8th. They made no objection then to the case being argued before Judge Spears although surely they knew he was a District Court Judge. Apparently being willing to take their chances with [fol. 1745] Judge Spears they submitted their case to the panel. The case was under consideration by Judges Spears, Brown and Rives from October 8, 1964 to July 16, 1965, when a decision was rendered and during that time, over nine months, Curtis raised no objection to its appeal being ruled on by Judge Spears. Now that Judge Spears is one of the majority of the Court that decided the case against it, Curtis in effect claims error and wants a hearing by a court composed only of active Circuit Court of Appeals Judges and all of them at that. As said by the majority in its decision, page 32:

> "We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial."

(2) To contend now that the mere fact that the majority included a properly designated and impanelled district judge requires a rehearing *en banc* would mean that in every appeal considered by any panel of this Court consisting of a district judge would require a rehearing *en*

banc if a decision was a split decision with one of the circuit judges dissenting. It is shocking indeed for Curtis to be so intemperate as to suggest that Judge Spears' participation in the decision affords any basis whatsoever for a rehearing.

(3) *Wisniewski* v. *United States,* 353 U.S. 901 cited by Curtis for the proposition that uniformity in the decisions of this Court requires a rehearing *en banc* is inapplicable since the court in that case was dealing with two separate [fol. 1746] panels of the Court of Appeals as distinguished from this case where Curtis is complaining about two judges on one panel. The uniformity of decisions discussed in *Wisniewski* quite apparently is uniformity among the panels of the Court and not the judges of one panel of that Court.

3.

Under this ground of its petition Curtis contends that the applicability of the "new" First Amendment principles of *Times* is a question "of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance . . ." In response to this ground, Appellee asserts that (1) *Times,* as heretofore pointed out, did not for the first time extend the protection of the First Amendment to libel; and (2) the contention in this ground would presuppose Curtis had timely raised the defense of the First Amendment as it well knew it had the right and obligation to do in order to preserve same and not wait until after verdict and judgment.

4.

In this ground Curtis contends that the "affirmance of the unprecedented and excessive award of punitive damages" is in violation of its constitutional rights and then sets forth two arguments in support thereof. Appellee specifically denies the contentions set forth in this ground and as will be more fully hereinafter developed in his sup-

porting brief, Appellee points out that (1) the same points were raised in the application for writ of certiorari in [fol. 1747] *Aware, Inc.* v. *Faulk,* 202 N.E. 2d. 372, cert. den. 380 U.S. 916, 13 L. Ed. 2d. 801 (1965), recently filed and summarily denied by the United States Supreme Court wherein a jury award of three and one-half million dollars had been reduced by the state court on remittitur to $550,000; and (2) this same Curtis Publishing Company paid Paul Bryant $300,000 (R. 1456) to settle his companion libel suit in Alabama growing out of the same article, with no claim that it amounted "to a penal sanction."

5.

In this ground Curtis contends that "the Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings and instructions, as well as passion and prejudice; to stand." This contention is specifically denied and, as will be more fully developed in his supporting brief, Appellee shows that once again Curtis failed, as it did time and time again throughout the trial, to interpose objections to the matters now complained of as it was required to do under FRCP 51.

Wherefore, Appellee prays that the petition be denied.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, Robert L. Pennington, Milton A. Carlton, Jr., Gerald P. Thurmond, Attorneys for Wallace Butts, Appellee.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1600 William-Oliver Building, Atlanta, Georgia 30303.

[fol. 1747a] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1748]

EXHIBIT "A" TO RESPONSE TO PETITION FOR REHEARING

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Feb 26 1963—William E. Davis, Clerk, U. S. District Court, By Jewel M. Massey, Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION
Civil Action No. 63-2-W

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation, and FURMAN BISHER,

Defendants.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY, A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1749] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a

personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis Publishing Company, A Corporation

[fol. 1750]

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1751]

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Apr 30 1963—William E. Davis, Clerk, U. S. District Court, By (Signature Illegible), Deputy Clerk.]

EXHIBIT "B" TO RESPONSE TO PETITION FOR REHEARING

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

Civil Action No. 63-166

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation,

Defendant.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY, A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1752] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis Publishing Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1753]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

BRIEF IN SUPPORT OF APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

[fol. 1757]

I.

Curtis' Defenses of the First and Fourteenth Constitutional Amendments as Made by It in the Companion Libel Cases of Paul Bryant v. Curtis Publishing Company and Its Failure to Raise Those Defenses in This Case Shows a Clear Intent to Waive Them.

Under Point I of its brief, Curtis complains of the "refusal of the majority to consider the fundamental constitutional issues presented under the First and Fourteenth Amendments on the basis of the subsequent decision of the

Supreme Court in the *New York Times Co.* v. *Sullivan* because of the alleged waiver of these basic rights by the [fol. 1758] defendant." Curtis then argues that *Times* "radically changed the substantive law previously applicable to libel cases."

In its brief (P. 5) Curtis asserts "the majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon its interlocking battery of counsel, . . ." and then proceeds to state in the footnote on this page that " . . . the majority has concluded from unsupported statements in Butts' brief, which for the most part are not true, that there was 'full communication among Curtis' counsel' in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right."

Curtis, in an effort to circumvent this fatal situation, has seen fit to attach to its brief affidavits of its attorneys participating in the companion cases of *Bryant* and *Butts* which were filed because of the same Saturday Evening Post article. In his said affidavit, Mr. Philip H. Strubing, Curtis' general counsel, stated on oath that he was "a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. . . As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant* v. *Curtis Publishing Company* in the United States District Court for the Northern District of Alabama." Mr. Strubing further states in his affidavit that he "did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case."

[fol. 1759] With this affidavit before us, and comparing it with sub-paragraphs (f) and (h) of Exhibits "A" and "B"

attached to Appellee's Response to Curtis' Motion For Rehearing, let us examine just what Curtis' general counsel did by way of timely raising the First Amendment defense in the *Bryant* cases and not raising this or any other constitutional defense in the *Butts* case which was filed *after* Curtis' general counsel had filed pleadings in the first *Bryant* case:

On February 26, 1963 (one month before suit was filed in the *Butts* case) Curtis' general counsel, Pepper, Hamilton & Scheetz, (Mr. Strubing) signed pleadings in the case of *Paul Bryant* v. *The Curtis Publishing Company, et al,* Civil Action No. 63-2-W, in the United States District Court for the Northern District of Alabama (Exhibit "A" to Response), wherein Curtis moved (as a defense under Rule 12(b)6 FRCP) to dismiss a libel action instituted by Bryant because of another article appearing in its Saturday Evening Post on the grounds, among others, that:

> "3(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States . . .
>
> "(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

[fol. 1760] Thereafter, the same plaintiff, Paul Bryant, filed another suit against Curtis because of the article published in the Saturday Evening Post, which formed the basis of this suit by Butts, being Civil Action No. 63-166 in the United States District Court for the Northern District of Alabama. (Exhibit "B" to Appellee's Response) Again, in that case, Curtis' general counsel, Pepper, Hamilton & Scheetz (Mr. Strubing), signed pleadings in which it moved to dismiss the action for, among others, the reason that:

"2(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. . .

"(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

This pleading was filed on April 30, 1963.

It might be added here that the above-quoted pleading filed for Curtis in Bryant's case No. 63-2-W was Exhibit "D" to the petition for mandamus filed in both *Bryant* cases by Curtis' general counsel (Mr. Strubing) in the United States Court of Appeals for the Fifth Circuit and was part of the record in Case No. 21,152 in that court. It was also part of the printed petition for writ of certiorari [fol. 1761] filed in January, 1964, for Curtis in the United States Supreme Court.

Thus, we have Curtis' general counsel "actively participating" with local counsel (Beddow, Embry & Beddow—T. Eric Embry) in the *Bryant* cases in Birmingham, as well as with local counsel in the *Butts* case in Atlanta. In *Bryant* Curtis' general counsel demonstrated its awareness of its right to defend against libel suits under the First Amendment by raising this defense in a timely fashion. In spite of this awareness, Curtis remained absolutely silent as to any constitutional defenses in the *Butts* case. For Curtis to argue now in its petition for rehearing that it could not have been expected to raise the First Amendment defense in *Butts* because it could not have been expected to know how *Times* would be decided is fantastic. Curtis had not needed that information in order to raise the First Amendment defense in *Bryant*. Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times* v. *Sullivan* case by Curtis' local counsel in

Bryant long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

> "The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

We have always thought it was horn-book law that if one wanted an appellate court to rule upon a given defense and, particularly, one based upon the violation of a defendant's constitutional rights, it was necessary to raise the issue before verdict and judgment, thereby preserving the point for decision by the appellate court.

If the First and Fourteenth Constitutional Amendments were thought by Mr. Strubing to be valid issues and grounds [fol. 1762] for dismissal of the *Bryant* cases in the United States District Court in Alabama, then why, if they did not intend to waive those grounds, did they not assert them in the *Butts* libel case growing out of the same article which was pending in the United States District Court in Georgia. For Curtis and its general counsel, Philip H. Strubing, to now claim that he "did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case" when he was contemporaneously asserting the First and Fourteenth Amendments as grounds for dismissal in the companion libel case of Paul Bryant in the United States District Court of Alabama growing out of the same Saturday Evening Post article, *is to say the least incredible.*

For Mr. Philip H. Strubing to now represent to this Court that "there was no discussion between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised

in the *Butts* v. *Curtis* case" we say again is most incredible. Does it stand to reason that the firm of Beddow, Embry & Beddow and Mr. T. Eric Embry of that firm who actively handled the libel case of *Sullivan* v. *Times* and its pleadings therein in the Alabama Courts and raised constitutional issues of the First and Fourteenth Amendments in that case *would have no discussions whatsoever* with Mr. Strubing about having raised those issues in the *Times* case when they jointly with Mr. Strubing made those same defenses in the *Bryant* v. *Curtis* cases?

How in the name of common sense did the issues of the First and Fourteenth Amendments get in the pleadings brought jointly by counsel for Curtis in the *Bryant* v. *Curtis* cases as grounds for dismissal under Rule 12(b)6, if there was no discussion by such counsel as to whether such issues should be asserted in the case?

[fol. 1763] Mr. Strubing states in his affidavit that Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. of the firm of Beddow, Embry and Beddow did in fact attend the trial of the *Butts* v. *Curtis* case in Atlanta, "but only as spectators," that they had not commenced active preparation of the Paul Bryant case. Again we ask the question, does it stand to reason that able trial counsel from Birmingham in the cases of *Bryant* v. *Curtis Publishing Company* would spend two weeks in idle attendance as mere curious spectators at the *Butts* v. *Curtis* trial in Atlanta growing out of the same libelous article? Appellee says that the obvious answer is that Messrs. Embry and Beddow were on the payroll of Curtis Publishing Company for the two weeks they spent at the Curtis counsel table at the Butts trial in Atlanta and that such attendance was a part of active preparation for the *Bryant* v. *Curtis* trial soon to come up in Alabama. For Curtis to now contend that there was no discussion between its mutually interested interlocking counsel in the *Butts* and *Bryant* cases concerning questions and issues in the *Butts* v. *Curtis* case is most incredible. If such matters were not discussed then what was the function, responsibility and duty of joint counsel in such im-

portant litigation? Can it be believed that Messrs. Embry, Beddow and Strubing played the role of ostrich and buried their heads in the sand throughout the two weeks that Messrs. Cody, et al. tried the *Butts* case in Atlanta?

In its brief, Curtis relies upon *Hormel* v. *Helvering*, 312 U.S. 552 for the proposition that the majority refused to consider *Hormel* when passing upon the question of waiver. A review of *Hormel* clearly indicates the reliance is misplaced. In *Hormel*, the Commissioner of Internal Revenue [fol. 1764] had issued a tax deficiency against the taxpayer for his failure to include income from three trusts created by him in 1934, each of which was revocable at will. The Board of Tax Appeals decided the income was not taxable, however, this decision was reversed by the Circuit Court of Appeals which held the income was taxable under the subsequent decision of *Helvering* v. *Clifford*, 309 U.S. 331. In *Hormel* the Supreme Court held that when the Commissioner makes an express waiver of Section 22(a), as he did in *Helvering* v. *Wood*, 309 U.S. 334, he could not present in that Court an entirely new issue concerning the applicability of Section 22(a). *Hormel* is clearly distinguishable from our situation in that there the trusts involved were substantially identical to the trust in *Clifford*. In fact, the Supreme Court held that was no controlling distinction at all between the two cases of *Clifford* and *Hormel*. *Hormel* went on to hold that as a general rule an appellate court should confine itself to the issues properly and timely raised below and that the only exception which would be recognized was where the obvious result would be a plain miscarriage of justice.

Curtis further states that the majority's decision is in direct conflict with *Cobb* v. *Balkcom*, 339 F. 2d 95. This Court is well aware that *Balkcom* involved the trial of a defendant for murder in the Superior Court of Jasper County, Georgia. The question involved was whether the defendant had waived his right to challenge the composition of the jury. This Court held that it was well settled that a Negro defendant in a criminal case is entitled to an indict-

ment by grand jury and trial before a traverse jury from which Negroes have not been systematically excluded. A conviction cannot stand where such exclusion is established [fol. 1765] because it constitutes a denial of due process and the equal protection of the laws. The crux of the waiver rule as set out in *Balkcom* and in the majority of the other cases relied upon by Curtis is that the federal court in the administration of its habeas corpus jurisdiction may go beyond state court procedural confines. We fail to see any similarity between those cases and the decision in this case.

In summary, it is clear that Curtis elected to raise but a single defense to this action and that was a plea of justification. It is further clear that at the time this defense was filed Curtis well knew of the availability to it of the defense of the First Amendment and decided to ignore it. It thereby elected *not* to defend on constitutional grounds in Georgia but elected to do so in Alabama. The reasons are of no importance. What is important though is that Curtis should be held to this election. It made it with its eyes wide open and with full knowledge that it was at the same time defending on First Amendment grounds in the *Bryant* cases in Alabama.

Curtis attempts to persuade this Court that *Times* did, in fact, radically change the substantive law previously applicable to libel cases. This just isn't true and is recognized as such throughout the decision in *Times*. No attempt will be made here to quote those statements in the decision in detail since it is felt that the following excerpts illustrate our point:

> "Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. [fol. 1766] Those statements do not foreclose our inquiry here. *None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.*" (*Times*, 11 L. Ed. 2d 686 at 699)

• • • • • • •

"The general proposition that freedom of expression upon public questions is secured by the First Amendment has *long been settled* by our decisions." (11 L. Ed. 2d 700)

• • • • • • • •

"Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (11 L. Ed. 2d 701)

• • • • • • • •

"The fight of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." (11 L. Ed. 2d 703)

• • • • • • • •

"An oft-cited statement of a like rule (prohibiting a [fol. 1767] public official from recovering damages unless he proves actual malice), which has been adopted by a number of state courts, (the court here cites decisions from over a dozen state supreme courts and adds that 'the consensus of scholarly opinion apparently favors the rule that is here adopted.') is found in the Kansas case of *Coleman* v. *MacLennan,* 78 Kan. 711, 98 P. 281 (1908)." (11 L. Ed. 2d 706, 707) (Emphasis added)

We think these illustrative quotations should lay to rest the assertion by Curtis that *Times* "radically changed the substantive law previously applicable to libel cases."

We say, therefore, that contrary to the contention urged by Curtis in this section of its brief, the Supreme Court in *Times* did not enunciate a completely new rule of law that can be used by Curtis as an excuse for its deliberate and intentional refusal to raise as a defense to this action the

point that its First Amendment guarantees were involved and would be violated if the action was permitted to proceed.

Curtis can get small consolation from those decisions cited by it in its brief in an attempt to excuse its waiver of fundamental constitutional rights. Each of these decisions dealt with the alleged failure by an ignorant and indigent Negro defendant in a criminal case who was denied his basic constitutional rights. The case Curtis cites most often, *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 82 L. Ed. 1461 [fol. 1768] (1938), is in this same category. There, the defendant was bound over to await action of the United States Grand Jury and was kept in jail due to his inability to give bail. Later he was indicted; taken to court and there first given notice of the indictment; immediately was arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary. The Supreme Court found that:

> "Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of Counsel." (82 L. Ed. 1464)

Continuing, the Supreme Court stated:

> "(The Sixth Amendment) embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel." (82 L. Ed. 1466)

Certainly, Curtis would not put itself in the category of this type of a defendant—not with the experienced and learned counsel employed by it.

Continuing, the Court stated:

> "The determination of whether there has been an in-
> [fol. 1769] telligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. * * * The *Patton* case (281 U.S. 276) noted approvingly a state court decision pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, and was not furnished Counsel,' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses and not permitted to tell his own story.'
>
> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropri-
> [fol. 1770] ate for that determination to appear upon the record." (82 L. Ed. 1466, 1467)

Certainly, Curtis would not have this Court believe that it was in a position similar to that of these indigent and ignorant defendants in those cases cited by it in its brief. On the contrary, it is abundantly clear from what has already been said that Curtis was represented by highly skilled, competent and able attorneys who were thoroughly cognizant of its right to plead the First Amendment and who went so far as to do this in one instance and refused to do it in the other. Could there be any clearer example of a waiver of a known right? As the majority panel stated,

"the facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13) and, we might add, in the *Bryant* cases.

As the majority concluded:

> "For whatever tactical or other reason Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge, through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in [fol. 1771] *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading even problems of local jurisprudence, Curtis' complete and utter silence amounted to 'an intentional relinquishment or abandonment of a known right or privilege.'" (Dec. P. 15-16)

Even Judge Rives in his dissent recognizes that Curtis must not have intended to raise this issue before verdict and judgment when he commented upon Curtis' failure even to offer the defense under Georgia law (Ga. Code Ann., Section 105-709(6)) which provides that communication concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions. He states:

> "Thus, although the Georgia statute which grants a privilege to 'comments upon the acts of public men in their public capacity and with reference thereto' appears as broad, if not broader, than the 'public official'

as contemplated by *New York Times Co.*, the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered." (Dec. P. 44)

[fol. 1772] Of course, what Judge Rives had to say about what the plaintiff Butts and his attorneys recognize about this law is immaterial insofar as the point is concerned. Suffice it to say, had Curtis meant to rely upon the First Amendment and/or Georgia Code Section 105-709(6), which, as Judge Rives says, is even "broader than the 'public official' as contemplated by *New York Times Co.*", both were clearly available to it and, just as clearly, Curtis knew of their existence and availability. It raised *both* defenses in *Bryant*!

We might point out here that the reference by Judge Rives to *Henry* v. *Collins*, 380 U.S. 356, is of no help because the question of waiver was not raised in that case and, therefore, was not considered by the Supreme Court.

In its brief, Curtis has the temerity to state that "the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the Post." (P. 3) Curtis then proceeds to give its own summary of what it says was the evidence in the case. The fact remains, however, that in spite of what Curtis has said, the majority did review the evidence in detail and so stated more than once. For example, the majority held at Page 32:

> "The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of [fol. 1773] the evidence, *with which we are in complete accord*, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

"The case was fully developed during extensive pretrials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. *We have given full consideration to the entire record . . .*"

Again, the majority stated at Page 6:

"As the trial judge saw it: 'The article was clearly defamatory and extremely so . . . The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable.' *We wholeheartedly agree with that appraisal.*" (Emphasis added)

The above two quotations might well lead one to ask what possible benefit Curtis could hope to get if a rehearing was granted as requested. It is abundantly clear from its decision that, had it ruled precisely on that point, it would have concluded that "actual malice" had been proven beyond a doubt and, therefore, the limitations of *Times* would have no effect. We think the last two quoted portions of the majority's decision substantiates this beyond any doubt.

[fol. 1774] II.

The Points Urged by Curtis in This Section of Its Brief Are Merely a Repetition of Points Previously Rejected Both by the Trial Court and the Majority Decision in This Court.

Curtis, in Part II of its brief, complains that the punitive damage award, as reduced, violates its rights under the Constitution and could not be cured by remittitur.

Part II of Curtis' brief deals primarily with four points:

1. The punitive damage award, four hundred times the Georgia criminal libel fine, amounts to criminal punishment without the procedural safeguards of due process.

2. No definite standard or guide governed the award.

3. The award cannot stand because it was a result of the jury's passion and prejudice.

4. The remittitur invades Curtis' right to trial by jury under the Seventh Amendment of the Constitution.

This is nothing more than a repetition of Curtis' argument on this point in its previous briefs to this Court and the trial court.

Point one emphasized by Curtis can be disposed of by referring this Court to the decision of *Reynolds* v. *Pegler*, 123 F.Supp. 36 (D.C.N.Y. 1954), and the New York Criminal Libel Law, *N.Y. Unconsol. Laws Art.* 126 §1340, §1341, §1937 (McKinney, 1944).

The jury in *Reynolds* v. *Pegler, supra,* awarded $100,000 punitive and $1.00 compensatory damages against the author of the article. The Second Circuit, in *Reynolds* v. *Pegler,* 223 F.2d 429 (2d Cir. 1955) affirmed, holding, at page 434, the amount of punitive damages to be awarded [fol. 1775] is peculiarly within the province of the jury:

> "It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment . . ."

At this point it is well to note that under §1341 of New York Law, supra, criminal libel is punishable as a misdemeanor, and §1937 of New York Law provides one convicted of a misdemeanor may be fined not more than $500.00.

The United States Supreme Court denied certiorari in the *Reynolds* case, supra, in 350 U.S. 846. The award of punitive damages in *Reynolds* v. *Pegler* was two hundred times the maximum fine which could have been imposed in a criminal prosecution in New York, and one hundred thousand times the amount of compensatory damages awarded by the jury.

The most obvious defect in Curtis' argument becomes apparent when the true purpose of punitive damages is

considered. They were allowable at common law to deter the defendant from any such wrong in the future, and as a proof of the detestation of the jury for the act itself. Clearly, the amount awarded could be many times the maximum fine for a misdemeanor.

Curtis, in its second point, complains that no definite standard or controlling guide was given the jury to govern the award.

The court in *George Knapp & Co.*, 21 Mo. 655, 112 S.W. 474 (1908), was of the opinion that so many considerations enter into the awarding of damages by a jury in a libel case that the courts approach to the question of excessiveness of a verdict with great reluctance. The court added [fol. 1776] that in such a case, the question of damages was peculiarly within the province of the jury and apart from prejudice or corruption the verdict would not be interfered with.

Defendant's contentions relative to due process would all but abolish punitive damages. Such contentions appear to have escaped the notice of counsel and the courts for one hundred years since the passage of the Fourteenth Amendment.

The standard in Georgia, which rests upon the enlightened conscience of the jury, applies alike to an award for pain and suffering. Such rule rests on the fact that by the very nature of the tort it is impossible to set up any other standard to guide the jury.

The third point raised by defendant is that the verdict was the result of passion and prejudice.

It is well settled that the trial court's determination, as to whether a verdict is the result of passion or prejudice, will not be disturbed unless the determination is clearly erroneous. 6 *Moore's Federal Practice* ¶59.05[3], p. 3746 (2d. Ed.).

In *Bradley Mining Company* v. *Boice*, 194 F. 2d 80 (9th Cir. 1957) cert. den. 343 U.S. 941, it was held that a federal appellate court could consider only whether a verdict was

grossly excessive or monstrous, while the trial judge might set aside the verdict if he thought it was against the weight of evidence. The trial judge is so familiar with the atmosphere of the trial and sensible of imponderables, the appellate court should hesitate to interfere. The reason why a trial court's decision as to whether a verdict is the result [fol. 1777] of passion and prejudice will stand is obvious. The trial judge's familiarity with the atmosphere and personalities of the case allows the judge to give a well-considered determination of whether or not passion or prejudice prevailed.

The fourth point raised by Curtis was that the reduction by Judge Morgan of the punitive damage verdict to $400,000.00 constituted an invasion of defendant's right to trial by jury on the issue of damages guaranteed by the Seventh Amendment.

Professor Moore disagrees. Moore states that remittitur practice in the federal courts in jury cases has become widespread following Justice Story's decision, sitting on circuit, in *Blunt* v. *Little,* 3 Fed. Cas. 760 (C.C.D. Mass. 1822). Some have criticized the granting of remittitur in jury cases as violating the Seventh Amendment, however:

> "... its use has become so universal in the trial and even in the appellate courts and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without uprooting of precedent akin to that effected by *Erie* v. *Tompkins.*" 6 *Moore, Federal Practice,* ¶59.05[3], p. 3740 (2d. Ed.).

This Court approved the use of the remittitur in *Greyhound Corporation* v. *Dewey,* 240 F. 2d. 898 (5th Cir. 1957). Curtis further makes the point that there is no standard for the amount to be remitted.

In fact most courts have not articulated any definite standard by which to determine the amount of the remittitur. *Moore, supra,* p. 3743. The majority of the remittitur

[fol. 1778] cases fix the amount at a figure the court believes a proper functioning jury should have found. This position gives the defendant the benefit of the full supervisory power of the court. Such a position effects a fair and practicable adjustment. *Moore, supra,* p. 3745.

In conclusion to Part II of Curtis' brief, it here has *raised again* points which have no merit and have previously been argued time and time again. Punitive damages cannot be equated to a penal fine for misdemeanors. Of necessity the jury has no algebraic formula for calculating the amount of punitive damages. Such a determination must be made by the enlightened consciences of impartial jurors. The trial judge's determination of whether the verdict is a result of passion and prejudice should be allowed to stand. It is settled beyond any serious argument that the remittitur practice does not violate rights guaranteed by the Seventh Amendment.

III.

In This Section Curtis Is Again Merely Relying Upon Points Previously Rejected in the Trial Court and by the Majority in This Court, None of Which Are the Basis for Granting a Rehearing Under Rule 25(a) of This Court.

In Section III of its brief in support of its motion for rehearing en banc, Curtis has lumped together some nine claimed procedural errors. All of these deal with various rulings during the trial as to the admissibility of evidence, the propriety of Appellee's argument and the correctness of the court's instructions.

In this shotgun attack, Curtis has completely overlooked [fol. 1779] the basis for a motion for a rehearing en banc. Rule 25(a) of this Circuit's Rules clearly provides that "ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or conformity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided."

"En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *U. S.* v. *American-Foreign S.S. Co.*, 363 U.S. 685, 4 L. Ed. 2d. 1491, 80 S. Ct. 1336 (1960).

The mere fact that the decision here under review was by a divided court gives no justification for a rehearing. *Shreveport* v. *Holmes*, 125 U.S. 694. To suggest that a rehearing en banc should be granted because a District Judge participated in the decision does not speak favorably for counsel for Curtis.

There has been no intimation by Curtis with respect to the points here raised that the Court overlooked or misconstrued any controlling authority, that the decision is in anywise contrary to any prior decision of this Court, or that any of these points are unusually important or novel. Rather, Curtis has simply taken the position that the contentions it made initially were sound and should have been sustained. These points were considered very thoroughly and at length by the Court. The entire court should not be burdened with this task merely because of the disappointment of Curtis. Needless to say, Appellee should not [fol. 1780] be faced with any more delay than he has met thus far.

The first point raised deals with the refusal of the court to permit evidence of alleged specific acts of misconduct. This is nothing but a continuing attempt by Curtis to assassinate Appellee's character without any justification. They have reiterated their patently false assertions that Appellee's entire case revolved around his loyalty to the University. In our main brief (pp. 99-108), this point was dealt with extensively. Suffice it to say that Appellee never testified that he had done nothing to hurt the University. The fact that he had made such a statement prior to the trial was elicited by counsel for Curtis for the sole purpose

of trying to lay the groundwork to introduce evidence relating to alleged specific acts of misconduct.

The authorities cited in our main brief show without question that the courts uniformly reject such evidence. The case of *Cox* v. *Strickland,* 101 Ga. 482 (5), 28 S.E. 655 (1897) clearly held that under Georgia law in a libel suit, the defendant has the right to show the plaintiff's bad character "but cannot in so doing, go into proof of special acts."

The article in question dealt only with the alleged fixing of the Georgia-Alabama football game and not with the private life of either Coach Butts or Coach Bryant. The complaint dealt solely with his reputation in the football coaching profession, which Curtis admitted was good before it published the article which it knew would kill that reputation. Under this state of the evidence and the law, there was clearly no error in rejecting this type of evidence.

Curtis goes on to say that the court erred in refusing to allow it to cross-examine Appellee with respect to certain testimony given by him in his deposition and with respect [fol. 1781] to his refusal to answer certain questions on his deposition. The alleged "false testimony" (relating to whether he knew anyone who went by the name of E. C. Lindsey) was not relevant to any issue in the case and was but another attempt by Curtis to evade the court's ruling that evidence of alleged specific acts was not admissible. (pp. 101-102, Brief of Appellee) The refusal of Appellee to answer certain questions was based on advice of counsel, and subsequently they were answered in detail. No possible harm was suffered by Curtis by this delay, and hence there was no prejudicial error (See pp. 109-112, Brief of Appellee).

Curtis next urges that it was improperly prevented from impeaching witness Carmichael by proof of a 30 year old conviction of a childhood misdemeanor and by proof that he had made mis-statements in applications for licenses to sell beer many years before the trial.

The rule is well settled that a federal trial judge has the discretion of admitting or rejecting proof of an ancient conviction. See cases cited at pp. 113-115 of Appellee's main brief and particularly *Goddard* v. *U. S.*, 131 F. 2d. 220 (5th Cir., 1942), a case arising in Georgia. Although Curtis relies on *Woodward* v. *State*, 197 Ga. 60, 28 S.E. 2d. 480 (1943), this case merely held that it was not error for the trial judge to admit a 23 year old felony connection; the case is not authority for the proposition that a 30 year old misdemeanor conviction must be admitted. Whether such a conviction is admissible lies entirely within the discretion of the trial court.

With respect to Curtis' claim that Carmichael had a "propensity to give false statements," the authorities are decidedly against the admissibility of this type of evidence. As this Court very clearly held in *Roberson* v. *U. S.*, 249 [fol. 1782] F. 2d. 737 (5th Cir., 1957) an attempt to impeach a witness cannot be made by showing wrongful conduct or even the commission of a crime for which there has been no conviction. The general rule is that "a witness cannot be impeached by evidence showing particular instances in which he has been untruthful." 98 C.J.S. Witnesses §512, p. 417. See pp. 115-119 Appellee's main brief.

The next claimed error relates to the refusal of the court to permit witness Burnett to testify as to conversations he had with the telephone operator and Milton Flack (who was not called by Curtis as a witness) to corroborate his asertion that there was in fact a telephone conversation between the two coaches. As the majority of this Court pointed out (and there was no dissent on this point), "the full import of most, if not all, of that evidence got before the jury." Indeed, there was never any contention that there was no telephone conversation. Butts didn't deny it. The only thing in dispute was whether the contents of that conversation were correctly reported by Burnett, and no amount of self-serving, extrajudicial assertions by Burnett would be admissible to corroborate his patently fictitious story.

Error, to be reversible, must be harmful. As held by this Court in *State Farm Mutual Auto Insurance Co.* v. *Bourne*, 220 F. 2d. 921, 923-924 (5th Cir., 1955):

> "Appellate courts do not sit to review claims of procedural errors where it is plain, as here, that no substantial prejudice could possibly have resulted and the questions, therefore, are mere abstractions."

The next three points concern the court's instructions regarding the construction to be placed upon Appellee's testimony, the credibility of witnesses and the presumption [fol. 1783] that Appellee had a good reputation. These points are of such little present consequence and have been covered so fully in Appellee's main brief (pp. 147-161), that further comment is unwarranted.

Contrary to Curtis' argument next urged, the trial court correctly charged the jury that the article was libelous per se, that is, as a matter of law. In its answer, Curtis admitted that Butts had a good reputation in his chosen profession. At the trial, Curtis successfully urged that it had filed a valid "plea of justification" which, under Georgia law, is the admission of a prima facie case in favor of the plaintiff. Thus, the Post made a solemn admission *in judicio* that Butts was a member of the football coaching profession, that his previously good reputation had been injured, that the article was written with malice and that it was false. Under these admissions, as well as the undisputed evidence, the court, following the rule laid down in *Walker* v. *Sheenan*, 80 Ga. App. 606, 54 S.E. 2d. 628 (1949) to the effect that statements tending to injure one in his trade are libelous per se, correctly charged that the article was libelous as a matter of law.

Curtis concludes its many-faceted attack by claiming that counsel for Appellee were allowed to make improper arguments to the jury. If objection had been made, the trial court would have been in a position to stop any improper argument and to take such corrective measures as were

necessary, including instructing the jury to disregard it and rebuking counsel. None of Curtis' numerous attorneys participating in the trial thought that this was needed, hence they sat silently by. Assuming purely for the purpose of this brief that the argument was improper (although we agree with the majority which held to the contrary), the matter is aptly put to rest by this Court's holding that "they did not consider the arguments objectionable at the time they were delivered, but made their claim as an after-thought." (P. 20)

[fol. 1784] Conclusion

It is clear that Curtis Publishing Company has shown no basis for this Court to grant its request for a rehearing en banc. The decision of the majority should be allowed to stand.

Respectfully submitted,

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[fol. 1785] Certificate of Service (omitted in printing).

[fol. 1786]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING

Before Rives and Brown, Circuit Judges, and Spears, District Judge.

OPINION—October 1, 1965

Per Curiam: As Curtis' petition for rehearing asserts that the waiver found by us is based on "alleged facts, most of which are outside the record", and upon "unsup-
[fol. 1787] ported statements in Butts' brief, which for the most part are not true", we deem additional comment appropriate.

The burden of Curtis' brief, elaborated in the petition for rehearing, is that *Times* came like a bolt out of the blue, and no one either knew of, or could anticipate, that a state-created libel damage action was subject to or could be controlled by First Amendment freedom of speech

constitutional limitations. Therefore, the argument runs, until *Times* there was no reason to assert the constitutional claim, and consequently it should not be held to the usual appellate consequence of failing properly to preserve the point.

Obviously this Court is not required to accept the mere assertions of Curtis. This Court has the duty of determining whether this contention of Curtis was well founded. While this partakes of factual evaluation in a sense, the question of waiver is a law problem—i.e., whether skilled counsel would reasonably think the contention to be plausible. Since Curtis did not seek to raise the constitutional issues before verdict and judgment, it was entirely proper to look to the sources discussed in our original opinion in order to ascertain the pertinent facts. Until the filing by Curtis of its petition for rehearing, the statements in Butts' brief, referred to by Curtis, had not really been disputed. And now, after having given full consideration to the affidavits and to all other matters presently submitted by Curtis, we are still of the firm opinion that when all of the acts and conduct of Curtis' [fol. 1788] attorneys are tested in the light of reason, Curtis cannot sustain the proposition that its counsel were ignorant of a constitutional claim so as to be totally excused for the complete absence of any timely assertion of it.

To its petition for rehearing, Curtis attaches affidavits made by Philip H. Strubing, whose Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, is general counsel for Curtis; by T. Eric Embry, whose Birmingham, Alabama law firm represented the New York Times Company in the case brought against it by Sullivan (*Times* case), and also represented Curtis in the related libel cases brought against it in the United States District

Court by Coach Paul Bryant;[1] and by Welborn B. Cody, who was lead trial counsel for Curtis in the *Butts* case. In general, the affidavits assert that Mr. Embry and his partner, Roderick Beddow, Jr., attended the trial of this *Butts* case as spectators only, were not consulted concerning trial strategy, and did not advise Mr. Cody concerning the constitutional questions they had raised in *Times*. Mr. Cody stated that "he was not aware of the constitutional issues being urged in (the *Times*) case."

There is no dispute that the lawyers who sat together at the Curtis counsel table during the Butts trial were representing Curtis either in this case or in the related Bryant libel suits pending in Alabama, so presumably they were all on Curtis' payroll. Unusual as it would be for them not to consult with one another concerning strategy and tactics during the two-week trial, we accept the statement [fol. 1789] that neither Mr. Embry nor Mr. Beddow informed Mr. Cody of the constitutional questions being raised in the *Times* case.

But what about Mr. Strubing? In his affidavit he stated that he participated actively in the preparation of the *Butts* case for trial, and that he also worked actively with Mr. Embry in the preparation of the related *Bryant* cases. He is also on the brief in our case and participated in the arguments.

Butts' response to the petition for rehearing refers us to the records of this Court, of which, of course, we may also take judicial notice. In Cause No. 21,152, *The Curtis Publishing Company* v. *Honorable H. H. Grooms, United States District Judge for the Northern District of Alabama*, Curtis sought a writ of mandamus to compel Judge Grooms to vacate his orders denying Curtis' motion for change of venue. That record reflects that on February 26, 1963 (one month before the Butts suit was filed) Mr. Strubing's law

[1] Civil Actions Nos. 63-2-W and 63-166, brought in the Western and Southern Divisions respectively, of the Northern District of Alabama.

firm, together with the firm of which Mr. Embry and Mr. Beddow are members, signed and filed in the Alabama District Court a motion to dismiss the related libel action instituted by Bryant, on the grounds, among others, that:

> "To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. . . .
> [fol. 1790] "To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States . . ."

In a later suit filed against Curtis by Bryant the same two law firms made identical contentions in a motion to dismiss signed and filed by each of them in the District Court on April 30, 1963, still more than three months before the trial of the *Butts* case.

If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an *active* participant in all three cases, so he certainly should have known what the rights of Curtis were. Although he now says that he was not aware of the constitutional defenses articulated by *Times* until that case was decided by the Supreme Court some six months after the trial of the *Butts* case, neither he nor his local counsel (Mr. Embry) considered a final decision in *Times*—or for that matter any other case—a necessary prelude to raising in the related *Bryant* cases, the constitutional claim previously asserted by Mr. Embry in *Times*.[2]

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[2] That these constitutional claims were well preserved by these counsel in *Times* without the learning which was to come several years later through the words of the *Times* opinion is recognized

And for good reason, at least ever since June 1962 when [fol. 1791] those who wished could see the handwriting on the wall, certainly as the moving finger followed the voice of Mr. Justice Black's celebrated "First Amendment 'Absolutes'; A Public Interview".[3]

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by the Court itself: "The (Alabama trial) judge rejected petitioner's contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments." 376 U.S. 254, 263.

The Alabama Supreme Court also recognized the assertion of these constitutional claims for it "rejected petitioner's constitutional contentions with the brief statements that "the First Amendment of the U.S. Constitution does not protect libelous publications • • • 14 So.2d at 40." 376 U.S. 254, 264.

[3] Justice Black and First Amendment "Absolutes"; A Public Interview, Edmond Cahn and Mr. Justice Hugo L. Black, 37 NYU Law Review 549 (June 1962). The background of the interview was the Justice's lecture entitled "the Bill of Rights", delivered at the New York University School of Law, February 17, 1960, published at 35 NYU Law Review 865 (1960). See, e.g.:

"CAHN: Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?

"JUSTICE BLACK: My view of the First Amendment • • • is that it said Congress should pass none of these kinds of laws. • • • I have no doubt myself that the provision • • • intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. • • • " (557)

"• • •

"My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.

"• • •

"I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me, '• • • Government shall not attempt to control the ideas a man has. • • • Government shall not abridge freedom of

[fol. 1792] Granted that the extra-judicial statements of a single Justice do not an opinion make,[4] the Court itself in *Times* treats this newly announced rule as a natural development of the constitutional propositions long recognized by its extensive writings on First Amendment freedom of speech rights.[5] Thus, it emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. 254, 269. Announcing its rule, it referred to the "oft-cited statement of a like rule * * * adopted by a number of state courts * * * found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)"—a decision then nearly half a century old.

Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses[6] it had raised in the Alabama *Bryant* cases,

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the press or speech. It shall let anyone talk in this country.' * * * Let them talk! In the American way, we will answer them." (563)

[4] They were shortly to be announced *ex cathedra* in his concurring opinion in *Times*, 376 U.S. 254, 293, joined by Mr. Justice Douglas and substantially echoed by Mr. Justice Goldberg (with Justice Douglas), 376 U.S. 254, 297.

[5] See the extended annotations, The Supreme Court and the Right of Free Speech and Press, 11 L.Ed. 2d 1116-1175; 2 L.Ed. 2d 1706; 93 L.Ed. 1151.

[6] These would include the conditional privilege recognized by §105-709(6) of the Georgia Code concerning published statements relating to the "acts of public men in their public capacity". See Note 20, 376 U.S. 254 at 280.

[fol. 1793] in order to get the right to open and close the arguments.

Nor, as suggested in Judge Rives' dissenting opinion on denial of rehearing, do we consider that our action is at all inconsistent with the principle of law expressed for the Court by Judge Wisdom in *Commissioner of Internal Revenue* v. *Chase Manhattan Bank*, 5 Cir., 1958, 259 F.2d 231, 238, cert. denied, 359 U.S. 913.[7]

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[7] Actually, in this tax case the theory later developed for the first time in this court had been raised in the bank's petition filed in the lower court and agreed upon by both parties at the trial. The Court, in deciding to consider the development of the theory, stated that the "tax liability as to the testamentary trust depends on whether Daniel's will put Marie to an election. *The question is in the case.* A just determination of the appeal requires us to decide it." (Emphasis supplied). This case involved the gift tax liability under three trusts created by the decedent, "Daniel", one of which was a testamentary trust of his residuary estate from which his wife, Marie, was to receive the income for life, the remainder to be divided among Daniel's descendants. In the Tax Court, the bank's petition stated that "the estate was still under administration and that 'no determination has yet been made as to whether or not the said Marie Elizabeth Moran has elected to take under the will' . . . that Marie's motive in not taking against the will was to benefit herself' ". At the trial the Commissioner and the bank agreed to assume that Daniel's will put Marie to an election and that Marie's receipt of income from the trust was sufficient to show that she had elected to take under the will. They differed only as to whether the effect of the election was that she had made a taxable gift. The Tax Court held that Daniel's will put Marie to an election and that Marie's "acquiescence" in the testamentary trust constituted a taxable gift. On appeal, for the first time in the case, the defendant made the assertion that Daniel's will did not purport to dispose of Marie's share and therefore she was not put to an election, thereby denying that Marie transferred her share of the community estate to the trust. In answer to the Commissioner's objection to the bank's new argument that Marie was not put to an election, and its contention that the taxpayer is not at liberty to urge as a ground for reversal a point not raised in the court below, the court states that "indeed, . . . the taxpayer invited error . . . worse, the invitation was accepted. But an appellant has no vested right in an opponent's error of law in the lower court—especially when the protesting appellant is the Commissioner of Internal Revenue

[fol. 1794] In that case the legal theories developed in this Court for the first time could be fairly disposed of on the record, and the opposing party was not prejudiced by the use of other theories.[8] However, here Curtis seeks a reversal so that a new record based on different theories may be made at another trial. The wholesome desire "to secure the just * * * determination of every action", neither [fol. 1795] dispenses with the rules of procedure, nor forecloses the applicability of the doctrine of waiver when all of the elements which constitute that doctrine are present, as in the present case.

. . . (who) owes a duty to all taxpayers . . . to see that the tax law is applied justly. . . . Federal procedure is moving away from what Pound calls 'the sporting theory of justice', Wigmore the 'instinct of giving the game fair play', and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A. Daniel's will is in the record and speaks for itself. '(W)here, as here, the case below was tried, not upon any misapprehension of the facts, but upon a misapprehension of the effects of those facts in law, appellant may not be prevented from pressing here for the application, to the proven facts, of the correct principles of law.' . . . 'We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties.'".

See also Jack Ammann Photogrammetric Engineers, Inc. v. Commissioner of Internal Revenue (5th Cir. 1965) 341 F. 2d 466, a tax case citing Commissioner of Internal Revenue v. Chase Manhattan Bank, in determining that since legal theories were there being urged "that can be fairly disposed of on the record before us. We do not consider that we should refuse to consider them merely because they were not urged in the Tax Court."

[8] See Glavic v. Beechie (5th Cir. 1964), 340 F. 2d 91. The majority refused to consider a question not presented for determination in the District Court. Judge Wisdom in his concurring opinion stated, in opposing this decision, that he "would allow either party on appeal to advance a new theory or to change his theory of the case—if: (1) all the relevant evidence is before the court, (2) the opposing party has had adequate time to brief the point, and (3) the opposing party is not prejudic(ed) by not having introduced evidence below that would have militated against the validity or effect of the new theory."

As to all other contentions in the petition for rehearing and supporting brief, we adhere without further comment to the holdings in our original opinion. Finding no error, see Rule 25(a) of this Court, the petition for rehearing is denied.

Petition Denied.

Rives, Circuit Judge, Dissenting:

The majority undertakes to bolster its holding "that Curtis has clearly waived any right it might have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times."[1]

I.

As suggested in my earlier dissent,[2] that is not true as to the holding in *Times* that a state law of civil libel which sustains the imposition of extremely large awards of damages in libel actions may constitute a prior restraint on freedom of expression forbidden by the First and Fourteenth Amendments. *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254, 277, 278.

The enormous amount of the verdict in the present case could not have been anticipated. Curtis raised the point [fol. 1796] seasonably as a ground for its first motion for new trial.[3]

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[1] Slip Opinion, pp. 17 and 18.

[2] Slip Opinion, pp. 46, 47, 52 and 53.

[3] "That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by the First and Fourteenth Amendments of the United States Constitution because:

". . . . . .

"(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press." (Record, pp. 46, 47.)

In ruling on that motion the district court recognized that: "As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds* v. *Pegler*, D.C., 123 F.Supp. 36; 2 Cir., 223 F.2d 429." 225 F.Supp. 916, at 919. Nonetheless, after the plaintiff filed his remittitur, the district court entered judgment against Curtis for $400,000 punitive damages plus $60,000 general damages, or a total of $460,000. Since that time, Curtis has lost no opportunity to insist that the $460,000 award, if sustained, is so large as to constitute a prior restraint upon freedom of the press within the rule announced in the *Times* decision. On that issue, there is, I submit, no debatable question of waiver. For reasons expressed in my prior dissent,[4] I would rule with Curtis on that issue.

As to the punitive damage award, the section of the Georgia Code quoted in my earlier dissent[5] and the oral [fol. 1797] charge to the jury,[6] make clear that the very purpose of punitive damages is to act as a deterrent to future conduct, which, in libel cases, means a prior restraint on freedom of expression. When that deterrent or restraint assumes proportions of the jury's verdict, $3,000,000, or even of the award made by the district court, $400,000, I submit that it is forbidden by the First and Fourteenth Amendments.[7]

The part of the *Times* opinion relating to prior restraints on freedom of expression was certainly not "new law."

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[4] Slip Opinion, pp. 51, 52 and 53.

[5] Section 105-2002, Georgia Code Annotated.

[6] "The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award."

[7] See Bantam Books, Inc. v. Sullivan, 1963, 372 U.S. 58, 70, cited in *Times* (376 U.S. at 278).

Nor was that part of the opinion limited to public officials. Clearly, I submit, whether Butts was a public official or not, the enormous award of damages must be set aside.

II.

The specific holding in *Times*, which had not theretofore been generally recognized, was that a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It was that principle to which I referred in my earlier dissent,[8] when I said "it was not even enunciated by the [fol. 1798] counsel who petitioned for certiorari in the *New York Times Co.* decision."[9] Now on petition for rehearing, counsel makes affidavit that: "The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented in the Alabama courts nor in the petition for certiorari to the United States Supreme Court."

In order properly to object[10] to the district court's instructions allowing recovery of general damages without proof of malice, and recovery of punitive damages on a definition of malice at variance with that prescribed in *Times*, counsel must have anticipated that specific holding of the *Times* decision.

Judge Morgan, the District Judge in the present case, recognized, at least impliedly, that Curtis had not waived

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[8] Slip Opinion, p. 42.

[9] An opinion which I had reached from an examination of the petition and briefs on certiorari.

[10] "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 51, Fed.R.Civ.P.

that constitutional right by its failure to insist upon it at the trial, when, in denying the motion for new trial under Rule 60(b), Fed.R.Civ.P., he considered and ruled on the defense on its merits. *Butts* v. *Curtis Publishing Co.*, N.D. Ga. 1964, 242 F.Supp. 390.

Based largely on facts dehors the present record, the majority held that Curtis' trial counsel had knowingly and intentionally waived the constitutional protections af- [fol. 1799] forded by the *Times* case, by failing to raise them at the trial. In response to that holding, three of Curtis' attorneys have filed with this Court their sworn affidavits.[11] Now the majority goes still further beyond the present record and considers another case shown by the records of this Court but of which Judge Morgan could not have taken judicial notice when he considered and ruled on Curtis' section 60(b) motion. With deference, I submit that it is the function of this Court simply to review the ruling of the district court on the record before that court.

If, however, we are to resort to evidence outside the record and to bolster our judicial notice from records in other cases, those extraneous matters do not impugn the integrity and veracity of Curtis' trial counsel. It seems clear to me that, at the time of trial, counsel had no notice of the *specific* holding thereafter made in *Times*. It is impossible for me to believe that, if counsel had any such notice, they would have knowingly and intentionally waived the specific constitutional protection afforded by the *Times* case "in order to get the right to open and close the arguments," as suggested in the majority opinion.

It is too much to hold counsel to the duty of anticipating the specific holding of *Times*, because of general assertions of First Amendment defenses in other cases, or even because of Mr. Justice Black's view that the First Amendment ". . . intended there should be no libel or defama-

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[11] Ethically permissible "when essential to the ends of justice." A.B.A. Canons of Prof. Ethics No. 91.

tion of law in the United States under the United States [fol. 1800] Government, just absolutely none so far as I am concerned . . . ."[12] The majority paints with such a broad brush as to require the assertion of a First Amendment defense in *every* libel or defamation case hereafter litigated.

With deference, I submit that it is the outworn sporting theory of justice[13] which leads the majority to convert this appeal into an unseemly trial of Curtis' lawyers. The function of this Court is not to decide a contest, but to administer justice. Curtis, not its lawyers, stands mulcted in damages to the extent of $460,000 as the result of a trial conducted on a fundamentally and constitutionally deficient theory of law.

The resulting damage extends far beyond the monetary loss to Curtis. This Court's refusal to consider and decide whether constitutional standards were observed in adjudging Curtis liable is a grave reflection upon the administration of justice itself. Permitting such a libel judgment to stand will cause " . . . the pall of fear and timidity [to be] imposed upon those who would give voice to public criticism in an atmosphere in which the First Amendment freedoms cannot survive."[14]

[fol. 1801] A just determination requires this Court to consider and decide this appeal on its merits.[15] The altered

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[12] Quoted in footnote 3 to the majority opinion on rehearing.

[13] "Federal procedure is moving away from what Pound calls 'the sporting theory of justice,' Wigmore the 'instinct of giving the game fair play,' and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a Court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A." Commissioner of Int. Rev. v. Chase Manhattan Bank, 5 Cir. 1958, 259 F.2d 231, 238.

[14] New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 278.

[15] Hormel v. Helvering, 1941, 312 U.S. 552, 556, 557.

situation created by the intervening decision of the Supreme Court makes that a compelling duty.[16]

I, therefore, respectfully dissent.

[fol. 1802] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1803]

SUPREME COURT OF THE UNITED STATES

No. 37—October Term, 1966

CURTIS PUBLISHING COMPANY, Petitioner,

v.

WALLACE BUTTS.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and one and one half hours are allotted for oral argument. The case is set for oral argument immediately following No. 150.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[16] The Peggy, 1801, 5 U.S. (1 Cranch) 103, 110; Connor v. New York Times Co., 5 Cir. 1962, 310 F.2d 133, 135, and cases there cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS, PETITIONER,

vs.

EDWIN A. WALKER.

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Donald James Proehl—		
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Doy L. Gorton—		
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Travis Buckley—		
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Kingsby Kingsley—		
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Defendant's Exhibit No. 29, Newspaper story "Walker Charges, Then Falls Back" by Tom Gregory, Oxford, Miss., Monday, October 1, 1962 (excerpts)	1757	1154
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No. 1C—AP News release, Jackson, Miss., Sept. 29	1877	1224
No. 1D—AP News release, Oxford, Miss., Sept. 30	1878	1225
No. 1E—AP News release, Oxford, Miss., Sept. 30	1879	1228
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No. 3—AP News release, Oxford, 10/1/62	1885	1242
No. 3A—AP News release, Washington	1887	1247
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No. 3F—AP News release, Oxford, Miss., Oct. 1	1892	1257
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No. 4I—AP News release	1909	1286
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No. 5A—AP News release	1920	1302
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No. 7A—AP News release re Bond Set	1935	1320
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No. 11—University of Mississippi Plot Plan appears in POCKET to Exhibit Volume	1997a	1381
No. 12—Photograph from Fort Worth Star-Telegram, Friday, September 28, 1962, "Troops Called to Support US Marshals at Ole Miss"	1998	1383
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No. 21—Handwritten notes by John E. King, Manager of Radio Stations, WROB & WAMY	2027	1441
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No. 1—Statement of Talmadge Witt of Pontotoc, Mississippi, dated November 25, 1963	2031	1445

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No. 4—Order of the Supreme Court of the United States, Justice Black, dated September 10, 1962	2047	1461
No. 5—Order granting permanent injunction in the U.S.D.C. for the Jackson Division of the Southern District of Mississippi, dated September 13, 1962	2048	1463
No. 6—Findings of fact, conclusions of law and judgment of civil contempt in U.S. C.A. for the Fifth Circuit	2052	1467
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No. 12—Radio Interview—WNOE, Friday, September 28, 1962, General Edwin Walker	2060	1472
No. 13—ARKANSAS GAZETTE, Thurs., Sept. 26, 1957, "Text of General's Speech to Students"	2065	1477

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No. 16—Executive Order—Providing Assistance for the Removal of Unlawful Obstructions of Justice in the State of Mississippi, dated September 30, 1962 with certificate of Archivist of the United States	2069	1481
No. 17—Newspaper story, "Walker Mentally Able to Stand Trial, Judge Says", Oxford, Miss., Nov. 22	2073	1485
No. 18—Newspaper story, "U.S. Orders Mental Tests for Walker", Springfield, Mo., Oct. 2	2074	1487
No. 19—Newspaper story, "Court Asked to Reverse Walker Order", Oxford, Miss., Oct. 16	2076	1489
No. 29—Newspaper story, "Walker Charges, Then Falls Back", by Tom Gregory, Oxford, Miss., Monday, October 1, 1962	2077	1490
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Order allowing certiorari	2159	1555

[fol. 2]

IN THE 17TH JUDICIAL DISTRICT COURT

IN AND FOR TARRANT COUNTY, TEXAS

No. 31741-C

EDWIN A. WALKER

v.

AMON G. CARTER, JR.; CARTER PUBLICATIONS, INC.; FORT WORTH STAR TELEGRAM; WBAP RADIO; WBAP TELEVISION; and ASSOCIATED PRESS

PLAINTIFF'S ORIGINAL PETITION—Filed September 27, 1963

To the Honorable Judge of Said Court:

Now comes Edwin A. Walker, Plaintiff in the above styled and numbered cause and files this his Original Petition complaining of Amon G. Carter, Jr., as publisher of the Forth Worth Star Telegram, d/b/a Fort Worth Star Telegram; Carter Publications, Inc., and any other legal entity known as and using the trademarks or assumed name Fort Worth Star Telegram; WBAP Radio; WBAP Television; Fort Worth Star Telegram; WBAP Radio, WBAP Television, and all individually and as members and agents of the association known as Associated Press; the Associated Press, a foreign association organized under the laws of the State of New York and doing business within the State of Texas and as grounds therefor would respectfully show the Honorable Court as follows:

1.

That Plaintiff, Edwin A. Walker, is a resident of the City of Dallas, Dallas County, Texas, and that the Defen-

[File endorsement omitted]

dants Amon G. Carter, Jr.; Carter Publications, Inc.; Fort Worth Star Telegram; WBAP Radio; WBAP Television; and Associated Press all have offices and principal places of business in the City of Fort Worth, Tarrant County, Texas, where service of citation may be had upon each of them.

[fol. 3] 2.

That on the 30th day of September, and the 1st, 2nd, and 3rd days of October, 1962, the following libelous and slanderous statements and statements with like import were uttered, published and communicated in writing and orally by Defendants on and from the premises of Defendants commonly known as Fort Worth Star Telegram, WBAP Radio and WBAP Television in the City of Fort Worth, Tarrant County, Texas, by and through their respective duly authorized agents, servants and employees, the names of whom are unknown to Plaintiff, but well known to Defendants:

October 2, 1962—"Walker, *who Sunday night led a charge of students against federal marshals on the Ole Miss Campus,* was arrested on four counts including insurrection against the United States."

October 3, 1962—"Rioter Asked Walker to Lead Crowd; He Did

"Editor's Note—Former Maj. Gen. Edwin A. Walker, a key figure in week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.

"By Van Savell.

"Oxford, Miss., Oct. 3 (AP)—Utilizing my youth to the fullest extent, I dressed as any college student

would and easily milled among the several thousand rioters on the University of Mississippi campus Sunday night.

"This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century-old Lyceum building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 p.m. Sunday near the University Ave. entrance about 300 yards from the Ole Miss administration building.

[fol. 4] "He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

"The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Ark.

"One unidentified man queried Walker as he approached the group.

" 'General, will you lead us to the steps?'

"I observed Walker as he loosened his tie and shirt and nodded 'Yes' without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

"The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

"Walker assumed command of the crowd, which I estimated at 1,000, but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

"Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

"This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

"We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

"BEFORE DOING so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

"We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statute near the grove entrance below the Lyceum.

"I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

"I heard Walker say that Gov. Barnett had betrayed the people of Mississippi.

[fol. 5] "'BUT DON'T let up now,' he said, 'You may lose this battle but you will have been heard.'

"He continued:

"'This is a dangerous situation. You must be prepared for possible death. If you are not, go home now.'

"There were cheers. It was apparent that Walker had complete command over the group.

"By this time, it was nearly 11 p.m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the 'New Frontier' government to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

"One Ole Miss student queried the former general, 'What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn marshals?'

"Walker suggested the use of sand to snuff out the tear gas.

"'This stuff works real well, but where can you get it?' he asked.

"At this time the rioters were using a university fire truck and five portable fire extinguishers in an attempt to make the tear gas bombs ineffective.

"I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

"Again I left the area for a telephone. As I walked toward a dormitory with George Bartsch of the Little Rock Associated Press bureau, we were attacked by marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200-yard walk back to the Lyceum building.

"Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the marshals' headquarters.

"Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors."

[fol. 6]

3.

That prior to the occasion of so publishing, uttering, and communicating, causing to be published, uttered and communicated, the statements in question, the Defendants and each of them by and through their duly authorized agents, servants and employees, were put on notice of the likelihood that the above described statements were untrue by receipt of the following communication:

"Lights on the campus were smashed, leaving it in almost total darkness. A number of non-rioting students left. Girls streamed out of dormitories, some half dressed, got in cars and fled the campus.

"During a lull in the rioting, General Edwin Walker mounted a confederate statue on the campus and begged the students to cease their violence. He said: 'This is not the proper route to Cuba.' His plea was greeted with one massive jeer.

"Walker, who commanded federal troops which were sent to Little Rock five years ago, was seen striding toward the demonstration wearing a big Texas hat. He had several aides surrounding him.

"As he concluded his speech, three adults were seen walking onto the campus with their arms loaded with whole bricks and triangular pieces of stone. One marshal was struck on the leg by a two-foot iron pipe welded by a student.

"A magazine reporter was slugged and kicked and knocked to the ground. He had an ugly gash over his left temple and was dragged to safety by two students.

"Jagged pieces of soft drink bottles and pieces of metal littered the ground.

"One youth set off a fire extinguisher and aimed it into the face of one of the drivers of trucks used to bring in the marshals.

"A state patrol officer was asked by a young man: 'Do you plan to move this crowd back out of here?' He replied, 'What crowd—you mean these bystanders?'

"Demonstrators carried confederate flags on staffs. Many appeared not to be students."

[fol. 7] 4.

That despite receipt of the notice described in the preceding paragraph, the statements in question were wilfully, and recklessly published, uttered and communicated to the general public in Tarrant County and surrounding areas by Defendants in heedless disregard of Plaintiff's rights and reputation. The above statements constitute and are reckless, false, wilful and malicious accusations that Edwin A. Walker wilfully committed infamous crimes all to the detri-

ment of Edwin A. Walker's reputation and in violation of his rights.

5.

That even though the Defendants and each of them have had ample and daily opportunity to retract such statements for almost a year, the Defendants have failed and refused to so do.

6.

That Edwin A. Walker is an upright and honorable citizen of the United States of America and the State of Texas. His service to his country throughout his life have been well beyond the call of duty and that prior to the publishing, uttering and communicating of the above malicious statements, he had an untarnished reputation as a patriotic, law abiding, peace loving and God fearing citizen with unbounding love and sense of duty to his country and fellow citizens. In this connection, it should be remembered that Edwin A. Walker gave his career to the honorable service of his country rising through the ranks of the United States Army from the status of a cadet at the United States Military Academy to the rank of Major General. That during this [fol. 8] time our country as well as our country's allies were so appreciative of his conduct, ability and reputation that he received the following awards and commendations, among others:

The Silver Star
The Bronze Star with Oak Leaf Cluster
Combat Infantryman's Badge (Second award)
Senior Paratroopers Badge (47 jumps)
Legion of Merit with Cluster
Commendation Ribbon
Korean Unit Citation
French Croix de Guerre (1943)
Norwegian Order of St. Olav (1946)
Order of the British Empire (1945)

Korean Ulchi Medals with Gold and Silver Star (1951-1953)

8.

That as a result of Edwin A. Walker's conduct, ability and reputation he was assigned the following sensitive, vital and responsible duties, among others, all of which duties were performed with distinction:

Commanding Officer, 1st Special Service Force (airborne, amphibious, mountain and ski troops) in Italy, France and Germany
Commanding Officer, Task Force "A", Oslo, Norway
Senior Advisor, First Republic of Korea Corps
Chief Army Section Military Assistance and Advisory Group, Taipai, Taiwan and Advisor to Commander in Chief, Chinese Nationalist Army
Commanding General, 25th Division Artillery
Chief, U. S. Army Military District, Little Rock, Arkansas, and Commander, IX U. S. Army Corps (Reserve)
[fol. 9] Commanding General, 24th Infantry Division
Assistant Deputy Chief of Staff Operations, Headquarters U. S. Army Europe
Chief of Staff for Training and Operations, Headquarters, U. S. Army Pacific

9.

Subsequently, the said Edwin A. Walker determined that the course and conduct of the political affairs of our nation were taking a turn detrimental to the best interests of his fellow Americans to the extent that he could not in good conscience remain silent. Having due recognition and respect of his position as a Major General in the United States Army, he then determined that the only proper, lawful and honorable way that he could speak out was after he resigned said commission, so that he could speak out as a private citizen. This he did.

10.

That as reflected above Edwin A. Walker has always conducted himself as a peaceful, law-abiding citizen who not only respects and obeys, but upholds, the laws of the United States. That Edwin A. Walker is not guilty of the criminal acts which Defendants maliciously and viciously accused him, but on the contrary, did attempt to restore peace and prevent violence on the occasion in question. That despite this, and as a direct result of the above described statements Edwin A. Walker no longer has the untarnished reputation to which he is entitled.

11.

That as a direct and proximate result of Defendants' wilfully and maliciously publishing, uttering and communicat- [fol. 10] ing the above described accusations, Edwin A. Walker has been exposed to the public hatred, contempt and ridicule, and his reputation as above described has been severely injured and damaged and the said Edwin A. Walker has been caused to suffer pain and anguish as a result therefrom, all to his actual damages in the amount of not less than One Million Dollars ($1,000,000.00) for which amount suit is brought.

12.

That the above described statements of Defendants were published, uttered and communicated both orally and in writing maliciously and wilfully with full realization of the damages Plaintiff would suffer for two apparent purposes:

1. To sell newspapers thereby increasing Defendants' profits at the expense of Edwin A. Walker.
2. To discredit and ruin Edwin A. Walker's reputation.

That therefore Plaintiff is entitled to recover punitive damages in an amount of not less than One Million Dollars ($1,000,000.00) for which amount this suit is brought.

Wherefore, Premises Considered, Edwin A. Walker prays that Defendants and each of them be cited in terms of law, that they appear in answer herein and upon final trial and hearing hereof, Defendants and each of them, jointly and severally, be ordered to pay Two Million Dollars ($2,000,000.00) and that Edwin A. Walker further prays for such other and further relief, both at law and in equity to which he may be justly entitled.

Matthews & Weaver, By Joe W. Matthews, 812 Fidelity Union Life Building, Dallas 1, Texas, Ri 8-8347, Attorneys for Plaintiff.

[fol. 11]

IN THE SEVENTEENTH JUDICIAL DISTRICT COURT

IN AND FOR TARRANT COUNTY, TEXAS

No. 31741-C

[Title omitted]

PLAINTIFF'S SECOND AMENDED PETITION—Filed June 2, 1964

To the Honorable Judge of Said Court:

Comes now Edwin A. Walker, plaintiff in the above styled and numbered cause and filed this his Second Amended Petition complaining of The Associated Press, a foreign association organized under the laws of the State of New York and doing business within the State of Texas and as grounds therefor would respectfully show the Honorable Court as follows:

I

That plaintiff, Edwin A. Walker, is a resident of the City of Dallas, Dallas County, Texas and that the defendant, Associated Press has an office and principal place of

[File endorsement omitted]

business in the City of Fort Worth, Tarrant County, Texas, where service of citation may be had upon it.

II

That on the 2nd and 3rd days of October, 1962, defendant falsely, maliciously, knowingly and in reckless disregard of the truth uttered, published and communicated in writing on and from the premises of the Fort Worth Star Telegram, for monetary consideration, the following libelous and defamatory statements in the form of wire service reports, falsely accusing plaintiff of crimes in violation of the penal code of the United States of America which publications are as follows:

1) October 2, 1962 "Walker, *who Sunday night led a charge of students against federal marshals on the Ole Miss Campus,* was arrested on four counts including insurrection against the United States."

2) October 3, 1962 "RIOTER ASKED WALKER TO LEAD CROWD; HE DID"

[fol. 12]

3) (Editors Note: Former Maj. Gen. *Edwin A. Walker, a key figure in the week-end battling* over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

By Van Savell: Oxford, Miss., October 3, 1962 (AP) "Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.

4) *"This allowed me to follow the crowd—a few students and many outsiders—as they charged federal mar-*

shals surrounding the century old *Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker,* who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

"He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

5) *"The crowd welcomed Walker,* although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

6) *"One unidentified man queried Walker as he approached the group.* 'General, will you lead us to the steps?'

7) *"I observed Walker as he loosened his tie and shirt and nodded 'Yes' without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.*

"The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

8) *"Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes* when a neatly dressed, portly man of about 45 approached the group. *He conferred with Walker for several minutes and then joined a group near the front.*

9) *"Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.*

10) *"This march toward tear gas and some 200 marshals was more effective than the previous attempts.* Al-
[fol. 13] though Walker was unarmed, the *crowd said this was the moral support they needed.*

11) *"We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.*

12) *"Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.*

13) *"We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.*

14) *"I went to a telephone. A few minutes later I returned and found Walker talking with several students.* Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

15)-

16) *"I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. 'But don't let up now,'* he said, *'You may lose this battle, but you will have been heard.'*

17) "He continued: 'This is a dangerous situation. *You must be prepared for possible death. If you are not, go home now.'*

18) "There were cheers. *It was apparent that Walker had complete command over the group.*

19) "By this time, it was nearly 11:00 p.m. and *I raced to the telephone again. Upon my return,* Walker was calmly explaining the 'New Frontier Government' to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

20) "One Ole Miss student queried the former General, 'What can we use to make the tear gas bombs ineffective? *Do you know of any way that we can attack and do some damage to those damn Marshals?*'

20) "Walker suggested the use of sand to snuff out the tear gas.

21) " 'This stuff works real well, but where can you get it?', he asked.

22) "At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

23) "I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

24) "Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. [fol. 14] We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

24) "Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

25) "Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors."

Plaintiff states that such part of defendant's news releases, as italicized above, are false, malicious, and in reckless disregard of the truth as to the respective numbered paragraphs as follows:

1) Plaintiff led no charge against Federal Marshals on the Ole Miss Campus; and this statement of fact in plaintiff's news release is a completely fabricated falsehood.

2) Although plaintiff was asked to lead a charge on several occasions, he refused to do so; and, at no time, participated in the rioting.

3) Plaintiff was not a "key figure in week-end battling", except for the false news reports issued by defendant.

4) Insofar as this paragraph infers that the author, Van H. Savell, was in "direct contact" with plaintiff, during a charge against Federal Marshals surrounding the Lyceum Building, it is false.

5) The statement that, "the crowd welcomed Walker" is false. Although separate individuals, at various times, greeted plaintiff, there was no concerted action by the crowd.

6) The statement that an unidentified man queried Walker, *as he approached the group,* "General, will you lead us in a charge?" is false. Although various individuals, from time to time requested plaintiff to lead a charge, which he always refused, there was no such request when plaintiff first entered the Campus; and plaintiff, at no time, "approached a group".

7) This paragraph is completely false.

8) The statement that, "Walker assumed command of the crowd" is completely false, and particularly so, when taken in context with the remainder of the report that, "Walker first appeared in the riot area at 8:45 * * * the crowd welcomed Walker * * * unidentified man queried Walker, 'General, will you lead us to the steps' * * * Walker assumed command of the crowd." The true facts are that, when plaintiff first arrived on the Campus, he had no contact with any crowd of

[fol. 15] people, and only walked around in the area near the Confederate Monument and to the east of the flagpole in the center of the Circle; and had neither the inclination nor the capability of "assuming command of the crowd." The statement of an estimated 1,000 people, inferred to be in the immediate presence of plaintiff, is a gross exaggeration. Although there may have been 1,000 people upon the Campus, the entire crowd was never assembled in one group at one time. The statement that plaintiff was "delayed for several minutes when a neatly dressed, portly man of about 45 approached the group" is also false. Although a man fitting this description, one Talmage Witt, was near plaintiff from the time plaintiff first entered the Campus until approximately two hours thereafter, he never "approached a group" of which plaintiff was a part, nor did he confer with plaintiff for several minutes, as falsely stated by the above report.

9) The statement that "Two men took plaintiff by the arms, and they headed for the Lyceum and the Federal Marshals" is completely false. The remainder of this paragraph is also false, in the inference that the author, Van H. Savell, was with plaintiff in an alleged movement toward Federal Marshals, as stated in the first sentence of the paragraph.

10) This paragraph is false. Plaintiff participated in no march "toward tear gas and marshals." Plaintiff was unarmed, as stated; but he gave the crowd no "moral support", nor did "the crowd" make such statement.

11) This paragraph is false in the inference that plaintiff was "met with a barrage of tear gas", while participating in a march against U. S. Marshals.

12) This paragraph is also false in the inference that plaintiff was participating with "the rioters who hurled their weapons".

13) This paragraph is also false, in the inference that plaintiff was participating in the group that was "charging marshals".

14) Plaintiff has no knowledge of the author, Van H. Savell, going to a telephone; but alleges that at the Associated Press newsman, Ben Thomas, to whom Van H. Savell made his telephone report has testified under oath, that he received no report from Savell until after the incident when plaintiff addressed students from a Confederate Monument. Plaintiff has no knowledge of the truth or falsity of the statement that the author, Van H. Savell, "returned and found Walker talking with several students. Shortly thereafter, Walker climbed half-way up the Confederate Monument and addressed the crowd."; but alleges that Van H. Savell has testified, under oath, that, when he returned from making his alleged phone call, he found plaintiff "standing on a ledge of the Confederate Statue." Plaintiff does not know which of the statements by Savell, if either, are true. Plaintiff admits that he did address a group of people from the Confederate Statue.

15) This statement is false. Plaintiff, at no time, stated that Gov. Barnett had betrayed the People of Mississippi.

[fol. 16] 16) The statement attributed to plaintiff, "but don't let up now" is false. The remainder of the alleged statement, although taken out of context, is essentially true.

17) This alleged statement, attributed to plaintiff, is false.

18) Although there were some cheers during the course of plaintiff's talk from the monument, there were also boos, when plaintiff remonstrated with the students to avoid violence. The statement that plaintiff had complete command over the group is completely false.

19) The statement, that it was nearly 11:00 p.m. when plaintiff finished talking from the monument is false. Plaintiff has no knowledge as to whether the author, Van H. Savell, "raced to the telephone again", other than the sworn testimony of the Associated Press newsman, Ben Thomas, that Savell made but one report, and that was after plaintiff's talk on the monument. Plaintiff states that the report that plaintiff "advised on several tactics" is false.

20) These statements although taken out of context, are essentially true.

21) This statement is false.

22) This statement is essentially true, although plaintiff has no knowledge as to the use of fire extinguishers.

23) Plaintiff has no knowledge as to this statement.

24) Plaintiff has no knowledge as to these statements.

25) This statement is false as to the timing, "within minutes". Sporadic firing had occurred long prior to this time.

III

Prior to defendants publication of the false charge that plaintiff was violating the law of the United States of America, in commanding and leading a charge against United States Marshals, plaintiff bore a good reputation as an upright, honorable and law abiding citizen of the United States of America and the State of Texas; and, for over 30 years, served his country as a member of the United States Army, both in War and at Peace, with devotion and loyalty. Prior to the above false and malicious statements, plaintiff had never been charged with a crime, and bore a reputation, in accordance with his oath as an officer of the United States Army of being committed to defending and supporting the Constitution of the United States.

[fol. 17]

IV

Plaintiff states that the above false statements of fact are not within the privilege extended to newspapers or periodicals by Article 5432, Vernon's Texas Civil Statutes; and, being statements of fact, do not come within the classification of reasonable and fair comment or criticism protected by the privilege statute. The only statement that could be classed as "comment", "This march toward tear gas and some 200 marshals was more effective than the previous attempts" is not reasonable or fair comment or criticism, since it is based upon a false statement of fact.

V

As a direct and proximate result of the defendants' falsely, wilfully, maliciously and in reckless disregard of the truth, publishing, uttering and communicating the above described written statements, knowing that such statements would be printed, and widely circulated throughout the State of Texas by the Fort Worth Star Telegram, plaintiff has been exposed to the public hatred, contempt and ridicule; and his reputation, as above described, has been severely defamed, injured and damaged, causing mental anguish, humiliation and embarrassment, all to his general damage in the amount of $1,000,000.00, for which plaintiff is entitled to judgment herein.

VI

Plaintiff states that the above described statements, charging plaintiff with the commission of a crime against the law of the United States of America, were published, uttered and communicated by defendant, Associated Press, for monetary consideration, and for the purpose of having the same re-published and circulated throughout the State of Texas by the Fort Worth Star Telegram, maliciously, wilfully and in reckless disregard of the truth. Aside from, and in addition to the malice implicit and inherent in the

defendant's falsely accusing plaintiff of a crime, defendant's entire handling of the news releases concerning plaintiff [fol. 18] between the dates of September 30, 1962 and January 22, 1963 reveal malice and ill will, as well as slanted and distorted reporting, including the following:

1) Between the dates of September 30, 1962 through October 7, 1962, defendant disseminated and published, through its wire service connections with the Fort Worth Star Telegram reports that plaintiff had led a charge against U. S. Marshals, had been arrested, charged with assaulting U. S. Marshals, conspiracy to intimidate and injure U. S. Marshals, insurrection and seditious conspiracy, and that plaintiff had been committed to the U. S. Medical Center, Springfield, Missouri, a place for confinement of criminal insane prisoners.

2) In reporting the incidents involving plaintiff's arrest and commitment, the defendant deliberately refrained from fairly and impartially reporting the true facts that he had been transported from the State of Mississippi, where he had been committed by a judicial officer, and into the State of Missouri, without a Court Order, and that, on the following day, a Court Order was entered by the U. S. District Court at Oxford, Mississippi ordering plaintiff to be transferred and committed to the U. S. Medical Center for Federal Prisoners at Springfield, Missouri, which order had been entered, without notice to plaintiff, without a hearing, at which plaintiff was represented, and without the benefit of counsel for plaintiff. Defendant further refrained from reporting that such Order by the U. S. District Court at Oxford, Mississippi had been entered upon an affidavit by Dr. Charles E. Smith, Medical Director and Chief Psychiatrist of the Federal Bureau of Prisons, who had never seen plaintiff, but had examined news reports.

3) Defendant failed to further report the true facts that, on October 16, 1962, plaintiff filed in the U. S. District Court at Oxford, Mississippi a Motion to Strike the entire proceeding by which plaintiff was committed to the Federal Mental Hospital, upon the ground that such commitment, in violation of the right to make bail, and without counsel, notice or hearing, violated the Constitutional Rights of plaintiff. Plaintiff alleges that the obvious disparity in emphasis placed by defendant's reporting of the alleged violation of the civil rights of the student, James Meredith, which was dramatically and extensively projected by defendant, and the alleged violation of plaintiff's Constitutional Rights which was completely ignored by defendant, reveals the existent malice of defendant toward plaintiff.

4) Plaintiff states that defendants malice toward plaintiff is further revealed by defendants reporting of two Court hearings before the U. S. District Court at Oxford, Mississippi, involving plaintiff, as follows:

a) On November 21, 1962, in covering a sanity hearing before the U. S. District Court at Oxford, Mississippi on November 21, 1962 defendant deliberately slanted its news report by emphasizing that a Government witness, Dr. Guttmacher testi- [fol. 19] fied that a study of plaintiff's records disclosed confusion and examples of defective judgment, with possibility that there had been a deterioration in the mental processes of plaintiff in the last year or two. Despite the fact that defendant had given extensive publicity upon its major wire trunk report to the Fort Worth Star Telegram of such testimony by Government witnesses questioning plaintiff's mental capacity, defendant failed to issue a wire service report to the same paper that a Court appointed Psychiatrist, Dr. Robert L. Stubblefield had reported that plaintiff was "currently functioning under the superior level of intelligence". Defen-

dant's report of Judge Clayton's comments was also slanted, in reporting that the Court appointed Psychiatrist, Dr. Robert L. Stubblefield, had expressed no opinion on the sanity of Walker, when the Court, in reality, had stated that the Stubblefield report was "essentially negative; that is to say, there is no opinion expressed that Edwin A. Walker is presently insane or incompetent." Such reporting further reveals malice and bias on the part of defendant.

b) On January 22, 1963, after the Mississippi Federal Grand Jury had failed to indict plaintiff, and the charges against plaintiff had been dismissed by the Government, defendant reported that such charges had been dismissed by U. S. District Judge Clayton, "without prejudice", and added an interpretive statement, not made by the Court as follows: "This means that the Federal Government may reconsider them before the Statute of Limitation expires in Five Years", which reporting further reveals malice and bias on the part of defendant toward plaintiff.

5) Because of the malicious and defamatory report by defendant, as above set forth in Paragraph II, falsely accusing plaintiff of a crime, to the discredit and defamation of plaintiff's reputation, and in reckless disregard of the truth, plaintiff is entitled to recover punitive damages against the defendant in the sum of $1,000,000.00.

6) The malice, bias and prejudice of defendant toward plaintiff is further demonstrated by the failure of defendant to further investigate and correct the false report by their reporter, Van H. Savell, as above set forth, after defendant had noticed from news report of United Press International, on October 1, 1964, that the report of Savell was untrue, which United Press news report included the following:

"During a lull in the rioting, General Edwin A. Walker mounted a confederate statue on the campus and begged the students to cease their violence. He said: 'This is not the proper way to Cuba.' His plea was greeted with one massive jeer.

"Walker, who commanded federal troops which were sent to Little Rock five years ago, was seen striding toward the demonstration wearing a big Texas hat. He had several aides surrounding him."

[fol. 20] Wherefore, Premises Considered, plaintiff prays judgment against the defendant, Associated Press, in the sum of $1,000,000.00 general damages and $1,000,000.00 punitive or exemplary damages, and the costs of this action.

Andress, Woodgate, Richards & Condos, Fidelity Union Life Building, Dallas, Texas, By: William Andress, Jr.;

Looney, Watts, Looney, Nichols & Johnson, 219 Couch Drive, Oklahoma City, Oklahoma, By: C. J. Watts;

Attorneys for Plaintiff.

[fol. 21]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, THE ASSOCIATED PRESS—Filed June 5, 1964

Now comes defendant, The Associated Press, and makes and files this its Second Amended Original Answer directed to Plaintiff's Second Amended Petition, and says:

1.

Defendant specially excepts to the allegations contained in Paragraph II for the following reasons:

(a) same are so vague, general, indefinite, immaterial and prejudicial that defendant is not apprised of the kind and character of proof it will be required to meet in that the way and manner of the alleged publication and communication in writing on and from the premises of the Fort Worth Star-Telegram is not set forth; in that the question of monetary consideration is immaterial, prejudicial and inflammatory, and such allegation does not apprise the defendant of the proof that will be offered in connection therewith; in that said allegations do not apprise the defendant of what crime in violation of the penal code of the United States of America the plaintiff is complaining of, nor do the allegations of said Paragraph II apprise the defendant of what part of the same plaintiff is contending constitutes an accusation of crime.

(b) said allegations are mere conclusions of the pleader without adequate facts to support.

(c) While there are some allegations of falsity, there are no sufficient allegations of what plaintiff is contending is libelous or libelous per se;

[fol. 22] (d) by such pleading the defendant is not apprised of which of said allegations plaintiff is contending is a headline or a caption and what is the body of an alleged wire service report;

(e) As directed to that portion of Paragraph II appearing on page 4 and immediately following the allegation "Plaintiff states that such part of defendant's news releases, as underlined above, are false, malicious, and in reckless disregard of the truth" is argumentative, redundant, prejudicial, inflammatory, evidentiary and do not allege any ultimate issue in the case; the allegations that the same were malicious and in reckless disregard of the truth is a con-

clusion on the part of the pleader without allegation of facts, is an attempt to advise the jury that malice can be inferred from the publication of the article itself, and all of the remaining portion of said Paragraph II after the above quotation should be stricken;

(f) the allegations in subparagraph 14 on page 5 and subparagraph 19 on page 6, a part of Paragraph II of plaintiff's second amended petition, should be stricken for the reason that the testimony of two of the witnesses is arrayed one against the other and then inaccurately and improperly so, which is highly prejudicial and inflammatory, is argumentative, and does not allege any ultimate fact issue, and, in the alternative and without waiving the foregoing exceptions, such allegations should be stricken.

2.

Defendant specially excepts to the allegations in Paragraph III for the reason that the same are so vague, general and indefinite that this defendant is not apprised of the kind and character of proof that it will be required to meet, and in particular does not allege what law or laws plaintiff was claiming that defendant charged him with or what portions of the articles alleged to be false constituted a charge of such crime.

[fol. 23]

3.

Defendant specially excepts to the allegations contained in Paragraph IV for the following reasons:

(a) the same are mere legal conclusions of the pleader;

(b) do not allege any ultimate fact issue;

(c) invades the province of the court and jury as to what is reasonable or fair comment;

(d) is prejudicial and inflammatory and argumentative also as to the facts.

4.

Defendant specially excepts to Paragraph V for the following reasons:

(a) in the allegations "wilfully, maliciously and in reckless disregard of the truth," the same are general and indefinite, and this defendant is not apprised of the kind and character of proof that it will be required to meet;

(b) the same are mere conclusions of the pleader without facts;

(c) does not differentiate between those parts of the written statements claimed to be false and those admitted to be true as to any claimed damages suffered therefrom, and the same are prejudicial and inflammatory.

5.

Defendant specially excepts to the allegations in the opening paragraph of Paragraph VI for the following reasons:

(a) as to the statements made in the opening paragraph of said Paragraph VI, the same are so vague, general and indefinite that this defendant is not apprised of the kind and character of proof it will be required to meet, especially in connection with what crimes plaintiff is alleging that he was charged with;

(b) that the allegation "for monetary consideration" is immaterial, prejudicial and inflammatory;

[fol. 24] (c) that as to the allegation "for the purpose having the same republished and circulated throughout the State of Texas by the Forth Worth Star Telegram," it is highly prejudicial, inflammatory and immaterial and seeks to impose on this defendant a greater burden or duty than that imposed by law;

(d) with reference to the allegation "maliciously, wilfully and in reckless disregard of the truth" for the reason

that such allegations are conclusions of the pleader, not based on any fact, and do not allege any ultimate fact issue;

(e) with reference to the allegation "in addition to the malice implicit and inherent in the defendant's falsely accusing plaintiff of a crime," same is highly prejudicial and inflammatory and is an attempt to inform or influence the jury that the publication of the article itself infers malice, all of which is contrary to law.

6.

Defendant further specially excepts to the allegations in Paragraph VI beginning with the allegation "defendant's entire handling of the news releases concerning plaintiff between the dates of September 30, 1962 and January 22, 1963 reveal malice and ill will, as well as slanted and distorted reporting, including the following:" and continuing to the end of said paragraph VI, for each and all of the following reasons:

(a) the same are so vague, general and indefinite that this defendant is not apprised of the kind and character of proof it will be required to meet;

(b) the same constitutes an effort on the part of the plaintiff to inject into this case matters that are barred by limitation;

(c) same are immaterial and irrelevant to any issue in the case and are highly inflammatory and prejudicial;

(d) the allegations with respect to defendant's failure to report various matters are completely immaterial because defendant is under no duty to plaintiff to report any of [fol. 25] such matters, and, further, because there is no allegation that defendant had knowledge of the matters it is charged with having failed to report;

(e) such allegations are too remote in time and in their complete lack of relation to or connection with the events

occurring on the campus of the University of Mississippi as set forth in the alleged article upon which plaintiff sues;

(f) the phrase "slanted and distorted reporting" is mere conclusion of the pleader, and is highly prejudicial and inflammatory and is irrelevant and immaterial.

(g) with particular reference to the allegations in subparagraph 5 of Paragraph VI, defendant says that the allegations "because of the malicious and defamatory report by defendant, as above set forth, falsely accusing plaintiff of a crime," the same are insufficient to apprise defendant of what report plaintiff is referring to, plaintiff having alleged two reports in Paragraph II and several other reports in Paragraph VI; and insofar as said allegations may refer to reports described in said Paragraph VI, same appear on their face to be barred by limitations, and constitute an attempt on the part of the plaintiff to inject into this suit alleged publications and reports published more than one year prior to the filing of plaintiff's second amended petition;

(h) with particular reference to the allegations in subparagraph 6 of Paragraph VI, defendant says that same are completely immaterial and should be stricken in that any alleged notice that defendant purportedly received from United Press International would be hearsay, and defendant was under no duty to believe the same or take any action based thereon, and such allegations are too vague and indefinite to apprise defendant of when, where and how it is alleged to have received such notice, and such allegations show on their face that the alleged notice is not set forth in full in said pleading.

[fol. 26] Wherefore, defendant, The Associated Press, prays that each and all of said special exceptions be sustained.

I.

This defendant, The Associated Press, denies each and every, all and singular, the allegations in plaintiff's said

amended petition contained and demands strict proof thereof.

II.

By way of further answer herein, and without waiving any of the foregoing pleas, defendant, The Associated Press, would respectfully show to the court and the jury that the plaintiff is not entitled to recover in this cause for the reason that the statements made in the publications complained of as to statements of fact were and are true in fact and in substance.

III.

By way of further answer herein, and without waiving any of the foregoing pleas, defendant, The Associated Press, would respectfully show to the Court and the jury that the plaintiff is not entitled to recover damages in this cause of any nature for each and all of the following reasons considering all the material facts and circumstances surrounding the plaintiff's alleged claim of damage:

(1)

Plaintiff by his own statements in pleadings filed in this cause has alleged that he resigned his Army Commission in order to speak out and install himself as a leader and public figure. Plaintiff, Edwin A. Walker, voluntarily injected himself into a situation of turmoil, resentment and excitement in Mississippi and of great national publicity and interest everywhere at the time he uttered certain public statements, more fully hereinafter alleged, on television, radio and to newsmen and by his subsequent trip to Jackson, Mississippi, and Oxford, Mississippi, at the very height [fol. 27] of such tension and turmoil between September 10 and October 1, 1962.

(2)

The publications complained of in this action insofar as the same consist of comments were and are fair comments

made in good faith upon facts which related to matters that were and are affairs of public interest, importance and concern and related to acts and utterances of plaintiff, a public figure, in public places and at public meetings.

(a) The background and events into which Walker injected himself are set forth in the following paragraphs.

(b) On or about May 31, 1961, one James H. Meredith, a colored person, filed a complaint in the United States District Court, Southern District of Mississippi, and on behalf of himself and all other colored students in the State of Mississippi similarly situated, against Charles D. Fair, President of the Board of Trustees of the State Institutions of Higher Learning in the State of Mississippi, and others connected with the University of Mississippi, seeking admission to said University. Thereafter, and on or about February 3, 1962, the United States District Court for the Southern District of Mississippi rendered a decision reported in 202 F. Supp. 224, denying Meredith rights of admission to the University of Mississippi.

Thereupon Meredith appealed to the United States Court of Appeals for the 5th Circuit, at New Orleans, and on or about June 25, 1962, said Court rendered a decision (*305 F.2d 343*) in which said Court reversed the decision of the United States District Court, thereupon remanding said action, with directions to the United States District Court for the Southern District of Mississippi to grant forthwith the relief prayed for by Meredith and to issue a permanent injunction against each and all of the defendants in said suit and all persons acting in concert with them, as well as all persons having knowledge of said decree, and directing and compelling admission of the said Meredith to the [fol. 28] University of Mississippi as a student.

(c) Thereafter, and on or about July 26, 1962, the United States Court of Appeals, 5th Circuit, at New Orleans, vacated certain stay orders signed by Federal Judge Ben F. Cameron, and further directed the U. S. District Court for

the Southern District of Mississippi to enter the judgment and the injunction as theretofore ordered (306 F.2d 374). On July 28, 1962, the said United States Court of Appeals for the 5th Circuit, at New Orleans, also entered a certain interim order to the same effect.

(d) Subsequently Judge Ben F. Cameron issued three other successive stays of execution of the mandate of the United States Court of Appeals, 5th Circuit, which ordered the admission of Meredith to the University of Mississippi, said stays to operate pending an appeal to the Supreme Court of the United States. On or about September 10, 1962, Mr. Justice Black of the U. S. Supreme Court entered an order (1) to vacate the orders of Judge Ben F. Cameron, and (2) that the judgment and mandate of the Court of Appeals for the 5th Circuit at New Orleans should be obeyed and immediately carried out, and (3) that pending any appeal, the parties were enjoined from taking any steps to prevent enforcement of the Court of Appeals, 5th Circuit, judgment and mandate.

(e) On or about September 13, 1962, the United States Court for the Southern District of Mississippi as directed by the U. S. Court of Appeals, 5th Circuit, at New Orleans, issued an injunction and ordered that the said Meredith be admitted to the University of Mississippi forthwith.

(f) On or about September 20, 1962, the said Meredith appeared on the campus of the University of Mississippi accompanied by U. S. Marshals for the purpose of registering as a student pursuant to the orders of the United States Courts above set forth, but the Governor of Mis-
[fol. 29] sissippi, the Honorable Ross Barnett, then and there rejected the application of the said Meredith to the University of Mississippi.

(g) Again, and on or about September 25, 1962, the said Meredith appeared at the offices of the Board of Trustees of State Institutions of Higher Learning, at Jackson, Mississippi, for the purpose of registering as a student pur-

suant to the prior orders of the United States Courts. When Meredith sought to enter the offices, as aforesaid, the Honorable Ross Barnett, Governor of the State of Mississippi, and certain officers acting under his direction, again barred the said Meredith and denied him admission to the University of Mississippi. On or about September 26, 1962, the said Meredith sought to enter the campus of the University of Mississippi where he was barred from so entering by the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, and certain state police acting under his orders, thereby denying the aforesaid Meredith admission to the University of Mississippi. On September 25, 1962, the United States Court of Appeals for the 5th Circuit, at New Orleans, entered another restraining order against the Honorable Ross Barnett, Governor of the State of Mississippi, and other named officials in said State, and all persons in active concert or in participation therewith, from interfering with or obstructing in any manner the admission of the said Meredith to the University of Mississippi.

(h) Thereafter, on the same day, the United States Court of Appeals for the 5th Circuit issued its orders requiring the aforesaid Ross Barnett, Governor of the State of Mississippi, and the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, to appear before said Court and show cause why they should not be held in civil contempt for willfully disobeying the orders of the United States Courts and barring the admission of Meredith to the University of Mississippi, and on or about [fol. 30] September 28 the said Court entered its judgment and order adjudging the said Ross Barnett and Paul B. Johnson, Jr. guilty of civil contempt and levied fines to continue on a daily basis unless on or before October 2, the said Governor and Lt. Governor should show to the Court that they had fully complied with all restraining orders of all the United States Courts, and that they had notified enforcement officers in the State of Mississippi to cease and

desist from interfering with the orders of the aforesaid Courts and to cooperate with the officers and agents of the United States in the execution of all orders and injunctions to the end that Meredith would be permitted to register as a student at the University of Mississippi.

(i) That the attempts of the said James H. Meredith to enter the University of Mississippi and the actions of the authorities in Mississippi preventing his entry, and the actions of the various United States Courts in making and entering said injunctions and mandates, as above set forth in the preceding paragraphs, had all been given wide publicity throughout the United States by newspapers, radio and television, and were matters of general knowledge and affairs of great public interest and concern prior to September 30, 1962. The plaintiff in this cause knew, or reasonably should have know of the court orders, injunctions and mandates herein pleaded based on knowledge acquired from an ordinary reading of the newspapers and reports from other news media and he also knew of the defiance of Governor Ross Barnett, Governor of the State of Mississippi, and of the Lt. Governor towards the fulfillment of the court orders of the United States Courts above set forth.

[fol. 31] (3)

The plaintiff, the former Major General of the Army of the United States, following his resignation therefrom for the stated purpose of speaking out in protest as a private citizen, had made frequent public statements and had made an unsuccessful venture into politics as a candidate for Governor of the State of Texas.

Plaintiff was a well known public figure because of his long military career, his commands and duties with the Army of the United States, his role as Commanding General of the troops in the Little Rock, Arkansas, integration crisis in 1957, his resignation from the Army of the United States with the rank of Major General with the avowed

statement and purpose of being able to protest and take a stand and position in matters of public interest and affairs, and his candidacy for Governor of the State of Texas in 1962. With such background as a public figure, the plaintiff, during the critical times involved herein, between September 10, 1962 and October 1, 1962, injected himself into the Mississippi crisis with the request and/or notice for frequent press releases or conferences, from Dallas, Texas, Jackson and Oxford, Mississippi, and thereby invited comment as to his activities. His public utterances and statements were all in protest and opposition to duly constituted governmental and judicial authority and relating to the admission of Meredith to the University of Mississippi, and were in violation of the injunctive decrees issued by the United States Courts, as herein set forth, and in favor of the positions then being taken by Governor Ross Barnett and other officials in Mississippi who were seeking to obstruct Meredith's entry as a student at the University of Mississippi.

Notwithstanding such knowledge, the plaintiff by radio and other news media, beginning on or about September 27, 1962, and thereafter, called for Americans 10,000 strong from every State in the Union to go to Mississippi and [fol. 32] rally behind Governor Barnett in his stand against admitting Meredith, saying, among other things, "It is now or never. Bring your flag, your tent and your skillet."

The plaintiff, Edwin A. Walker, further injected himself into the crisis in Mississippi by proceeding to Jackson, Mississippi, on or about September 29, 1962, when he made further press releases and statements, and by then proceeding to Oxford, Miss., where he held a further press conference on September 30, 1962, at all of which he reiterated his previous position.

At about 4:30 P. M. on the afternoon of September 30, 1962, the U. S. Marshals under orders to enforce the judgments, injunctions and mandates of the United States Courts for the enrollment of Meredith as a student at the University of Mississippi, proceeded on to the campus at

Oxford, setting up a ring substantially around or in front of the Lyceum Building on the campus. At about the same time, Meredith was escorted to another part of the campus. Immediately after the arrival of the Marshals, students and others began to congregate in the Circle and in the streets adjacent to the Lyceum Building, facing the Marshals, at first taunting them with jeers and remarks, subsequently throwing lighted cigarettes and missiles at the Marshals and at the vehicles in which they arrived. The temper of the crowd became worse and more unruly, and at about 8:00 o'clock P. M. tear gas was fired. Thereafter, the rioting increased by the hour as the night progressed, resulting in injuries to many persons and much property damage to personal property, automobiles and to the campus itself.

While the plaintiff was in Oxford, Mississippi, and on or about September 30, 1962, at about 8:00 P. M., a proclamation was made by the then President of the United States to the effect that the Governor of the State of [fol. 33] Mississippi and certain other officials and other persons had been and were willfully opposing and obstructing the enforcement of the injunctions, orders and judgments of the United States Courts and the President thereupon commanded all persons engaged in such obstruction of court orders to cease and desist and to disperse and retire peaceably forthwith. In addition, the President of the United States made a TV and radio appearance on the same date at about 8:00 o'clock P. M. in which he sought in substance the same compliance with court orders. Notwithstanding said proclamation of the President of the United States and the appeal of the President, the said plaintiff immediately thereafter proceeded to the campus of the University of Mississippi, at Oxford, arriving there at approximately 8:45 P. M. on the night of September 30 and stayed on said campus for a period of several hours thereafter. Following the widespread dissemination of plaintiff Walker's statements in the press, TV and radio, not only in Mississippi but elsewhere, the plaintiff's very presence on the campus tended to increase the emotional

excitement, the explosive condition, the courage, fervor and rage of the mob, thereby increasing the dangers and damage from what at first had been a demonstration, to a riot, mob violence, and to more organized and determined attacks upon the U. S. Marshals. At the time of the arrival of the plaintiff on the campus, there had already been violence and injury to persons and property, all of which was known to the plaintiff or should have been known in the exercise of ordinary observation on the campus. On the occasion in question, the plaintiff was welcomed by the crowd as its leader and he then and there made a speech which further excited and enraged the mob and, at least on one occasion, the plaintiff did proceed as a part of a generalized movement towards the Marshals at the Lyceum Building accompanied or followed by a crowd of students [fol. 34] and others shouting and yelling defiance, some of whom when close enough to the Marshals hurled missiles toward them. On many occasions during the night in question, plaintiff would move back and forth through the Circle (an area in the vicinity of and near the front of the Lyceum Building where the Marshals were stationed). He also offered advice on how to make the tear gas bombs ineffective, and otherwise complimented, encouraged and urged on the crowd of rioters to further protest and to keep up what they were doing, all of which resulted in continual opposition to duly constituted governmental and judicial authority including violation of the injunctive decrees heretofore referred to.

Therefore, each and all of the statements complained of by plaintiff herein are fair comment and are privileged.

IV.

By way of further answer, defendant, The Associated Press, respectfully shows to the court and the jury that the dispatch to the effect that plaintiff was arrested on four counts insofar as it relates to his arrest was privileged, and the defendant therefore pleads as a defense that it was

true and that said publication was a fair and honest report of judicial proceedings and as the act or acts of the arresting officers.

V.

By way of further answer herein and adopting all the allegations heretofore made herein, this defendant, The Associated Press, denies that any malice was involved or intended on the part of this defendant in the publication of any one or all of the articles or dispatches complained of, but was occasioned only by an effort in good faith—actuated solely by a sense of duty growing out of the occasion—to report to its members and to the public what this defendant believed to be an accurate report of the plaintiff's activities in the Mississippi crisis, and to make fair [fol. 35] comment thereon, all of which is privileged.

VI.

By way of further answer herein and adopting all of the allegations heretofore made herein, this defendant denies that it was or is guilty of any conduct which would authorize the allowance of any damages, punitive or otherwise, but would further say that the allowance of any damages herein would amount to a restraint and deterrent to the publication of news and the freedom of the press as required by the First and Fourteenth Amendments to the Constitution of the United States. The publications complained of were published and circulated by the defendant among the general public; the information contained therein is true; it concerns the plaintiff, a public figure, and was related to public affairs and matters of great public concern, and the publication was made so that the public should be informed, and the same was made in good faith and without malice, so that the same is privileged. Further, the allowance of any damages under and by virtue of any rule of law as applied by the courts of the State of Texas would be in violation of the foregoing Constitutional safeguards and would be constitutionally deficient for failure to permit freedom of speech and press which are guar-

anteed by the Constitution of the United States. The allowance of any damages herein also would be violative of the Constitution of the State of Texas which prohibits the abridgment of the freedom of the press in Article I, Paragraph 8 thereof.

VII.

By way of further answer and without waiving any of the foregoing defenses this defendant would respectfully show to the Court that the publications complained of were made in good faith under the belief by the defendant they were true in substance and in fact, and in connection therewith this defendant acted in good faith and was actuated [fol. 36] solely to report to the public with respect to plaintiff's activities in the Mississippi crisis, and for these reasons the plaintiff should not recover any sums by way of damages based thereon.

VIII.

By way of further answer and without waiving any of the foregoing pleas and defenses, this defendant would respectfully show to the Court that the cause of action, if any, as to all matters complained of and Paragraph VI of the Plaintiff's Second Amended Petition arose more than one year prior to the filing thereof, and that each and all of said causes of action or complaints, if any, are barred by the one year statute of limitations, being Article 5524 of the Statutes of the State of Texas.

Wherefore, Premises Considered, this defendant, The Associated Press, prays that plaintiff take nothing by reason of this suit, and that it go hence without day and recover its costs.

Cantey, Hanger, Gooch, Cravens & Scarborough,
By J. A. Gooch, 1800 First National Bank Bldg.,
Fort Worth 2, Texas, Attorney for defendant, The Associated Press.

[File endorsement omitted]

[fol. 37]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

PLAINTIFF'S TRIAL AMENDMENT TO PLAINTIFF'S SECOND AMENDED PETITION—Filed June 5, 1964

To the Honorable Judge of Said Court:

Now comes Edwin A. Walker, plaintiff in the above styled and numbered cause, and with leave of Court, files this, his trial amendment to his Second Amended Petition herein.

At page 6, Paragraph II, after subparagraph 25, add the following:

Plaintiff states that, of the above language, when taken in proper context with the entire news releases by the defendant, the following specific words are false, defamatory and libelous per se:

From release of October 2, 1962:

"Walker, who Sunday led a charge of students against federal marshals on the Ole Miss campus."

From news release of October 2, 1962; subparagraph 4:

"• • • the crowd • • • charged federal marshals." • • •

From page 5:

"The crowd welcomed Walker." • • •

From page 6:

"One unidentified man queried Walker as he approached the group 'General, will you lead us to the steps'".

[File endorsement omitted]

From subparagraph 7:

"I observed Walker as he loosened his tie and shirt and nodded 'Yes' without speaking."

From subparagraph 8:

"Walker assumed command of the crowd, which I estimated at one thousand." • • •

[fol. 38] From subparagraph 9:

"Two men took Walker by the arms and they headed for the Lyceum and the federal marshals." • • •

From subparagraph 10:

"This march toward tear gas and the some two hundred marshals was more effective than the previous attempts." • • •

From subparagraph 11:

"We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet farther when we had to turn back."

Plaintiff alleges that the above statements of fact in defendant's news releases falsely accused plaintiff of crimes under the criminal statutes of the United States of America, and thus constitute libel per se.

C. J. Watts, Attorney for Plaintiff.

[fol. 39]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31,741-C

[Title omitted]

DEFENDANT'S MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE FOR INSTRUCTED VERDICT AND RULING THEREON—June 15, 1964

To the Honorable Judge of Said Court:

Comes now the defendant, Associated Press, at the close of the plaintiff's evidence and after the plaintiff has announced that he has rested, and moves the Court to instruct a verdict in favor of the defendant and against the plaintiff, and for grounds therefor would show the Court as follows, to-wit:

I.

The alleged libel in this case as set forth under the rulings of the Court with specific certainty and plaintiff's trial amendment to plaintiff's second amended petition is based on excerpts from an article written by Van Savell of the Associated Press on or about October 3, 1962, it being plaintiff's proof that such article was published in the Star-Telegram in Fort Worth, Tarrant County, Texas, on or about such date.

The alleged libelous excerpts from such article are as follows:

> "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus".

With respect to this allegation the defendant would show to the Court that the proof thus far adduced by the plaintiff shows that such a statement is a statement of an occurrence [fol. 40] that occurred on the Ole Miss campus on the night of September 30, 1962. That by plaintiff's own testimony and from the majority of his witnesses there has been abso-

lute testimony to the effect that the plaintiff Walker went towards the Federal Marshals at a stage or stages during the night of September 30, 1962, followed by a considerable number of people varying anywhere from five to one thousand; that therefore the use of the term "charge" as carried in such article and upon which relief is sought is no more than a comment and according to the evidence is a fair comment under the statutes of the state of Texas as to the actions of the plaintiff on that occasion. It is shown by the entire and substantial proof on the part of the plaintiff that an occurrence such as described in said article did occur, and since same is descriptive of the events which occurred on the campus, then same is a comment and not a statement of fact insofar as the word "charge" is concerned, and therefore privileged under the statutes of the state of Texas as a fair comment on the activities of a public figure.

That the evidence shows without any doubt and from all the witnesses who have testified with respect thereto that the plaintiff Walker was a public figure on the occasion in question and enjoyed that title and description on the date and day in question.

II.

That the evidence is without dispute that the subject matter of the riot on the campus of Ole Miss university on September 30, 1962, was in connection with the integration problem which is shown by the evidence to have been a [fol. 41] problem of National import and National interest or perhaps International interest, and therefore the publication as set forth in the Star-Telegram coming from the Associated Press is privileged and is a fair comment on the happenings or actions of a public figure and related to a national problem or a matter of National public interest.

III.

With respect to the allegation number two in plaintiff's trial amendment plaintiff says over United Press wires of October 2, 1962, said paragraph four " • • • • crowd • • • •

charged Federal Marshals." With respect thereto the defendant would show to the Court that the evidence so far adduced by the plaintiff, and from plaintiff's witnesses only, show without doubt that a crowd of some character as to numbers did in fact charge the Marshals or charge in the direction of the Marshals on the night in question, reference being specifically made to plaintiff's witnesses: Talmage Witt, also to plaintiff's witness Richard Sweat, General Walker, David Channell, Cecil Holland, Robert Lee Watkins, Alvis McRhea, Harold Schneider, Henry Edwards, Donald Jackson, and Danny Lee Hunter, all of whom testified a crowd in which Walker was a participant, varying in size, made some character of movement toward the Marshals on the night in question after the entry on to the campus by General Walker and after he had conferred with a number of the students on the campus. As a matter of fact at least 15 of the witnesses have testified thus far that they were in the crowd that went with Walker toward the flag pole even though some of them have testified that only four or five or six were in the group.

[fol. 42] IV.

With respect to the next allegation on the part of the plaintiff as to a libelous article, he has alleged as follows from page 5: "The group welcomed Walker".

This is a comment, a fair comment, based on the testimony of all the witnesses in this case and constitutes an interpolation of the scrivener as to his interpretation of the actions of the crowd in connection with the welcoming of General Walker. It is further shown that on the occasion in question a group of considerable size, varying according to the testimony from 100 to 1,000 or more, crowded around General Walker at the time he entered the campus shouting such things as "Here's General Walker; here comes General Walker; here is our leader, Lead us, lead us; here is our leader", being excerpts from the testimony thus far adduced from plaintiff's witnesses as well as from the plaintiff himself.

V.

Plaintiff alleges as a part of the alleged libel; "One identified man queried Walker as he approached the crowd 'General, will you lead us up the steps'"?

The testimony is undisputed that this crowd—as a matter of fact the plaintiff himself testified that that was said to him at some time shortly after he arrived on the campus, and therefore has been conceded to be true on the part of the plaintiff.

VI.

The plaintiff has pled an excerpt from sub-paragraph 7 as follows: "I observed Walker as he loosened his tie and shirt and nodded 'yes' without speaking".

[fol. 43] With respect thereto defendant would show that the evidence shows that such an incident did occur, perhaps not in that context in which it was used, but could be nothing more than an expression or an opinion or a comment or an interpretation wherein the scrivener said that he nodded "yes" without speaking, such being an interpretation of an event through the eyes of the person who was writing the article.

VII.

The next article claimed to be libelous per se on the part of the plaintiff is from sub-paragraph 8, which reads as follows: "Walker assumed command of the crowd which I estimated at 1,000".

The defendant would show to the Court that this is no more than an estimate or an opinion on the part of the scrivener and has been confirmed by at least four of plaintiff's witnesses with respect to the numbers, and so far as the statement "Walker assumed command of the crowd", same is but a comment and an opinion on the part of the scrivener, privileged under the laws of the state of Texas as being a comment with respect to a public figure concerning a public matter.

VIII.

Plaintiff has alleged as a part of the libel: "Two men took Walker by the Arms and they headed for the Lyceum building and the Federal Marshals".

With respect thereto defendant would show the Court that under no circumstances could any matter such as that be the subject of a libel. It does not charge any act that would be unlawful nor any other matter which could have any effect other than be distasteful to one who does not [fol. 44] wish to be taken by the arms, and for that matter it is shown by at least one of plaintiff's witnesses that Walker at one time was taken by the arms when he was walking in the direction of the Lyceum building.

IX.

The next statement alleged by plaintiff to be libelous is as follows: "This march towards tear gas and the some 200 Marshals was more effective than the previous attempts".

With respect thereto defendant would show to the Court same could not be classed as anything other than a comment and is therefore privileged under the laws and statutes of the state of Texas in that same had to do with a public figure concerning a matter of public interest to the general public.

X.

Plaintiff alleges as a part of the alleged libel: "We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet farther when we had to turn back".

For the reason that such statement does not constitute any libel with respect to the plaintiff in this case, as being a comment from one who is alleged to have been present, and is a comment and a statement from the writer as to what his view of the situation was at the time in question.

XI.

For the further reason that since it has been shown by the testimony in this case that the article written by Van Savell and upon which this alleged libel is based is privileged under the laws of the state of Texas for the reasons set forth herein, and since no malice has either been shown or attempted to be shown and in fact no evidence whatsoever of malice having been introduced, the Court should [fol. 45] instruct a verdict in favor of the defendant and against the plaintiff.

XIII.

In the alternative the defendant would further show to the Court that the matters complained of here, after the amendment of the Texas statutes, are absolutely privileged and certainly in the absence of actual malice constitute no grounds for a cause of action. Also malice under Texas law cannot be inferred from the articles themselves since they relate to fair comment according to all of the evidence.

Respectfully submitted,

Cantey, Hanger, Gooch, Cravens & Scarborough, By Sloan B. Blair.

Overruled, 6-15-64. Chas. J. Murray, Judge

[fol. 46]

IN THE 17TH JUDICIAL DISTRICT COURT OF
TARRANT COUNTY, TEXAS
No. 31741-C

[Title omitted]

PLAINTIFF'S REQUESTED DEFINITION AND DENIAL THEREOF—
June 18, 1964

To said Honorable Court:

Plaintiff requests the Court, prior to submission of its charge, to submit the following definition:

By the term "led a charge" as used herein, is meant to conduct, direct and govern, as a chief or commander, implying authority, an act of rushing upon or towards an enemy or opponent with the determination to close with him, in an impetuous onset or attack.

Respectfully submitted,

Wm. Andress, Jr., Of Counsel for Plaintiff.

Denied: June 18, 1964. Chas. J. Murray

[File endorsement omitted]

[fol. 47]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31,741-C

[Title omitted]

DEFENDANT'S MOTION AT CLOSE OF ALL EVIDENCE FOR INSTRUCTED VERDICT AND RULING THEREON—June 18, 1964

To the Honorable Judge of Said Court:

Comes now the defendant, Associated Press, after both the plaintiff and defendant had rested, and moves the Court to instruct a verdict in favor of the defendant and against the plaintiff, and for grounds therefor would show the Court as follows, to-wit:

I.

The alleged libel in this case as set forth under the rulings of the Court with specific certainty and plaintiff's trial amendment to plaintiff's second amended petition is based on excerpts from an article written by Van Savell of the Associated Press on or about October 3, 1962, it being plaintiff's proof that such article was published in the Star-Telegram in Fort Worth, Tarrant County, Texas, on or about such date.

The alleged libelous excerpts from such article are as follows:

> "Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss campus".

With respect to this allegation the defendant would show to the Court that the proof thus far adduced by the plaintiff shows that such a statement is a statement of an occurrence [fol. 48] that occurred on the Ole Miss campus on the night of September 30, 1962. That by plaintiff's own testimony and from the majority of his witnesses there has been abso-

lute testimony to the effect that the plaintiff Walker went towards the Federal Marshals at a stage or stages during the night of September 30, 1962, followed by a considerable number of people varying anywhere from five to one thousand; that therefore the use of the term "charge" as carried in such article and upon which relief is sought is no more than a comment and according to the evidence is a fair comment under the statutes of the state of Texas as to the actions of the plaintiff on that occasion. It is shown by the entire and substantial proof on the part of the plaintiff that an occurrence such as described in said article did occur, and since same is descriptive of the events which occurred on the campus, then same is a comment and not a statement of fact insofar as the word "charge" is concerned, and therefore privileged under the statutes of the state of Texas as a fair comment on the activities of a public figure.

That the evidence shows without any doubt and from all the witnesses who have testified with respect thereto that the plaintiff Walker was a public figure on the occasion in question and enjoyed that title and description on the date and day in question.

II.

That the evidence is without dispute that the subject matter of the riot on the campus of Ole Miss university on September 30, 1962, was in connection with the integration problem which is shown by the evidence to have been a [fol. 49] problem of National import and National interest or perhaps International interest, and therefore the publication as set forth in the Star-Telegram coming from the Associated Press is privileged and is a fair comment on the happenings or actions of a public figure and related to a national problem or a matter of National public interest.

III.

With respect to the allegation number two in plaintiff's trial amendment plaintiff says over United Press wires of

October 2, 1962, said paragraph four "• • • • • crowd • • • • charged Federal Marshals." With respect thereto the defendant would show to the Court that the evidence so far adduced by the plaintiff, and from plaintiff's witnesses only, show without doubt that a crowd of some character as to numbers did in fact charge the Marshals or charge in the direction of the Marshals on the night in question, reference being specifically made to plaintiff's witnesses: Talmage Witt, also to plaintiff's witness Richard Sweat, General Walker, David Channell, Cecil Holland, Robert Lee Watkins, Alvis McRhea, Harold Schneider, Henry Edwards, Donald Jackson, and Danny Lee Hunter, all of whom testified a crowd in which Walker was a participant, varying in size, made some character of movement toward the Marshals on the night in question after the entry on to the campus by General Walker and after he had conferred with a number of the students on the campus. As a matter of fact at least 15 of the witnesses have testified thus far that they were in the crowd that went with Walker toward the flag pole even though some of them have testified that only four or five or six were in the group.

[fol. 50] IV.

With respect to the next allegation on the part of the plaintiff as to a libelous article, he has alleged as follows from page 5: "The group welcomed Walker".

This is a comment, a fair comment, based on the testimony of all the witnesses in this case and constitutes an interpolation of the scrivener as to his interpretation of the actions of the crowd in connection with the welcoming of General Walker. It is further shown that on the occasion in question a group of considerable size, varying according to the testimony from 100 to 1,000 or more, crowded around General Walker at the time he entered the campus shouting such things as "Here's General Walker; here comes General Walker; here is our leader. Lead us, lead us; here is our leader", being excerpts from the testimony thus far adduced

from plaintiff's witnesses as well as from the plaintiff himself.

V.

Plaintiff alleges as a part of the alleged libel: "One identified man queried Walker as he approached the crowd 'General, will you lead us up the steps'."

The testimony is undisputed that this crowd—as a matter of fact the plaintiff himself testified that that was said to him at some time shortly after he arrived on the campus, and therefore has been conceded to be true on the part of the plaintiff.

VI.

The plaintiff has pled an excerpt from sub-paragraph 7 as follows: "I observed Walker as he loosened his tie and shirt and nodded 'yes' without speaking".

[fol. 51] With respect thereto defendant would show that the evidence shows that such an incident did occur, perhaps not in that context in which it was used, but could be nothing more than an expression or an opinion or a comment or an interpretation wherein the scrivener said that he nodded 'yes' without speaking, such being an interpretation of an event through the eyes of the person who was writing the article.

VII.

The next article claimed to be libelous per se on the part of the plaintiff is from sub-paragraph 8, which reads as follows: "Walker assumed command of the crowd which I estimated at 1,000".

The defendant would show to the Court that this is no more than an estimate or an opinion on the part of the scrivener and has been confirmed by at least four of plaintiff's witnesses with respect to the numbers, and so far as the statement "Walker assumed command of the crowd", same is but a comment and an opinion on the part of the scrivener, privileged under the laws of the state of Texas as

being a comment with respect to a public figure concerning a public matter.

VIII.

Plaintiff has alleged as a part of the libel: "Two men took Walker by the Arms and they headed for the Lyceum building and the Federal Marshals".

With respect thereto defendant would show the Court that under no circumstances could any matter such as that be the subject of a libel. It does not charge any act that would be unlawful nor any other matter which could have any effect other than be distasteful to one who does not wish to be [fol. 52] taken by the arms, and for that matter it is shown by at least one of plaintiff's witnesses that Walker at one time was taken by the arms when he was walking in the direction of the Lyceum building.

IX.

The next statement alleged by plaintiff to be libelous is as follows: "This march towards tear gas and the some 200 Marshals was more effective than the previous attempts".

With respect thereto defendant would show to the Court same could not be classed as anything other than a comment and is therefore privileged under the laws and statutes of the state of Texas in that same had to do with a public figure concerning a matter of public interest to the general public.

X.

Plaintiff alleges as a part of the alleged libel: "We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet farther when we had to turn back".

For the reason that such statement does not constitute any libel with respect to the plaintiff in this case, as being a comment from one who is alleged to have been present, and is a comment and a statement from the writer as to what his view of the situation was at the time in question.

XI.

For the further reason that since it has been shown by the testimony in this case that the article written by Van Savell and upon which this alleged libel is based is privileged under the laws of the state of Texas for the reasons set forth herein, and since no malice has either been shown or attempted to be shown and in fact no evidence whatsoever of malice having been introduced, the Court [fol. 53] should instruct a verdict in favor of the defendant and against the plaintiff.

XII.

In the alternative the defendant would further show to the Court that the matters complained of here, after the amendment of the Texas statutes, are absolutely privileged and certainly in the absence of actual malice constitute no grounds for a cause of action. Also malice under Texas law cannot be inferred from the articles themselves since they relate to fair comment according to all of the evidence.

Respectfully submitted,

Cantey, Hanger, Gooch, Cravens & Scarborough, By Sloan B. Blair, Attorneys for Defendant.

Overruled 6-18-64, Chas. J. Murray, Judge.

[fol. 54]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31,741-C

[Title omitted]

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE COURT'S MAIN CHARGE AND RULING THEREON—June 18, 1964

To the Honorable Judge of Said Court:

Comes now the defendant, Associated Press, after the preparation of the Court's main charge to the jury, and within a reasonable time prior to the submission of the same to the jury, and makes and takes the following objections and exceptions thereto:

I.

Defendant objects and excepts to the Court's definition of "fair comment" for the reason that same should contain the statutory language "concern published for general information", which said language should be included after the words "General public interest".

II.

Defendant objects and excepts to special issue No. 1 for the reason that the statement inquired about is a comment rather than a fact as a matter of law, and as submitted is a comment on the weight of the evidence and infers that said activity was libelous per se rather than submitting the same to the jury to so determine.

III.

Defendant objects and excepts to special issue No. 4 and the definition thereof for each and all of the following [fol. 55] reasons:

(a) There is no evidence to support the submission of such issue;

(b) There is insufficient evidence to support the submission of such issue;

(c) Neither the issue nor the definition informs the jury that malice cannot be inferred from the publication itself, which is a necessary element of such definition or instruction;

(d) Such issue as submitted does not limit the jury to malice which may have existed at the time of the making of the publications sued upon.

IV.

Defendant objects and excepts to special issue No. 5 for the reason that the statement inquired about is a comment rather than a fact as a matter of law, and as submitted is a comment on the weight of the evidence and infers that said activity was libelous per se rather than submitting the same to the jury to so determine.

V.

Defendant objects and excepts to special issue No. 8 and the definition thereof for each and all of the following reasons:

(a) There is no evidence to support the submission of such issue;

(b) There is insufficient evidence to support the submission of such issue;

(c) Neither the issue nor the definition informs the jury that malice cannot be inferred from the publication itself, [fol. 56] which is a necessary element of such definition or instruction;

(d) Such issue as submitted does not limit the jury to malice which may have existed at the time of the making of the publications sued upon.

VI.

Defendant objects and excepts to special issue No. 9 on damages for the following reasons:

(a) There is no evidence to support the submission of such an issue;

(b) There is insufficient evidence to support the submission of said issue;

(c) The issue as submitted and the instructions in connection therewith would permit the jury to award damages resulting from statements found by the jury to be fair comment and found by the jury to have been made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public, and said issue should be corrected so as to instruct the jury that no damages can be awarded for statements that are fair comment or made in good faith in reference to a matter in which the defendant has a duty to report to its members and thence to the public.

VII.

Defendant objects and excepts to the submission of special issue No. 10 on exemplary damages because there is no evidence or insufficient evidence to support a finding of exemplary damages.

[fol. 57]

VIII.

Defendant specially objects and excepts to the submission of special issue No. 11 on exemplary damages because there is no evidence or insufficient evidence that plaintiff is entitled to exemplary damages.

IX.

Defendant objects and excepts to the Court's charge as a whole because the same is tantamount to instructing the jury that the statements quoted in special issues Nos. 1 and 5 are libelous or are libelous per se, and said charge does not contain any issues with the burden of proof upon the plaintiff inquiring in substance whether either or both of said statements were in fact libelous or libelous per se or would have been understood by an average reader to be libelous, with appropriate definitions and instructions with respect to the meaning of the term libelous.

Respectfully submitted,

Cantey, Hanger, Gooch, Cravens & Scarborough, By Sloan B. Blair.

Overruled 6-18-64, Chas. J. Murray, Judge.

[fol. 58]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17th JUDICIAL DISTRICT

No. 31,741-C

[Title omitted]

CHARGE OF THE COURT—Filed June 18, 1964

Ladies and Gentlemen of the Jury:

This case is submitted to you in the form of questions which are called special issues. You are to answer these questions by unanimous consent.

Do not let bias, prejudice, sympathy, resentment, or any other such emotion play any part in your deliberations.

[File endorsement omitted]

During your deliberations be careful not to mention or discuss any personal knowledge you may have about the facts in the case. *Your duty is to answer these questions from the evidence you have heard in this trial and from that alone.*

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

Do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result.

Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

Do not decide who you think should win and then try to answer the questions accordingly. If you do this your verdict will be worthless.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge.

The following definitions are given you by the Court. Whenever any of the terms so defined are used in any of the special issues, you will refer to the appropriate definition and be guided thereby in considering your answer:

By the term Preponderance of the Evidence is meant the greater weight and degree of the credible evidence before you.

[fol. 59] Definitions

In answer to Special Issue No. 1 you are instructed that by the term "led" is meant activities by a person who directs, moves to action, or encourages in some action or movement, and that by the term "charge" is meant a movement toward the marshals, or a group or body of people moving toward an objective.

In answering the issues in this charge in which the term "substantially true" is used, you are instructed that in

order for a statement to be "substantially true" it is not necessary that the exact facts or the most minute details of the plaintiff's activities be completely accurate. Mere inaccuracies not affecting the substance of the report of plaintiff's activities are immaterial. You are further instructed that in answering special issues in which the term "substantially true" is used that the publication must be considered as a whole, giving to all the words contained therein (except those hereinabove defined for you) their ordinary meaning as read and understood by the average reader.

In answering the issues in these instructions in which the term "fair comment" is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable comments thereon. You are further instructed that by said term is meant a statement which represents the honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon.

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss Campus", complained of by plaintiff, constitutes fair

comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No

[fol. 60] *Special Issue No. 3*:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined.

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No

[fol. 61] *Special Issue No. 8*:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinaboye set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "Yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law ; t your discretion, and any amount [fol. 62] which you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00

Chas. J. Murray, Judge presiding.

IN THE DISTRICT COURT OF TARRANT COUNTY

VERDICT OF THE JURY—June 19, 1964

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return same into court as our verdict.

Waverly S. Johnson, Foreman.

[File endorsement omitted]

[fol. 63]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31,741-C

[Title omitted]

DEFENDANT'S MOTION TO DISREGARD THE JURY'S VERDICT AND FOR JUDGMENT NOTWITHSTANDING SAID VERDICT—Filed June 29, 1964

To the Honorable Judge of Said Court:

Now comes the defendant, Associated Press, and moves the Court to set aside and disregard the verdict of the jury and each and every finding therein, and to render judgment for the defendant and against the plaintiff notwithstanding such verdict, and as grounds therefor would respectfully show as follows:

1.

The jury's negative finding in response to Special Issue No. 1 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true.

2.

The jury's negative finding in response to Special Issue No. 2 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement quoted in the preceding paragraph, and in said Special Issue No. 2, constituted a fair comment about a matter of public concern published for general informa-

[File endorsement omitted]

tion concerning the plaintiff's activities at the time and place involved.

[fol. 64]

3.

The jury's negative finding in response to Special Issue No. 3 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement inquired about therein, as quoted in paragraph 1 of this motion, was made by the defendant in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public.

4.

The jury's affirmative answer to Special Issue No. 4 on malice should be set aside and disregarded because there is no evidence of any malice on the part of this defendant in publishing the statement referred to in said Special Issue No. 4.

5.

Since the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" constituted as a matter of law, under all of the evidence, fair comment about a matter of public concern published for general information, such statement was and is absolutely privileged under the provisions of Article 5432 of the Texas Statutes; or, in the alternative, said statement was qualifiedly privileged under the provisions of said Statute, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

6.

Since the statement quoted in the preceding paragraph was as a matter of law, under all of the evidence, made in good faith by the defendant in reference to a matter in which the defendant had a duty to report to its members and thence to the public, such statement was privileged,

and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

[fol. 65]

7.

The jury's negative finding in response to Special Issue No. 5 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement "Walker assumed command of the crowd" was substantially true.

8.

The jury's negative finding in response to Special Issue No. 6 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement quoted in the preceding paragraph, and in said Special Issue No. 6, constituted a fair comment about a matter of public concern published for general information concerning the plaintiff's activities at the time and place involved.

9.

The jury's negative finding in response to Special Issue No. 7 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement inquired about therein, as quoted in paragraph 7 of this motion, was made by the defendant in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public.

10.

The jury's affirmative answer to Special Issue No. 8 on malice should be set aside and disregarded because there is no evidence of any malice on the part of this defendant in publishing the statement referred to in said Special Issue No. 8.

11.

Since the statement "Walker assumed command of the crowd" constituted as a matter of law, under all of the evidence, fair comment about a matter of public concern published for general information, such statement was and is absolutely privileged under the provisions of Article 5432 of the Texas Statutes; or, in the alternative, said statement was qualifiedly privileged under the provisions [fol. 66] of said Statute, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

12.

Since the statement quoted in the preceding paragraph was as a matter of law, under all of the evidence, made in good faith by the defendant in reference to a matter in which the defendant had a duty to report to its members and thence to the public, such statement was privileged, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

13.

There is no evidence whatever of damages, and therefore the jury's answer to Special Issue No. 9 has no support in the evidence, and said answer should be set aside and disregarded.

14.

There is no evidence to support the jury's answer to Special Issue No. 10 on exemplary damages, and said answer should therefore be disregarded and set aside.

15.

There is no evidence to support the jury's answer to Special Issue No. 11 on exemplary damages, and said answer should therefore be disregarded.

16.

Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

[fol. 67]

17.

Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by Article 1, Paragraph 8, of the Constitution of the State of Texas.

Wherefore, defendant Associated Press respectfully prays that the Court set aside and disregard the verdict of the jury and each and every finding therein, and that judgment be here rendered notwithstanding said verdict, that plaintiff take nothing by his suit, and that defendant go hence with its costs without day; and defendant prays for such further and additional relief, at law and in equity, to which it may be entitled.

Cantey, Hanger, Gooch, Cravens and Scarborough,
By Sloan B. Blair, 1800 First National Building,
Fort Worth 2, Texas, Attorneys for defendant
Associated Press.

[fol. 67-A]

LETTER DATED JULY 29, 1964 FROM JUDGE MURRAY TO COUNSEL

CHAS. J. MURRAY
DISTRICT JUDGE
17TH JUDICIAL DISTRICT OF TEXAS
CIVIL COURTS BUILDING
FORT WORTH 2, TEXAS

July 29, 1964

Mr. C. J. Watts, Attorney
219 Couch Drive
Oklahoma City, Oklahoma

Mr. William Andress, Jr., Attorney
627 Fidelity Union Life Building
Dallas 1, Texas

Mr. J. A. Gooch, Attorney
1800 First National Bank Building
Fort Worth, Texas

Gentlemen:

I am entering judgment for the plaintiff on the jury verdict as to special issues one, two, three, five, six, seven and nine, and judgment for the defendant as to issues four, eight, ten and eleven.

At the time the charge to the jury was being prepared, you will recall I expressed the opinion that the alleged libelous statements contained in special issues one and five were statements of fact and not opinion, and, at least as to the statement set out in issue number one, was a charge of a commission of a crime. I submitted the defense of truth as to the statements, and the jury found that they were not substantially true. I believe there is evidence to support these findings. I now have some doubt as to whether I should have submitted the statement,

"Walker assumed command of the crowd," because it does not accuse Walker of the commission of a crime. However, in view of my decision as to special issue number one, this is immaterial.

I submitted issues as to fair comment and good faith (despite my then expressed opinion that they did not constitute defenses to a statement of fact charging the plaintiff with commission of a crime) so as to get jury findings and thus avoid a new trial in the event an appellate court disagreed with my conclusions. Since the jury answered issues two, three, six and seven as they did, I concur with these answers as a matter of law.

[fol. 67-B] Turning now to issues four, eight, ten and eleven, I find there is no evidence to support the jury's answers that there was actual malice by Associated Press in publishing the stories of October 2 and 3, 1962. As you will recall, I also expressed doubt when the charge was being prepared as to whether I should even submit malice and did so only to get a jury finding as I did on the defendant's claimed defenses of fair comment and good faith.

Under Texas Law, the news stories complained of are not of themselves evidence of malice without further proof. Plaintiff claims that malice is shown by the failure of the Associated Press to check the story written by its young reporter, Van Savell, because there was a conflict between the story as written, and as related by Savell to Thomas, an AP employee in its Atlanta office. This alleged conflict related only to whether General Walker led a charge against the federal marshals *before* rather than *after* his speech to the students on the Confederate Monument. I fail to ascertain how the failure to check such a minor discrepancy could be construed as that *entire want of care* which would amount to a *conscious indifference* to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice. Wisdom and good judgment do not necessarily come with age, nor are they necessarily denied

youth. In my opinion New York Times vs. Sullivan, 11 L. ed. 2nd 686; Wortham-Carter Publishing Company vs. Littlepage, 223 SW 1043 and Fitzgarrald vs. Panhandle Publishing Company, 228 SW 2nd 499, support these conclusions.

Plaintiff's urge that this case is comparable to United Press International, Inc. vs. Mohs (Eastland Court of Civil Appeals—unreported) decided on June 26, 1964. I do not agree. In the UPI case, Miller, the night editor of UPI, *knew* that another story had been written at and sent from his UPI office the same night as the second story found to be libelous. The first story contained no statement that Mohs had been ordered arrested and handcuffed; that Mohs had been caught lying or that he had been charged with any offense for landing his plane on White Rock Lake in Dallas. Between the time this first story was written and sent from UPI's office, someone in this office called the police headquarters and learned that as far as the police knew, Mohs had not been charged with any [fol. 67-C] offense. Miller himself, nor anyone in his office, made any attempt to verify the facts of the landing on the lake, other than the call to police headquarters, yet Miller then distributed the second story which said that Mohs had been arrested, handcuffed and charged with violation of a city ordinance for landing on the lake. None of this was true. This second story was based on information received from one DeHarrow. Miller knew the story (the first one) previously written in his office was materially different from the story related by DeHarrow (the second story). He had many reasons to question the truth of the story attributed to DeHarrow, but made no attempt to check it. The Eastland Court found that these facts raised jury issues "as to whether there was such a want of care as could raise the belief that his acts (and thus the acts of UPI) were the result of a conscious indifference to the rights of Mohs."

As I have stated above, in the Walker case the only discrepancy was whether Walker led a charge before or after

his speech on the monument, and not whether he did or did not lead a charge at all. This evidence falls short of that set out in the UPI vs. Mohs opinion.

Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant.

The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.

Freedom of the press is perhaps the most important protection against tyranny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.

[fol. 67-D] However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case.

Jury findings as to issues four, eight, ten and eleven are set aside, and judgment will be entered for the plaintiff in the amount of $500,000.00 and costs.

Very truly yours,

/s/ CHAS. J. MURRAY
Charles J. Murray, Judge
17th District Court

CJM:oec

[fol. 67-E]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

ORDER DIRECTING SUPPLEMENTAL TRANSCRIPT—
January 25, 1965

On this the 25 day of January, 1965, upon motion and suggestion of the defendant in the above case, and pursuant to the provisions of Rule 428, T.R.C.P., It Is Ordered and Directed by the Court that the Clerk prepare a Supplemental Transcript to be certified and transmitted by the Clerk to the Court of Civil Appeals, same to include this Order and the Court's letter of July 29, 1964, addressed to Mr. C. J. Watts, Mr. William Andress, Jr., and Mr. J. A. Gooch.

Signed and Entered the date first above written.

Chas. J. Murray, Judge presiding.

[fol. 67-F] Clerk's Certificate to Foregoing Papers (omitted in printing).

[fol. 68]

IN THE 17TH JUDICIAL DISTRICT COURT OF
TARRANT COUNTY, TEXAS
No. 31741-C

EDWIN A. WALKER
vs.
THE ASSOCIATED PRESS

JUDGMENT—August 3, 1964

On 8 June 1964 came on regularly to be heard the above numbered and entitled cause, wherein Edwin A. Walker is plaintiff and The Associated Press is defendant, the defendants Amon G. Carter, Jr., and Carter Publications, Inc., having theretofore been dismissed by the plaintiff, and all parties appeared by counsel and announced ready for trial, and thereupon came a jury of twelve good and lawful jurors who, being duly empanelled and sworn, did on 19 June 1964 return the following answers to the issues submitted:

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole

Miss Campus", complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No

[fol. 69] *Special Issue No. 3*:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined.

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No

[fol. 70] *Special Issue No. 8*:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements, if any, inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinabove set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "Yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law at your discretion, and any amount which [fol. 71] you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00

which said verdict was duly received by the Court and ordered filed; and the plaintiff filed a motion for judgment upon said verdict, and the defendant filed a motion to disregard the jury's verdict on each issue and for judgment notwithstanding said verdict, and after a hearing upon said motions and after considering the oral and written argument of the parties, the Court is of the opinion that the plaintiff is entitled to judgment upon the verdict of the jury in response to Special Issues Nos. 1, 2, 3, 5, 6, 7, and 9, but that there is no evidence to support the jury's answers to Special Issues Nos. 4, 8, 10, and 11, and that the motions of each of the parties should be granted partially as above set forth;

It is therefore ordered, adjudged, and decreed that the plaintiff Edwin A. Walker do have and recover of and from the defendant The Associated Press the sum of $500,000.00, with interest at the rate of 6% per annum from this date until paid;

It is further ordered, adjudged, and decreed that the original defendants Amon G. Carter, Jr., and Carter Publications, Inc., owner, operator, and licensee of Radio Broad-
[fol. 72] casting Stations WBAP-AM and WBAP-FM, and Television Station WBAP-TV, and The Fort Worth Star Telegram, be and they are hereby dismissed from this cause upon the motion of the plaintiff; and

It is further ordered, adjudged, and decreed that all of the costs hereof be taxed against the defendant The As-

sociated Press, for all of which judgment let all proper process issue.

Both parties excepted to adverse rulings.

Signed August 3, 1964.

Charles J. Murray, Judge.

Approved as to Form: Cantey, Hanger, Gooch, Cravens & Scarborough, By: S. B. Blair, Attorneys for Defendant.

Wm. Andress, Jr.
Of Counsel for Plaintiff.

[fol. 73]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL—Filed August 12, 1964

To the Honorable Judge of Said Court:

Now comes the defendant Associated Press, after entry of judgment herein on August 3, 1964, and makes and files this its Original Motion for New Trial, and moves the Court to set aside the judgment heretofore rendered against it and to grant a new trial herein, upon the following grounds, to-wit:

1.

The Court erred in overruling the motion for instructed verdict made by defendant after plaintiff had rested.

2.

The Court erred in overruling the motion for instructed verdict made by defendant after both sides had rested.

[File endorsement omitted]

3.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of defendant's motion to disregard the jury's verdict, and for judgment notwithstanding said verdict.

4.

The Court erred in overruling defendant's exceptions and objections to the Court's main charge.

5.

The Court erred in rendering judgment for plaintiff and against defendant for each and all of the following reasons:

[fol. 74] (a) The jury's negative answer to Special Issue No. 1 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(b) The jury's negative answer to Special Issue No. 2 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(c) The jury's negative answer to Special Issue No. 3 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(d) The jury's negative answer to Special Issue No. 4 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(e) The jury's negative answer to Special Issue No. 6 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(f) The jury's negative answer to Special Issue No. 7 is so against the great weight and preponderance of the evi-

dence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(g) The jury's answer to Special Issue No. 9 on damages is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(h) The amount of damages found by the jury in answer to Special Issue No. 9, to-wit, the sum of $500,000.00, is so grossly excessive as to be manifestly wrong and unjust and to show that the jury disregarded the evidence, and was in-
[fol. 75] fluenced by passion, prejudice, or other improper motive.

Wherefore, defendant Associated Press prays that said judgment be set aside, and that defendant be granted a new trial herein.

Cantey, Hanger, Gooch, Cravens & Searborough, By Sloan B. Blair, 1800 First National Bldg., Fort Worth 2, Texas;

Attorneys for Defendant.

[fol. 76]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDED MOTION FOR NEW TRIAL—August 12, 1964

On this the 12th day of August, 1964, the defendant having moved the Court for leave to file an Amended Motion for New Trial, and the Court being of the opinion that such leave should be granted:

It Is Accordingly Ordered that the defendant, Associated Press, is granted leave to file an Amended Motion for New Trial in this cause within twenty days from this date.

Signed and Entered the day above written.

Chas. J. Murray, Judge Presiding.

[fol. 77]

IN THE 17TH JUDICIAL DISTRICT COURT OF

TARRANT COUNTY, TEXAS

No. 31741-C

[Title omitted]

PLAINTIFF'S MOTION TO CORRECT JUDGMENT—
Filed August 13, 1964

To said Honorable Court:

Plaintiff, Edwin A. Walker, moves the Court to correct the judgment signed herein on 3 August 1964 by sustaining in full the plaintiff's motion for judgment and overruling in full the defendant's motion for judgment notwithstanding the verdict and the answers to each issue, and thereupon to correct the judgment by making the plaintiff's recovery against the defendant the sum of $800,000.00.

Wherefore plaintiff moves the Court to correct the judgment accordingly.

Looney, Watts, Looney, Nichols & Johnson, 219 Couch Drive, Oklahoma City, Oklahoma;

Andress, Woodgate, Richards & Condos, By: Wm. Andress, Jr., 627 Fidelity Union Life Building, Dallas 1, Texas;

Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 78]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL—
Filed August 31, 1964

To the Honorable Judge of Said Court:

Now comes defendant, The Associated Press, and with leave of the Court first had and obtained makes and files this its Amended Motion for New Trial, and would respectfully show as follows:

I.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of Defendant's Motion to Disregard the Jury's Verdict and for Judgment Notwithstanding such Verdict, for each and all of the reasons therein set forth, which said Grounds read as follows:

(1) The jury's negative finding in response to Special Issue No. 1 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true.

(2) The jury's negative finding in response to Special Issue No. 2 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement quoted in the preceding paragraph, and in said Special Issue No. 2, con-

[File endorsement omitted]

stituted a fair comment about a matter of public concern published for general information concerning the plaintiff's activities at the time and place involved.

(3) The jury's negative finding in response to Special Issue No. 3 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement inquired about therein, as quoted in paragraph 1 of this motion, was made by the defendant in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public.

[fol. 79] (5) Since the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" constituted as a matter of law, under all of the evidence, fair comment about a matter of public concern published for general information, such statement was and is absolutely privileged under the provisions of Article 5432 of the Texas Statutes; or, in the alternative, said statement was qualifiedly privileged under the provisions of said Statute, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

(6) Since the statement quoted in the preceding paragraph was as a matter of law, under all of the evidence, made in good faith by the defendant in reference to a matter in which the defendant had a duty to report to its members and thence to the public, such statement was privileged, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

(7) The jury's negative finding in response to Special Issue No. 5 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement "Walker assumed command of the crowd" was substantially true.

(8) The jury's negative finding in response to Special Issue No. 6 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement quoted in the preceding paragraph, and in said Special Issue No. 6, constituted a fair comment about a matter of public concern published for general information concerning the plaintiff's activities at the time and place involved.

(9) The jury's negative finding in response to Special Issue No. 7 should be set aside and disregarded because the evidence conclusively established as a matter of law that the statement inquired about therein, as quoted in paragraph 7 of this motion, was made by the defendant in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public.

(11) Since the statement "Walker assumed command of the crowd" constituted as a matter of law, under all of the evidence, fair comment about a matter of public concern published for general information, such statement was and is absolutely privileged under the provisions of Article 5432 of the Texas Statutes; or, in the alternative, said statement was qualifiedly privileged under the provisions of said Statute, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

(12) Since the statement quoted in the preceding paragraph was as a matter of law, under all of the evidence, made in good faith by the defendant in reference to a matter in which the defendant had a duty to report to its members and thence to the public, such [fol. 80] statement was privileged, and, there being no evidence of malice, judgment should be rendered for defendant and against the plaintiff.

(13) There is no evidence whatever of damages, and therefore the jury's answer to Special Issue No. 9 has

no support in the evidence, and said answer should be set aside and disregarded.

(16) Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

(17) Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by Article 1, Paragraph 8, of the Constitution of the State of Texas.

And defendant here renews and again urges each of the foregoing Grounds.

II.

The Court erred in overruling Defendant's Second Objection to the Court's Charge and each and every ground thereof, which reads as follows:

Defendant objects and excepts to special issue No. 1 for the reason that the statement inquired about is a comment rather than a fact as a matter of law, and as submitted is a comment on the weight of the evidence and infers that said activity was libelous per se rather than submitting the same to the jury to so determine.

III.

The Court erred in overruling Defendant's Third Objection to the Court's Charge and each and every ground thereof, which reads as follows:

> Defendant objects and excepts to special issue No. 4 and the definition thereof for each and all of the following reasons:
>
> (a) There is no evidence to support the submission of such issue;
>
> [fol. 81] (b) There is insufficient evidence to support the submission of such issue;
>
> (c) Neither the issue nor the definition informs the jury that malice cannot be inferred from the publication itself, which is a necessary element of such definition or instruction;
>
> (d) Such issue as submitted does not limit the jury to malice which may have existed at the time of the making of the publications sued upon.

IV.

The Court erred in overruling Defendant's Fourth Objection to the Court's Charge and each and every ground thereof, which reads as follows:

> Defendant objects and excepts to special issue No. 5 for the reason that the statement inquired about is a comment rather than a fact as a matter of law, and as submitted is a comment on the weight of the evidence and infers that said activity was libelous per se rather than submitting the same to the jury to so determine.

V.

The Court erred in overruling Defendant's Fifth Objection to the Court's Charge and each and every ground thereof, which reads as follows:

Defendant objects and excepts to special issue No. 8 and the definition thereof for each and all of the following reasons:

(a) There is no evidence to support the submission of such issue;

(b) There is insufficient evidence to support the submission of such issue;

(c) Neither the issue nor the definition informs the jury that malice cannot be inferred from the publication itself, which is a necessary element of such definition or instruction;

(d) Such issue as submitted does not limit the jury to malice which may have existed at the time of the making of the publications sued upon.

VI.

The Court erred in overruling Defendant's Sixth Objection to the Court's Charge and each and every ground thereof, which reads as follows:

[fol. 82] Defendant objects and excepts to special issue No. 9 on damages for the following reasons:

(a) There is no evidence to support the submission of such an issue;

(b) There is insufficient evidence to support the submission of said issue;

(c) The issue as submitted and the instructions in connection therewith would permit the jury to award damages resulting from statements found by the jury to be fair comment and found by the jury to have been made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public, and said issue should be corrected so as to instruct the jury that no damages can be awarded for statements that are fair comment

or made in good faith in reference to a matter in which the defendant has a duty to report to its members and thence to the public.

VII.

The Court erred in overruling Defendant's Seventh Objection to the Court's Charge and each and every ground thereof, which reads as follows:

> Defendant objects and excepts to the submission of special issue No. 10 on exemplary damages because there is no evidence or insufficient evidence to support a finding of exemplary damages.

VIII.

The Court erred in overruling Defendant's Eighth Objection to the Court's Charge and each and every ground thereof, which reads as follows:

> Defendant specially objects and excepts to the submission of special issue No. 11 on exemplary damages because there is no evidence or insufficient evidence that plaintiff is entitled to exemplary damages.

IX.

The Court erred in overruling Defendant's Ninth Objection to the Court's Charge and each and every ground thereof, which reads as follows:

> Defendant objects and excepts to the Court's charge as a whole because the same is tantamount to instructing the jury that the statements quoted in special is-[fol. 83] sues Nos. 1 and 5 are libelous or are libelous per se, and said charge does not contain any issues with the burden of proof upon the plaintiff inquiring in substance whether either or both of said statements were in fact libelous or libelous per se or would have been understood by an average reader to be libelous,

with appropriate definitions and instructions with respect to the meaning of the term libelous.

X.

The Court erred in rendering judgment for the plaintiff and against defendant for each and all of the following reasons:

(a) The jury's negative answer to Special Issue No. 1 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(b) The jury's negative answer to Special Issue No. 2 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(c) The jury's negative answer to Special Issue No. 3 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(d) The jury's affirmative answer to Special Issue No. 4 on malice is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(e) The jury's negative answer to Special Issue No. 5 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(f) The jury's negative answer to Special Issue No. 6 is so against the great weight and preponderance of [fol. 84] the evidence as to be manifestly wrong and

unjust, and there is insufficient evidence to support such answer;

(g) The jury's negative answer to Special Issue No. 7 is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(h) The jury's affirmative answer to Special Issue No. 8 on malice is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(i) The jury's answer to Special Issue No. 9 on damages is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(j) The amount of damages found by the jury in answer to Special Issue No. 9, to-wit, the sum of $500,000.00, is so grossly excessive as to be manifestly wrong and unjust and to show that the jury disregarded the evidence, and was influenced by passion, prejudice, or other improper motive;

(k) The jury's affirmative answer to Special Issue No. 10 on exemplary damages is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust, and there is insufficient evidence to support such answer;

(l) The jury's answer to Special Issue No. 11 on exemplary damages is so against the great weight and preponderance of the evidence as to be manifestly [fol. 85] wrong and unjust, and there is insufficient evidence to support such answer.

(m) The amount of damages found by the jury in answer to Special Issue No. 11 on exemplary damages,

to-wit, the sum of $300,000.00, is so grossly excessive as to be manifestly wrong and unjust and to show that the jury disregarded the evidence and was influenced by passion, prejudice or other improper motives.

XI.

The Court erred in permitting the plaintiff Edwin A. Walker, over defendant's objection, to testify that he did not lead a charge of students against Federal marshals on the Ole Miss campus, because such testimony was an incompetent and inadmissible conclusion on the part of such witness and invaded the province of the jury.

XII.

The Court erred in permitting the plaintiff Edwin A. Walker, over defendant's objection, to testify that he did not assume command of the crowd, because such testimony was an incompetent and inadmissible conclusion on the part of such witness and invaded the province of the jury.

XIII.

In permitting the plaintiff Edwin A. Walker, over defendant's objection, to testify that he did not lead a charge of students against federal marshals on the Ole Miss campus, and that he did not assume command of the crowd, the Court further erred by stating in the presence and hearing of the jury that the Court would permit plaintiff to so testify, after the Court had excluded such testimony by other witnesses, in that such statement by the Court amounted to a comment upon the weight of the evidence and inferred to the jury that the Court believed the plain-
[fol. 86] tiff's testimony upon such subjects to be more credible than the excluded testimony of other witnesses with respect thereto, and such statement by the Court further indicated to the jury that in determining whether the statements by defendant were substantially true, or were fair comment, the standard to be applied by the jury was

the subjective intent of the plaintiff, whereas, the proper standard in determining such matters was how the plaintiff's conduct appeared to an ordinary viewer.

XIV.

The jury was guilty of misconduct during its deliberations, which was materially harmful and resulted in injury to defendant, such misconduct consisting of each of the following:

(a) During the deliberations of the jury, and prior to making any answers to the Special Issues, several jurors stated to the others that all news media in the past had been guilty of false, irresponsible and malicious reporting, and one juror stated in this connection that news services were always publishing false and malicious reports, all of which statements constituted misconduct in that:

(1) They constituted the receipt by the jury of original evidence with respect to the conduct of all news media in the past about which there was no evidence whatever at the trial, in direct violation of the Court's instructions to the jury, and with respect to which any evidence, if offered at the trial, would have been irrelevant, immaterial, inflammatory and prejudicial, and

(2) They clearly demonstrate preconceived bias and prejudice against this defendant on the part of at least some of the jurors which was concealed by said jurors during the voir dire examination in spite [fol. 87] of the fact that said jurors were asked on the voir dire examination if they had any preconceived bias or prejudice, to which they responded that they did not, and said bias and prejudice, if disclosed upon voir dire examination, would have likely resulted in said jurors being disqualified, or at least would have afforded defendant the oppor-

tunity to exercise its peremptory challenges against them;

(b) During the deliberations of the jury, and prior to making any answers to the Special Issues, one juror stated to the others that the jury should award plaintiff a million dollars because defendant had plenty of money and would never miss it, which said statement constituted the receipt by the jury of original evidence concerning the financial condition of this defendant in direct violation of the Court's instructions to the jury, in the complete absence of any admitted evidence with respect thereto, and with regard to a matter which was highly inflammatory and prejudicial, and with respect to which no evidence would have been permitted if offered at the trial;

(c) During the deliberations of the jury, and before answering any of the Special Issues, one of the jurors stated to the others that a plaintiff never receives damages in the amount he seeks, whereupon another juror stated that a football coach in Georgia had received a large damage award in a libel suit, which said statement constituted the receipt by the jury of original evidence concerning the results of litigation among other parties in direct violation of the Court's instructions to the jury, and with respect to which no evi- [fol. 88] dence would have been permitted at the trial, if offered, because the same is immaterial, irrelevant, prejudicial and inflammatory.

Each of the foregoing statements constituted overt acts on the part of the jurors occurring during the deliberations of the jury, and said statements, considered separately, and particularly considered together, clearly demonstrate the preconceived, unsupported and openly expressed conviction upon the part of at least some of the jurors that since all news media had in the past been guilty of false, irresponsible and malicious reporting, this defendant, as a part

of the Nation's news media, must be similarly disposed and guilty of the same conduct with respect to the matters alleged by plaintiff in this case, and that defendant was possessed of such financial means that the sum of one million dollars was an insignificant amount to it; and such statements could have had no other effect than to result in harm and injury to this defendant, both with respect to the issues concerning liability and those concerning damages. In support of this ground of the Motion, the affidavits of jurors M. L. Meriweather and W. J. M. Tarter are attached hereto and, to the extent they relate facts, are incorporated herein by reference.

XV.

The jury's finding of exemplary damage in the sum of $300,000.00, despite the complete absence of any evidence of malice, and the jury's finding of general damages in the grossly excessive amount of $500,000.00, in support of which there was no evidence whatever, when considered in connection with the misconduct described in the preceding paragraph, further shows the preconceived and unwarranted bias and prejudice against this defendant which led the jury to disregard all the evidence, even though the finding on exemplary damages was properly disregarded by the Court in rendering judgment.

[fol. 89] Wherefore, premises considered, this defendant prays that the judgment heretofore rendered be set aside and that judgment be here rendered for defendant that plaintiff take nothing; and, alternatively, defendant prays that the judgment be set aside and that defendant be granted a new trial herein; and that it have such other and further relief to which it may show itself entitled.

Cantey, Hanger, Gooch, Cravens & Scarborough, By Sloan B. Blair, 1800 First National Bldg., Fort Worth 2, Texas, Attorneys for Defendant.

[fol. 90] AFFIDAVIT TO MOTION

The State of Texas
County of Tarrant

Before Me, Mary D. Blackburn, a Notary Public in and for Tarrant County, Texas, on this day personally appeared M. L. Meriweather, Who, being by me duly sworn, upon oath says:

On June 8, 1964, I was selected as a juror in a case entitled Edwin A. Walker vs. Associated Press, Cause No. 31741-C in the District Court of Tarrant County, Texas, 17th Judicial District, and thereafter through June 19, 1964, served as a juror in said case; that at or about 2:00 p.m., on June 18, 1964, the Court charged the jury and thereafter counsel for the parties argued the case to the jury and the jury then retired to begin its deliberations. During the deliberations of the jury and prior to making any answers to the Special Issues two jurors stated that all news media had in the past been guilty of false and malicious news reports. One juror stated that news services were always publishing false and malicious reports. One juror stated that we should award Walker a million dollars because the Associated Press had plenty of money and would never miss it. At some time before or during the deliberations a juror remarked that a Georgia football coach had gotten a big libel damage award.

M. L. Meriweather

Subscribed and Sworn to Before Me by the said M. L. Meriweather this 26 day of June, 1964, to certify which witness my hand and seal of office.

Mary D. Blackburn, Notary Public in and for Tarrant County, Texas.

[fol. 91] AFFIDAVIT TO MOTION

The State of Texas
County of Tarrant

Before Me, Wayman B. Flynn, a Notary Public in and for Tarrant County, Texas, on this day personally appeared W. J. M. Tarter, who, being by me duly sworn, upon oath says:

On June 8, 1964, I was selected as a juror in a case entitled Edwin A. Walker vs. Associated Press, Cause No. 31741-C in the District Court of Tarrant County, Texas, 17th Judicial District, and thereafter through June 19, 1964, served as a juror in said case; that at or about 2:00 p.m., on June 18, 1964, the Court charged the jury and thereafter counsel for the parties argued the case to the jury and the jury then retired to begin its deliberations. During the deliberations of the jury and before answering any of the Special Issues a few of the jurors orally stated that all news media had in the past been guilty of irresponsible and malicious reporting. Two of the jurors were more outspoken in expressing such opinion than others.

In my opinion this malicious reporting did not affect the verdict.

W. J. M. (Bill) Tarter

Subscribed and Sworn to Before Me by the said W. J. M. (Bill) Tarter this 24th day of June, 1964, to certify which witness my hand and seal of office.

Wayman B. Flynn, Notary Public in and for Tarrant County, Texas.

[fol. 92]

IN THE 17TH JUDICIAL DISTRICT COURT OF

TARRANT COUNTY, TEXAS

No. 31741-C

[Title omitted]

PLAINTIFF'S AMENDED MOTION TO REFORM AND CORRECT THE JUDGMENT—Filed September 1, 1964

To said Honorable Court:

Plaintiff Edwin A. Walker, with leave of Court, files this amended motion to reform and correct the judgment signed herein on 3 August 1964, to make the plaintiff's recovery against the defendant the sum of $800,000.00, in that there was some evidence more than a scintilla, and sufficient evidence, to sustain the jury's findings and answers to Special Issues Nos. 4, 8, 10, and 11, upon the following grounds:

1. Entrusting a story of the magnitude of the Ole Miss campus to an untrained and immature reporter without guidance from experienced personnel able to exercise discretion, and then relying unquestionably upon his lurid story charging a seasoned general with insurrection against his government, was such a showing of wilful disregard of his rights as to justify the jury's finding of legal malice.

2. When The Associated Press failed to exercise diligence to reconcile the internal conflicts and discrepancies in the excited and confused reports of an immature reporter, and sacrificed any attempt to correct and verify such statements in its own selfish interest in the speedy dissemination of a startling story, it displayed such a disregard for the rights of Walker that the jury was justified in finding legal malice.

3. The known failure of the Associated Press to verify the harmful implications of the story before its dissemina-

[fol. 93] tion to the world is some evidence from which the jury may draw the conclusion that the story was disseminated with a callous disregard to its impact on the reputation of a former general of the United States, which would constitute legal malice.

4. Upon knowledge of its conflict with the United Press story, the total failure of the Associated Press to reconcile the conflicts or investigate their cause, while continuing to disseminate the story, was evidence from which the jury could find the existence of legal malice.

5. By the failure of the Associated Press to produce its employee, Van Savell, as a witness to the intent with which the false story was written, there is a presumption which the jury may draw that his non-production was because his testimony would have been damaging, and this inference is some evidence of that ill will and evil motive which constitutes legal malice.

6. Since the jury could not see Van Savell and hear him cross-examined, to weigh whether his motives, as ratified by the Associated Press by its acceptance and transmission of his story, were vicious propaganda for the intentional destruction of Walker and his conservative views, and since the Associated Press could have produced its employee but did not do so, the jury was entitled to conclude that there was a deliberate scheme to blacken Walker's reputation, which would constitute legal malice.

7. If Van Savell had written the story in good faith and at his honest fair comment on the confused events at the Ole Miss campus, he would have appeared and told the jury so under oath, and his failure to do so is evidence of malice.

8. The deliberate persistence of the Associated Press in insisting upon the uncorroborated veracity of its immature [fol. 94] reporter from the time of the publication of his story until the jury retired, and its failure to retract or

correct its story with its harmful results, was properly considered by the jury as evidence of legal malice.

9. The unbroken lack of contrition by the Associated Press for the injury done Walker's reputation from the time of publication to the conclusion of the trial was some evidence which would justify the jury in finding legal malice.

For all of the foregoing reasons, plaintiff moves the Court to increase the amount of the judgment to correspond with the answers of the jury.

Looney, Watts, Looney, Nichols & Johnson, 219 Couch Drive, Oklahoma City, Oklahoma;

Andress, Woodgate, Richards & Condos, By Wm. Andress, Jr., 627 Fidelity Union Life Building, Dallas 1, Texas.

Attorneys for Plaintiff.

[fol. 95]

LETTER DATED SEPTEMBER 29, 1964 FROM JUDGE MURRAY TO COUNSEL

CHAS. J. MURRAY
District Judge
17th Judicial District of Texas
Civil Courts Building
Fort Worth 2, Texas

Sept. 29, 1964.

Mr. Clyde J. Watts,
219 Couch Street,
Oklahoma City, Oklahoma.

Mr. William Andress, Jr.,
627 Fidelity Union Life Bldg.,
Dallas 1, Texas.

Mr. J. A. Gooch,
First National Bank Bldg.,
Fort Worth 2, Texas.

In re. Cause No. 31,741-C
Edwin A. Walker vs Associated Press

Gentlemen:

I am overruling defendant's motion for a new trial, and make the following Findings of Fact and Conclusions of Law on the issue of jury misconduct:

Findings of Fact:

Before the verdict of the jury was returned in open court,

(1) At least one juror made the statement that Associated Press was always hurting someone, and printing false and malicious reports, or words to this effect. This statement was not discussed or commented upon at length by the jury.

(2) At least one juror made the statement that Associated Press had plenty of money, and would never miss it. This statement was discussed by the jury until they were admonished that it was not a proper matter for their consideration. It was not then discussed again.

(3) At least one juror made the statement that the Georgia football coach had received a substantial award and damages for libel. There was no further comment or discussion about this statement.

[fol. 96] (4) The statement set forth in (1) above was made during a general discussion of the case.

(5) The statements referred to in (2), (3), above were made during deliberations of the jury on the issues of malice and exemplary damages.

(6) None of the aforesaid statements, either singly or collectively, made by one or more of the jurors induced any juror to change an answer, or vote differently than he would otherwise have done on one or more of the issues.

Conclusions of Law:

(1) The statement referred to in paragraph (1) above under Findings of Fact was not misconduct. The jury had before them numerous Associated Press and United Press reports, as well as news stories from several newspapers, and could have been discussing this evidence on the issue of malice when this statement was made.

(2) The statements referred to in paragraphs (2) and (3) under Findings of Fact constitute misconduct because there was no evidence in the record concerning A.P.'s financial condition or the jury award to the football coach, but they do not constitute material misconduct since I have determined that none of the statements induced any juror to change an answer, or vote differently than he would otherwise have done on one or more of the issues. Moreover, the Court has already set aside the jury findings as to malice and exemplary damages.

(3) There has been no showing, considering the pleadings, the testimony, the Court's charge, and argument of counsel, that probable injury resulted to the defendant because of any or all of these statements.

The Clerk is being directed to file a copy of this letter as part of the record in this case.

Very truly yours,

Chas. J. Murray

[fol. 97]

IN THE 17TH JUDICIAL DISTRICT COURT OF
TARRANT COUNTY, TEXAS

No. 31741-C

[Title omitted]

ORDER OVERRULING MOTIONS FOR NEW TRIAL AND TO REFORM THE JUDGMENT—October 6, 1964

On 18 September 1964 came on to be heard the amended motion for new trial filed by the defendant Associated Press, and the amended motion to reform the judgment filed by the plaintiff, and it appearing to the Court that all of said original motions and amended motions were duly and timely filed and presented in accordance with the rules, and all parties having been heard in full, and having presented such testimony as they desired, and submitted briefs,

It is ordered that the defendant's amended motion for new trial be and the same is hereby overruled; and

It is further ordered that the amended motion to reform the judgment filed by the plaintiff be and the same is hereby overruled.

All parties excepted to adverse rulings and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Sitting at Fort Worth.

Signed October 6, 1964.

Chas. J. Murray, Judge.

[fol. 98]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

[Title omitted]

DEFENDANT'S NOTICE OF APPEAL—Filed October 7, 1964

Now comes The Associated Press, defendant in the above entitled and numbered cause, now pending on the docket of this Court, and hereby gives notice that it desires to appeal from the judgment rendered herein on August 3, 1964, and from the order overruling defendant's Amended Motion for New Trial signed and rendered herein on October 6, 1964, to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Sitting at Fort Worth.

Cantey, Hanger, Gooch, Cravens & Scarborough, By Sloan B. Blair, 1800 First National Bldg., Fort Worth 2, Texas, Attorneys for Defendant.

[File endorsement omitted]

* * * * * * * * * *

[fol. 106] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 1]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31-741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

Be it remembered, that upon the trial of the above numbered and entitled cause, before His Honor, Charles J. Murray, and a Jury, on the 8th day of June, A. D., 1964, the following proceedings were had and evidence adduced:

Transcript of Evidence

APPEARANCES:

Mr. Clyde J. Watts, Oklahoma City, Oklahoma; Mr. William Andress, Jr., Dallas, Texas; and Mr. Toy Crocker, Fort Worth, Texas, for the Plaintiff;

Cantey, Hanger, Gooch, Cravens & Scarborough, Fort Worth, Texas, By: Mr. J. A. Gooch, Mr. Carlisle Cravens, and Mr. Sloan Blair, for the Defendant.

[fol. 3] PROCEEDINGS

* * * * * * *

[fol. 87] OPENING STATEMENT BY MR. WATTS

Mr. Watts: If Your Honor please, and ladies and gentlemen of the Jury: As His Honor told you, I am C. J. Watts, and I am one of the lawyers for General Walker and he is a long-time friend. For thirty-five years we have

been close personal friends. And, at this point if I seem to get too deep into the lawsuit it may be because I have too deep a personal association.

Now, I will read the Plaintiff's pleadings, and they just outline to the Jury and the Court the facts we intend to prove.

(Plaintiff's pleadings read by Mr. Watts.)

(Defendant's pleadings read by Mr. Gooch.)

[fol. 88] Mr. Watts: Thank you very much.

Mr. Gooch: May I have the Court file to read from?

I will read the Answer of the Defendant, Associated Press.

(Answer read to the Jury.)

The Court: Mr. Watts is going to make an opening statement.

Mr. Watts: If Your Honor please, and ladies and gentlemen of the Jury, the Jury, having suffered through these long delineations of the legal issues as outlined by the lawyers in this case, we feel are entitled to a very brief and simple statement of what's involved.

We expect to prove a state of facts substantially as follows:

In order to brief you properly, I will draw a very crude diagram on the board of the University of Mississippi campus.

(Drawing.)

I am never able to tell where I am going or where I have been unless I can see it.

Now, to orient the Jury and Your Honor, the top of the little rough plat, of course, is north. This is the area of the Mississippi campus where the entire riot took place, [fol. 89] as we will outline. This area in here is the so-called "Oval".

The evidence will be from General Walker and many, many witnesses that General Walker came to Mississippi for a basic reason:

Number one, as the former commander at Little Rock, to protect against making a Military operation of a very critical civilian problem.

Number two, to protest, as best he could, against the diversion of the attention of the American people and of the Military power of the country away from Cuba where he thought it belonged sincerely and into the Mississippi campus.

Now, his evidence will be that he arrived on the campus at night about 8:45; that he walked with an associate, a friend of his, along this sidewalk on the south side of University Boulevard; that when he arrived about in this position, there was a group of people gathered around this installation here, which is a Confederate Statue.

He, in this area, talked to several people for a few minutes, maybe fifteen or twenty minutes. At that time there was activity going on up in this direction. This installation here is the so-called Lyceum Building which was surrounded by a ring of U.S. Marshals.

[fol. 90] Prior to that, to his arrival on the campus, and about 8:00 o'clock the Marshals had, between them and the assembled students, a ring of Highway Patrolmen. About eight, tear gas was fired and the Highway Patrolmen pulled away and so that when Walker and a young lad, Louis Leman, who will be here in Court, arrived on the campus, there was sporadic activity out in this area out here in terms of two, three, five, a few, students, throwing rocks and sticks and things such as kids will throw, and the Marshals shooting tear gas.

Walker and Leman stood in this area for a few minutes, observed what was going on, then walked out into this area in the so-called Circle or Grove. They stayed there for

fifteen or twenty or perhaps thirty minutes, so that in a period of thirty to forty-five minutes they had proceeded from the entrance to the campus out about to in here, near, between the Confederate Monument and the flagpole, had talked with several people, observed what was going on and then started back to this area here.

About the time Walker started back, there was a convoy of vehicles going out here, leaving the campus. It became immediately obvious they were highway patrolmen leading [fol. 91] them. The evidence will be that students then raised the comment that, "The Governor has sold out."

The evidence will further be that General Walker, who had been downtown at the Court House and heard the Governor's representative speak and state his position, decided for the first time that he would get on the Confederate Statue and speak to the students.

He did get on the Statue and did make a presentation to the students, first, that violence was not the answer to nobody, that the real enemy was yonder way in Cuba. [fol. 92] At that point, the evidence will be that he was met by one massive jeer.

Later he went on to point out that the Governor had not sold them out; that the individual who had let the student onto the campus was the highway patrolman, one Col. Birdsong, and not the Governor.

After the speech, Walker got down from the monument, stood around here for a few more minutes and again, in company with several other people, one of whom is a deputy sheriff, who will be here to testify and was with Walker constantly from the time Walker arrived on the campus and he saw him coming until the time he left, this deputy sheriff will testify that at no time then did Walker lead or participate in anything that even remotely approximated a charge.

The evidence will be that after the speech on the monument, Walker then again proceeded out into the oval area

where there was activity of a constant sporadic nature of groups of students throwing things, tear gas being fired, falling back, more groups coming in, Walker stood around in this area and observed those activities for several hours.

Now his evidence will be, and it will be supported by many, many witnesses, that at no time did he lead a charge; at no time did he commit the act that the Associated Press [fol. 93] circulated of him around the world, that he arrived striding down the middle of University Avenue, met the leaders of the mob in this vicinity, assumed command of the crowd, had a student or a leader of the mob on each side by each elbow, lined up in front of a thousand people, led a charge against the Marshals and raced back to the statue.

Our evidence will be, Ladies and Gentlemen, that that just did not occur and is an absolute deliberate fabrication by a 21-year-old boy who was a cub reporter and represented the Associated Press at that incident.

The evidence will further be that this lad, after he claims he saw this alleged charge, is supposed to have raced 600 yards over here and made a report and then raced back at which time he saw Walker speaking upon the monument. [fol. 94] Now, when we have presented to you ladies and gentlemen these facts, we feel that beyond any possible shadow of a doubt this Jury must conclude that Walker did not lead a charge. That proves the first issue in the lawsuit. The second issue is, assuming as we hope we do that we are able to prove that this is a deliberate fabrication, and that this is false, that Walker did lead a charge, that the Associated Press, by its conduct in its news releases, literally did it with malice, in which event if we are able to prove that, not only will Walker be entitled to actual damages but punitive damages.

Our evidence will be substantially as follows: The Associated Press will bring into Court a stack of news issues in which in issue after issue after issue and message after

message it is reported Walker leading a charge; that he was arrested by the Federal authorities; that he was shipped to the insane hospital in Springfield, Missouri. The evidence will be a stack of news releases by the Associated Press this high (indicating) as to Walker being arrested, committed to the nut house. The evidence will be that when they came around to report in a sanity hearing that we held in Oxford on November 21, 1962, that they reported extensively and in several news releases on the [fol. 95] so-called A and B wire the testimony of the Government psychiatrist, who incidentally had never seen him, that he was a paranoid and psychosomatic. The evidence will be that along toward the end of the hearing the Judge of that Court opened a report by Dr. Stubblefield of Dallas, a Court-appointed psychiatrist, who stated in his report that Walker was of superior intelligence; that report, however, that Walker was of superior intelligence, never found its way into the A and B wire, and the evidence as to Walker's sanity got cut off right there.

Oh, it got in a few local papers, maybe in Fort Worth, probably in Fort Worth, but anyhow the evidence will be that the Associated Press deliberately smothered the evidence, as opposed to the testimony that Walker was crazy.

Finally, the final culmination and conclusion of this tragic incident occurred on the 22nd of January, 1962, when the United States Government, after having arrested him, after having committed him to the nut house, after his having finally got out, dismissed the charges against him, upon the grounds, it will be obvious from reading the news reports, the evidence will be, that the Associated Press, after building the thing up that he had been put in jail, [fol. 96] after building up that he was paranoid and psychosomatic had a little tiny release, a line or two, that Walker had been released by the Government and the Government dismissed the charge, which means it can be re-filed in five years.

So, when we get through with this evidence, ladies and gentlemen of the Jury, I feel sincerely that you ladies and gentlemen will find that this young lad, Van Savell, a twenty-one year old Cub Reporter, sat down and wrote himself a story that absolutely did not happen, and that General Walker, after having suffered six days and nights among the atmosphere of the insane, certainly did not get a fair break in the most powerful news media on the face of the earth, under the label of the truth.

Thank you.

Opening Statement by Mr. Gooch

Mr. Gooch: You will recall that at the outset the Court said that the pleadings and what the lawyers say is not evidence. I assume he is still of that opinion as he listens to Mr. Watts make this very dramatic appeal, and if he is in a position to back up his statement on that, there is not much for the Jury to listen to.

You told me on voir dire examination that you would listen to the witnesses in this case; that you would keep [fol. 97] an open mind until all of the evidence in this case is concluded.

The preparation for this case has not been in ten or fifteen minutes or ten or fifteen days. There have been some fifty-one depositions taken in this case. All of those people who could have had or possibly had, if they could be found, a possible knowledge of what occurred on the campus of the University of Mississippi on the night of September 30, 1962; part of the pleadings that were read to you in this case was to the effect that prior to the time General Walker made his advent on the campus of the University of Mississippi he called in—mind you, the Press didn't seek General Walker out, General Walker called for a Press conference at his Turtle Creek home in the City of Dallas, and he said to the reporters and to the world on television tape, "I am going to Mississippi," in effect

Barnett is right. "The orders of the United States Government should be disobeyed," by inference, and, "how should we do it?" "Bring your flags, your tents and your skillets, ten thousand strong from every state in the Union."

He gets over to Mississippi, this man who had called the Press conference, all the reporters in the news media, the TV camera to take down for posterity what he has to say. [fol. 98] He gets over to Mississippi and he says, "I stand shoulder to shoulder with Governor Ross Barnett. Rally to the cause of freedom. Now or never. Bring your flags, your tents and your skillets," by inference, "We will show the United States of America and the constituted authorities what should be done in this instance.

One more time he calls in the Press, after he had arrived at Oxford, Mississippi, if you please, on the scene of where he was to come. He says, "We are called to Oxford. We are here to carry out what Governor Ross Barnett said he wanted to carry out. We will not let the constitutional authority of this United States interfere with what we want to do as citizens. Mind you, he was not a citizen of the State of Mississippi, he lived in the State of Texas.

Mr. Watts dramatically portrayed General Walker slowly walking on the campus at the University of Mississippi along about 5:00 p. m. on the evening of September 30, 1962.

Well, I have read these depositions. I participated in these depositions. Maybe Mr. Watts and I don't read the same language, I don't know, but Walker says—that is, General Walker I am talking about, a great man when he [fol. 99] was in the Army until he started mixing with things he had no business meddling in. He says, "I came down University Avenue." That he got near the campus; he turned around and waved his arm, "Come on." He got within a few steps of the Confederate Statue. He saw a group of people standing on the corner. This is General Walker testifying. He says, "Come on."

Then we pick up and we have got Mr. Watts saying, "We have got witnesses." We sure have. Mr. Watts'

witnesses, if they tell the truth as they did when their depositions were taken, will testify that General Walker came on this campus and got with this howling mob.
[fol. 100] The deputy sheriff having been sent there by Governor Ross Barnett to keep Meredith from entering the University of Mississippi.

We are not trying a segregation or integration case, Ladies and Gentlemen. We are trying the rights of an individual public figure to defy in any manner the law of this land; otherwise we would have anarchy, we would be guided by mob rule.

The witnesses who have testified that have been called by Mr. Watts, have testified that General Walker went with a group over near the flagpole which is about the center of this circle (indicating on blackboard). He called it an oval. The witnesses usually refer to it as a circle. There, while he was loitering there with this crowd, that Walker had nothing in his hand. Nobody ever said Walker had a missile or anything in his hand. But there this group surrounding Walker hurled their rocks and missiles at the United States Marshals who had been ordered in there by the President of the United States to see to it that the law of the Court in this country should be obeyed. That is what we are trying in this case, as to whether or not a man can defy the Court.

Mr. Andress: I believe that is completely beyond the scope of the pleadings. We are trying whether or not the [fol. 101] Associated Press can make a false statement about what a man did, not whether the man can defy the Courts.

The Court: Ladies and Gentlemen, you have heard the pleadings. Questions will be submitted to you concerning matters of alleged libel. Now in answering those questions you can consider any evidence which is offered in evidence in this trial, and according to the pleadings evidence of the activities of the Plaintiff here and the activities of possibly Meredith, and certainly the Marshals, and what

the Courts did, will be in evidence. You may consider all of that.

You may proceed.

Mr. Gooch: I reiterate we are not trying the question of integration or segregation; we are trying a story that was written by the Associated Press of the action of General Walker on the campus of the University of Mississippi from about 8:45 p.m., on the night of September 30, 1962, until the wee hours of the morning.

The Associated Press, as Mr. Watts has told you, as Mr. Andress has told you, is an organization that gathers news. The Associated Press does its best to cover every piece of news that it can get its hands on. It does not publish a newspaper of its own. It sends these stories to the newspapers who are members of the Associated Press, [fol. 102] for the newspapers to use or not as they see fit, such news as is sent to them on the wires.

The issue in this case—another issue in this case will be the truth or falsity and the fair comment that was given by the Associated Press to such newspapers as cared to print the story.

Now I will not go into the details of what the witnesses will testify. I said to you before that you will listen to these witnesses and you can draw your own conclusion as to whether or not this publication charged to be libelous by General Walker was, in fact, libelous, false or untrue. I think you will determine from the witnesses and from General Walker himself that the statements made about General Walker were in fact true.

Now I know this may be boring to you but we are full of our cases and I can't sit here and listen to Mr. Watts get up and tell you what the facts are, without giving you my version of them, because I have been there, too. As Charlie McCarthy used to say, I was there, Charlie. Not in Mississippi, but in these depositions.

He says the Associated Press slanted the news. He says

the Associated Press did not send out a story from Dr. [fol. 103] Stubblefield to the effect that Walker, at the time of his mental examination along about October 2nd or 3rd of 1962, was acting under a superior intelligence—

Mr. Watts: —excuse me.

Mr. Gooch: —I challenge that statement—

Mr. Watts: —excuse me—

Mr. Gooch: The very statement—

The Court: Just a minute.

Mr. Watts: If Your Honor please, I must challenge this statement. I didn't say they didn't send it out. What I said, the statement of Walker's imprisonment and insanity was put on the A and B wire; the statement by Dr. Stubblefield was put on the subordinate wire.

Mr. Gooch: So we are tit-for-tat.

[fol. 104] As I understand the pleadings in the case, and the Court will correct me if I am wrong, Mr. Watts has traversed the state, the State of Texas. The story Mr. Watts claims is untrue and false was published in the Fort Worth Star Telegram and was an AP story. Now, he says he went all the way around the world getting his pleadings. He is limited, or should be limited in his cause of action, to something that happened in the State of Texas and particularly in the Fort Worth Star Telegram. Now, I say to you, Mr. Watts, and I say to you ladies and gentlemen without fear of successful contradiction, that this Associated Press story was sent to the Star Telegram, the same newspaper that published the libelous article, that Mr. Watts says is libelous, in which they said that the psychiatrist who examined General Walker, the psychiatrist said General Walker was operating under a superior level of intelligence at the time he was examined.

He further read to you and stated in his argument that they slanted the news because the Associated Press did not send to the Star Telegram as part of its news coverage the contention that General Walker had been denied his

constitutional rights when he was arrested in Mississippi. [fol. 105] I challenge that statement and I tell you that we will show and Mr. Watts knows we will show, and yet he stood here and read to you that the news was slanted. [fol. 106] He knows that the Associated Press in a story from Oxford, Mississippi, on the very day that this motion he's complained of, complaining that we didn't print it, on the very day it was printed the Associated Press, on its wires, sent a verbatim copy of Mr. Watts' motion in favor of General Walker to the Forth Worth Star Telegram and it was run on the very day that it was filed in Oxford, Mississippi.

News slant? Ladies and Gentlemen, the Associated Press is not mad at anybody. They have one function in life to perform and that is to disseminate to the public news as it occurs and as quickly as possible. It is given to the newspapers to print as they see fit. The headlines are not those of Associated Press. The news stories come in the newspaper. The newspaper can do as it sees fit.

I have taken too much of your time. You get carried away with these things when it is attempted, as I see it, to deliberately mislead the jury before the evidence starts.

I apologize for my outburst.

Again, may I say, with all candor, listen with me on the evidence in this case and see if the innuendoes and statements that I have made to you are not sustained by the evidence that comes from that witness stand.

[fol. 107] The Court: Ladies and Gentlemen, it's too late, I think, this afternoon to go ahead and start with the testimony. We will just get a little bit in, so I am going to recess until 9:00 o'clock tomorrow morning.

Now this jury room to your left will be your home while you are trying this case. Just be in the jury room tomorrow morning at 9:00 and we will call you out from there.

(Thereupon, at 4:45 p.m., an adjournment was taken until 9:00 o'clock, Tuesday, June 9, 1964.)

[fol. 110] Proceedings

Colloquy Between Court and Counsel

Mr. Gooch: If Your Honor please, we ask the invocation of the Rule with respect to the witnesses.

The Court: The Rule has been invoked in this case and that means all the witnesses except the parties to the suit must remain outside until each is called by the respective attorneys. So, Mr. Andress and Mr. Watts, you keep an eye on your witnesses and if they walk in ask them to remain outside.

Mr. Watts: Do you wish to swear all witnesses who are available?

The Court: No, I will swear them one at a time.

Mr. Watts: If Your Honor please, we have some news releases I think we can open up with.

The Court: All right.

Mr. Watts: If Your Honor please, we have here by agreement the respective teletype releases of the Associated Press which we now will offer in evidence.

The Court: You want to have them marked?

Mr. Watts: Yes, sir. It will probably save time if we just mark each of these groups as an exhibit, and then we will designate them as A, B, C and so forth later. Mark [fol. 111] this as Exhibit 1.

(Document marked Plaintiff's Exhibit 1, by the Court Reporter.)

Mr. Cravens: If you will, read which is which.

Mr. Watts: Yes, we will.

Mr. Gooch: I assume—

The Court: Just a minute, he is marking.

Mr. Watts: This is 2, 3, 4, 5, 6, 7, 8, 9, and 10.

(Documents marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9 and 10 by the Court Reporter.)

Mr. Watts: Now, Mr. Gooch, do you have a comment to make?

Mr. Gooch: I don't know what you are introducing, or having marked, so I assume the objection, if any, will be raised at the time of the entry of the individual item.

Mr. Watts: Yes, sir.

Mr. Gooch: As I understand the ruling of the Court on pre-trial conference, that the matters introduced are confined to the AP reports as carried in the Forth Worth Star Telegram?

The Court: I don't recall that. As far as the allegations in paragraph 2 of the Petition are concerned.

[fol. 112] Mr. Gooch: That's right.

The Court: In those wire reports that appeared in the Star Telegram, are the only ones to be admitted.

Mr. Watts: That is correct. It is my understanding—

The Court: Is that what you have at this time?

Mr. Watts: No, sir, it was my understanding that the news releases alleged in paragraph 2 of the Petition would be offered without identification to establish the libel, and that everything connected with Walker issued by the AP would be tendered by the Plaintiff in support of its contention of malice. That is my understanding of the pre-trial.

The Court: Are you offering one of those news reports?

Mr. Watts: At this time we offer to the Jury the news report upon which paragraph 2 asserts libel.

The Court: That is all you are offering now?

Mr. Watts: That is all we are offering now. Then, when they are specifically identified we will introduce the entire news releases of the Associated Press, to establish malice.

The Court: To which exhibit are you now referring?

Mr. Watts: I must pick them out. Let's see. Now, we [fol. 113] will hold these (indicating) on the side. They are not identified as exhibits.

If Your Honor please, it would save considerable time if we later—if I offer them as alleged in the complaint, the specific news releases, and then we will get the same releases out of the file.

The Court: I will admit that at this time.

Mr. Watts: If Your Honor will permit me to read it from the original Complaint then.

The Court: All right.

Mr. Watts: Now, Ladies and Gentlemen of the Jury, it has been agreed by counsel in this case that the specific teletype report as alleged in the Plaintiff's Original—rather, Amended Complaint, to be presented to the Jury as having been issued by the Defendant, Associated Press.

I will now read to the Jury the teletype report issued by the Associated Press that the Plaintiff, General Walker, asserts is false and libel. This will be identified in the record as the Plaintiff's Exhibit 1-A.

(Plaintiff's Exhibit 1-A marked by the Court Reporter.)

Mr. Watts: And the release under date of October 3rd will be identified as the Plaintiff's Exhibit 1-B.

[fol. 114] (Plaintiff's Exhibit 1-B marked by the Court Reporter.)

Mr. Watts: I will now read to the Jury the Plaintiff's Exhibit 1-A, under date of October 2, 1962:

PLAINTIFF'S EXHIBIT 1-A

"Walker, who led a charge of students against Federal Marshals on the Ole Miss campus was arrested on four counts, including insurrection against the United States."

That is the Plaintiff's Exhibit 1.

Mr. Gooch: 1-A.

Mr. Watts: I will now read—sir?

Mr. Gooch: 1-A.

Mr. Watts: 1-A, yes.

Mr. Gooch: All right.

Mr. Watts: I will now read Plaintiff's Exhibit 1-B, which is under date of October 3, 1962, was issued by the Associated Press upon its teletype wire services to the Fort Worth Star Telegram in Fort Worth, and as I understand,

it is admitted by all parties that this news release was published by the Fort Worth Star Telegram?

Mr. Gooch: That is correct.

Mr. Watts: All right.

[fol. 115] PLAINTIFF'S EXHIBIT 1-B

Editor's Note: "Former Major General Edwin A. Walker, a key figure in the week-end battling—

Mr. Gooch: Just a minute. The Editor Note was by the Star Telegram?

Mr. Watts: No, that's part of the news release, Mr. Gooch. See, that is the AP Editor's note and is a part of the news release.

(Reading) "Former Major General Edwin A. Walker, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says that he was told there was a scene of considerable disturbance on the University of Mississippi campus. He went there.

Here is the story of Van Savell, twenty-one, Associated Press newsman, who was on the scene and saw what happened:

By Van Savell. Oxford, Mississippi. October 3, 1962, AP. Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi campus at night. This allowed me to follow the crowd, a few students and many outsiders, as they charged Federal [fol. 116] Marshals, surrounding the century-old Lyceum Building.

It also brought me into direct contact with former Major General Edwin A. Walker, who is now under arrest on charges of inciting, insurrection and seditious conspiracy.

Walker first appeared in the riot area at 8:45 p. m., Sunday, near the University Avenue entrance about 300 yards from the Ole Miss administration building. He was nattily

dressed in a black suit, tie and shoes and wore a light tan hat.

The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

One unidentified man queried Walker as he approached the group, "General, will you lead us to the steps?" I observed Walker as he loosened his tie and shirt and nodded yes without speaking.

He then conferred with a group of about fifteen persons who appeared to be the riot leaders. The crowd took full advantage of nearby construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles. Walker assumed command of the crowd, which I estimated at 1,000, but was delayed for several minutes when a neatly dressed, portly man of about forty-[fol. 117] five approached the group. He conferred with Walker for several minutes; then joined a group near the front.

Two men took Walker by the arms and they headed for the Lyceum and Federal Marshals.

Throughout this time I was less than six feet from Walker. This march toward tear gas and some 200 Marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back. Before doing so, many of the rioters hurled their weapons, the bricks, the bottles, rocks and wooden sticks toward the clustered Marshals. We fled the tear gas and the charging Marshals, the crowd racing back to a Confederate soldiers statue near the Grove entrance below the Lyceum.

I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly

thereafter, Walker climbed half way up the Confederate Monument and addressed the crowd.

I heard Walker say that Governor Barnett had betrayed the people of Mississippi, "But don't let up now," he said, [fol. 118] "You may lose this battle but you will have been heard."

He continued, "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

There were cheers. It was apparent that Walker had complete command over the group.

By this time it was nearly 11:00 p. m. and I raced to the telephone again.

Upon my return, Walker was calmly explaining The New Frontier Government to several by-standers. He remained away from the rioting throughout the next few hours but advised on several tactics.

One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

Walker suggested the use of sand to snuff out the tear gas. This stuff worked real well, "But where can you get it?" He asked.

At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

I left Walker and walked a hundred yards away where Molotov Cocktails and gasoline bottles with a fuse were [fol. 119] made.

Again I left the area for a telephone. As I walked toward a dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200-yard walk to the Lyceum Building.

Thanks to recognition by Chief Marshal James B. McShane, we were quickly released and given freedom in the

Marshal's headquarters. Within minutes shotgun and rifle fire erupted from the rioting crowd and two men, one a French newsman, were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.

Is Richard Sweatt out there?

The Court: Mr. Watts, has there been a stipulation that Exhibits 1-A and 1-B were written by an employee of the Associated Press who was in the course of his employment with the Associated Press at the time?

Mr. Watts: There has been such a stipulation and perhaps it would be in order to confirm it at this time.

[fol. 120] Mr. Gooch: That is correct.

Mr. Watts: At this time, then, I will read a deposition from another of the Associated Press employees.

Mr. Gooch: You called Sweatt. What are you doing now?

Mr. Watts: I thought while he was showing up, I would read that deposition.

Mr. Cravens: Which deposition are you reading, Mr. Watts?

Mr. Watts: Just a moment, I will get it here. Ben Thomas.

If the Court please, this is the deposition of B. R. Thomas, Associated Press newsman, taken in New Orleans on March the 31st, 1964.

[fol. 121] "Deposition of B. R. Thomas"

Mr. Watts: (Reading)

"Q. Your name, please, sir?

A. Ben Thomas.

Q. Your profession?

A. I am an Associated Press newsman.

Q. And what educational background do you have, Mr. Thomas?

A. I have three years of college, and almost thirteen years in the news profession.

Q. Have you done news work, in addition to working in the office for A.P.?

A. Yes, I have.

Q. What is the difference between a reporter and an office re-write man? Are you interchangeable?

A. I am interchangeable, that is why I say I am an A.P. Newsman. We do office work, re-writes, and also field reporting.

Q. Where did you go to school?

A. Henderson State Teachers College, Arkansas.

Q. When did you graduate?

A. I did not graduate. I lacked about twelve hours receiving a Bachelor's degree.

Q. Where were you raised, Mr. Thomas?

A. In Florida, and in Arkansas.

[fol. 122] Q. What place in Florida?

A. Sarasota, where I was born.

Q. How long did you live in that place in Arkansas? What was that place in Arkansas?

A. Hot Springs was my grandmother's house, and then I lived in Hot Springs for a short period, up until th time I was fifteen, and then I was there from then on out, until—except for the times I visited Florida.

Q. Where did you work when you got out of school?

A. I worked— After college?

Q. Yes?

A. Well, I was in college, and before I was in college while I was finishing high school, I worked on the Centennial Record in Hot Springs, Arkansas.

Q. And then where?

A. Then the Times Picayune, in New Orleans.

Q. How long were you with them?

A. I was with the Picayune for seven months.

Q. Where then?

A. Associated Press Bureau in New Orleans.

Q. What was the occasion for your transfer?

A. There was a vacancy in the A.P., and I had long

wanted to work for the Associated Press, so I applied for it and was hired.

Q. When did you first go to work for them?

[fol. 123] A. The first of July, 1960.

Q. What is your age?

A. Thirty. (30)

Q. Do you know what personnel the Associated Press sent to cover the Oxford incident?

A. When you say, "Oxford incident," do you mean on September 30, or the entire story?

Q. Just September 30?

A. I believe I recall the principal people as they were. There were so many press people thrown in that night I might miss one.

Q. Give us the best you can recollect, the ones that came from the New Orleans office?

A. To the best of my knowledge, there was no one from the New Orleans office itself at Oxford that night except photographer James Bourdier. There were people from some of our correspondent points.

Q. What office was Van Savell from?

A. Jackson, Mississippi office.

Q. And no newsmen at all were sent from New Orleans?

A. To the best of my knowledge, there were none out of New Orleans, except our photographer newsman, James Bourdier.

Q. What time that day, on the 30th, did you come to work?

[fol. 124] A. Around three o'clock in the afternoon.

Q. What was your assignment?

A. I came to the Bureau to write some sport stories early, and be on hand for anything that happened at Oxford.

Q. What was your assignment in the office?

A. My specific assignment that night was to work the night re-write shifts from ten o'clock at night until six-thirty in the morning.

Q. Now, from eight o'clock—

A. That is my normal shift on Sundays, and I am sure the records will show that I was scheduled to work that

shift that night. I usually came in about three in the afternoon to do my sports, take a little break, and then come back on at ten o'clock.

Q. What do you mean by the "re-write shift"?

A. It is just an A.P. term. That is what the shift is called. Actually, the early editor, or the overnight editor is responsible for filing the early reports for the afternoon newspapers.

Q. Why do you use the term 're-write'?

A. Because much of your duties consist of re-writing stories from the previous cycle.

Q. What are your guidelines for re-writing?

A. I am not so sure what you mean by that.

Q. Why don't you just disseminate on the wire services [fol. 125] the report that the news writers send in, that is the news men send in?

A. This is not necessarily re-writing of reports that newsmen send in. On this night re-write or early shift, you take stories that have occurred during the period which would be reported in the morning newspapers, and you re-write the stories simply by changing the structure of the words and possibly digging up fresh information. If there is not a reporter, getting on the phone yourself, and calling to the sheriff or wherever it might be, and pick up fresh information to have a different story for the afternoon newspapers than the morning ones had.

Q. Did you re-arrange then, the context of—

A. No, not the context. The contents are re-arranged but not the context. We never try to change the meaning of any story unless there is fresh new information that does change the situation of the story.

Q. Were you on the telephone on the night of September 30?

A. Yes, I was.

Q. With whom were you communicating in Oxford?

A. I communicated with Van Savell, I talked to Edmund Lebercon, and I talked to Gavin Scott.

Q. All right. Go on.

A. And I talked to two Ole Miss. students who were work-
[fol. 126] ing with the A.P.

Q. Were they so-called 'stringers'?

A. Yes, sir.

Q. Would you know who they are?

A. Yes, John Perkins and John Hall. I also talked one time to Wilson Minor, who is the Times Picayune Jackson, Mississippi correspondent.

Q. Go ahead.

A. I talked to A. P. photographer, James Bourdier.

Q. How do you spell that?

A. B-o-u-r-d-i-e-r.

Q. All right. Go on.

A. And I talked to Jim Laxson, who is photo editor in the Atlanta Bureau. I may have talked to one or two or possibly three more people, but I can't recall. If I did, they were very brief conversations.

Q. Did any of these individuals, other than Savell, report to you that they had seen General Walker lead a charge against the United States Marshals?

A. No, sir, except for the students. May I clarify that answer? May I add something?

Q. Yes.

A. Except for the students who were in the dormitory room, where we had a telephone line, and they did not go out of the room, and could not see the area where the demon-
[fol. 127] strations, the main demonstrations, took place. The other A.P. people that I talked to, that night I talked with them much later, and none of them were in the vicinity of the Lyceum Building.

During the early part of the evening, from the start of the demonstration on to around seven o'clock, until after midnight.

Q. Now, you used the term, 'except for the students', did the students purport to see the charge?

A. No. I say none other than I talked to the students. The only ones that I talked to between approximately seven o'clock and midnight were the two students who were in

their room, and were in their dormitory. We had maintained a telephone line, a long distance line, into their room that night for about nine to ten hours, and they did not leave their room, they stayed there and held their lines. Savell would come in from his various points where he had been on the campus.

Q. What was the nature of these reports that these students gave you?

A. The only reports that they gave me was that tear gas was seeping into their dormitory, and they told me of hearing what sounded like either rifle fire or possibly tear gas cannisters exploding, of seeing other students from their window, which looked in the opposite direction of the Ly- [fol. 128] ceum, of seeing students and others scurrying about.

Q. Now then, let's get down to Van Savell. Start with the earliest report that you received from him, and outline it by time and content.

A. It has been nearly a year and a half. The earliest report that I received from Savell that night was around five o'clock in the evening, on the Marshals being thrown into the airport at Oxford, and going onto the campus.

Q. Did you have at that time, two phones connected to Oxford?

A. I couldn't say. At various times, one. We had from six-thirty at night until around four o'clock a.m. in the morning, this one telephone line into the dormitory room occupied by John Hall and John Perkins. The connection was continuous on that one, and at various times when the other newsmen who were in the area could get an open line, they would talk to the Bureau, but for the period from seven o'clock until almost three o'clock, the only method of communication we had was this one telephone line, and over our wire photo net work net up in a motel some ten blocks from it.

Q. Did you then, alone, maintain and operate that one open telephone line at Perkins' room?

A. Yes, I did.

Q. Did you have any assistance on the line, or any one [fol. 129] else that helped you?

A. Around two or three o'clock in the morning, I turned the phone, very briefly, to Carl Corben who is now the editor of the States Item, a former A.P. man, and I asked him to hold it while I went to the rest room. He said there was nothing. No one had anyhing to report on the telephone during that time.

Q. So then the A.P. Office in New Orleans received all the reports from Savell?

A. Yes, sir.

Q. Up until two o'clock?

A. Well, it was certainly up until around three o'clock, around three or four o'clock.

Q. Well, it was certainly after midnight?

A. Yes, sir.

Q. When was the next time that you heard from him?

A. I believe the next time that I heard from him was around six-fifteen to six-twenty, when he called from this room. That is when we kept the line open from there after.

(Conference was held off the record.)

I wasn't taking notes on the typewriter of what Savell had to say. I wasn't noting the time, except where it was really pertinent, as Meredith arrived on campus at such and such a time. I don't remember whether the story said that [fol. 130] Meredith arrived on campus at such and such a time, but it seems to me that it was around six-fifteen or six-twenty that he called and said that Meredith was there or that the Marshals had circled the Lyceum Building.

Q. Have you read Savell's deposition?

A. No.

Q. You haven't seen it at all?

A. No, sir.

Q. All right. Go ahead and give us the next report. You may refer to those exhibits in that deposition to refresh your recollection if you would like. Also there are other wire releases there before you, covering the same period of time. Now, then give us the next report that you received.

A. Well, we had a television set near the telephone, and I heard President Kennedy's speech which started at seven o'clock, and before it was over, or during the middle of it, Savell came back to the phone and said that the Marshals were firing tear gas at co-eds, and that the students had started throwing bricks and bottles, stones, and rocks at the Marshals.

Q. Now, let's recheck the timing on that. Wasn't the speech at eight o'clock instead of seven?

A. To the best of my knowledge, it was seven o'clock, Central Standard Time. It might have been eight o'clock [fol. 131] Eastern Standard Time. Because the A.P. usually operates and changes time to make everything eight o'clock Eastern Standard Time, or to make it into Eastern Standard Time, the stories may show this, particularly on radio wire copies.

Q. I wish you would recheck some of your communications there, because I was positive in my own mind that it was eight o'clock.

Mr. Gooch: I think it was. It was eight o'clock, Central Standard time, it is a fact.

The Witness: All right, then that was it.

By Mr. Watts:

Q. All right. Then you do remember, distinctly remember the incident of the President's speech on the television, right before, by your side?

A. Yes, sir. Not from the television on my side, but by hearing, because they had the telephone, I mean the television, in the room, in the dormitory room at Oxford, and the boys would hold the telephone there, and I was listening to what the President had to say.

Q. All right. Go ahead then. Before this speech was over, Savell reported that bricks were being thrown and tear gas fired?

A. Yes, sir.

Q. All right. Give us the next report.

A. I can't at this time, specifically say what his next report was. I know that I told him to be sure and check back [fol. 132] in or at least get word to me every fifteen or twenty minutes, even if he really had nothing to report. Just so we would know where he was and what the situation was, and if we had any word to pass on to him.

Q. All right. Go ahead?

A. He came in, as I said, every ten or fifteen minute intervals thereafter, reporting various facts that he had seen and observed. More students, or more people, not necessarily students, throwing bricks and bottles, and the Marshals firing tear gas, and the wind was blowing it back toward the Marshals.

Q. Did he tell you how far away he was from the scene of the rioting?

A. He told me he was in and out of the student groups, that he mingled in as close as he could. In fact, sometime he would be in the midst of a group of students who were yelling taunts and jeers at the Marshals.

Q. Did he give you a briefing as to the lay of the land?

A. Well,—

Q. How far the distances were, we will say from the Confederate Monument to the dormitory, when he was making the fifteen minutes reports?

A. I don't remember if he gave me a briefing on the distances or not. I know that it seems to me that he said [fol. 133] it was just a short distance.

Q. All right. Go ahead then.

A. Then, he came to the telephone, and said that General Walker had talked to the students, the rioters, and then had led them on a charge on the Marshals.

Q. That Walker had talked to the students, and then led them on a charge against the Marshals?

A. Yes, sir; walked to the front of the charge, and led it against the Marshals.

Q. All right. Go ahead. Tell to the best of your recollection, the rest of his report.

A. And he told me—

Q. Excuse me. Right there, see if you can convert this information that he gave you about Walker talking to the students, and then led them on a charge against the Marshals. Can you convert that into terms of a report that you passed on for use on the wire service?

A. Well, since I was not actually writing any of the material that he was reporting, I was taking notes, and passing them on to Tom Dagard, who I believe you talked to yesterday, and he was doing the main overall wrap up.

Q. All right. Go ahead, Mr. Thomas.

A. I remember, with the incidents involved about the troops being sent in and so forth, we were putting out almost a continuous news lead to the story, and I remember [fol. 134] calling to Tom, who was no more than ten feet away from me, that General Walker had just led the charge of the students against the Marshals.

Q. Is this Tom Dagard?

A. Yes.

Q. All right. Go on.

A. And he rushed over and took my notes from the typewriter.

Q. Yes?

A. And I asked Savell to give me as much detail on the information as he could. I can refresh my memory by going in here and looking at this report.

Q. Well, we will get to that in a minute, but just to the best of your recollection now, give us the details that he gave you.

A. He said that Walker had climbed on the Confederate Monument and talked to the students, and said something to them about if they retreated and went home, they would be cowards, that they should stand up and fight.

Q. All right.

A. And then that he got down from the monument and started walking toward the Marshals and the students followed behind him, and he led the group of yelling, screaming, brick-throwing group with him as close to the Marshals as they could get, until they were turned back by tear gas.

[fol. 135] Q. Now, was that the first real or formal charge?

A. No, sir. There had been other charges earlier in the night. He had given a report that cars were being set fire to. I can't, at this time, recall whether this was—I don't want to say I am certain, but it seems to me that the French newsman—

Q. Guillard?

A. He had been found before, or it may have been after.

Q. Did Savell report to you the effect that the speech Walker made from the monument had on the students before this charge?

A. He just said that they seemed to be in agreement with what he said, and ready to follow him.

Q. And did he say whether or not, prior to the time Walker had spoken to them and got an agreement, that the students were able to organize and present a mass charge, or was it sporadic activity up until that time?

A. I believe that he said that it was more of a sporadic activity, more of a mob activity. When General Walker first walked into the group, it seemed more organized.

Q. Now, after Walker had appeared on the campus, and made his speech from the monument, the charge became more organized, did it?

A. Yes, sir.

[fol. 136] Q. Would you say it became more effective? You may refresh your recollection from your wire releases there if you like. You said it became more effective after this speech?

A. I don't recall him saying one way or the other as to where it was more effective, but I think from his reports that the charges were more in the nature of a protest. And you can say whether a protest is effective or not, well—At times the Marshals were forced to sort of re-group, and several of them, of course, were wounded and injured by flying objects, but the students—

Q. Have you ever been on the Ole Miss campus?

A. Yes, I have.

Q. Had you been, as of that time?

A. No, I had not.

Q. But you are now familiar with the general layout of Ole Miss campus?

A. Yes, sir.

Q. I am going to hand you this, I believe there is a plat here in the deposition that you may use to refresh your recollection. Here is one right here."

Mr. Watts: Mr. Gooch, do you have that big plat available we agreed on?

Mr. Gooch: Yes, sir, it is outside.

Mr. Watts: Can we bring it in?

[fol. 137] Mr. Gooch: It will take the easel to put it on.

The Court: That is a magnetized board. I have some magnets. If it is not too heavy it will hold it on the blackboard. We can try it.

Mr. Watts: Yes, may I obliterate my rather miserable architectural effort here? It is not in evidence.

The Court: Yes.

Mr. Watts: At this point in the deposition, after pointing to a plat similar to this the question was asked the witness:

"Q. Is that the general lay of the land as you understand it?

A. Yes, it is.

Q. Did Savell report to you, or have you since learned, that the way Savell came was from the monument, around the Lyceum Building to Booth Hall, which is about six hundred yards?

A. No, I don't think that I know where Booth Hall is right there. Now you have him coming around to—

Q. Well, his testimony was when we took his deposition was that. . . ."

Mr. Gooch: Now, if the Court please—

Mr. Watts: —that's right. I think that is—

I am skipping from Line—Page 19 through the remainder [fol. 138] of that page.

Mr. Gooch: On Page 19?

Mr. Cravens: What line number?

Mr. Watts: I am skipping the remainder of that page.

Mr. Cravens: What line number?

Mr. Watts: 17. Now starting on Page 20, the question on Line 3, "Now, he then reported to you on this occasion when he first reported that Walker had led the charge, that Walker had made a speech from the monument, and that that speech seemed to give the boys more organization. Then after the speech, he led the charge?

A. Yes, to the best of my knowledge.

Q. He made this report to you about the speech and the charge in the same telephone conversation and not in two?

A. In the same conversation.

Q. Right. Now, in other words, he didn't come and tell you that Walker was making a speech, and then come back and say that he was leading a charge?

A. No, sir.

Q. Nor did he tell you that Walker was leading a charge on one telephone conversation, and come back and tell you in a subsequent conversation that he was making a speech? [fol. 139] A. To the best of my knowledge, no.

Q. All right. Now, what next report did Savell give you about Walker?

A. I don't recall Savell giving me any more reports about Walker that night. I asked him later on if he saw General Walker any more, and I truthfully can't recall whether he said yes or no."

Mr. Watts: The remainder we will reserve.

Mr. Gooch: Where did you stop?

Mr. Watts: I have terminated on Line 3, Page 21.

The Court: Do you have anything to offer at this time, Mr. Gooch?

Mr. Gooch: No, sir.

Mr. Watts: Call Richard Sweat.

[fol. 140] RICHARD HARVEY SWEAT, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Will you state your name, please, sir?
A. Richard Harvey Sweat.
Q. How old are you?
A. Twenty, sir. Be twenty-one in September.
Q. Where do you live?
A. Karnes, Mississippi.
Q. Were you raised in Karnes?
A. No, sir, I was raised in Tennessee, in a place about twenty miles from Karnes.
Q. Are you at this time a student at the Mississippi University?
A. Yes, sir.
Q. Were you such a student in September and October of 1962?
A. Yes, sir.
Q. What courses, Mr. Sweat, were you pursuing in college?
A. Pre-law.
Q. How long have you been at the University of [fol. 141] Mississippi at this time?
A. At that time, sir?
Q. Yes, sir.
A. I had been there about a year and a half.
Q. And that was almost a year and a half ago?
A. Yes, sir.
Q. So, you have now been at Ole Miss University approximately three years?
A. Yes, sir.
Q. Are you familiar with the lay of the land at Ole Miss University?

A. Yes, sir.

Q. Will you please take the pointer in front of you, take it in your hand, and step over to this chart.

May we agree, if Your Honor please, that this chart will be offered in evidence as the—actually, it is a joint exhibit. I don't know what the Court's procedure is.

The Court: If there is an agreement you can offer it. If you agree to it, both of you can use it.

Mr. Watts: All right, sir.

Mr. Gooch: That is satisfactory.

Mr. Watts: What, Mr. Reporter, is the next exhibit?

Mr. Nuss: Number 11.

[fol. 142] (Chart marked Plaintiff's Exhibit 11.)

By Mr. Watts:

Q. Mr. Sweat, you have before you Exhibit 11 which is a scaled reproduction of the University of Mississippi campus. Do you see a railroad at the right side of the chart about even with your chin?

A. I do.

Q. As it goes on forward?

A. Yes, sir.

Q. The top of the chart, of course, is north. Do you see a street, University Boulevard, as it crosses the railroad right about your chin? Much lower. Right there (indicating).

A. Here at the avenue, sir.

Q. Yes, sir, University Avenue.

A. Yes, sir.

Q. Do you see it proceeding westward?

A. Yes, sir.

Q. Put your pointer at the intersection of University Avenue and the railroad.

A. (Witness complies.)

Q. And as you proceed on westward with your pointer now about how wide is that street at this point?

A. This street?

Q. Yes, sir.

[fol. 143] A. Oh, it is wider than this room.

Q. A good big wide boulevard-type street?

A. Yes, sir.

Q. Proceeding on westward, and do you see an installation there called the Circle?

A. Yes, sir.

Q. Do you see a dot which is to the left of your pointer right there?

A. Right there (indicating).

Q. What is that installation?

A. That is the Confederate Monument.

Q. Will you describe please that Confederate Monument for the benefit of the Jury who have never been there?

A. The Confederate Monuments are quite a thing in Mississippi. Every town or every small community has one, in dedication to the boys who marched away in the War between the States. And Ole Miss has this particular monument dedicated to the University Grays that marched away in the War between the States. And it is a tall monument on a granite base that has a Confederate soldier standing there holding his rifle like this (indicating) and looking out on University Avenue.

Q. Does it have a base about two feet above the level of the ground?

[fol. 144] A. Yes.

Q. And then as you proceed to the right of that Confederate Statue will you identify some of the buildings?

A. This is the old Geology Building, formerly the old Library Building also. This is the YMCA Building.

Q. Wait just a minute. This YMCA Building will figure very prominently in the evidence. I think it is well to orientate the Jury at this time and identify it. Is there a street between the Circle and the YMCA Building?

A. Yes.

Q. What is that?

A. That is the Grove Loop.

Q. What is the street to the southwest of the YMCA Building?

A. This is still University Avenue.

Q. University Avenue curves around and makes a loop?

A. Yes, sir.

Q. What is the next building to the west of the YMCA Building?

A. The Fine Arts Center.

Q. And as you proceed on then to the southwest, around University Avenue, what is the next big building you encounter?

A. The Peabody Building and the Fullerton Chapel, [fol. 145] but it sets back.

Q. What is this building (indicating) directly west of the Circle?

A. The Lyceum Building.

Q. Did that building have any personnel around it the night of this incident?

A. Yes, sir, this building was ringed by 700 Marshals that night.

Q. Now, then, moving onto the southward, what is the next big building?

A. The next building is the Chemistry Building. Chemistry and Pharmacy Building, I might add.

Q. Then circling back toward the east, what is the next building?

A. This is Carrier Hall. This is the engineering building.

Q. All right, sir.

A. Right here (indicating).

Q. Then, returning then to the point of origin, what are the rest of the buildings?

A. Well, the Chemical Engineering Building sets right here, and the new Science Building, Hume Hall, sets right here.

Q. All right. Now, on this night in question, September 30, 1962, was the Science Building, Hume Hall, in the [fol. 146] process of construction?

A. Yes, sir.

Q. Is there any installation, street lights or anything of the kind just north of Hume Hall?

A. Yes, sir, a street light sets right here (indicating chart).

Q. Where is that with reference to the Confederate Statue?

A. With the Confederate Statue, it sets a little southeast.

Q. It is southeast of the Confederate Statue?

A. Yes, sir.

Q. All right, take your seat on the witness stand.

Now, Mr. Sweat, were you present on the Ole Miss campus on the night of September 30, 1962?

A. Yes, sir, I was.

Q. Where had you been?

A. I had been home. I was returning back from home.

Q. Had there been some school activity in Jackson that day?

A. There had been a football game the Saturday before, I believe.

Q. And about what time did you arrive back on the campus?

[fol. 147] A. I got back on the campus around 4:00 o'clock that evening.

Q. What day of the week was that?

A. This was on Sunday.

Q. And at the time you got back on the campus were the students there in force, or what was the condition?

A. No. Ordinarily the students at Ole Miss arrived back at the campus from the week-end, usually about that time, around 4:00 or 5:00 o'clock, and they were just beginning to come in.

Q. Mr. Sweat, when you arrived on the campus where did you go?

A. Well, when we arrived on the campus the first thing we heard, we were stopped by some boys and we heard the first thing we knew, we had been occupied, that we had been sold out, and that the Marshals were already

here, and the Army was on the way, so we went on up to the Lyceum Building.

[fol. 148] Q. Now, who is "we"?

A. This boy that rode with me, Jimmy Coggan. He is, also, from Torrance, Mississippi.

Q. All right, sir. Continue then with what occurred.

A. We stopped at the Lyceum Building. The Marshals hadn't ringed the Lyceum Building at that time. We stood around and talked and then a few minutes later, trucks drove up with Marshals in the back of them. These were Army trucks. Marshals standing in the back of these trucks had on white helmets, a vest—some people say they were bullet-proof vests, I don't know.

The vests had tear gas canisters in them and many of the Marshals carried big tear gas guns.

The trucks pulled up around the University Loop in front of the Lyceum Building. The tailgates were dropped and the Marshals got out and immediately ringed the Lyceum Building.

Q. Were those typical six by six Military-type trucks?

A. Yes, sir, they were all Military trucks.

Q. Go ahead.

A. The Marshals got out. They formed a double line in the front of the Lyceum Building and single line running around the back.

The Marshals stood shoulder to shoulder. They didn't say anything. You could ask them something. A Marshal [fol. 149] wouldn't say anything to you.

This was a curiosity to the students. Many of the students immediately came down. People from the Student Union Building got word that the Marshals had ringed the Lyceum Building and the people came down.

I took my things on back up to the room and took the boy that had ridden with me over to the fraternity house and he put his things up and we returned.

By this time the word had gotten all over the campus. Boys who had seen it were running around to the fraternity houses and to the dormitories, passing the word.

This made a lot of people angry because the Lyceum Building holds a very special place on the Ole Miss campus. And to see it ringed by Marshals, naturally caused resentment and drew a crowd.

Q. Could you roughly estimate the size of that crowd at that time?

A. Well, the size of this crowd at this time, I would say, three or four thousand, because this included all the students that had returned and it was a tremendous crowd down there finally, toward late evening.

Q. Now, roughly, Mr. Sweat, where was that crowd distributed?

A. This crowd was distributed, running from the En- [fol. 150] gineering—I mean the Chemistry-Pharmacy Building in front of the Lyceum Building—

Q. Now, Mr. Sweat, until the Jury gets these places pretty well fixed in their mind, I wish at this point you would take your pointer and again show them just where these installations are.

A. The crowd stretched from this point of the Chemistry-Pharmacy Building on around. We were in the street then. On around on University Circle, down here in the front of Peabody, almost to the side of the Lyceum Building.

Q. Now, where is Labuve Hall

A. Labuve? Labuve is right here.

Q. All right, sir. And at that time were there any Highway Patrolmen in the area?

A. Yes, sir, there were Highway Patrolmen.

Q. I wish you would point out to the Court and Jury where the Highway Patrolmen were stationed.

A. At first, the Highway Patrolmen, of course, were at the exits. But then the Highway Patrol moved in and they were stationed out in front with the students.

Q. Now, coming eastward from the Lyceum Building, who were the first personnel that you would encounter?

A. Coming eastward?

Q. Yes.

[fol. 151] A. The first personnel you would encounter coming this way would be students.

Q. No, I mean walking out of the Lyceum Building.

A. Oh, walking out of the Lyceum?

Q. Yes, sir.

A. The first personnel you would encounter would be Marshals.

Q. Do I understand there was a double ring of Marshals?

A. Yes.

Q. Who would be the next personnel?

A. The next personnel would be the Highway Patrol.

Q. Now, what was the number of this Highway Patrol? Can you give us a rough estimate?

A. I'm not sure about that, sir. I would say 200 probably.

Q. Was there an interval or distance between the U. S. Marshals and the Highway Patrol?

A. Not at first. Now, when the Highway Patrol moved in, they formed a line between the students and the Marshals.

Q. All right. What was the distance between the line of Marshals and the line of Highway Patrolmen?

A. At first, the distance was about fifteen feet. Ten—ten, fifteen feet.

[fol. 152] Q. And what was the distance then between the Highway Patrolmen and the students?

A. The students were right up against the Highway Patrolmen. They were wanting to get up closer but the Highway Patrol wouldn't let them.

Q. All right, sir. You may return to your seat.

Now, continuing, please give this Jury as accurate a word picture and a description of what you saw and what occurred from that time on until the Highway Patrol personnel left the campus.

A. Well, the Highway Patrol moved in, got between the students and the Marshals. The students—a lot of students were mad by this time because the Marshals had ringed the Lyceum Building. They resented this. And there was opposition growing, discontent. People were thumping cigarette butts at the Marshals and throwing pebbles at

them. I say "pebbles", now. No rocks like a lot of people say. There are no rocks on the University Loop. It's all paved. You won't find rocks. You will find pebbles. Students were throwing that.

[fol. 153] Well, the highway patrol moved in between and the men started to tell us just to calm down, no reason to get excited.

Chancellor Williams came out, pleaded with the students, said break up, said go back to your dormitories, you can't do any good down here.

Dean Love walked among the crowd, trying to persuade them to break up but the crowd wouldn't do it. They felt by this time that things had gone too far.

Q. Now was this daylight or dark?

A. This was still daylight.

Q. All right, sir. Now where were you roughly at that time?

A. Just out in the crowd, milling around in front of the Lyceum Building.

Q. Now is that in the area marked as the circle?

A. Yes.

Q. All right, sir, go ahead.

A. Toward late evening, almost at dusk, the highway patrol suddenly formed a straight line and started pushing the students back. The reason they were doing this is because the trucks—

Mr. Gooch: Now we object to the reason.

Mr. Watts: That's right, you possibly don't know the reason. You're just a pre-law student, Mr. Sweat, not into [fol. 154] the law yet. That is not proper evidence, so go ahead—

The Court: Just tell what you saw.

A. All right, I will. They were pushing us back. Well, I could tell you why they were pushing us back.

Q. But what went on in the Marshals' mind is not proper evidence so you just tell what you—

A. Well, they were pushing—anyway, they pushed us back.

Q. You were pushed back?

A. We were pushed back and while they were pushing us back, they had their backs to us and the students were, well, they were—well, they were allowing, you know, the highway to push them back on the grass. What they evidently were wanting to do was to form an empty zone there between the Marshals and the students.

Q. And after they pushed you back, about how wide was this empty zone?

A. Well, while they were pushing us back, that's when the riot broke.

Q. Tell us what happened?

A. Well, while they were pushing the students back, suddenly the Marshals leveled tear gas and opened fire.

Q. Did you hear a command?

A. No, I didn't hear a command. I was out in the crowd. [fol. 155] I wasn't paying any attention to the Marshals. I had turned around, you know, to see where I was stepping. And all of a sudden we had tear gas.

Q. At that time was there any violence of any kind existent?

A. No, sir.

Q. Describe to the jury to the very ultimate of your recollection exactly what you saw and what occurred.

A. Well, the Marshals opened fire with tear gas. It threw a thick cloud of smoke all over the students and the highway patrol was completely stunned. Some of the men even got hit in the back—

Mr. Gooch: If the Court please—

Mr. Watts: Just a minute.

The Court: You don't know whether they were or not. You testify to what you saw and not what you are guessing at.

The Witness: Well, that's just what I saw.

The Court: You don't know whether they were stunned or not.

The Witness: One was hit in the back, sir.

The Court: Well, you just testify to what you saw.

The Witness: Yes, sir.

By Mr. Watts:

Q. Tell us, Mr. Sweat, about that one that was hit in the back. What did he look like?

[fol. 156] A. He was a big, heavy-set fellow.

Q. After he was hit, was he horizontal or vertical?

A. He was still standing up but I wouldn't care to repeat what he said.

Q. Well, don't repeat what he said just tell what he did and what you saw.

A. Well, he ran down with the students. All the students ran when that went off. All the students ran down to the Confederate statue.

Q. Now is that eastward from the Lyceum?

A. That's towards the east, sir.

Q. About that time what—could you roughly estimate the size of this group of students?

A. It was still—it was still a pretty good sized crowd.

Q. Were all the students in the circle or were some of them elsewhere?

A. Well, no, not all the students were in the circle. Most of the students, like I say, were there in front of the Peabody Building and around near Carrier Hall.

Q. Would that be northwest of the so-called circle?

A. That would be north, northwest of the circle.

Q. All right, sir.

A. Some were over at the YMCA Building, too.

Q. Go ahead and describe the events.

[fol. 157] A. Well, the students ran back to the Confederate statue. We milled around. We didn't know what was happening. We got together again and we thought somebody had done something, you know, that—

Q. Now Mr. Sweat, was there any leadership at all of this group of students?

A. No, sir.

Mr. Gooch: If the Court please, we believe that is a conclusion, that he can tell exactly what he saw.

The Court: Sustained. I instruct the jury not to consider it for any purpose.

By Mr. Watts:

Q. Tell the jury what was the organization of this group of students, how they reacted and to whom they looked for instructions and orders.

A. Well, they didn't look to anyone. They were completely bewildered. They didn't know what to do. After that first volley went off, the students got together and they started walking back up towards the Lyceum Building. That's west.

They started walking back up towards the Lyceum Building and suddenly the Marshals charged again and this time drove all the students that were in the circle past the Confederate statue and back down University Avenue almost to the Journalism Building.

Q. And what happened to the highway patrolmen then?

[fol. 158] A. Well, some were with us but not all of them. I don't know what happened to the rest of them. There were a few down with us though.

Q. And what was the attitude and demeanor of the crowd at that time?

A. Well, after the second volley went off the crowd was ready to fight then. The boys started picking up bricks and bottles and started back toward the Marshals.

Q. Now as they went back describe to the jury how they went back and in terms of just how they looked to you.

A. Well, the way it looked to me, was that there were a few students that—after the second volley went off and we had been driven back down, they picked up some bricks and bottles and said, "We've had it, we've had it, we've had enough. Let's go back and fight."

And the people started picking up things then and the students went up almost as one body at that time, just together.

Q. Uh-huh.

A. And the Marshals started a charge again and we charged back this time.

Q. Uh-huh.

A. And pushed the Marshals back up to the Lyceum Building. This was tried getting all the students together for one, you might say, big student push.

[fol. 159] We tried that two or three times but it's too costly because each time we tried it, get up near the Lyceum Building, the Marshals would just level their tear gas guns and cut loose with a volley, so you couldn't bring a large group up near the Lyceum Building in what you might call a charge.

Q. And then what happened?

A. The students fell back to that Confederate statue. A lot of people—a lot of people really wanted to defend that statue. I don't know why. They said, "By God, this is ours. We're holding." And they did. Students milled around. They busted up concrete benches in the circle, boys went down to Hume Hall. That was the new Science Building under construction then.

They started hauling back bricks, anything you could get your hands on, coke bottles, or anything. You would pick it up, you would run back up to the circle, you would have to go through the tear gas to chunk.

Q. You said boys would do that. Now explain to the jury how that was organized or how it operated.

A. Well, everyone was on his own, really. If you wanted to throw something, you would have to get your own what you might call ammunition.

You might start out and there would be about four or five boys and they would be going your way, too, and you [fol. 160] would say, "Well, come on, let's go," and just whoever would fall in and go—that's what your charge would consist of. Now then—

Q. There was no organization?

A. There was no organization.

Q. How long did that condition continue?

A. This continued all night long.

Q. Was there ever any organization, as you say?

A. No, sir.

Mr. Gooch: If the Court please, we object to that as a conclusion.

The Court: Sustained. The jury is instructed not to consider it for any purpose.

By Mr. Watts:

Q. All right. Explain to the jury what you observed then with respect to this subject you are talking about from there on out.

A. To the riot, sir?

Q. No, this matter of the group of students and the size of the group and their actions?

A. Well, groups of students would get together. Probably the largest group you would see charged would be a group of 20. Some boys—some boys hit upon the idea that if you charged in a small group, the Marshals would charge you back; you could draw them in between two buildings where some more boys would be and you could jump them.

[fol. 161] Well, this worked, this worked for a little while. But the Marshals caught on to this and they wouldn't do that any more.

So the boys—boys throwing rocks and bottles extending all the way down from the Chemistry Pharmacy Building all the way through the grove on up to the YMCA Building were throwing and not more than groups of 20—groups of five, six, seven, things like that.

Sometimes you would just go by yourself and throw.

Q. Do you have any idea roughly of the time when the Marshals first fired the gas?

A. No, sir, I don't. I left my watch back in the room and I wasn't too concerned with time at that time.

Q. All right, sir. Did you at any time during the course of that evening encounter an individual whom you recognized from pictures or anything else as General Walker?

A. Yes, sir, that night.

Q. Could you take your pointer and point out to the jury with respect to the Confederate monument where you first saw General Walker?

A. When I first saw General Walker, he was standing about—well, I would say two to four feet right off the sidewalk here.

Q. Now what direction is that from the Confederate [fol. 162] monument?

A. Well, from the Confederate monument, it's still south, southeast.

Q. All right, sir. Now about how far would you say it was to the monument, if you could estimate?

A. From where I saw General Walker to the monument?

Q. Yes, sir.

A. Twenty feet.

Q. Now then as you have been doing and to the very best of your recollection, try to reconstruct in your mind exactly what you saw and what occurred after General Walker appeared at this point and you saw him, and tell the jury just what you saw and what occurred.

A. Well, my attention was drawn to General Walker. The cry went up, "General Walker is here, General Walker is here. We have got a leader."

And there was a crowd there at that time because we had just finished beating up a reporter—no, not a reporter. He was a chemistry professor. He was down there taking names and he was recognized. The boys didn't want reporters around because they feared if they got their picture in the paper or something, you know, it could get them in trouble—and especially professors taking names. That didn't go over too well either.

Q. You didn't like that?

[fol. 163] A. No, sir. So they had just finished beating him up and escorting him down University Avenue and there was a small crowd down there. And the cry went up, "General Walker is here."

I was standing just a little west of the statue. I looked around and saw General Walker.

Q. Now was this position where you were west of the statue in the so-called circle?

A. Where I was?

Q. Yes.

A. Yes, sir.

Q. All right, go ahead.

A. I looked around and saw General Walker. Boys were running up to him, shaking his hand. They wanted to meet him. They just wanted to see what he was like. People had heard of General Walker but we hadn't met him. I was curious, too.

I went down where he was. There was still boys charging at this time. A lot of people didn't know Walker had arrived. Just the people down in there knew it.

Q. Uh-huh.

A. Walker milled around in the crowd with the boys, shaking hands. The boys kept asking him, "Where are your volunteers?"

And he wouldn't answer that.

[fol. 164] And they said, "Well, General, what should we do? Give us some advice."

And he would just shake his head.

And the boys began to start wondering about him then. They said, "Well, what's he here for," you know. They thought that—

Mr. Gooch: We object.

By Mr. Watts:

Q. You can't say what they thought?

A. Well, anyway, I thought—

Q. You can say what you said.

Mr. Gooch: Whatever you say is fine.

A. I thought when I first—my first impression, when General Walker came up, I thought, "Well," I said, "Here we have got a leader." I said, "We have got a leader finally, somebody can lead this thing."

But I found out that General Walker wouldn't lead it. The boys found this out, too. And some of them drifted off, you know, and some of them were right resentful at it—

Mr. Gooch: If the Court please—

Mr. Watts: We withdraw it.

The Witness: I'm sorry. I'm saying the same thing again.

Mr. Gooch: We are going to protect this record regardless of the levity of this matter.

The Court: I understand.

[fol. 165] Mr. Gooch: And I object to the remarks of the witness. He's been cautioned about it and I respectfully request the Court to advise the witness to talk about things he knows.

The Court: That's what I'm getting ready to do, Mr. Gooch.

Mr. Watts: That's right.

The Court: Mr. Sweat, you will find, after you get through law school, there is such a thing as a conclusion. You can't look into somebody else's mind and determine what they think, see?

The Witness: Yes, sir.

The Court: So in describing your story, limit yourself to what you saw, what you actually observed and not what you think somebody else thought or observed.

By Mr. Watts:

Q. That's fine. Now then, son, go ahead with your description to the jury without me bothering you. You just tell this jury exactly what you saw and what occurred.

A. People were still milling around. Boys were still coming back from the charges they had made. They were coming right past Walker down to Hume Hall.

They didn't even recognize General Walker, a lot of them.

Mr. Gooch: Well, if the Court please—

[fol. 166] The Witness: I know they didn't because my roommate was one of them.

Mr. Watts: Just a minute, son.

Mr. Gooch: If the Court please—

Mr. Watts: We withdraw that.

The Court: Mr. Sweat, you are going to be in trouble with me in a minute.

The Witness: Yes, sir, I'm sorry. I just can't—

The Court: And I advise you not to do that.

The Witness: I just keep messing up, huh?

The Court: Yes, you just keep messing up. Now you just testify to what you saw.

Mr. Watts: Yes, sir.

The Court: And what you observed?

The Witness: Yes, sir.

By Mr. Watts:

Q. That's fine. Just go ahead and tell the jury what you saw.

A. The rumor was going around in the crowd, verbal rumor—

The Court: Now did you hear or see the rumor?

The Witness: Yes, sir, I heard the rumor.

The Court: You saw the rumor?

The Witness: Yes, sir.

The Court: What does a rumor look like?

The Witness: The rumor was passed by word of mouth—

[fol. 167] The Court: Did you see it? You heard it.

The Witness: I heard it.

The Court: You testify to what you saw.

Mr. Watts: All right, go ahead.

A. What I saw?

By Mr. Watts:

Q. Yeah. Just tell what you saw. Don't tell the rumor.

A. Well, I saw students pleading with General Walker to get up and speak because they thought—well, I take that

back. Anyway, we thought—I thought Governor Barnett had sold us out.

There were fights going on because of that. Finally General Walker did get up, stepped up on the base of the statue—

Q. Just a minute. Before he stepped on the statue, I wish you would go up there and take your pointer and point out to the jury where he went from the first place under the street light where you saw him. Just trace his course on the chart.

A. Well, when I saw General Walker, like I say, he was standing somewhere right in here.

Q. About how long did he stand there?

A. He stood there—I couldn't say, but he stood there a little while because there were a lot of boys that wanted to shake hands with him.

[fol. 168] He walked up towards the YMCA Building like he didn't know where he was—that's the impression I got.

He stopped and looked around and then he came back. Then he stepped up near the statue over here to the south of it, and he walked just a little north—I mean just a little west of it, stopped and he looked up towards the Lyceum Building.

And the boys were still around him, telling him, well, what was going on and everything.

Q. Was anyone specifically with Walker at that time?

A. Specifically with Walker?

Q. Yes, sir.

A. I didn't notice anyone.

Q. Yes, sir. All right, go ahead and tell the jury, point out as nearly as you can roughly what the furthest west point he reached may have been.

A. I would say just about here.

Q. Now in terms—what is that installation in the middle of the circle?

A. That's the flagpole.

Q. And is that about, oh, a little over half-way between the Confederate monument and the west end of the circle?

A. Yes.

Q. Now in terms of fractions, roughly how far from the [fol. 169] monument to the flagpole did General Walker get on that occasion?

A. I wouldn't say quite half-way.

Q. All right, sir. And then how long did he stay in that position?

A. Just a few minutes.

Q. All right. What occurred then?

A. The thing was still going on.

Q. All right. You can go back then to your seat.

A. People were still rioting. Tear gas was still being fired.

About that time some boys over near the Chemistry Pharmacy Building had just made a charge and the Marshals had leveled some tear gas over there.

Q. And then where did General Walker go?

A. Then he came back to the, near the Confederate statue.

Q. Now up to that time, did General Walker lead the charge?

A. No, sir.

Mr. Gooch: We object, if the Court please.

Mr. Watts: Just a minute now, I would—

Mr. Gooch: A conclusion on the part of this witness. He can testify what happened.

Mr. Watts: May counsel approach the bench?

[fol. 170] (Conference at the bench.)

Mr. Watts: That's what I wanted to get straight. Loan me your pointer there, son.

By Mr. Watts:

Q. Now, son, as General Walker moved from this point here just northwest of the street light and southeast of the Confederate monument over to this point you have marked about not quite half-way to the flagpole, what gait did he travel?

A. He walked.

Q. He did. What type of a walk?

A. Just a slow, casual walk.

Q. Was anyone around him?

A. Yes, sir, students were still around him.

Q. Was anyone between him and the Marshals around the Lyceum at that time?

A. Oh, yes, sir.

Q. Well, would you estimate for the benefit of the Court and jury what the size of the group was between Walker as he walked in this direction and the Marshals?

[fol. 171] A. That would be hard to do, sir, because a lot of the boys in the building—there were some up there breaking up benches, some had just come back from the charge, and there was tear gas smoke. I couldn't be too sure. But just as a guess—

Mr. Gooch: If Your Honor please, we will object to the guess.

Q. That is all right. Give us your best judgment.

A. This is just a guess.

Q. Don't call it a guess. Give us your best judgment.

A. My best judgment would be forty or forty-five people in that area.

Q. All right, now, what was Walker's actions with respect to anyone on beyond him toward the Marshals?

A. There was none.

Q. Did he have any contact with them?

A. Any what?

Q. Any contact with the people out in front that were throwing things at the Marshals?

A. No, sir.

Q. Did he say anything to them?

A. No, sir.

Q. As nearly as you possibly can I wish you would report to the Jury everything Walker said to you boys [fol. 172] around him after he appeared at this point, until

he started backward up from the position between the Monument and the flagpole?

A. Well, mainly what he said, people would introduce themselves, he would shake their hands, say, "Glad to meet you," or something. People would ask him, "General, what should we do, the Marshals have got the Lyceum Building ringed now, shouldn't we get some boys and go over here and do this or do that?" And General Walker wouldn't say anything. And one boy really got mad about it, he said—

Mr. Gooch: Well, now—

By Mr. Watts:

Q. Don't get into what the other boys said.

A. Well.

Q. Did you at any time—strike that.

Did at any time during this interval between your first observing Walker as he came on the campus and the time when he came up there and walked back toward the monument, did anyone at this time have ahold of his arms, in this manner (indicating)? As he walked.

A. No, sir.

Q. Did you notice a rather portly heavy-set individual that came up to the group about that time?

A. No, sir. I did notice one. He was from Columbus [fol. 173] though. I saw him earlier that evening.

Q. Now, then, did—did or did not General Walker—strike that.

Did you hear one identified man query Walker as he approached the group, "General, will you lead us to the steps?"

A. Yes, sir. I don't know that that is the man you are talking about, but I did hear that question asked.

Q. Did or did not you observe Walker as, ". . . he loosened his tie and shirt and nodded 'yes' without speaking?"

A. No, sir.

Q. Did that occur?

A. No, sir.

Q. Did he confer with a group of about fifteen persons who appeared to be riot leaders?

A. Well, now, that was probably the group I was in.

Q. All right. Tell the Jury exactly what happened.

A. Well, if the President of the University thought I was a riot leader I wouldn't be in school very long. This was after the speech.

Q. That was what I was trying to get the timing on.

A. This is after the speech.

[fol. 174] Q. Well, now, to further fix the time on it, did Walker, after he came back from the position there approximately half way between the monument and the flagpole, did he make a speech from the monument?

A. Yes, sir.

Q. And did anything unusual occur in University Avenue just south of the monument just before he made the speech?

A. Just before he made the speech?

Q. Yes.

A. There was a lot of confusion down there.

Q. Was there any vehicles?

A. Not that I remember. Down near the Journalism Building.

Q. At any time prior to this incident you are talking about when Walker made the speech did Walker assume command of the crowd estimated at a thousand?

Mr. Gooch: Leading and suggestive.

By Mr. Watts:

Q. All right, I was just going down the terms but, all right, we will not proceed that way then.

All right, you say Walker came back from that position and made a speech?

A. Yes, sir.

Q. Now, have you outlined to us everything that you [fol. 175] remember that he did and that you saw him do

between the time he arrived on the campus and the time he made the speech?

A. Well, I think—now, he didn't go directly from there to the Confederate Monument. He came back and was down around the Confederate Monument, and then later made the speech.

Q. Was tear gas fired at the group where he was just—strike that.

I see counsel is going to object and I don't want to ask anything remotely objectionable. All I want you to do is tell the Jury what you saw and what happened. Tell us about any tear gas being fired, if any, and where it was fired while he was up in the area west of the monument.

A. West of the monument?

Q. Yes.

A. There was still tear gas up from the flagpole, or up to the Lyceum Building, was a flat of tear gas. This was pretty thick. You could see through it every now and then. Now, there wasn't too much of a breeze that night, so it kind of hung over in the Grove. When this tear gas would clear up the Marshals would let go another salvo of it and build up a cloud.

Q. How close were you to Walker?

[fol. 176] A. Well, I was pretty close to him.

Q. How many feet?

A. Well, I was—I could reach out and touch him.

Q. Now, while you were in that position what was the nearest tear gas that came to you and to Walker?

A. The nearest tear gas?

Q. That is pellets that were fired.

A. There was one that landed over by the—facing the Lyceum Building, there was one that landed to the left of us over there near the street, almost. That was about the closest I remember. Of course, there were so many fired that night it would be hard to tell.

Q. Now, when Walker returned from that position to the area near the monument, what was his gait?

A. He was still walking.

Q. What kind of a walk?

A. It was just—my impression, just a casual stroll, just to look it over; things.

Q. And what were the students doing around him?

A. The students, by this time, had kind of, they were just—

Mr. Gooch: Wait a minute.

By Mr. Watts:

Q. What were they doing?

A. They were just walking along with him.

Q. That is what we are trying to get.

[fol. 177] A. Standing around him. Some people had just heard he was there.

Q. Don't tell us that, what they heard. And what was the gait of the students?

A. Oh, they were in a slow gait too. They were keeping up with him.

Q. What were the actions of the students in his immediate vicinity?

A. Well, they were just standing around him.

Q. Were any of that group participating at that time in throwing things at the Marshals?

A. No, sir.

Q. Now, then, describe to the very best of your ability what happened from the time you started back from the position west of the monument until he made his speech on the monument?

A. I am not too sure about that. Walker did come down to the monument and he stood around in that area and there were a lot of things still going on over around the Lyceum Building. I returned and watched that for a little while, but I know Walker stayed down in that area.

Q. Then, what did he do?

A. He made a speech on the statue.

Q. Would you outline please for the Jury to the best of your recollection what General Walker told the boys from [fol. 178] the statue?

A. General Walker got on the statue and he said something to this effect, he said, "You have a right to protest. It is guaranteed to you in the Constitution. This is not the way, it is the long way around."

He said, "You do have a right to protest, . . ." but he said something about, ". . . Cuba being yonderway." That is the best I remember.

Q. What was the reaction? Was there any sound that come from the students?

A. There was some jeers.

Q. What?

A. Jeers, boos.

Q. Then what happened?

A. Walker stepped down and the crowd dwindled off. Walker stepped to the right of the Confederate Monument and this is when I talked to him. He stepped down to his immediate right and he came passed me. This is now when the group of around fifteen boys were around Walker. The other crowds had drifted off.

Q. Tell us about that.

A. Walker stepped down and walked past, just a few feet west of the Confederate Statue, and stopped, and looked around, and he lit a cigarette, and—

Q. Are you sure of that?

[fol. 179] A. Yes, sir, I know he did because at that time I borrowed a cigarette from him.

Q. Did you have any cigarettes of your own?

A. Yes, sir, they were back in the room though. I didn't bring anything down with me.

Q. Then what happened?

A. We stood and talked with General Walker, some of us did, just a general conversation. We discussed politics. I asked him about his training program he had over in Germany and we talked about things like that; just a general conversation.

Q. What was going on further toward the west at that time?

A. Oh, further toward the west, the same thing. Boys in small groups started throwing at the Marshals and they were charging and coming back, and the Marshals were still shooting tear gas.

Q. What were the group of boys immediately around Walker doing?

A. The boys immediately around Walker were just standing around.

Q. Were any of them at that time throwing things?

A. No, sir.

Q. At this point, could you take the pointer there and show the Jury where this conversation took place?

[fol. 180] A. Right about in here (indicating chart). That is about southwest of the Statue.

Q. And about how long did that session there take place?

A. I would say twenty minutes.

Q. Where did Walker go from there?

A. Walker started out over this way (indicating), and I still stood there and watched him. I was watching him because a boy had asked me to keep an eye on him.

Mr. Gooch: Now—

By Mr. Watts:

Q. Don't say what the boy told you to do. Just tell us—

A. He walked up this way, (indicating), and stopped and stood around. He seemed to start back. At this point I lost him. I got interested in something else.

Q. Did you have any more contact with Walker from that time on?

A. No, sir, I didn't see him any more that night.

Mr. Watts: Take your seat. I believe that is all.

The Court: We will recess before cross examination. Ladies and Gentlemen, we will recess until a quarter until 11:00 by this clock in here.

[fol. 181] (Thereupon, Plaintiff's Exhibit No. 11, was marked for identification.)

Cross examination.

By Mr. Gooch:

Q. In September of 1962, you were approximately 18 years of age, is that correct?

A. No, sir.

Q. Nineteen?

A. Nineteen.

Q. All right. You had been a student at the University of Mississippi, I believe you testified, for about a year and a half?

A. Yes, sir.

Q. Now, do you recall when the school year opened in the year 1962?

A. Yes, sir.

Q. When was that?

A. In September.

Q. Do you remember what date?

A. No, sir, I am not sure about that.

Q. Do you remember what date, about what date, you got on the campus for the Fall Semester for 1962?

A. What day I got on the campus for the Fall Semester?

Q. That's right.

A. No, sir, not the exact date.

[fol. 182] Q. Well, prior to the time that the Fall Semester began at Ole Miss in 1962, it was general knowledge in the State of Mississippi and elsewhere as to the Meredith case, was it not?

A. Yes, sir.

Q. You were aware, when you entered school in September of 1962, that the United States Court of Appeals had ordered Meredith on the campus in the status of a student, were you not?

A. Yes, sir.

Q. You knew that Governor Ross Barnett exercising his prerogatives as Governor of the State of Mississippi was using considerable force to prevent the entry of Meredith into Ole Miss, did you not?

A. Yes, sir.

Q. You knew that Meredith, on more than one occasion, had been turned away from registering in Ole Miss by both Governor Ross Barnett and Lt. Governor Johnson, did you not?

A. Yes, sir.

Q. Were you on the campus on September 25th, 1962, when the Governor, in connection with certain law enforcement agencies, refused to admit Meredith to Ole Miss?

A. Yes, sir.

Q. At that time, an angry resentment came up from the student body in support of Governor Ross Barnett, did it not?

[fol. 183] A. A resentment to Governor Ross Barnett?

Q. No, a resentment to the entry of Meredith?

A. Yes, sir.

Q. And the students—I will confine it to you. You felt that Governor Ross Barnett was right, did you not?

A. Yes, sir.

Q. You felt that the United States District Court or the United States Court of Appeals was wrong, did you not?

A. Well, not necessarily, sir.

Q. All right.

A. I felt that they were wrong in this case.

Q. All right.

A. Because of James Meredith's Air Force record. The doctors had testified he was in a nervous state of condition. And I felt that Mississippi had a right, and—as a state, on behalf of the people, to take their case before the Supreme Court, before a full tribunal.

Q. You did know, however, that a final judgment had been entered by the Fifth Circuit ordering Meredith admitted, did you not?

A. Yes, sir.

Q. You did know that Governor Ross Barnett, Lt. Governor Johnson and all of those persons acting in concert had been enjoined from interfering in any way with the entry [fol. 184] of Meredith as a student at Ole Miss, did you not?

A. Yes, sir.

Q. All right. You also knew those things on September the 30th, 1962, did you not?

A. Yes, sir.

Q. Now I believe you have testified that you are a pre-law student?

A. Yes, sir.

Q. Did you enter the University of Mississippi for the purpose of becoming a lawyer?

A. Yes, sir.

Q. You knew at that time that the Court's Decrees, edicts and injunctions had to be obeyed until overruled, did you not?

A. Yes, sir.

Q. Are you still of that same opinion?

A. Yes, sir, I am.

Q. All right. Now the reason I alluded to your youth—I say this in all fairness. That's something that we have all had, some of us have passed on beyond past that but something we cherish deeply.

Eighteen, nineteen-year-old youth is capable of perception and remembering what things have happened, is he not?

A. Yes, sir, he could be.

[fol. 185] Q. You consider yourself one of those, do you not?

A. Well, I remember certain things—I mean—

Q. All right. I believe you testified that you arrived on the campus somewhere around 4:30 in the afternoon of Sunday, September 30th?

A. 4:00 o'clock.

Q. 4:00 o'clock. And at that time was there any activity on the campus at all?

A. By what. . . . "activity"?

Q. Were there any students around the Lyceum Building or down in the circle?

A. There were a few, yes, sir.

Q. Was there anything unusual occurring at that time in the nature of any rock throwing or things of that sort?

A. No, sir, not at that time.

Q. Now did you leave the area from the time you arrived on the campus around 4:00 o'clock until after the first burst of tear gas was fired?

A. No, sir, I was there before the first burst of tear gas was fired.

Q. All right. Then you remained constantly—

A. Yes, sir.

Q. —on the campus until the tear gas was fired and for some time after that?

A. Yes, sir.

[fol. 186] Q. All right. Now do you know about what time the Marshals came on the campus?

A. I would say 5:00 or 5:30. Now I didn't have my watch at that time.

Q. I understand, and I am not holding you to times. I'm just giving you an approximation.

A. It was daylight.

Q. Still daylight. Now you knew why the Marshals were there, don't you?

A. Yes.

Q. You knew that the Marshals were there for the purpose of enforcing a court decree, did you not?

A. Yes, sir. But the court decree that I understood that they were enforcing was one that was handed down by Hugo Black over the telephone, mobilizing them.

Q. That makes a difference to you?

A. Yes, sir.

Q. As to whether or not it's written?

A. It did.

Q. And you didn't know that the Fifth Circuit Court had ordered Meredith into that University?

A. That the—the Circuit Court had—I can't think who it was—somebody had given the State of Mississippi a stay. Might have been Judge Sidney Miles, I'm not sure.

Q. Or Judge Cameron, to be exact?

[fol. 187] A. Or Cameron.

Q. And the stay had been revoked by Justice Black, is that correct?

A. Yes, it was a stalemate and Justice Black broke it.

Q. And Justice Black is on the Supreme Court of the United States, is he not?

A. Yes.

Q. And Justice Cameron is the District Court of Mississippi, I mean Justice Cameron is on the Circuit Court?

A. Circuit Court.

Q. You do realize, as a pre-law student, that the Supreme Court has a higher power than a Circuit Court, do you not?

A. Yes, sir, but one man—

Q. All right. One man or ten, it matters not.

Mr. Watts: If Your Honor please, this is an awfully unequal struggle between a lawyer of the experience of Mr. Gooch and a pre-law student.

Now within limits, I have no objections but it becomes argumentative after so long a period of time.

The Court: Is that in the form of an objection, Counsel?

Mr. Watts: Yes, sir, it's argumentative at this point.

[fol. 188] The Court: Then it's overruled.

By Mr. Gooch:

Q. Now I take it that you did not attend the football game in Jackson?

A. No, sir.

Q. You had come from your home at Karnes?

A. Yes, sir.

Q. Now when you saw the Marshals come on the campus, about where were you with respect to the Lyceum Building?

A. I was in front of the Lyceum Building, standing on the grass in the circle.

Q. Were the highway patrolmen there at that time?

A. There were a few there.

Q. More came later?

A. More came in just right after the Marshals started—

Q. Then without going into a great number of details, I believe you testified, and I would like for you to elaborate a little more, if you will, on whether or not things started being tossed at the Marshals, as you put it, or thrown, pebbles, cigarette butts, et cetera?

A. Yes, sir, pebbles and cigarette butts were tossed at the Marshals.

Q. Now there had been no gas fired prior to that time, had there?

A. No, sir.

Q. The tenor of the crowd, did you hear some cursing? [fol. 189] A. Yes, sir.

Q. And abuse—

A. As a matter of fact, our school yell has a few words in it and they were giving that.

Q. You hurled that at the Marshals?

A. Yes, sir.

Q. Did the Marshals answer back? I believe you said they remained silent?

A. Yes, sir, they did. They remained silent. People would ask them something and they wouldn't say anything. They would just look at you.

Q. Then the students, or whoever was there, started throwing a few rocks and pebbles at them?

A. A few pebbles and cigarette butts.

Q. All right. How about, anything catch afire? Did anything catch afire?

A. No, sir.

Q. You didn't see a canvas top on one of the automobile—Army trucks catch afire from a match or cigarette that was tossed into it?

A. That—I read that in a report somewhere. There was no fire at that time.

Q. All right. At least, if there was, you didn't see it, is that correct?

A. I was standing there. I would have seen it had there [fol. 190] been—

Q. While you were standing there, were you doing some of the pebble tossing?

A. No, sir, I was with a bunch that was yelling.

Q. You were yelling?

A. Yes, sir.

Q. And you say your school yell has a few words that amount to taunts, is that right?

A. Yes, sir.

Q. All right. Some of the language, though, was beyond the taunting stage, was it not?

A. Well, that depends upon the person, I guess.

Q. Very well. Now would you attempt to estimate the time—I know you didn't have a watch—attempt to estimate the time or about the time that the first tear gas was fired?

A. Oh, it was about—it was close to about 40 minutes after the Marshals had ringed the Lyceum Building.

Q. Was it still daylight or was it dark?

A. It was just—just a little daylight left.

Q. Just a little daylight left?

A. Yes, sir.

Q. And were you hit by the tear gas?

A. No, sir, I wasn't hit by it. I got some of it, though.

[fol. 191] Q. You hadn't thrown anything up to that time?

A. Not up to that time, no, sir.

Q. But after that time, you decided to really join in the riot, didn't you?

A. After the second volley.

Q. After the second volley?

A. Yes, sir.

Q. That's when you made up your mind to do what you could do, is that right?

A. That's right.

Q. And you set about to direct whatever havoc you could towards the Marshals, didn't you, Mr. Sweat?

A. No, sir, I didn't direct any havoc.

Q. Did you throw anything at the Marshals?

A. Yes, sir.

Q. Well, that wouldn't be havoc?

A. Well, it was havoc but I wasn't directing any.

Q. You weren't throwing at the Marshals?

A. Yes, sir.

Q. All right. A choice of words. Now do you know about how long things were thrown at the Marshals that night?

A. All night long, sir. Even up through dawn, even at the Army when they came in.

[fol. 192] Q. Was that throwing at the Marshals almost continuously and constant throughout the night from the time of the second salvo of tear gas was fired?

A. Well, looking at the night as a whole, it was continuous and constant, because there was always somebody running out there throwing something.

Q. Now, you did participate in some of this—would you call this a mob?

A. Well, not really.

Q. Would you call it a riot?

A. I would call it a riot.

Q. All right, was it obvious a riot was occurring there in front of the Lyceum Building?

A. Sure, a riot was occurring.

Q. Now, let's go a step further in your dissertation, and come down to the question of your moving away from the Lyceum Building, and get down to the time you were in the party, or I believe you said you were in the party that beat up a chemistry professor.

A. I was down there at the time. I was still standing behind the Confederate statue because they beat him up east of the Confederate statue, on the east—East Avenue.

Q. I must have misunderstood you. I understood you to say, "We . . . "?

[fol. 193] A. Well, "We". I consider myself part of the student body. But I didn't beat him up.

Q. You didn't participate in that?

A. No, I didn't.

Q. But some of your group did?

A. Yes, sir. Not my group. I mean the students did.

Q. Was anybody else beaten up?

A. Yes, sir, there were reporters beat up that night, people with cameras.

Q. Did you witness the beating up of a reporter and see his camera smashed and his car kicked around a good deal?

A. Yes, sir.

Q. That was before General Walker arrived on the campus, wasn't it?

A. Yes, sir, that was still in the evening. The reporter was from Texas, driving a station wagon?

Q. I believe from the Dallas News, if I am not mistaken.

A. Yes.

Q. You say that was in the evening?

A. Yes, sir, that was still—that was still in the evening, kind of. That was before the volley of tear gas was fired. The reason the students beat this reporter up—

[fol. 194] Q. Never mind about the reason. If you will stick to the facts, please, sir, I think we will get along a little bit better.

Now, you said on direct examination, and correct me if I am wrong, that when you first saw General Walker was just after this chemistry professor had been beat up, and escorted down the University Avenue?

A. Not just after. I explained there was a crowd. That is why there was a lot of people down there. They had witnessed the beating, and some of them were still hanging around.

Q. Now, give me again, if you will, please, the place on the campus, or near the campus, where you first saw General Walker?

A. It was right here (indicating).

Q. You are pointing to a place a little bit east and south of the Confederate monument?

A. Yes, sir.

Q. Describe General Walker's movements from the time you saw him until I ask you another question.

A. Yes, sir. Well, like I said, I saw General Walker here,

coming up, and people were introducing themselves. General Walker walked toward the YMCA Building and stopped and came back in here (indicating chart), walked [fol. 195] over here, not quite halfway. He came back again in this area, still moving around.

Q. Let's dwell on that a moment, if you will, please. You may resume your seat. When General Walker arrived on the campus, I believe you stated that quite a number of the students rushed up to him and started saying various things, "Here is General Walker, we have a leader, where are the volunteers," and things of that sort?

A. Yes, sir.

Q. Was it obvious to you, with your perception, that you and the crowd was rather glad to see General Walker?

A. Yes, sir.

Mr. Watts: Excuse me, if Your Honor please. If we want to throw this open, what this man thinks the crowd was thinking, that is fine with me, but I want it understood that if he goes into it I will.

The Court: Are you objecting to it?

Mr. Watts: I just want it understood that I will go into it.

The Court: No, we are not going to do that. Are you objecting to it?

Mr. Watts: I don't care. It is all right with me. I want to bring out the whole facts. We can bring out anything. [fol. 196] Mr. Gooch: If the Court has ruled, may I have the answer to the question?

A. Will you repeat that question?

Mr. Gooch: Read it back to him, Mr. Nuss.

(Question read.)

By Mr. Gooch:

Q. I will reframe that question. Were you glad to see General Walker?

A. Yes, sir, I was glad to see General Walker.

Q. Had you heard about General Walker before?

A. I had heard about General Walker before.

Q. Did you make any outcry to the General as he came on the campus?

A. No, I didn't.

Q. But you did hear it said, "Here is General Walker?"

A. "Here is General Walker."

Q. "Here is our leader?"

A. That's right—wait, take that back.

Q. Did you hear it said?

A. Yes, sir, they said, "We have got a leader now."

Q. Then was a question asked General Walker among that group as to where his volunteers were?

A. Yes, sir.

Q. What did he say?

[fol. 197] A. He didn't say anything.

Q. Had you heard by news releases and otherwise that General Walker was coming with ten thousand strong?

A. Well, I heard that for weeks.

Q. You mean before?

A. Yes, sir, I heard the Alabama National Guard was on the way, the Louisiana Highway Patrol was coming up—we heard things.

Q. I will ask you to talk about General Walker rather than wandering off to Louisiana and other places. You had heard General Walker had said he was coming with a group of volunteers?

A. Yes.

Q. All right, and he was asked where they were?

A. Yes, sir.

Q. And he made no statement?

A. He made no statement.

Q. Did you shake hands with him at that point when you first saw him a little bit south and east of the Confederate statue?

A. No, I didn't shake hands with him until he stepped off the statue after his speech.

Q. All right. Now, at the time you first saw him was there a group of students around?

A. At the time I first saw him? Yes, sir.

[fol. 198] Q. And that was part of the group that had gone down and escorted the chemistry professor who had been beaten up, off the campus?

A. Some.

Q. Some of them?

A. Some of them.

Q. How many people would you estimate were down there around the Confederate monument and there where University Avenue comes on the campus, at the time you first saw General Walker?

A. Just in that area I would say seventy-five.

Q. All right. Now, how many would you put on the campus in the circle at the time General Walker came on the campus?

A. On the campus in the Circle? People? I would say one thousand now. Now, that is including around the YMCA Building, and just a little behind it. Those were people standing around, now. Not all were participating in the riot.

Q. You said something on direct examination you thought there might have been three or four thousand?

A. I said that evening.

Q. That evening?

A. That evening when the people first arrived. We had people from Oxford that come in to see what was coming [fol. 199] off.

Q. At the time General Walker got there, how many people would you estimate were on the campus? One thousand, two thousand, five hundred, two hundred and seventy-five?

A. On the campus itself?

Q. Yes, sir.

A. On the campus itself, on the entire campus itself, not including people in the dormitories?

Q. I understand.

A. I would say two thousand. This is including everything from the Alumna House on down University Avenue, on up to the Lyceum Building.

Q. Let's confine ourselves to the area in the north bounded by Peabody and the Y, on the east by the Confederate monument, on the south by, I believe you said, the Engineering Building, and on the west by the Lyceum, including the roadways and the circle. How many people would you estimate was on the campus, or in that area at the time General Walker arrived?

A. Around six hundred.

Q. All right. Now, when this group, you among them, went by General Walker, and when he was south and a wee bit east of the Confederate monument, how many people gathered around General Walker there?

[fol. 200] A. There were about fifty people gathered around him there.

Q. As he started toward the YMCA what did those people do?

A. Well, they followed him.

Q. As he cut back from the YMCA? And westward toward the flagpole what did that group of people do?

A. He didn't cut back that way.

Q. All right, he came back?

A. Down University Avenue Street.

Q. He came back down University Avenue?

A. Yes, sir.

Q. Then is when he walked west to the flagpole, or Lyceum Building?

A. There was a pause there.

Q. I will say after the pause.

A. People were still shaking his hand.

Q. Were they following him as he went west toward the flagpole?

A. A few did. A few went back to Hume Hall to get more bricks..

Q. Now, that brings up a very interesting subject. As a portion of these students followed General Walker west toward the Lyceum Building, the rest of them went over to Hume Hall to get more bricks, or some of them; is that [fol. 201] right?

A. Well, a few of them that had already returned from previous charges. Some of them didn't even know General Walker was on the campus.

Q. You say they went to Hume Hall to get more bricks?

A. Yes, sir.

Q. How did they transfer those bricks from Hume Hall? Carry them in their hands, a wheelbarrow?

A. Just anyway you could. If you had a box to fill them up, that was all right.

Q. When you brought those bricks on into the Circle area, what did you do with them?

A. Into the Circle area?

Q. Yes, sir.

A. Well, we would generally wait for the Marshals to charge.

Q. Then what?

A. Then we would charge back. The thing to do was catch them right after they had shot their tear gas guns so they couldn't let a salvo go in your face, you know, directly at you.

Q. Then what did you do with the bricks and stones you had gotten from the Hume Building?

A. Well, we would throw at them.

[fol. 202] Q. At the Marshals?

A. Yes, sir.

Q. And you were in that group?

A. I was. Not at that time. Now, earlier that night I had been. But by that time I had been nicked in the thumb and my arm was stiff.

Q. Were you nicked in the thumb before you saw General Walker?

A. Yes.

Q. After?

A. Yes.

Q. About how long before?

A. It wasn't too long before I saw General Walker, because a boy had just brought me back.

Q. From the Infirmary?

A. Yes.

Q. Well, now, before you went to the Infirmary had there been charges and hurling of brick and stone at Marshals?

A. Yes, sir, bigger charges at that time.

Q. When you came back from the Infirmary what did you find?

A. I found the things had changed, that the people were not charging in the old type Confederate line, like they used to, because it was too costly; that they had split up into [fol. 203] groups of five, seven, or twenty, and just coming out from anywhere they could.

Q. Toward the Marshals?

A. Yes, sir. But to attack the Marshals you had to get past the flagpole, you had to go through the tear gas smoke, and you had to hold your breath and run at the same time.

Q. Do you know about how far it is from the Confederate monument to the flagpole?

A. Oh, I guess it is about two hundred and fifty yards.

Q. Two hundred and fifty yards? Step down there and look at the scale on that map.

A. I am not sure. Being around the campus you never really pay any attention to distance.

Q. I realized that and that is why I asked you to check the scale on the map.

A. Two hundred and fifty feet.

Q. That is just one third of two hundred and fifty yards, isn't it?

A. Yes, sir, that's right.

Q. Now, how far is it from the flagpole up to the Marshals?

A. That is a little further.

Q. From the flagpole up to the Marshals?

[fol. 204] A. Oh, I thought you were talking about from the Confederate statue.

Q. No, no, no. Talking about from the flagpole up to the Marshals.

A. The Marshals were directly in front of the Lyceum Building on the steps. They still stayed back in the line.

The Court: The question, Mr. Sweat, is how far is it?

A. How far is it?

The Court: Yes, sir.

A. It is still two hundred and fifty feet.

By Mr. Gooch:

Q. Two hundred and fifty feet from the flagpole?

A. I am going by the scale on the map.

Q. That is what I am going by. Two hundred and fifty feet from the flagpole up to the Lyceum Building? Take this pencil, if you will, please, and project it. That is the back of the Lyceum Building where you are putting the pencil.

A. No, sir, this is the front.

Q. That's right. Put your pencil point here. You had it past what you were talking about. You did overguess considerably.

A. Yes, sir.

[fol. 205] Q. It is not much more than one hundred feet from the flagpole up to the Lyceum Building?

Mr. Watts: Now, if Your Honor please, I object to that as argumentative. If he overguessed Mr. Gooch is underguessing. This is argumentative.

The Court: Mr. Sweat, are you able to calculate the distance?

The Witness: No, sir.

The Court: You are not able to use that scale and calculate it?

The Witness: I could tell if you would give me a ruler.

The Court: Do the best you can with the pencil and tell the Jury what you find.

Mr. Watts: As I understand, the question is from the flagpole to the Lyceum Building?

The Court: That is right.

Mr. Watts: Yes, sir.

The Witness: Hundred and twenty-five feet is what I come up with.

By Mr. Gooch:

Q. And the Marshals were out in front of the Lyceum Building?

A. Yes, sir.

Q. So, the Marshals would have been some closer?

A. Yes, sir.

[fol. 206] Q. To the flagpole than the Lyceum Building?

A. Yes, sir, but you still had to go past that flagpole to get to the Marshals. You couldn't throw it.

Q. That depends on the throwing arm of the individual, doesn't it?

A. No, sir, the trees and limbs actually prevented you from tossing bricks or bottles. You couldn't see.

Q. All right. Now, at the time General Walker arrived on that campus and you saw him let's look at it through your eyes, Mr. Sweat. Were the Marshals being thrown at?

A. Prior to the time General Walker arrived?

Q. At the time.

A. Yes, sir.

Q. At the time he arrived on that campus were the boys bringing up bricks and stones from Hume Hall?

A. They had been doing that all night long.

Q. Was that obvious to you as you stood near General Walker?

A. Well, I didn't pay any attention to that. That had been going on all night.

Q. It was continuous?

A. It was continuous.

Q. It was perfectly obvious to you that it was going on?

[fol. 207] A. Yes, sir, but after I saw it I didn't pay much attention to it, an—after that.

Q. Was it obvious to you there was tear gas in the air? Up somewhere around the flagpole and the Lyceum Building?

A. Yes, sir.

Q. And further back into the Circle?

A. Yes, sir.

Q. Was that easily discernible?

A. Sir?

Q. Was that easily discernible, just by looking?

A. Yes, sir, you could see it.

Q. Were there boys or groups going in and throwing missiles at the Marshals at the time General Walker walked on that campus?

A. Yes, sir.

Q. Was that obvious to you from where you stood down near the monument?

A. Yes, sir.

Q. And it was obvious to anybody that looked around, that there were bricks being carried on the campus, on the circle, that they were being broken up into half bats, that the boys were gathering up those missiles and bricks and stones and coke bottles, whatever they could find, and going toward the Marshals and throwing those missiles at the [fol. 208] Marshals? That was obvious, wasn't it?

A. Yes, sir.

[fol. 209] Q. It was obvious at the time General Walker walked on that campus, wasn't it?

A. Yes, sir.

Q. Now the General, as he walked, after he had gone over towards the YMCA, and according to you had come back down to the Confederate monument, he walked some distance, which you estimate as half-way?

A. Yes, sir, not quite half-way.

Q. Not quite half-way?

A. No, sir.

Q. Trying to be accurate on your testimony. Walked about half-way from the Confederate monument up towards the flagpole?

A. Up towards the flagpole, yes, sir.

Q. And you say he was followed by a group of these students?

A. A group.

Q. Did those students have anything in their hands?

A. No, sir.

Q. They all had dropped them just before they started up there?

A. Yes, sir, most of them dropped them so they could shake hands with him.

Q. I see. Did he—did they pick them up?

A. If they didn't, someone else did. I couldn't speak for [fol. 210] the people that dropped the bricks.

Q. Some of them dropped them and some of the rest picked them up?

A. They were more interested in talking with General Walker.

Q. I understand. But they did walk towards the Marshals?

A. Yes, sir, they walked up towards the Marshals—but not half-way.

Q. All right. Now this leadership you were talking about, you have mentioned in answer to a question by Mr. Watts that you were a part of a group of about 15 leaders that conferred with General Walker?

A. Well, we were—

Mr. Andress: Just a moment, we are going to object to the form of the question. He did not testify there were 15 "leaders". He testified there were about 15 people.

The Court: If he didn't, he can say so. Overruled.

The Witness: That's right, they weren't leaders. That's the account that Mr. Watts read to me and I said that might be what whoever wrote that was talking about.

By Mr. Gooch:

Q. Mr. Watts asked you, read you an excerpt from an article in which it said that General Walker conferred with about 15 people who appeared to be the riot leaders and [fol. 211] your answer was, "That was part of the group I was in."?

A. I think—I think that's the one he's talking about.

Q. All right. How long did that conference take place?

A. Not too long.

Q. And when did it take place?

A. It took place while they were standing there. They stopped—

Q. While who was standing there?

A. While General Walker and a few of the boys were standing there.

Q. Was that when he first came on the campus?

A. No, sir. Now I am talking about right after the speech he made.

Q. We haven't gotten down to the speech yet.

A. Well, no, this—then this isn't the thing we are talking about then, the 15 people.

Q. Well, the 15 people you say was after the speech?

A. Yes, sir.

Q. Could you be mistaken on that?

A. No, sir.

Q. As a matter of fact, didn't General Walker, the minute he finished his speech and without hesitancy come down [fol. 212] off the monument and walk towards the Marshals and toward the Lyceum Building with a group of people following him?

A. No, sir. When General Walker stepped off the statue, he stepped to the right and walked just a little past the statue and that's when we talked with him.

Q. And he didn't walk on up then towards the Marshals?

A. No, sir.

Q. At no time?

A. Not then.

Q. Then did he later?

A. He did, now, before that. Like I told you, when he came back from the "Y", he started up that way, but he stopped half-way and he stood and looked and then he came back.

Q. Did General Walker after that first advent, when he walked toward the flagpole with this group you described, before the speech, did you ever see General Walker walk at the head of a group any more west toward the Marshals?

A. Walk at the head of a group?

Q. Yes, sir.

A. He could have now but I didn't see it.

Q. You didn't see it?

A. No, sir.

Q. And when General Walker stepped down off the [fol. 213] monument, you say that he stopped there and conferred at length?

A. Yes, sir, we talked with him.

Q. How long would you say he conferred?

A. Long enough for me to smoke a cigarette and have it put out and still stand there and talk with him.

Q. Now that was after the speech?

A. After the speech.

Q. Now you are positive about that?

A. I am positive about that.

Q. All right. Now let's get down to the speech that General Walker made on the monument. Would you detail again for the benefit of myself, as well as the Court and jury, what you heard General Walker say.

A. Well, I heard General Walker say something to the effect that, said, "You have a right to protest. It's guaranteed to you in the Constitution."

Said, "This is not the right way. It's the long way around but," said, "You have a right to protest."

And he said something about Cuba being that way (indicating).

Q. Do you remember him making a statement as follows: "This is wrong but you have a right to protest"?

A. He said that. Yeah, he said something like that.

Q. That was after he had come on the campus and had [fol. 214] seen all of these bricks and bottles and stones and sticks being hurled at the Marshals?

A. Yes, sir.

Q. Wasn't it?

A. Yes, I guess he was—he saw that.

Mr. Watts: If Your Honor please, I still object to him asking this witness what Walker saw.

The Court: Sustained.

Mr. Andress: We request that the jury be instructed not to consider it.

The Court: The jury is instructed not to consider the last question and answer.

Mr. Gooch: Well, now I don't want to transgress on the Court's ruling but I do want to ask him one more question and I'd better say it to the Court.

The Court: You asked him a while ago, Mr. Gooch, what he saw and what was taking place out there at the time that the General came up there.

Mr. Gooch: I can't ask him about what Walker said?

The Court: Oh, yes.

Mr. Watts: Oh, I have no objection to that.

The Court: Yes.

Mr. Watts: I just don't want him to ask him what Walker saw.

The Court: That question related to what he saw and [fol. 215] not what Walker said.

Mr. Gooch: Let's go back to cure that objection, then.

By Mr. Gooch:

Q. I asked you and you answered as to what General Walker may have seen. I want that question stricken because I want just strictly what you know.

At the time that General Walker came on the campus, the very time he came on the campus, before he made a

speech, tell us whether or not there were sticks and stones and bottles hurled at the Marshals?

Mr. Watts: If Your Honor please, I object to that as repetition. The witness has testified that at least four times from Mr. Gooch's testimony (sic), that when Walker came on the campus, there were being sticks, stones and missiles—

The Court: Sustained.

By Mr. Gooch:

Q. Did you hear General Walker say these words: "Keep up the protest."?

Mr. Watts: Just a minute, if Your Honor please. I object to that unless he fixes where and when.

Mr. Gooch: On the monument.

Mr. Watts: Now I have no objection to it.

A. No, sir, I honestly didn't hear that.

By Mr. Gooch:

Q. We will get to that in just a minute. I will ask you if this happened: Walker, right after that—and I'm talking [fol. 216] about the speech—stepped down off the statue, a crowd of people still around, Walker walked up due west towards the flagpole?

A. He walked a few steps due west past the Confederate monument, going toward the flagpole but not far enough to really make any difference.

Q. All right. Just a moment. Let me ask you this question:—

Mr. Watts: Might I fix what place you are reading from the deposition, please? The pages are numbered.

Mr. Gooch: Well, I will just put that in now.

Look on Pages 16, of Mr. Sweat's deposition.

Mr. Watts: All right.

By Mr. Gooch:

Q. Mr. Sweat, do you recall your deposition having been taken over in Oxford, Mississippi, sometime in March of 1964?

A. Yes, sir.

Q. March 13th, to be exact. Now, if you will, please look on Page 16, the question was asked:

"Who came down here to a meeting?" And the answer?

A. Walker said—you want me to read it?

Q. Yes.

A. Walker said something about a meeting here in Oxford courthouse that Birdsong had withdrawn the highway patrol and I didn't get all of this speech because someone [fol. 217] near me started talking to me and I didn't hear that clearly.

Walker right after that stopped—stepped down off the statue, a crowd of people still around—these are the 15 boys I was talking about.

Mr. Gooch: Please read your testimony, please, sir.

A. Well, Walker walked up due west towards the flagpole. Well, he did, he walked a few steps up.

Q. All right. Could you give us the benefit of your very best estimate, not in the whole area but in the crowd that immediately surrounded Walker.

A. Right after the speech?

Q. Yes, sir.

A. Right after the speech, Walker lost the crowd.

Q. Read your answer.

A. Fifty people. There were 50 people around the statue.

Q. Go ahead and read the rest.

A. Fifty people. General Walker was a curiosity. He was a well noted person. People were there to see what he looked like. Many had never seen him before.

Q. Next question: Did anyone say anything about leading them before he started up the grove?

Mr. Andress: Before he started west.

By Mr. Gooch:

Q. Did anyone say anything to him about leading them before he started west? Excuse me.

[fol. 218] Mr. Andress: All right.

A. Yes. While Walker was going up to the grove he stopped before he got to the flagpole. He looked it over. People said, "Walker, what could we do?"

Now this was before the speech.

By Mr. Gooch:

Q. Now, let's see if it was.

A. Now this is the way I understood the question—before the speech.

Q. Well, that doesn't say that, does it?

A. It doesn't say when it was, really.

Q. All right. Now let's don't quibble, please, sir, because here is what you have talked about.

A voice somewhere to the left said, "I'll tell you, you sold us out. It was Col. Birdsong."

Now was that on the monument or was that before he got on the monument?

A. That was while Walker was on the monument.

Q. All right.

A. People were screaming, Ross Barnett had sold them out.

Q. People said, "Was it Col. Birdsong, General Walker? Was it Col. Birdsong?"

Mr. Watts: May I inquire where you are reading?

Mr. Gooch: Page 16, the same page. I have been on it for the last five minutes.

[fol. 219] Mr. Watts: You are skipping around. I can't keep up with you.

Mr. Andress: Going backwards.

The Court: Just a minute. I don't want any of this business between counsel.

Mr. Watts: I'm sorry. I found it. It's at the top of the page.

By Mr. Gooch:

Q. General Walker said the man was Col. Birdsong. Did that happen on the monument?

A. Yes, sir.

Q. He mentioned something about coming down here to Oxford to a meeting. I'm not sure about that because—Now was that on the monument?

A. That was interrupted. The meeting?

Q. No.

A. Oh, when he said this? He said the man was Col. Birdsong. Now this is what I said, said he mentioned something about coming . . . . meeting. Now this was in talking with him, there was something mentioned about a meeting in Oxford. Now I didn't get all of that.

Q. Well, Mr. Sweat, if you will take that deposition and look on Page 15, you will see that the question was asked concerning the speech on the monument and then what occurred afterwards.

Is that a fair interpretation of your deposition?

[fol. 220] A. (Reading) Your Governor did not sell you out—

Q. Just go ahead and read.

A. General Walker did not say anything. He looked out over the crowd, stared down University Avenue. A voice somewhere on his left said, "I'll tell you. . . . Col. Birdsong."

Q. Was that while he was on the monument?

A. Yes, sir, he was still standing on the monument.

Q. All right. Now go ahead.

A. (Reading) People said, "Was it Col. Birdsong. General Walker, was it Col. Birdsong. General Walker said the man was Col. Birdsong."

Q. All right.

A. He mentioned something about coming down here to Oxford to a meeting.

I'm not sure about that because—now this was right after the speech, in talking with him.

Q. All right, the next question follows.

A. Walker stepped off the statue, a crowd of people still around. Walker walked up due west towards the flagpole.

Well, he did. There were a few people around Walker and he did take a few steps due west towards the flagpole.

Q. All right. Then we are talking about after his speech, aren't we?

[fol. 221] A. Right now we are, yes, sir.

Q. All right. The next question: "Could you give us the benefit of your very best estimate of the crowd, not in the whole area, but in the crowd that immediately surrounded Walker?"

A. Now I interpreted this as the crowd around the Confederate statue. And I said fifty people.

But now when Walker stepped off, he lost those 50 people.

Q. They didn't go with him?

A. No, sir, they jeered him, as a matter of fact.

Q. Did anybody—did anybody walk with General Walker toward the flagpole after he made his speech?

A. Yes, sir, I was with him.

Q. Anybody else?

A. Yes, sir, there were a few other people.

Q. How many?

A. There were close to around 15, I would say.

Q. Did you have anything in your hands?

A. No, sir, I didn't have anything in my hands. I was wounded at that time. I couldn't carry anything.

Q. Well, the rest of them were not wounded, were they?

A. No, sir, but they didn't have anything.

Q. They didn't have anything. Now on the speech on the monument, I will give you the page on that in just a [fol. 222] moment.

Page 14, I have asked you the question if Walker, while he was on the monument, didn't say—

Mr. Watts: Page, please?

Mr. Gooch: Page 14, Mr. Watts.

By Mr. Gooch:

Q. "This is wrong but you have a right to protest." You said he made that statement?

A. Yes, sir.

Q. (Reading) He also said, "It is a long way around."?

A. It's a long way around, yes, sir, what we were doing.

Q. Then he said—and I asked you and you say you don't remember. —"keep up the protest." Look at your answer on Page 14, of the deposition, at the top of the page, please, sir.

A. (Reading) You have a right to protest. . . . long way around, he said, keep up the protest.

Well, I might have forgotten that.

Q. Well, now at the time your deposition was taken, that's the statement you made, was it not?

A. Yes, if it's in my deposition—

Mr. Watts: Object to that question unless he reads the entire statement. He just read an excerpt.

The Court: He's asking him if he answered it that way. [fol. 223] The Witness: But here is what else I said. Now by what he implies—

The Court: Just a minute. He hasn't asked you what else you said. He said, "Did you make that statement and at the—at the time of the deposition."

The Witness: Yes, sir, but this is in support of my statement.

Mr. Watts: That's all right.

The Court: That's the answer he's asking you now.

By Mr. Gooch:

Q. I'm asking if Walker said—did you hear him say, "Keep up the protest"?

A. If it's on the deposition, then I said it.

Q. All right. Did you know or see a minister by the name of Duncan Gray that night?

A. Yes, sir.

Q. Did you hear General Walker make any remark to

Duncan Gray to the effect that he, Walker, was ashamed he was an Episcopalian?

A. Yes.

Q. Did you hear the Reverend Duncan Gray ask or implore General Walker to stop the violence on the campus?

A. I didn't hear Duncan Gray ask that.

Q. Did you hear the conversation between Duncan Gray and General Walker?

A. No, sir. All I heard was Duncan Gray trying to get [fol. 224] up on the statue with General Walker.

Q. You didn't see Duncan Gray before that time?

A. Yes, sir, I saw him before that time now.

Q. Did you ever hear Duncan Gray ask General Walker to stop it?

A. No, sir, I didn't hear him say that.

Q. Did you ever hear General Walker say to Duncan Gray, "I wouldn't stop it if I could."?

A. No, sir, I didn't hear that.

[fol. 225] Q. Did you hear anything that Duncan Gray, any exchange between Duncan Gray and General Walker, except the statement made by General Walker that he was ashamed he was an Episcopalian?

A. I heard that now.

Q. After you heard General Walker say that he was ashamed he was an Episcopalian what happened to the minister?

A. The minister tried to get up on the statue and someone pulled him down. Now, if they hadn't pulled him down the crowd—

Mr. Watts: Just a minute.

The Court: He asked what he did.

The Witness: Well, he tried to get up on the statue and he was pulled down.

By Mr. Gooch:

Q. All right. Just a moment here, Your Honor.

The Court: All right.

By Mr. Gooch:

Q. Do you know what happened to Rev. Duncan Gray when he tried to get up on the monument where General Walker was speaking?

A. Yes, sir, he was pulled down.

Q. By whom?

A. By students at first.

Q. Then by whom?

[fol. 226] A. I don't know. I heard—

Mr. Watts: Don't say what you heard.

The Court: If you don't know, you can't say.

A. I just know he was pulled down by someone in the crowd.

By Mr. Gooch:

Q. All right, just a moment. If you will, here, please, at the time these missiles—I forgot to ask you this: I believe you alluded to it and I want to be sure. I believe you said they broke up the benches?

A. Yes, sir, most of the concrete benches in the Grove were broken up.

Q. When did this occur?

A. This occurred in the early part when it first started.

Q. You got rid of all that ammunition?

A. Yes, sir, people had been—I take that back.

Q. Have you been apprised of a statement made by General Walker before he got to Mississippi to the effect, "Bring your flags, your tents and your skillets"?

A. Yes, sir, I heard that statement, but I didn't put much faith in it.

Mr. Watts: Now, just a minute.

By Mr. Gooch:

Q. Some people did try to find out where these volunteers were coming from, didn't they?

[fol. 227] A. Yes, sir.

Mr. Watts: Now—well.

By Mr. Gooch:

Q. At the time you saw General Walker did any of the crowd that was around General Walker, and you testified there was a crowd around General Walker—have any missiles, sticks or stones?

A. Now, this is after the speech?

Q. No, before the speech, prior to the time he went toward the flagpole first.

A. I couldn't be sure about that. Probably some of them did, but it was a common thing.

Q. Please refer to page 38 of this witness' deposition, please, sir. It doesn't say what line it is, but it is the next to last question: "At the time this crowd was around him when you first saw him, east of the monument did some of the crowd, at least, have in their possession brickbats, stones and sticks?" And your answer?

A. The boys from Hume Hall—

Q. Well, I believe you prefaced that by "Yes, sir."

A. Yes, sir, but they were—

The Court: He asked you if you said that.

The Witness: I said that.

By Mr. Gooch:

Q. You said, "Yes, sir, the boys from Hume Hall did particularly," did you not?

A. Yes, sir.

[fol. 228] Q. And to further accentuate, may I refer you to page 39 of the deposition, the third question up from the bottom of the page. The question: "At the time you first saw him in the crowd that was around him there was some of these surroundees, we will call them, in possession of bricks, stones, sticks and missiles, is that correct?" And your answer?

A. "Yes, sir."

Q. Now, that was when he first came on the campus the first time you saw him?

A. Yes, sir, but that was a common thing for the people to have those things then, because we were still fighting on.

Q. You fought all night, didn't you?

A. Yes, sir.

Q. Now, you stated on direct examination that the first contact you had with Walker personally was after he finished his speech on the monument, I believe?

A. Yes, sir, that was my first personal contact.

Q. All right. Now, tell us again what Walker did when he got off the monument?

A. He stepped off to his immediate right. I was immediately below him. He brushed past me and I fell in right beside him.

Q. And went where?

[fol. 229] A. We walked just a few steps toward the flagpole and stopped, and we chatted around, started talking to him.

Q. And that few steps west would be toward the Lyceum Building and the Marshals?

A. Yes, sir.

Q. May I ask you a question as to your deposition on page 45, the question at the top, "Then Walker, according to your testimony, did not leave the vicinity of the monument for thirty minutes after he finished his speech?" Your answer?

A. "Well, now, I am talking about the time I talked to him when he stepped down off the statue. He did go toward the Lyceum because the smoke had cleared out and this is when we pointed out to him, this is the Lyceum, and that is where I talked with him."

Q. Then prior to the time you had the talk with him in which you bummed a cigarette, as you testified to, Walker did walk with a group?

A. Yes, sir, I was—

Q. Wait just a minute. Toward the Lyceum Building and the Marshals?

A. Yes, sir, but not far enough.

Q. I am not talking about far enough. Did he go toward the Marshals and the Lyceum Building after he finished his [fol. 230] speech?

A. Yes, sir, if he was traveling west he had to go toward the Lyceum Building.

Q. Well, now, will you answer the question?

A. Yes, sir, when he stepped off he automatically was facing the Lyceum Building anyway he stepped. He had to be going toward the Lyceum and the Marshals.

Q. How far did he walk?

A. I would say he didn't get no further than twenty steps.

Q. Twenty steps from the Confederate statue?

A. And those are short steps.

Q. Anybody following him?

A. We were around him. There were still people rioting that didn't even know General Walker was there.

Q. Did any of those boys that walked up with Walker and you, as he walked toward the Marshals or Lyceum Building, have anything in their hands? I believe you said no, did you not?

Mr. Watts: If the Court please—

The Court: Sustained. It is repetition.

By Mr. Gooch:

Q. Then may I ask him a question?

Mr. Watts: Sure.

The Court: Relating to the deposition?

Mr. Gooch: Yes, sir.

[fol. 231] The Court: Yes, sir.

By Mr. Gooch:

Q. On page 45, the bottom question, "Now, tell us, as the group walked there with Walker up near the flagpole did they have in their hands the brick and the stones and missiles that they had been throwing?" Your answer, please, in your deposition?

A. "Some of the boys did."

Q. Read the rest of it.

A. "Particularly that come from Hume Hall because they were the ones that were giving them out down there."

Q. Then, according to your testimony at the time your deposition was taken, the group that went with Walker toward the flagpole, some of them had missiles in their hands?

A. Everybody had something in their hand that night, or during the night.

Q. I am talking about at this particular time.

A. Yes, sir, but you can't be too sure about that, though, sir. Because you are so used to seeing that all night you really don't pay any attention to that. And I gave that on the assumption that most of the people did have something in their hands that night there, and I recall seeing one boy nearly—near Walker with a brick in his hand, but now he got mad and left.

Q. On page 47, the question number 1, 2, 3, from the [fol. 232] bottom, "But Walker did, though, immediately after he finished his speech, go with the group up toward or near the flagpole?" Your answer, please?

A. "Up near the flagpole, and he stopped."

Q. That was what you said when your deposition was taken?

A. Yes, sir.

Q. Is that still the truth?

A. Yes, sir, but he didn't get up to the flagpole.

Q. You said a while ago—I am trying to get your definition of near.

A. Near?

Q. You said he went about twenty steps and that they were short steps.

A. Yes, sir.

Q. Twenty steps from the monument towards the flagpole, if they were short steps, would not be more than about fifty feet, would it, or sixty at the outside?

A. I couldn't say that.

Q. But you know you stepped not quite a yard?

A. We didn't get far past that Confederate statue, because I remember leaning up against a tree down there near it.

Q. You said—a—because—

A. Because—

[fol. 233] Q. Just a minute. You said in your deposition you got near the flagpole?

A. Yes, sir, but not that near to it, like you are pointing.

Q. I was pointing out the flagpole. I am trying to get your definition of near.

A. I consider the wall at the back of the room near.

Q. All right. The last question on page 47, "Question: How long did General Walker remain with the crowd that had gone up there to the flagpole with him at that time?"

A. "He stayed there approximately two minutes."

Q. Is that the answer?

A. Yes, sir. Then we took—

The Court: Wait just a minute. He didn't ask you that. He asked you if you made that answer?

The Witness: Yes, sir.

The Court: Don't volunteer information.

The Witness: I am sorry.

By Mr. Gooch:

Q. Did you ever see a man with a Deputy Sheriff's badge on that weighed around 250 or 275, height approximately 5 feet 11?

A. I saw a lot of Deputy Sheriffs that night but I can't be sure that is the particular one or not.

[fol. 234] Q. Did you see one in the vicinity of Walker most all evening?

A. No, sir.

Q. Do you recall an incident of a fire truck coming on the campus?

A. Yes, sir, I recall that.

Q. Was that after General Walker's speech, or before?

A. I am thinking that that was after General Walker's speech.

Q. Did you—.

A. The question—

Q. —excuse me.

A. Go ahead, I am sorry.

Q. Did you go up and inspect the fire truck?

A. Not when the fire truck first got there, no, sir.

Q. Did you go up near where the fire truck was maneuvering?

A. Yes, sir, I was up near where the fire truck was maneuvering.

Q. Did you see General Walker there?

A. No, I didn't.

Q. Where was the fire truck with relationship to the flagpole?

[fol. 235] A. At what time?

Q. At any time.

A. When the fire truck came in they brought it in here and stopped it and the firemen got out and gave it to the crowd, and the fire truck took off right here and stopped and the boys got on it, the West Virginia boys and a few others and they started around, and they brought it around and swept past the Marshals in the tear gas and smoke and let them have it, and then they cut back down through here (indicating) and stopped somewhere in here, out in here.

Q. By "out in here" you are pointing now—

A. It is about north to northeast.

Q. North to northeast of what?

A. Of the flagpole.

Q. And about—

A. I couldn't be sure on this map. If I was on the campus I could point it out exactly.

Q. I realize that, but about how far from the flagpole?

A. Well, I would say one hundred feet.

Q. Is that where the fire truck stalled?

A. No, sir. Now, the caterpillar stalled.

Q. Didn't the fire truck stall?

A. The fire truck might have stalled because they [fol. 236] stopped for a long time.

Q. That is what I am talking about. Where was it stopped?

A. Right up in here somewhere (indicating map).

Q. Was it north of this east and west line of the Circle?

A. North of the east and west line of the Circle? Yes, sir, it was right here (indicating).

Q. Over toward the YMCA?

A. The YMCA, yes, sir.

Q. All right. Did you at any time hear General Walker say anything to the effect that he complimented the crowd on what they were doing that night?

A. Woud you explain that a little further?

Q. Oh? In connection with—I believe we established in your opinion, at least, a riot was going on there in the Circle?

A. Yes, sir.

Q. Did you at any time hear General Walker compliment the crowd on what they were doing?

A. Compliment the crowd?

Q. Yes, sir.

A. No, sir. I am not quite sure about what you mean on that.

Q. Well, I can't make it much plainer than that. Did [fol. 237] he state to them, "Keep it up"?

A. Well, now, in my deposition—

Q. Or—

A. —in my deposition I stated he stated keep it up. Now, of course, I don't recall saying that, but if it is in my deposition I said it.

Mr. Gooch: That is all, thank you.

Redirect examination.

By Mr. Watts:

Q. A couple of very short questions. Son, I want you to step down here, please, and re-check these distances. You testified on direct examination it was 125 feet?

A. Yes, sir.

Q. From the flagpole to the Lyceum, and I want to call to your attention the fact that this scale here starts with 100, then goes to zero, then goes to another hundred. I wish you would start here, start with the zero and measure 125 feet.

A. Fifty, seventy.

Q. Now, measure two hundred feet.

A. Two hundred feet?

[fol. 239] Q. Now put this scale up here next to the flagpole and point out to the jury where 125 feet is?

A. 125 feet is right here.

Q. Does that reach to the street, to the west of the flagpole?

A. No, sir.

Q. Now point out to the jury exactly how far it is from the flagpole to the Lyceum Building.

A. Oh, it's—

Q. Measure it first on your paper.

A. It's 200—250 or 300—

Q. Well, let's get it accurate here because you have a scale on your map.

A. It's 250, almost.

Q. All right, sir.

A. Give or take a few feet.

Q. Now you say it's 250 from where to where?

A. From the flagpole to the Lyceum.

Q. All right, sir. Now then at the time you saw General Walker enter the campus, was it possible to walk along University Boulevard to the Confederate monument as you went west?

A. No, sir.

Q. Why?

A. Because we had set up a barricade down there. I [fol. 240] helped build it. We got the material from the construction at Hume Hall and built a light barricade out of planks and barrels and whatever else could be drug up.

Q. In traveling westward from the entrance to the campus, towards the monument, what route was it necessary to take to get past those barricades?

A. You would have to go by the sidewalk.

Q. Was there a sidewalk on either side of that University Avenue?

A. On one side there is a sidewalk.

Q. Which side of University Avenue was the sidewalk?

A. The sidewalk runs down near the new Science Building and the Journalism Building; going toward the Lyceum, it's on your left.

Q. Now you were asked on cross examination by counsel to read the answer to your question, did anyone say anything to him about leading them before we started west. You read a part of it.

I will ask you to read the remainder and the entire answer that you gave.

A. Yes—

Mr. Gooch: I don't believe I asked that question.

Mr. Watts: That's the question you asked, Counsel, on Page 16.

The Court: Are you objecting to the witness answering [fol. 241] it?

Mr. Watts: Perhaps we'd better check the record.

Mr. Gooch: I'm objecting to the preface Mr. Watts made about what I interrogated him about.

The Court: I don't remember that. It's not particularly material as to whether you asked him or not.

If you now want to ask him—

Mr. Watts: Yes, sir, I want to ask him to read his entire answer, to first read—I'll read the question. Did anyone say anything to him about leading them before he started west?

Now read your answer.

The Witness: Yes, while Walker was going up to the grove, he stopped before he got to the flagpole. He looked it over. People said, "Walker, what could we do?" He didn't say anything.

And the people said, "General Walker, will you lead us?" He still didn't say anything.

People by this time were becoming mad at General Walker. They said, "At least you could give us advice." Walker said, "I don't want to obligate myself."

By Mr. Watts:

Q. And read the next—let me read the next question.

Mr. Gooch: Wait a minute. If the Court please, this is [fol. 242] his witness, not mine.

Mr. Watts: But this is his examination, if Your Honor please.

The Court: I will permit him to read it.

Mr. Watts: He asked a part of it and I think—thank you, sir.

By Mr. Watts:

Q. Now the next question, is, question, was that language clear to anyone in six or eight or ten feet so they could hear him?

Mr. Gooch: That's objectionable.

The Court: I sustain the objection.

Mr. Watts: Yeah, but I do want him to read the answer.

Mr. Gooch: Wait a minute.

The Court: Well, I won't permit him to read the answer because the question is objectionable.

Mr. Watts: Well, all right.

The Court: I will let him testify as to what he heard, not as to what anyone else could have heard.

Mr. Watts: All right, sir. Let's see, I think the next was on Page 14.

By Mr. Watts:

Q. Now on Page 14 of the deposition, you read a portion of your answer. I will read the question and ask you to read the entire answer.

Question: As best you can remember, outline to us what [fol. 243] you heard him say.

And, incidentally, to make sense out of that, I think we should read the previous sentence: I heard his speech. I was to Walker's immediate right. I was south.

Now read your entire answer, not just a part. Page 14.

A. We had trouble at first understanding what he said, even close up to him, because people were still screaming and yelling.

There was a charge going on about that time, too, and the boys were running back and a salvo of tear gas had been fired and some of it was drifting down.

Walker got up on the statue and started talking and he said something to this effect. I can't quote him exactly now word for word.

He said, we did have a right to protest. He said, "This is wrong but you have a right to protest. It is the long way around."

He said, "Keep up the protest."

Now by what he implied by that, the way I—

Mr. Watts: Just a minute. Just a minute. You can't—that's all right, you can't—that's right, I don't ask—I don't want him to say what he implied.

The Court: I don't want him to read that.

Mr. Watts: That's right.

[fol. 244] (Conference at the bench.)

By Mr. Watts:

Q. Now, son, you said you were knicked in the thumb?

A. Yes, sir.

Q. With what?

A. I think it was a buckshot but I couldn't prove it. It—

Q. Now was that before Walker arrived on the campus?
A. Yes, sir, this was.

Mr. Watts: It's 12:00 o'clock. I believe that's all, sir.
The Court: Are you through with the witness?
Mr. Watts: Yes, sir.
Mr. Gooch: That's all.
The Court: I'm going to excuse him then. All right, we will excuse you.

Ladies and Gentlemen, we will recess until 2:00 o'clock. At 2:00 o'clock, just wait in the jury room and I'll call you out.

(Thereupon, at 12:00 o'clock noon, a recess was taken until the same day at 2:00 o'clock, p.m.)

[fol. 245] Afternoon Session

Cecil V. Cox, Jr., called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Will you state your name, please?
A. Sonny Cox.
Q. Son, will you lean forward so the mike will fit you. Where do you live?
A. Marks, Mississippi.
Q. Spell that, will you?
A. The last or the first?
Q. The name of the town?
A. M-a-r-k-s.
Q. How old are you, son?
A. Twenty-one.
Q. Is Sonny your only name?
A. No, sir.
Q. What is your real name?

A. Cecil V. Cox, Jr.

Q. Which name do you go by?

A. Sonny.

Q. Are you a student at Ole Miss?

A. Yes.

[fol. 246] Q. Were you such a student on the 30th of September, 1962?

A. Yes, sir.

Q. Were you on campus that night?

A. Yes, sir.

Q. Do you know where an area on the campus known as the Circle is?

A. Yes.

Q. Were you there that night?

A. Yes.

Q. What was going on?

A. Mass confusion, I'll say.

Q. While you were there did you have occasion to see General Walker?

A. Yes, sir.

Q. I wish you would tell the Jury, please, in your own words from the time you saw General Walker, tell us what General Walker did, what you saw and what you heard. Now do not—I caution you at this time, do not endeavor to tell what anyone else saw, thought or heard, but tell what you saw and what you heard.

A. About nine o'clock I was rambling around about the end of University Avenue, and I saw a small crowd gathering under the Confederate statue. I walked over there and somebody was talking over there, I could see, and a group [fol. 247] of students was yelling, "Oh, go on back, you lost out in Texas, we don't need you here."

I didn't understand what it was, so I walked up closer and this General Walker was up there telling them, "We cannot accomplish anything like this, maybe if we could talk to them, or something to that effect."

Well, the crowd begin to kind of jeer him, and they were

kind of drifting off in another direction. A few stayed with him, maybe 15 or 20.

This other guy with me and I went up there and shook hands with him and he stepped down off the pedestal and we were standing there by the pedestal talking about the general advance and so forth. We talked a few minutes and moved on up toward the flagpole, you might say. We were walking along there and a few students were out in front. They had—they were using a T-shirt, a white shirt for a truce flag, going to try to talk to the Marshals. We walked along there, and a few in front and a few in behind. We got about 20 yards maybe from the street across from the building and we kind of held back and a few students went on up front, and they did begin have a little conversation up there. The Marshals asked them what they wanted. A couple of them said, "Well we want that nigger."

And something happened, I don't know what the occasion was, but the Marshals started firing again and every-
[fol. 248] body retreated, and some of them came back and retaliated by throwing bricks and bottles.

And that is the last I saw of General Walker that night.

Q. Had you seen General Walker before he made his speech on the monument?

A. No, sir.

Q. After he made his speech on the monument did he lead a charge against the Marshals?

Mr. Gooch: We object to that if the Court please. It calls for an opinion and conclusion of the witness.

Mr. Watts: All right.

The Court: Sustained.

Mr. Watts: All right.

Mr. Andress: If we may approach the Bench.

The Court: No.

Mr. Andress: All right, note our exception. We would like to have a bill on it too.

The Court: All right.

By Mr. Watts:

Q. After this speech on the monument, have you told us everything that he did that you saw?

A. Well, that is a general question.

Q. Well, you have attempted, as I understand, to outline what you saw him to do?

A. Yes.

[fol. 249] Q. Is there anything further that he did that you haven't told us about?

A. Well, we walked up there. We were talking.

Q. Hold it right there. As you walked up what gait did he walk?

A. Just a slow rambling gait.

Q. Try to describe as nearly as you can the actions and conduct of the people immediately in his vicinity, I will say within an area of 15, 20 or 30 feet?

A. After he stepped down off the statue?

Q. That's right.

A. From—some drifted off because they were disappointed.

Q. Well now—

Mr. Gooch: —Wait—

Mr. Watts: —I will agree.

The Court: Don't tell why you think they drifted off. You may testify to the fact they drift off, if they did.

A. Well, they drifted off because—

Q. Well, no, don't say "because."

A. Well, they drifted off.

Q. You don't know what was going on in their mind.

A. Yes, sir.

Q. We don't want you to testify to anything that you [fol. 250] don't know. Now then the ones that went on towards the flagpole, or in that direction with General Walker, describe to us how they appeared, how they walked, where Walker was within the group, what was the size of the group, and everything of interest, because these people need to learn what you saw?

A. I will 25 or 30 people were in the group, some in front of some in behind General Walker. He was in the middle of the group.

Some were waving the flag. All of them had their hands up. Most of them had their hands up. They had agreed to try to talk to the Marshals. That was kind of a mutual agreement between the students, I believe.

And they walked on up. A few, as I say, drifted behind and we were almost in the middle all this time.

I left General Walker. I walked five or six yards ahead of him to hear them talking to the Marshals about, "We want that nigger," and something sparked off the Marshals and they started firing again and a little battle began right there.

Q. While you were walking up there and until you left General Walker did any of these individuals around him throw missiles from a position near General Walker?

A. I didn't notice any.

Mr. Watts: That is all.

[fol. 251] Cross examination.

By Mr. Gooch:

Q. Mr. Cox, I believe you did not hear General Walker's speech from the monument?

A. Not all of it. I heard the last of it.

Q. What did you hear him say?

A. I heard him say that "We can't . . ." something to this effect. Now not these exact words but, "We can't get anything accomplished by open warfare. And if we could talk to them maybe we could get this thing settled."

Q. Walker said that?

A. Yes, sir, that is what I gathered from it.

Q. I believe when your deposition was taken over in Marks you said you didn't hear any part of the speech, is that correct?

A. I heard the last part of it.

[fol. 252] Q. All right. Let's see.

A. Mr. Gooch, you will notice, I think—

The Court: Just a minute. He hasn't asked you a question yet.

The Witness: Excuse me.

By Mr. Gooch:

Q. May be there. I just wanted to see.

Now I ask you again, did you hear any part of General Walker's speech?

A. I heard the last part of it.

Q. And what did he say?

A. He was saying something to the effect that we could—"If we could talk to them, maybe we could get more accomplished than by just running around, trying to battle them."

Q. I refer you to page 15, of the deposition of Mr. Cox, the last question on Page 15.

Mr. Cox, I ask you, did you hear any part of General Walker's speech? Your answer, yes, sir, I know I heard him say something but I don't remember what it was.

Mr. Watts: That should be, Mr. Gooch, please, sir, "I didn't remember what it was," as I read it. Maybe I misread it.

Mr. Gooch: All right. But I didn't remember what it was.

[fol. 253] By Mr. Gooch:

Q. Now have you remembered, since your deposition was taken?

A. Well, sir, I didn't remember exactly what words he said but I heard the general idea of what he was saying, when he was getting off.

Q. Well, all I am getting you to do now, in March you didn't remember and now you seem to have remembered. I was just trying to find out why?

A. Well, I think there should be a clause or something in there to the effect that I did remember part of it.

Q. Well, it's not here. That's the reason I was asking you that.

A. Yes, sir.

Q. Now, did General Walker say anything at that time about a truce or did somebody else say something about a truce?

A. Well, he said that we should try to talk to them, I believe, and some other guy grabbed a T-shirt and said, "We will use this for a truce flag."

Q. And you and Walker and several others started towards the Lyceum Building?

A. Yeah.

Q. Was this immediately after the speech on the monument?

A. Yes, sir—well, after we had—we had a little conver-
[fol. 254] sation there while the crowd was kind of separating.

Q. Did you see General Walker get down from the monument?

A. Yes, sir.

Q. And you had a few words there. How long would you say, two minutes, three minutes?

A. Oh, five or seven.

Q. Five or seven minutes. Standing around the monument?

A. Yes, sir.

Q. Then you and General Walker, and you have said some 15 or 20 others, started—

A. Yes, sir.

Q. —started towards the Lyceum Building?

A. (Witness nods "yes".)

Q. Is that correct?

A. Yes, sir.

Q. And you walked—how did you walk from the monument toward the Lyceum Building?

A. Just in a normal gait. We were talking, as you would walk and talk to somebody.

Q. What route did you take?

A. Well, along the sidewalk, the best I can remember.

Q. On the south side of the circle or the north side of the circle?

[fol. 255] A. North, I believe.

Q. All right. Then after General Walker had stepped down from the monument—would you step down here, please, sir? Where is that pointer?

The Court: Take the pointer here with you, Mr. Cox.

By Mr. Gooch:

Q. After General Walker had finished his speech at the monument, do you identify the monument to be at just about where University Avenue splits, University circle goes to the north and University circles around—do you identify that as a part of the campus of Ole Miss?

A. Yes, sir.

Q. Then right here at the fork of University Avenue is where the Confederate statue is, is that correct?

A. Yes, sir.

Q. And that's where General Walker made his talk?

A. Yes, sir.

Q. Now, as I understand you, you had not seen General Walker until just a short time prior to the time he stepped down off the monument, is that correct?

A. That's right.

Q. Now after he stepped down off of the monument and you say he conversed with some group there for a few moments—

A. Yes, sir.

Q. Minutes, maybe?

[fol. 256] A. Yes, sir.

Q. —then you say that something was said about a truce talk?

A. He was getting off the monument then.

Q. All right. He was getting off the monument when the truce talk was mentioned, when there was a mention of a truce talk?

A. Yes, sir.

Q. Then he talked around with the boys or the crowd or whoever it was for a few moments?

A. Yes, with two or three of us.

Q. Two or three. Then you say he started towards the Lyceum Building, is that correct?

A. Yes, sir.

Q. And who all was with him?

A. The names?

Q. No, no, how many?

A. Three was—three of us was right with him, walking with him and talking.

Q. How many were following him?

A. There were some in front and some in back. Maybe ten in front, ten in back. Most of them was to the left side, I'll say.

Q. All right. Then you went north of the east and west line through the circle, is that correct?

[fol. 257] A. Went right along in here, north of the monument.

Q. You went north of the monument?

A. Yes, sir.

Q. Did you go all the way past the monument?

A. Yes, sir.

Q. You said you got up at about 30 feet of the Marshals, is that right?

A. Well, that's 30 feet from this tree here. Now the Marshals were over here. And this is a street. I'll say that street is 25 feet.

Q. All right. That would have made you about, then, 55 feet, or 45 to 55 feet from the Marshals, is that correct?

A. Yes, sir.

Q. In other words, General Walker and this group, which you estimate, according to you, some 10 or 15 behind him? And three of you right with him—did you all have ahold of the General?

A. No, sir. I shook hands with him right here at the monument.

Q. Was one of you on each side of the General as you proceeded up there?

A. Yes, sir.

Q. You walked up north of the sidewalk that runs east and west through the campus?

A. Yes, sir.

[fol. 258] Q. Past the flagpole? And up within 30 feet of the street in front of the Marshals and Lyceum Building, is that correct?

A. I walked that far.

Q. Now where did General Walker stop?

A. Well, he stopped, I'll say, right here, I guess.

Q. Now you put him there about a fourth of the distance, to be safe, a fourth or a third of the distance between the flagpole and the edge of the street in front of the Lyceum Building, is that correct?

The Court: Answer out.

The Witness: Yes, sir.

By Mr. Gooch:

Q. Then you went on forward?

A. Yes, sir.

Q. And the truce talk turned out to be what, in—you heard somebody say?

A. "We want that nigger."

Q. You want that nigger. That was the truce talk? Thank you. Will you take the stand again, please?

Now did you have anything in your hands as you walked up there with the General?

A. No, sir.

Q. I guess none of the group that was around him had anything in their hands?

A. You mean the immediate group or the 15 or 20?

[fol. 259] Q. Well, any of them that was around him?

A. Some of them did. When they were going to call the truce, they threw them down at the—about when we got to the flagpole. And everybody raised their hands.

Q. As they walked from the flagpole up—from the statue, monument, up as far as the flagpole, they were, or some of them were, armed with missiles?

A. Well, they could have been. I didn't really notice.

Q. You don't know whether they were or not?

A. No.

Q. Now did you see any rock throwing that night?

A. Yes, sir.

Q. About what time did it start, Mr. Cox?

A. About 8:00, 8:15.

Q. And from 8:15, on, can you describe generally what occurred on the campus that night?

A. 8:15, I was in the YMCA Building. Kennedy was making a speech in there. And that's—about 8:00 is when the tear gas was started.

Q. Incidentally, did you hear President Kennedy's speech?

A. Part of it.

Q. Did you hear him admonish or ask the students of Ole Miss not to engage in any violence?

[fol. 260] A. No, sir.

Q. You didn't hear that?

A. (Witness nods "no".)

Q. All right, go ahead.

A. And the tear gas was beginning to drift in the "Y" Building and I moved on out, just looking around.

And as the night moved on, of course, we just—I didn't—I wasn't stationary, in—I was moving around over the general area there.

And, let's see, the National Guard moved in, I don't know what—I can't relate that.

And the highway patrol moved out and the National Guard moved in after that, or something. I don't remember exactly how that was.

Q. Did you see any groups, small or large, rush forward or go towards the Marshals and throw rocks and sticks and bricks?

A. Yes, sir.

Q. Did you participate in any of those matters?

A. I don't want to answer that.

Q. You just have.

A. (Witness nods yes.)

Q. Did those rock-throwing episodes occur almost throughout the night?

A. Yes, sir.

[fol. 261] Q. Continuously?

A. Well, not in one continuous movement. It just was in and out, not very regular.

Q. Some group would go forward and toss their missiles and retreat and then somebody, some other group would go forward, is that right?

A. That's about it.

Q. Now do you know where the ammunition came from, the majority of the ammunition, where it came from?

A. Well, it came from this new building they had down there. Picked up Coca-Cola bottles over the campus and later they were busting these benches up and taking the concrete from them and throwing it.

Q. Did you go on the campus the next morning?

A. Yes, sir.

Q. What, can you describe what you found there the next morning in the way of rocks and missiles and bottles and glasses and canisters?

A. And empty tear gas shells.

Q. Was there a lot of that around?

A. Yes.

Q. It looked like a real battlefield, didn't it, Mr. Cox?

A. It was a battlefield.

Q. Did you see any cars being burned that night?

[fol. 262] A. Yes, sir.

Q. Did you know about a chemistry professor that was beaten up?

A. No, sir.

Q. Did you know about a photographer that his car was beaten up and his camera smashed?

A. Yes.

Q. Were you—I won't ask you if you participated. Were you near enough to see the car being beaten up?

A. Yes, sir.

Q. Now, Mr. Cox, in September of 1962, you were in what classification at the University?

A. Junior.

Q. You had been there two years already?

A. No, sir.

Q. Well, had you been there any time or were you a new student?

A. New student.

Q. You had not been on the campus before?

A. No, sir—well, not—I had been on the campus to get an application.

Q. I mean had you matriculated?

A. No, sir.

Q. All right. This was your first year?

A. Yes.

[fol. 263] Q. Do you remember about what day in September you went on that campus?

A. The 17th, maybe. I'm not sure. A couple of weeks before that, almost.

Q. Had you been present when Meredith had been barred from the University by Governor Barnett and Paul Johnson?

A. Yes, sir.

Q. Did that create a resentment in you, one way or the other?

A. Yes, sir.

Q. You favored, I assume, Governor Barnett's and the Lt. Governor's actions in barring him?

A. Yes, sir.

Q. You knew, did you not, that the Court of Appeals had directed the entry of Meredith in Ole Miss prior to the 30th of September, 1962, did you not?

A. Yes, I knew that.

Q. Did you know that the order had been entered by that Court to allow him to be admitted to Ole Miss?

A. No, sir.

Q. Well, now what did you know about the legal procedures involving Meredith being admitted to Ole Miss?

A. Nothing much.

Q. You didn't even know that he was supposed to be admitted under court order?

[fol. 264] A. I heard—I had heard.

Q. You just didn't believe it, is that right?

A. Yes, that's right.

Q. All right. You didn't much want to believe it, did you, Mr. Cox?

A. Well, I don't—has that got anything to do with this case? Could I keep from answering that? You are going back into my life, you know.

Q. Sir?

A. You are going back into my life.

Q. Well, now have you got anything to be ashamed of, in your life, Mr. Cox?

A. No, sir.

Q. Well, why don't we hear about it?

A. It's—get you a string of bologna and I'll tell you about it.

Q. Do what?

The Court: This is argumentative. Do you want an answer?

Mr. Gooch: Yes.

The Court: All right, answer his question.

Mr. Watts: Just answer the question, Mr. Cox.

The Witness: Yes, sir.

By Mr. Gooch:

Q. Now you do recognize that the judgment of courts must be obeyed, do you not, Mr. Cox?

[fol. 265] A. Yes, sir.

Q. Did you feel that you were obeying the order of the court in what you were doing there on the campus there that night?

A. Well, I didn't feel—

Mr. Gooch: You may step down and stand aside. Thank you, sir.

Mr. Watts: Just a minute, before you stand aside.

The Court: Do you have any more questions?

Mr. Gooch: I mean as far as I am concerned.

Mr. Watts: Thank you for the postscript.

Redirect examination.

By Mr. Watts:

Q. Mr. Cox, how old were you when this incident took place?

A. Nineteen.

Q. And you were a Freshman in the University?

A. Yes.

Q. What school were you in?

A. Business.

Mr. Watts: That's all.

Mr. Gooch: I thought you said you were a Junior?

The Witness: Oh, I misunderstood that question. I was a Junior. I'm sorry.

By Mr. Watts:

Q. Were you a Junior when this incident took place?

[fol. 266] A. Yes, sir. Yes, sir.

Q. And how old do you say you were? Nineteen?

A. Yes, sir.

Q. In what school?

A. Business.

Mr. Watts: I see. Thank you.

The Court: Do you want to make your Bill now, Mr. Andress?

Mr. Andress: Yes, sir.

The Court: All right, Ladies and Gentlemen, would you step in the jury room, please.

(Jury leaves the courtroom.)

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[fol. 270] (Jury in; the following proceedings were had within the presence and hearing of the Jury.)

TALMAGE WITT, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Andress:

Q. State your name, please?
A. Talmage Witt.
Q. Where do you live?
A. Pontotoc, Mississippi.
Q. Now, most of us folks are not too familiar with Mississippi. What part of Mississippi is that in?
A. That is the north part of Mississippi.
Q. Is that the county seat?
A. I beg your pardon?
Q. Is that a county seat?
A. Yes, sir.
Q. What county?
A. Pontotoc County.
Q. Back in 1962, in the fall of 1962, did you hold any official position over there in Pontotoc County?
A. Yes, sir, I was Deputy Sheriff.
Q. Are you still?
[fol. 271] A. No, sir.
Q. Now, at that time, Sheriff, I direct your attention to September of 1962. Were you at any time in the latter part of September over in Oxford, Mississippi?

A. I was.

Q. Were you there on official business or not?

A. Well, I guess you would say official business.

Q. What was the occasion of your being over there?

A. I was called by the Sheriff of Union County.

Q. When did you first get over there?

A. About 4:30, I believe.

Q. On the 30th?

A. Of September.

Q. On the 30th of September.

A. Yes, sir.

Q. Were there other Sheriffs and Deputy Sheriffs from various counties in Mississippi over there at that time?

A. Yes, sir, there were.

Q. Where did you go when you got over there?

A. I went directly to the campus.

Q. Had you been over there at any time earlier in the last week or so before that time?

A. I was there five days and nights.

Q. Then how long had you been back home before you [fol. 272] went back?

A. I left Friday afternoon, late Friday afternoon, and returned Sunday.

Q. What was the occasion of your being over there on that earlier occasion, Sheriff?

A. We had been asked to go there. The Lt. Governor had met with all peace officers and asked us to try to control students and try to keep down a riot, if we could.

Q. So they were just pulling in peace officers from all over the state to try to keep it down?

A. Four hundred and twenty-five of us were there on Thursday.

Q. At that time was the order being preserved entirely by the officers of the State of Mississippi?

A. Everything was under good hands at that time.

Q. When you got over there on the afternoon of Sunday, the 30th of September, 1962, was anybody else over there in an attempt to preserve the peace, besides Mississippi—

Mr. Gooch: I object to that, leading and suggesting. He can say what he did do. As to whether he was trying to preserve the peace or not—

Mr. Andress: I think probably preserving the peace might be a conclusion, Judge, and I will withdraw that.

[fol. 273] By Mr. Andress:

Q. Were there anybody else besides peace officers of Mississippi there on the campus there when you got there, in any official capacity?

A. I don't think so; no, sir.

Q. After you got there, shortly afterward, did anyone else come in, any other officers?

A. There was quite a few officers came in later.

Q. What kind of officers?

A. Constables, Deputy Sheriffs and Sheriffs.

Q. Was anybody else on the campus that afternoon of the 30th of September besides Mississippi officials?

A. Well, now, there were people there from all over. I couldn't say where they were from.

Q. Let me direct your attention and ask you whether or not there were any United States Marshals there?

A. Oh, yes, sir; yes, sir.

Q. What time of day did they arrive?

A. That—they were there when I got there.

Q. They were there about 4:30?

A. Yes, sir.

Q. You didn't see them come on, they were already there?

A. Yes, sir.

Q. When you got there about 4:30 in the afternoon where were the United States Marshals?

[fol. 274] A. They were at the Lyceum Building.

Q. What were they doing around there? Were they in any kind of a formation?

A. Yes, sir, they were lined up completely around the place I would say four or five feet apart, three or four feet apart.

Q. Were they armed in any fashion?

A. Yes, sir, they had tear gas guns, and had their masks on.

Q. These officers, these Marshals all had masks on and tear gas guns with them?

A. I won't say that they had their mask on when I first got there, but before, just before they turned the gas loose sometime or other they put their masks on.

Q. Now, how long were you on the campus that evening?

A. I was there until 5:00 o'clock and then I left for two hours and came back.

Q. You were there just a little bit, you mean?

A. No, 5:00 o'clock in the morning.

Q. 5:00 o'clock in the morning. You were there constantly from 5:00 o'clock Sunday afternoon until—

A. 5:00 o'clock Monday.

Q. To 5:00 o'clock Monday morning. Now, were there other folks there besides the police officers and Marshals? [fol. 275] A. Yes, sir, quite a few.

Q. Well, were they men, women, or mixed?

A. Men or women, boys and girls.

Q. Were you—were they townspeople, students or both?

A. Both. They were from everywhere.

Q. And was there any general gathering or smaller gathering?

A. Oh, they were just in small groups all over the campus, the whole campus.

Q. They were not limited to just this area known as the Circle?

A. Oh, no, sir, they were all over the whole campus. Some were sitting in cars and some were sitting on the steps of the places and on the benches on the campus.

Q. What were they doing when you got there?

A. Well, they were just talking and everything seemed like to be building up.

Q. Later on was there any violence?

A. Not until after the gas was turned loose.

Q. Who turned the gas loose?

A. McShane ordered it.

Q. Who was McShane?

A. He was—I don't know how you would say it. He was [fol. 276] the head U. S. Marshal.

Q. How was the gas turned loose?

A. Well, all at once he just said, "Let them have the gas." And when he did, they done just that.

Q. Where were you when that happened?

A. Approximately twenty feet from them, facing them.

Q. Did you get any gas?

A. I did.

Q. Had you been engaged in any violence or anything of that sort toward the Marshals?

A. No, sir.

Q. What were you doing at that particular time?

A. Well, Paul Johnson, our Lt. Governor, had asked us to try to control the students, but that was a man-sized job.

The Court: He asked you what you were doing?

The Witness: I was standing up there in front of the students and spectators was behind us, and we were facing the Marshals.

By Mr. Andress:

Q. Who do you mean by "we"?

A. The Highway Patrol, Deputy Sheriffs, Sheriffs, Constables; any officer Mississippi had.

Q. In other words, the Mississippi peace officers were between the Marshals—

[fol. 277] A. And the students.

Q. And the students and the other people on the campus?

A. Yes.

Q. Will you state whether they were trying to protect the Marshals from the people or the people from the Marshals?

Mr. Gooch: We will object to that if the Court please. He can testify what he was doing.

By Mr. Andress:

Q. Now, Sheriff, prior to that evening had you ever known General Walker here?

A. No, sir.

Q. Did you—when did you first see him that evening?

A. Well, now, it is hard to keep up with the exact time. I would say approximately between 8:30 and 9:00 o'clock.

Q. Do you recall when the Highway Patrol moved out?

A. I don't recall when they moved off the campus. Now, they were—within a matter of minutes after the gas was turned loose they left the Lyceum Building. Where they went from there, I don't know.

Q. Now, where was General Marshal—General Walker when you first saw him?

[fol. 278] A. Coming up University Avenue on the south side, fifteen or twenty steps east of the Confederate monument.

Q. And what direction was he heading at that time?

A. He was heading west.

Q. That would be then—can you see this map here?

A. Yes, sir.

Q. That would be along about in here on University Avenue just before it gets to where it spreads into these two parts of University Circle, is that right?

A. Right.

Q. All right. Who was with him when you first saw him, now?

A. Some young—young fellow. I recognize him since I have got up here. Leman or something like was his name, but I recognized him since I got here; and one of our county drunks was walking along at the side with him. He wasn't with him, but he was the one trying to antagonize everything.

Q. Just General Walker then and this young man, one young man walking along?

A. That's right.

Q. How were they walking?

A. Oh, just walking in a normal walk.

Q. I mean, were they hurrying, moving along, or what?

[fol. 279] A. No, sir, just moving along.

Q. Where was the General as far as the street or sidewalk was concerned?

A. He was on the south side walking up the walk.

Q. And from the time you first saw him, did you know who he was?

A. I heard somebody say, "Here comes General Walker, we have got a leader now."

Q. Did you at that time talk to the General?

A. Just a few seconds after that I stepped out a couple of steps to, maybe, pick out which one it was. I asked somebody if that was him with the big hat on and they said it was. I stepped out to see.

Q. Did you introduce yourself to him?

A. No, sir, he walked up and introduced himself and talked to me a few minutes.

Q. At that time what did he have to say about you making him a Deputy Sheriff?

A. He said something about could I, or would I, deputize him. He said, "Not to help in this matter." He said, "I would just like to be safe to be here to observe what is going on."

I said, "I don't have the authority, General, to deputize you myself, even in my own county," and I said, "This is not [fol. 280] my county."

Q. From that time on how long were you in the immediate company of General Walker?

A. Some four to five hours.

Q. At the time you first saw him, was it like daylight or dark?

A. It was dark.

Q. What was the lighting set up there on the campus that night?

A. Well, it was pretty bad. It was—I won't say students, I will just say spectators and students, were breaking out all the lights they could, and it wasn't too light.

Q. Was there any moonlight that night?

A. I don't think so.

Q. Are there trees in the circle there between the monument and the Lyceum Building?

A. Yes, sir, there are.

Q. A lot of trees, or few?

A. Oh, yes, sir, there is some large trees and small trees.

Q. In the daytime—will you state whether or not that is a shady area?

A. Oh, yes, sir, it is a shady area.

Q. Now, after these lights had been put out, was the visi-
[fol. 281] bility good or bad?

A. No, you would have to be close to anybody to recognize who they were.

Q. Now, during this four or five hours that you were with or close by General Walker, what did he do?

A. Not one thing more than I done, or anybody else done over there. He was just there looking.

Q. Will you state whether or not you ever saw him with any kind of missile or anything you could throw in his hand?

A. No, I did not.

Q. Did—will you state whether or not you ever saw him moving around at anything faster than a walk?

A. No, sir, I didn't.

Q. Well, what was he doing as far as his contact with people in the area was concerned?

A. Well, he talked to people. People shook hands with him and talked to him and he just milled around there, around the monument out there.

Q. How close would you say was the closest you ever saw him go toward the Lyceum?

A. Not past the flagpole.

Q. And you are familiar with that campus, aren't you, pretty familiar?

A. Well, pretty familiar, yes.

[fol. 282] Q. Have you got any idea how far it is from the flagpole to where the Marshals were?

A. Not over three hundred feet.

Q. Will you state whether or not the Marshals were over on the west side of the driveway or street there in front of the Lyceum?

A. That is where they stayed most of the time. They got chances to get one or two boys singled out by themselves, they would run out and try to capture them.

Q. But the scrimmage line was there at the Lyceum Building?

A. Right there in front of the Lyceum Building.

Q. From the furtherest advance point the General ever occupied, would it have been possible for anyone to have thrown anything from that point to the Marshals?

Mr. Gooch: I object to that, if Your Honor please, that's a conclusion.

The Court: Sustained.

By Mr. Andress:

Q. Mr. Sheriff, how long were you a Deputy Sheriff?

A. Approximately three years.

Q. During that time have you seen unruly crowds?

A. Repeat that.

Q. During that time have you had anything to do with unruly crowds, rioting and so on?

[fol. 283] A. No, sir. No, sir.

Q. You hadn't had any prior experience?

A. No, sir.

Q. Did you hear the General talking to the crowd from the monument?

A. Yes, sir, I did.

Q. Now, prior to the time that he made this talk to the students from the monument, was that the time that he had gone forward about as far as the flagpole, before he made the speech?

A. One time he walked up just a little piece, just a little piece up there. I don't think he went hardly to the flagpole that time.

Q. Was anybody with him?

A. Not particularly. In other words, there was a large crowd of people there. Nobody particularly was with him. But this one young man, and, of course, myself. When you have a figure like that come to Mississippi, I wanted to watch what was going on, and I watched him.

Q. Was there any time you saw him head west from the monument when he was anywhere other than in the middle of a group of people?

A. No, sir, I didn't see it. In other words, any time he would be walking there would be people in front of him as well as behind him.

[fol. 284] Q. When he made this speech from the monument, what did you hear him say, as far as you remember?

A. I heard him say, "People, violence is not your answer. Cuba is yonderway. Protest all you want to but violence is not your answer."

Q. What kind of reaction did he get from the crowd?

A. Oh, he got boos from some. Some of them said, "What is he here for if he is not going to help us? Why don't he go back to Texas."

Q. Now, did he make any statement as to why he was there?

A. He just told me, he says, "I am just here to observe. I am not here to get in this either way."

Q. Do you remember a preacher coming up to see him?

A. Yes, sir, I do.

Q. Do you remember what he told the preacher about what he was there for?

A. Yes, sir.

Q. What did he tell him?

A. Well, he told the preacher he was just there to see what was going on, that he wasn't there to stop or start anything, that he didn't have anything to do with that.

Q. Did you see him at any time you were with him, did [fol. 285] you see him do anything inconsistent with that statement?

A. No, sir.

Q. Now, do you remember anything else he told them when he was making the speech from the monument?

A. He told them, "Protest all you want to." That they had a perfect right to do that, but violence wasn't the answer.

Q. Did you have anything to do with removing the preacher?

A. I moved him.

Q. What was going on that you moved him for?

A. He kept on jerking at the General's coat and everything and telling him to talk to them and break this thing up and that they would listen to him and go home. He said, "Preacher, I am not here to do that." He says, "I can't have anything to do with this."

And he just kept on at him and I heard three men start telling one of them, one of them says, "If we can get that preacher in the right place we will fix him."

Then when the General got up on the monument to make his speech I was on the right side facing east and the preacher came around on the other side and kept on pulling at him and when he did I walked around there and caught him by the arm and asked him to leave and he said he [fol. 286] wasn't leaving and, of course, according to my size and head, I felt like I could do it, and I just picked him up and carried him out of there.

Q. Did you see him any more, the preacher, after you carried him out?

A. No, I led him out of the crowd, out past the crowd and two men walked up and asked me what was I doing with the preacher and I said, "Well, I am afraid his life is in danger and I am going to get him away from here." And they said, "Well, we are friends of his, can we have him?" And I asked him if he knowed the people and he said he did and so I turned him over to them.

Q. Did you see anyone else touch or lay a hand on the General, as far as he was concerned?

A. Nothing only shaking hands with him.

Q. After the General had told this preacher he wasn't there to break it up or participate in it in any way, did he and the preacher have any kind of exchange about what their denomination was, or anything of that sort?

A. Well, General Walker turned around and asked him, says, "Preacher, what denomination are you?"

He said, "Episcopalian. I am an Episcopalian."

And he said, "You make me ashamed that I am an Episcopalian."

[fol. 287] Q. Did that faze the preacher?

A. I don't know. It didn't bother the preacher.

Mr. Gooch: We object to that conclusion, whether it fazed the preacher or not.

By Mr. Andress:

Q. After the General finished his speech from the monument, Sheriff, what did he do then?

A. He stepped down and just milled around there, around in front of the monument for a few minutes, and, of course, some of them kept on asking him to lead them and everything and he kept refusing to do that.

Q. Just milling around?

A. Yes, sir.

Q. Do you recall any occasion after he had made his speech and gotten down from the monument when he did go back toward the flagpole?

A. I think maybe, oh, maybe three or four minutes after he got down; might have been five, he walked a little piece up that way, approximately to the flagpole, and they turned another charge of gas loose, and he walked back down.

Q. How did he go toward the flagpole? What was his gait?

A. Walking. Just a common walk.

Q. Were people with him?

A. Well, there were people in the crowd. What I mean,

[fol. 288] there were some out front and they were scattered everywhere.

Q. And were any of the people in that group that were walking up there to the flagpole, did you see any of them at that point running?

A. No, sir.

Q. Would you say that they were walking fast or slow?

A. No, just a common walk.

Q. Now, when was the last time you saw the General that night?

A. Oh, somewhere between 1:00 and 2:00 o'clock.

[fol. 289] Q. And after he had made this speech from the monument and after he had made this other walk up towards the neighborhood of the flagpole with these folks, what did he do in between those times until he left the campus?

A. He just milled around there on the—back down next to the monument there.

Q. Was he doing anything differently from the other people?

A. No, sir.

Q. Was there anything that would attract your attention to him other than the fact that you knew he was General Walker?

A. That's all.

Mr. Andress: Pass the witness.

Cross examination.

By Mr. Gooch:

Q. Mr. Witt, at the time you went to the campus of Ole Miss—and you said you were over there five days and five nights before Sunday, September the 30th, if I understood you correctly?

A. The five days and five nights included September the 30th.

Q. All right. Now the reason you were over there was

to keep Meredith from entering the University of Mississippi, wasn't it?

[fol. 290] A. That was what our orders was Thursday.

Q. Now when were those orders changed?

A. After Thursday, we was—well, Sunday night we knew he was there. We had the report he had done got there.

Q. Now you said you went over there Sunday night because Sheriff Faulkner, or somebody called Sheriff Faulkner, or called you?

A. Sheriff Faulkner called me, yes, sir.

Q. You didn't get any instructions that night, did you?

A. Nothing only just come to the campus.

Q. Come to the campus. Now when was it somebody told you that you was over there to keep violence down? Did anybody ever tell you that?

A. Our Governor told us to try to keep down violence if we could—

Q. When was that?

A. That was on a Thursday.

Q. On a Thursday?

A. Yes, sir.

Q. But your avowed purpose for being over there was to try to keep Meredith from coming on the campus, wasn't it? That's what you had been there for?

A. That was Thursday.

Q. Did you get any further word from the Governor [fol. 291] after Thursday?

A. No, sir, I didn't directly, no, sir.

Q. Did you get any direct word from the Lt. Governor after Thursday?

A. No, sir.

Q. You were called Sunday to come over there, is that correct?

A. That's right.

Q. And you had received no other orders than the orders that you had had, to keep Meredith from being registered in the University of Mississippi, isn't that correct?

A. Faulkner, I asked him what was I supposed to do

when I got there and he said, "Try to take care of the students and keep them from starting anything."

Q. All right, now you got there about 4:30?

A. 4:30.

Q. And at that time were the Marshals already on the campus?

A. They were.

Q. And did you see any of the sheriffs and constables at that time?

A. Yes, sir.

Q. How many?

A. Well, now that would be hard to say.

[fol. 292] Q. Well, would you say 400?

A. No, sir, there wasn't—the 400 included the highway patrol. And the highway patrol—some of them was there when we got there but I don't think it would be 400 of them at that time.

Q. All right. Now did you take a position up pretty close to where the Marshals were around the Lyceum Building?

A. I was directly in front of the Lyceum Building, just across that little street.

Q. Did you stay there for a considerable period of time after you got there at 4:30?

A. I believe it was approximately 8:00 o'clock when the gas was turned loose and I left then.

Q. You were there then around the Lyceum Building until the gas was turned on?

A. Yes, sir.

Q. Now prior to the time that the Marshals fired their gas, what was the crowd doing insofar as the Marshals were concerned?

A. You mean before the gas was turned loose?

Q. That's right.

A. Well, nothing. Just standing around. Some of them were thumping cigarette butts towards the Army truck.

Q. Were there any pebbles thrown?

A. No, sir, not as I could see.

[fol. 293] Q. Was there any fire caught on one of the vehicles from a match or cigarette—

A. I believe I recall at one time there was a little fire started and somebody jerked a fire extinguisher and put it out.

Q. Were there any abusive words being spoken?

A. Well, now I imagine there was some bad language when I went over there, yes, sir.

Q. Were the Marshals saying anything or were they standing mute?

A. Marshals wasn't saying—I couldn't hear them saying anything at that time.

Q. But there were being some instruments tossed along with pebbles, lighted cigarettes, matches, et cetera?

A. Repeat that question, Mr. Gooch, please, sir.

Q. There were some insults or strong words being tossed at the Marshals in addition to pebbles?

A. Oh, yes.

Q. Cigarettes, and so forth?

A. There was some harsh words said, yes, sir.

Q. It was after these pebbles, as you described them, were tossed and the cigarettes that the first barrage of gas was fired, is that correct?

A. Now your pebbles, I don't know what you are calling pebbles. I only seen cigarettes, cigarette butts thumped.

[fol. 294] Q. You didn't see any pebbles?

A. No, sir.

Q. Did you hear any of the pebbles bouncing off their helmets?

A. No, sir.

Q. Or anything of that sort. Now you say the gas was fired along about 8:00 o'clock?

A. To the best of my recollection, I would say about 8:00 o'clock.

Q. Was it after dark?

A. Oh, yes, sir, just good dusky dark.

Q. And then after the gas was fired, did you go down towards the monument?

A. Yes, sir.

Q. On account of the gas?

A. Yes. And I did run at that time, too.

Q. All right. Now after you had run down to the monument, did you have an occasion to go back up towards the Lyceum Building?

A. We would ease back as far as we could but we couldn't —at that time, the gas was floating towards us and we couldn't get back up there.

Q. Was there a riot going on after that gas was fired?

A. That's when it started.

Q. Did that riot grow in intensity as the night wore [fol. 295] on?

A. It went until 5:00 o'clock.

Q. What all did the students throw at those Marshals?

A. Well, I seen them roll up wheelbarrows of brick and they would go to, somewhere in town and get the coca-cola bottles, sticks of wood; would break up the concrete benches —anything they could find.

Q. And what would they do with them when they picked them up?

A. If they could get up close enough, they would throw them at the Marshals.

Q. If they didn't get close enough, they would throw them anyway, isn't that the—

A. No, they didn't throw them until—they didn't want to waste their ammunition.

Q. All right. And they tried to get up close enough to be effective every time they threw them?

A. They would do their best.

Q. You didn't see any of them throwing unless the thrower had a reasonable opportunity of hitting his mark, is that right?

A. Well, now when the National Guard came through, or any other cars, as far as that's concerned, they tried to take care of them as it came through.

Q. You mean with bricks and stones?

[fol. 296] A. Yes, sir.

Q. And so from—and so forth. Did they do a pretty good job of it?

A. Yeah, I thought they done a good job.

Q. Did they set any automobiles on fire?

A. They burned and destroyed 16 cars.

Q. Was that during the time you were there?

A. Yes, sir.

Q. Between 4:30 in the afternoon and about 5:00 o'clock the next morning?

A. That's right.

Q. Prior to the time you saw General Walker come on the campus, were the students throwing rocks and stones and bricks and sticks at the Marshals?

A. They were throwing them before he got there and after he got there.

Q. Was it obvious to anybody that wanted to look that there was a riot going on at the time General Walker got on the campus?

A. Yes, sir, anybody could have told that.

Q. Were the students actually in the process—I don't mean continuously but in sporadic spurts, tossing their bricks and stones and missiles at the Marshals at the time General Walker got to the campus?

A. Before he got there?

[fol. 297] Q. Yes, sir.

A. Yes, sir.

Q. At the time he got there?

A. Yes, sir, they never did stop hardly.

Q. All right. Then you could plainly see from where you were down around the Confederate monument these charges or rocks and bricks and stones being thrown at the Marshals?

A. I could see them run up there with a brick in their hands.

Q. But could you see the arm movement of throwing?

A. Until they broke out a lot of the lights, I could.

Q. All right. Now there was considerable light in front of the Lyceum Building, was there not?

A. At one time there were. They eventually broke out every light.

Q. Well, I know, but there were some lights under the canopy of the Lyceum Building that stayed on all night, were there not?

A. Some of them stayed on all night but the Marshals had to turn their lights on their cars and jeeps.

Q. You could see the Lyceum Building, or the lights from the Lyceum Building, from the monument, could you not?

A. Well, you could see the lights but within that mist of tear gas, it was hard to see the building. And when it was too thick, you couldn't even see the lights.

[fol. 298] Q. But you could, if you walked up there around the flagpole, see pretty well what was going on around the Lyceum Building, couldn't you?

A. Not too good when the lights was—when that gas was there.

Q. I know, but did the gas lift and then come some more gas?

A. There was plenty of gas turned loose.

Q. That was quite obvious to everybody, both from a sight and a nostril standpoint, wasn't it?

A. Yes, sir.

Q. You stated that you saw General Walker as he approached the campus and I believe you said on the south side of University Avenue?

A. Yes, sir.

Q. And about how far was he from the monument when you first saw him?

A. I would say approximately 15 steps.

Q. Was there anybody at all with him or was he alone?

A. There was a young gentleman with him and this other fellow that I am referring to as Gene Connelly staggered up from somewhere. He wasn't with him but he staggered up from somewhere.

Q. Just the two of them, so far as you know?

[fol. 299] A. Yes, sir.

Q. As he got in closer to the monument, did anybody group themselves around him?

A. Well, there was a few walking up to him to shake hands with him and talk to him.

Q. Was anything said about, "Here is General Walker," or "Here is our leader"?

A. Yeah, I heard some of them say, "Here comes General Walker."

Q. Did they say, "Here is our leader"?

A. Said, "Yeah, we've got a leader now."

Q. Hear any of them ask him where his volunteers were?

A. I don't recall that now for sure, no, sir.

Q. All right. After he had been greeted there, did you go to him or did he come to you?

A. Well, I believe he walked up in the crowd where I was at. There was a, eight or ten of us standing up there, the crowd, and he seen my badge. We had orders to put our badge out on our coat and a white rag around our arm.

Q. All right. He walked over to you, did he?

A. Shook hands with me and introduced hisself and said, "I would like for you to deputize me, so I can help in this matter." He said, "I'm just here to observe."

Q. Now what did he exactly say? What did he exactly say?

[fol. 300] A. He said, "I would like for you to deputize me while I'm here so I won't, nothing will happen to me."

He said, "I'm not here to help in this matter in neither way but," he said, "I would just like to be on the safe side."

Q. Are you sure he said all that to you?

A. Well, Mr. Gooch, it's hard to remember everything that was said back that far.

Q. That's right, I know that, and I'm referring somewhat here to your deposition which was taken in March.

Now is your recollection better now than it was on March the 13th, 1964? I am asking you if it is?

A. Well, now I remember him walking up to me and shaking hands and say, "I would like for you—"

The Court: That wasn't his question, sir. His question was, is your recollection better now than it was on March the 13th of 1964.

A. Well, now I wouldn't say that it was.

By Mr. Gooch:

Q. All right. I recall, and we will get to it in a moment, that you said that what transpired between you, that you shook hands and he asked you to deputize him. That's all he said. And that you told him that you did not have the authority to deputize him, let alone in that county, but you were from a different county and couldn't deputize him if you wanted to?

[fol. 301] A. That's right.

Q. Now that's what I understood you to say in substance in March. I don't believe you mentioned anything about so he would be on the safe side or any of that sort of thing. We will get to that in a moment, though.

Now what is your best recollection now?

A. He shook hands with me and asked, "I would like for you to deputize me."

Q. All right.

A. And I told him, I says, "General, I don't have the authority to deputize you in this county, much less than my own," and I said, "This is not my county."

Q. Now that is substantially what was said between the two of you there?

A. As best as I can recall, yes, sir.

Q. All right. That's the later version and is now what you say you think happened?

A. Yes, sir.

Q. Now after he asked you to deputize him and you declined, what did he do?

A. Are you asking me a question?

Q. Oh, yes. What did he do after he asked you to deputize him, what did he do then?

A. Well, he just milled around there by the monument a while there.

[fol. 302] Q. Then what did he do?

A. Then he walked up a little closer. I heard him say something about, "We'll walk up a little closer and see what's going on."

And he walked up somewhere in the neighborhood of the flagpole.

Q. Did anybody go with him?

A. Well, not particularly go with him. Now the young man that was with him, walked with him, and then of course there was some behind him that just watched him as he walked up there.

Q. And you say nobody particularly went with him?

A. I don't think they called themselves going with him.

Q. I'm not talking about what they called themselves. I'm asking you if a number of people followed General Walker up towards the flagpole?

A. Well, there was some went in front of him and some went behind him, yes, sir.

Q. All right. Would you attempt to fix the number that was behind him?

A. Well, I don't really—somewhere in the neighborhood of three or four hundred.

Q. Now that's when he went up towards the flagpole the first time?

[fol. 303] A. I believe—yes, sir.

Q. Some three or four hundred went along behind him?

A. Well, no, let me back up on that just a little bit, Mr. Gooch.

Q. Well, go ahead, back up, either way you want.

A. I don't see that three or four hundred followed him because that dark, it would be hard for me to tell how many people followed him.

Q. Yeah.

A. I would say there was that many people behind him at that time in that area right down there.

Q. Well, were they just standing there or were they moving towards the flagpole with him?

A. Some people didn't move at all. Some people sit around on the benches. Some sit on the steps and didn't move.

Q. And some of them moved along with him up towards the flagpole, is that correct?

A. Some moved in front of him and behind him, yes, sir.

Q. All right. Now did you say how far he got on that occasion? Did he get up near the flagpole?

A. Somewhere close to the flagpole. I don't recall of him ever walking past the flagpole.

Q. Now did any incident occur with respect to Reverend Gray, this preacher that you referred to? I don't know [fol. 304] whether you mentioned his name as Gray or not. Was it Duncan Gray?

A. I don't know what his name was.

Q. Well, a preacher, anyway?

A. Yes, sir.

Q. You referred to him as "a preacher"?

A. Yes, sir.

Q. Did any conversation occur between General Walker and Reverend Duncan Gray or this preacher at the time he went up to the flagpole the first time with this crowd following him and on his way back?

A. Well, that was just before he went on the flag—up on the monument to make a speech.

Q. Uh-huh.

A. As he started back, the preacher kept nagging at him and pulling his coat, to try to stop the crowd.

Q. What did the preacher ask him to do?

A. He said, "General," he said, "This crowd will listen to you. Talk to them and have them go home. This is no good."

Q. Did he ask him to stop the rioting?

A. Yes, sir, he said, asked him to stop the rioting.

Q. What did the General reply?

A. He told him, he said, "I didn't come here—" He said, "I couldn't stop it if I wanted to." Said, "There's nothing [fol. 305] I can do."

Q. He said he wouldn't stop it if he could?

A. No, sir, he didn't say that.

Q. He didn't say that. All right. Then you say General Walker went back down around the vicinity of the monument. Now was there something said about him making a speech?

A. They kept on at him to make a speech.

Q. Now did the preacher attempt to get General Walker, while he was making his speech on the monument?

A. One time he came around on the left-hand side, which was the north, the way I was facing, to reach to him again. That was after I heard him be threatened and I walked around in front of General and caught him and drug him out in there.

Q. You are anticipating me. Did the preacher, as you refer to, did he ask General Walker while he was on the monument to try to stop the riot?

A. I don't recall of him getting to say nothing to him because when he reached up to catch his britches leg, that's when I reached and grabbed him.

[fol. 306] Q. So you got the preacher out of there, is that correct?

A. Yes, sir.

Q. All right. How many people would you say was on the campus there in the Circle—the Circle, now, and as distinguished from the campus, at the time General Walker was making his speech out there on the monument that night?

A. You mean in the Circle, or in the whole area around there?

Q. That whole area around the Circle, the flagpole, the Lyceum Building and the monument.

A. When I first got there I would say 400 people, in the whole area.

Q. How many was around the monument while he was making his speech?

A. Mr. Gooch, that is going to be hard to say. Somewhere in the neighborhood of one hundred people, maybe.

Q. All right. Now, tell me again what you heard General Walker say?

A. Well, I heard him say, "Violence is not the answer. Cuba is yonderway." And he pointed to the southerly direction. He told them, "Protest all you want to." They

have that right. And I heard him say something about help is on its way.

[fol. 307] Q. "Help is on its way", you heard him say to the crowd, "Help is on its way"?

A. Something like that, yes, sir.

Q. All right. Now, what happened after he finished his talk on the monument?

A. He got off and talked around there to a few other people, milled around there a little bit, say four or five minutes, and he walked up toward the flagpole again.

Q. When he walked up toward the flagpole again now, that was the second time he had gone toward the flagpole, is that right?

A. Yes, sir.

Q. When he walked up to the flagpole again did anybody follow him?

A. Well, there were people there walking. I don't know whether they called themselves following him or not.

Q. All right. And was he in front—a—

A. No, sir.

Q. —of anybody behind him?

A. Well, he had to be in front of somebody that was behind him.

Q. All right. They were not in a single bunch in one pile, were they?

A. No.

[fol. 308] Q. They were not walking completely abreast, were they?

A. No, sir. I would say there were as many in front of him as there were behind him.

Q. All right. We will get down to that in a little while. Now, did he make any remarks as he started up there, this second trip toward the flagpole?

A. I don't remember him making any remarks about anything. He talked to people, shook hands with people as he went along, you know. In other words, he didn't walk directly toward the flagpole. He was walking awhile criss-crossing around and shaking hands and talking.

Q. How many would you estimate were in the crowd that went up that time?

A. That is still hard to say, Mr. Gooch. Like I say, there were people in every direction.

Q. How many would you say?

A. In whole area?

Q. No, around General Walker at the monument, when he started and you went with him toward the flagpole?

A. Well, I don't know how far from him you would have to say was around him. In other words, naturally, there was people, some in front and behind him, but they were scattered out for a quarter of a mile from him all during the time he was there.

[fol. 309] Q. Now, you stated on direct examination that you never saw General Walker doing anything, that, I believe you said, nobody else did. Did you make a statement like that?

A. Yes, sir, but I thought that over a little bit.

Q. Yes, sir.

A. I seen some of the rest of them lead some of the violence and I didn't see him doing that. I will say this, I didn't see him doing anything more than I done.

Q. Did you throw anything towards the Marshals?

A. No, sir.

Q. Did you go towards the Marshals?

A. I went in the Marshals' building.

Q. I mean did you go up there with him up towards the Marshals?

A. No, sir, not particularly. I tried to watch the students, what they were doing, while they were in—while they were engaged in that kind of stuff, yes, sir.

Q. Did any of these crowd, or whoever it was that went with General Walker toward the flagpole, on either occasion you have testified about him going to the flagpole, have anything in their hands in the way of missiles, rocks or stones?

A. I seen some of them in the crowd with bricks in their hands.

[fol. 310] Q. Were they following along beside General Walker?

A. No, sir, the ones with the bricks would be more or less in front of him and out at each side.

Q. And out at each side?

A. Yes, sir.

Q. As they got up to this flagpole, could you see any of them throw the rocks?

A. They couldn't throw from the flagpole on up there. They would try to work on up close.

Q. Did you see any of them throw a—

A. Not down at the flagpole.

Q. I mean in the group with General Walker. Did you see any of them throw?

A. Not at the flagpole.

Q. I mean in the group with General Walker?

A. No, sir, not that group.

Q. Any group?

A. I did later when they tried to work on up closer when the gas would go down.

Q. You said General Walker said, "Violence is not your answer." Or did he say, "No violence is intended?" Do you know which he said?

A. Yes, sir, I sure do.

Q. What did he say?

[fol. 311] A. He said, "Violence is not your answer, Cuba is yonderway."

Q. He did not say, "No violence was intended?"

A. No, sir, I didn't hear him say that.

Q. He said, "Cuba is yonderway."

A. Yes, sir.

Q. He said, "Protest all you want, you have got a right to do that"?

A. Yes, sir.

Q. Then did he say this: "Protest all you want to, they might run out of gas, help is on its way, thousands are coming"?

A. I believe I remember hearing some statement like that, yes, sir.

Q. You testified before that is exactly what he said.

A. Well, yes, sir, I heard that.

Q. He said that while he was on the monument?

A. I believe that's right, yes, sir.

Q. All right. Did you hear him tell the students that Birdsong had sold them out?

A. No, sir. The main reason he got up there to make the speech, some of the students—

The Court: Wait just a minute. You tell what you saw and what you heard and don't give us what somebody else [fol. 312] may have done.

A. All right. He got up to make the speech. He didn't say Birdsong sold them out. He told them Gov. Barnett hadn't sold them out. He said, "I have heard Birdsong is the one that sold you out."

Q. Well, I quote again from page 24 of your deposition when you said, "Gov. Barnett did not—didn't sell you out, Birdsong did."

Do you remember making that statement?

A. Yes, sir, I do.

Q. Now, you say there was never a large crowd following Walker toward the flagpole?

A. No, sir.

Q. Are you saying there wasn't, or you didn't say that?

A. I am saying they weren't following him after he made his speech and wouldn't lead them the crowd more or less got irritated at him.

Q. The first time he went up before he made the speech, did anybody follow him up then?

A. Some came along, yes, sir.

Mr. Gooch: All right, could we have a recess before I finish with this witness?

The Court: Yes, sir. Ladies and Gentlemen of the Jury, let's recess until 3:30.

[fol. 313] Mr. Andress: After the Jury is out, could I make my Bill?

The Court: Let's get it done now, yes, sir.

(Jury out; the following proceedings were had outside the presence and hearing of the Jury.)

Mr. Andress: Sheriff, each time you saw General Walker over there that evening, did you ever see him leading a charge?

A. No, sir, I did not.

Mr. Andress: That is all.

The Witness: I may get a little scared up here in front of all these people and the Judge and everything.

Mr. Andress: That is all.

The Court: All right, we will recess.

(Short recess was had.)

[fol. 314] The Court: Mr. Watts is getting the original depositions. He will be here in just a minute.

All right, Mr. Gooch.

By Mr. Gooch:

Q. Mr. Witt, I don't know whether you would agree with a description such as this or not, but on this particular night, were you nattily dressed?

A. Well, I had my dress pants and coat on.

Q. Well, would you consider yourself to be nattily dressed?

A. Well, I hadn't thought of it either way but I guess you would say yes.

Q. All right. Are you a portly man?

A. Well, now, that's a matter of opinion.

Q. Let's see if we can get it in the record, then. How tall are you, Mr. Witt?

A. About five, eleven.

Q. And how much did you weigh on September the 30th, 1962?

A. About 275.

Q. All right, sir. Now, Mr. Witt, do you remember when your deposition was taken over in Oxford, Mississippi, by Mr. Watt, on the 13th of March, 1964?

A. I don't remember the date but I remember giving the deposition, yes, sir.

Q. Do you recall, also, that there was some cross ex-
[fol. 315] amination at that time after Mr. Watt had finished—

A. I do.

Q. —examining you?

A. Yes, sir.

Q. Now read along with me here. So we will get the continuity, I am reading from the deposition of Mr. Witt that was taken by Mr. Watt, Counsel for General Walker, on the 13th day of March, 1964, in Oxford, Mississippi.

Mr. Witt, if I—

Mr. Watts: Might I inquire what page, please, Mr. Gooch?

Mr. Gooch: Page 29.

Mr. Watts: Is this my examination or your cross examination?

Mr. Gooch: Cross examination, Mr. Watts.

The Court: Cross.

Mr. Andress: Judge, at this point, I would like to interpose an objection for this reason: The way you impeach a witness is to ask him the same question and then if you get something different, then you can go ahead and read what he says before, and not the way that Counsel has been doing it.

I have let it go along but I do think we ought to do it right, and, therefore, I would like to make an objection to it until the proper predicate is laid.

[fol. 316] The Court: Overruled.

Mr. Andress: May it go to the entire line here?

The Court: Yes.

By Mr. Gooch:

Q. To get the continuity, this question was asked: "Mr. Witt, I understood on the afternoon of September 30th, 1962, you got a call and did the call come to you or did it just come to the Sheriff's office?"

Your answer, "It came to me," is that correct?

A. That's right.

Q. It came to you personally?

A. Yes, sir.

Q. And that was Sheriff Faulkner from New Albany?

A. Yes, sir.

Q. And the answer was, "From Union County, yes, sir." Was that your answer?

A. Yes, sir.

Q. "Did he tell you why he wanted you to come to Oxford?" And your answer, "He told me to come over there."

Mr. Watts: Just a minute, please, Mr. Gooch. You skipped.

Mr. Gooch: "He told us to come over there."

Mr. Watts: Right.

By Mr. Gooch:

Q. "I believe it was Friday afternoon, that if we didn't get called back, not to come back until Monday," is that correct?

[fol. 318] A. That's right. Or until we was called.

Q. "Question—"

A. Or until we was called.

The Court: Right now he is just asking you whether or not what you said in this deposition was said at the time you gave that deposition.

The Witness: Yes, sir.

By Mr. Gooch:

Q. Now at the time you gave this deposition, you were under oath as you are today; did you understand it at the time?

A. Yes, sir.

Q. "Question: I see. You had been over here previously?" And your answer, "Yes, sir, I had been here five days and nights." Is that correct?

A. Yes, sir.

Q. "You had been over here five days and nights?"

A. "Yes, sir."

Q. Is that correct?

A. Yes, sir.

Q. "Were there a lot of officers over here at that time?"

"Answer: Yes, sir, I believe they estimated down here at the Army Building that there was sheriffs, highway patrol, constables, and so forth, 425 men."?

A. "Yes, sir."

Q. Did you make that answer?

[fol. 319] A. Yes, sir.

Q. Was it true?

A. Yes, sir.

Q. "Question: 425 officers had assembled here at Oxford and had come to the University for a number of days?"

Your answer, "I don't know if it would have been the same crowd every time. That was on Thursday. The day he was supposed to have come in here, they estimated 425."

A. Right.

Q. "Did that include the highway patrol?"

And you answered, "Yes, sir," is that correct?

A. Yes, sir.

Q. "The highway patrol, peace officers, sheriffs and deputies?"

And you answered, "Yes, sir," is that correct?

A. Yes, sir.

Q. "Why were they here?"

And you answered, "That was the day he was supposed to come in here, on Thursday, Meredith.

"Question: And what was the purpose of the officers being here when Meredith came in?"

And you answered, "To stop him from getting in".?

A. Yes, sir.

Q. "Question: To stop him from getting in?"
You answered, "Yes, sir." Is that correct?
[fol. 320] A. Yes, sir.
Q. "To prevent him from getting on the campus?"
And you answered, "That is right"?
A. Yes, sir.
Q. "Question: That was what you understood was the purpose that you all were assembled here for?"
And you answered, "Yes, sir."?
A. Yes, sir.
Q. Is that correct?
A. That's right.
Q. "And that was the object that you had in mind, to prevent Meredith from getting on the campus and enrolling in the University?"
And you answered, "Yes, sir."?
A. Yes, sir.
Q. And you said—is that correct? "The court reporter can't get your nod."
And you answered, "Yes, sir." But they did disarm us," is that correct?
A. That's correct.
Q. "Question: They did what?"
"Answer, they had taken our guns on the Thursday now. They had taken our guns away from us.
"Question: Who did that?"
Your answer, "The Lt. Governor, Paul Johnson." Was [fol. 321] that answer correct?
A. That's right.
Q. "Question: But you still, after your guns were taken away from you, you were still here as I understood it, and as your orders and directions were, and the information given you from the officers in charge, you were still here for the purpose of preventing James Meredith getting on the campus and enrolling as a student at the University?"
And your answer, "Yes, sir."?
A. Yes, sir.
Q. Well, is that correct?

"Question: After you got the call from Sheriff Faulkner on September 30th, you came on to Oxford, is that correct?"

Your answer, "Yes, sir."?

A. Yes, sir.

Q. Was that true?

A. That's right.

Q. "Did you go directly to the campus of the University?"

Your answer, "Yes, sir."?

A. Yes, sir.

Q. Correct? "Did you say who was with you at that time?" You answered, "Cecil Payne," is that correct?

A. Right.

[fol. 322] Q. "Now Cecil Payne is another Deputy Sheriff of Pontotoc County?"

And you answered, "Yes, sir"?

A. Yes, sir.

Q. Is that correct? "Now when you got on the campus at the University, the first tear gas had not been fired, had it?"

And you answered, "No, sir." Was that correct?

A. That's right.

Q. "And when you went up to the Lyceum Building just what was the situation that you observed there at the Lyceum?"

You answered, "The Marshals were in front of the Lyceum Building and we had gathered up on both sides. Our orders was to try to control the students and to keep them from doing anything violent."

Did you make that answer to that question?

A. I did.

Q. Now the rest of it—well, we will go on with it.

"There is a street that runs in front of the Lyceum Building?"

You answered, "Yes, sir," correct?

A. Yes, sir.

Q. "And you officers were out in the street in front of the Lyceum Building?"

"Answer, just across the street, we were just on the [fol. 323] curb back from the street."

"Question: Now the students and the crowd, you said you didn't know whether they were all students or not, but the crowd was assembled over in this circular area that is called the circle right across the street from the Marshals?"

And you answered, "Yes, sir"?

A. Yes, sir.

Q. "Question: Now when you first got there, what would you estimate the number in that crowd was then?"

You answered, "When I first got there just around 400 or 500 people, when I first got there." Correct?

A. Yes, sir.

Q. "500 people?" And you answered, "Yes, sir." Is that correct?

A. Yes, sir.

Q. "Now did that crowd constantly grow?"

And you said, "Oh, yes, sir," is that correct?

A. Yes, sir.

Q. "As the night went on and the whole crowd on campus grew, didn't it?"

And you answered, "Yes, sir"?

A. Yes, sir.

Q. "Between the time when you first got there, which you estimated at 4:30, and the time of the first tear gas [fol. 324] which you estimated at 6:00, I believe that is correct?"

And you said, "That is just a guess"?

A. Yes, sir.

Q. Was that your answer?

A. Yes, sir.

Q. "I understand that is just a guess, approximately."

You answered, "Yes, sir."

"Were you there all the time?"

And you answered, "Oh, yes, sir, I was there until 5:00 o'clock the following morning." Was that correct?

A. That's right.

Q. "Sometime along there the highway patrol left, didn't they?

"Answer: Yes, sir, shortly after the gas was released, they left, I would say, within five minutes." Is that correct?

A. That's correct.

Q. "And most of the law officers left?"

And you answered, "Yes, sir"?

A. Yes, sir.

Q. "Question: In fact you were just about the only law officer that stayed on there, weren't you?"

And you answered, "Me and Jim Garrison was the only ones that I remember," is that correct?

A. That's correct.

[fol. 325] Q. "Question: Jim Garrison, that is the Deputy Sheriff from Lafayette County?"

"Answer: Yes, sir.

"Question: And you are the only two law officers that remained there on the campus to try to help that night?"

And you answered, "The only ones I could see, yes, sir"?

A. Yes, sir.

Q. Was that correct?

A. That's right.

Q. "Now just prior to the time the first tear gas was fired, the crowd had gotten a little unruly, hadn't it?"

And you answered, "Oh, yes, sir." Is that right?

A. Yes, sir.

Q. "Question: There was a good deal of cursing going on, wasn't there?"

And you answered, "Yes, sir." Was that correct?

A. Correct.

Q. "And you heard a lot of profanity?"

And you answered, "Yes, sir"?

A. Yes, sir.

Q. "And the crowd was getting to what you would call restive, they were unruly, weren't they?"

And your answer, "At that time before the gas was turned aloose, they had thumped cigarettes and cigar butts [fol. 326] and they had struck matches and thrown on top of the canvas of the Army trucks and some of them at the Marshals"?

A. Right.

Q. Was that correct?

A. That's correct.

Q. "Question: Trying to set the things afire?"

And you said, "Well, I don't know." Is that correct?

A. Correct.

Q. "Did any of this canvas, these canvas tops, catch afire?" You answered, "At one time I recall that the canvas did sort of blaze up just a little bit and somebody put it out with one of the extinguishers."

Did you make that answer?

A. Yes, sir.

Q. Is that correct? "Do you remember the occasion when a photographer came in, he and his wife in a car, and they took their car and broke up the camera, that happened before the tear gas was fired, didn't it?"

And you answered, "No, sir. I didn't see any cars destroyed until after—" He—is that correct?

A. That's correct.

Q. "Question: I don't mean the car was destroyed, his camera, his Kodak was destroyed, do you remember seeing that before the tear gas was fired?"

[fol. 327] Answer, "No, sir, I don't remember that." Was that correct?

A. Yes, sir.

Q. "You say the crowd had grown unruly before it was fired, now after the tear gas was fired, then the crowd really got violent?"

And you answered, "Yes, sir"?

A. That's right.

Q. Is that correct? "In other words, there is no way of describing it except it was just a riot, just a mob, a violent mob, that is what it was, wasn't it?"

And you answered,—

A. Yes, sir.

Q. That was right?

A. Yes, sir.

Q. "Question: This violent mob was undertaking then to do anything they could and any harm they could do to the Marshals and to the property there on the campus, wasn't it?"

You answered, "Yes, sir."

Mr. Andress: This is all repetitious. He's been through this.

The Court: We have gone through this. What is the purpose?

Mr. Gooch: I am trying to get the continuity. I'm getting down to where I consider it impeachment.

[fol. 328] The Court: All right.

Mr. Andress: Pretty long as a preface, Judge.

Mr. Gooch: I was just trying to make the continuity but I will skip over.

By Mr. Gooch:

Q. Now you have previously testified that they were getting bricks and stones and sticks from whatever source available, have you not?

A. Right.

Q. And were they getting a considerable number of them at the new Science Building down there at Hume Hall?

A. I presume that's where they were coming from. I couldn't say where they was coming from.

Q. All right. On Page 38, "Question: Now this whole crowd out there—" It's the third question on Page 38.

Mr. Andress: Line 9?

Mr. Gooch: Well, mine isn't lined, Mr. Andress, so I will have to call it the best way I can.

By Mr. Gooch:

Q. "Question: This whole crowd out there, you say it wasn't organized, but that whole crowd or group of people out there in that area which you have estimated at least one thousand, they were participating in this thing, weren't they?"

Answer, "I wouldn't say, Mr. Smith, that everybody was throwing, but the crowd would go together as long as they could."

[fol. 329] "Question: And that happened not just once or twice, that happened numerous times?"

Answer, "That happened all night long until 5:00 o'clock."

Is that correct?

A. That is wrong. I remember giving the statement but I misunderstood the question and answered it wrong.

Q. All right.

A. If you will go on and read, you will find that somebody in the crowd asked me then to mark a circle where this thousand people was at. And it's completely around, surrounding the whole area.

Q. All right. All right. And the last question on the page, "And the ones in front would throw at the Marshals, wouldn't they?"

And you answered, "Yes, sir," is that correct?

A. When they would get up close, they could, yes, sir.

Q. "Now that was taking place before and at the time General Walker got there, wasn't it?" That's Page 39.

You answered, "Yes, sir," is that right?

A. Right.

Q. "And in those crowds that you say they would all surge up that way, some of those crowds that would surge up that way in your judgment would amount to one thousand people?"

[fol. 330] And your answer, "Yes, sir."

A. I was wrong on that, Mr. Gooch.

Q. All right. Now, how many were there?

A. I don't know. The thousand people included the people sitting in their cars, on the concrete benches that the campus had there and on the doorsteps and everything, and I don't know. I would say 15 to 50 people sometimes maybe would go in a crowd.

Q. All right. You are wrong then, you say you were wrong when you said a thousand people, you were wrong to the extent of the numbers, is that correct?

A. To the extent of number following in any group. Some of them never got out of their cars.

Q. Going down to one, two, three, four, five, the sixth question, "Now when General Walker got there, I believe you say that you didn't know him?"

And you answered, "No, sir"?

A. Right.

[fol. 331] Q. You had heard of him? Answer: "I heard of him." Question: "You knew who he was?" And you answered, "Yes, sir," is that correct?

A. When they pointed him out to me, yes, sir.

Q. All right. The one, two, third question on page 40, "But you did know he was a national figure and recognized as a prominent man?" And your answer, "Oh, yes, sir." Is that correct?

A. Yes, sir, that is correct.

Q. The last question on page 40, "How far, when you first saw him there, how far would you say he was from the monument, approximately?" And you answered: "Not over forty feet."

Is that correct?

A. That is correct.

Q. "Do you know how long he had been standing there before you saw him?"

Answer: "Well, no, sir, I heard the students say 'here comes General Walker' and they said, 'we've got a leader now.'"

Is that correct?

A. That's right.

Q. "When General Walker came on campus and the word began to get around, the word just went over the crowd, didn't it?"

[fol. 332] And your answer: "Yes, sir."

Right?

A. Right.

Q. "It was just like a wave going out over that crowd, 'General Walker has gotten here', and is that right?"

And your answer: "Yes, sir."

Is that right?

A. Yes, sir.

Q. "And that made an impression on that crowd, didn't it?"

And your answer: "Yes, sir."

A. Yes, sir.

Q. "And you could tell the difference in their attitude and their demeanor when he got there and they figured that they had a leader? It made a difference, didn't it? There was more enthusiasm, wasn't there?"

And your answer, "It looked like it, yes, sir."

A. Yes, sir. I am wanting to back up on one thing right there.

Q. Yes, sir?

A. After he made his speech I believe the biggest majority of them turned against him, after they found out he was not going to lead them. They didn't think too much of him then.

Q. All right. The next question: "And this crowd be-[fol. 333] came enthusiastic and they began to say 'General Walker is here, our leader is here', and when you heard that you began to look for him, didn't you?"

Answer: "I moved to one side where I could see him, naturally. I was like the students, I wanted to see what he looked like."

Is that correct?

A. That is correct.

Q. "You had on your Deputy Sheriff's badge, didn't you?"

Answer: "Yes, sir."

A. Yes, sir.

Q. On top of page 42—before we get to that question I will ask you again, did you go to General Walker or did General Walker come to you?

A. I will say General Walker walked to where I was standing.

Q. All right, that is what you said in your deposition, "And when you walked down to General Walker, or walked down towards him, did he come to meet you when he saw that Sheriff's badge?"

Answer: "He came to me."

Right?

A. Right.

Q. Question: "He came to you?"

[fol. 334] Answer: "Yes, sir."

Is that right?

A. Yes, sir.

Q. "How far did he walk to get to you, when he saw you?"

Answer: "Just a few feet west of the monument."

Is that correct?

A. Yes, sir.

Q. "And so you and he did stand there for a little space of time and talked, didn't you, when he was asking you—"

Answer: "He introduced himself to me and shook hands with me and he said he would like for me to deputize him and I told him I didn't have the authority to deputize him, even in my own county, and this wasn't my county."

A. That is correct.

Q. That is what you testified to on your deposition?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. That is correct there?

A. Yes, sir.

Q. The other matters you threw in are not correct?

Mr. Watts: If Your Honor please, I object to that. That is argumentative and an improper question.
[fol. 335] The Court: Sustained.

By Mr. Gooch:

Q. "So he was standing there talking to you at that time?" That is the next question, and you answered: "Yes, sir."

A. That's right.

Q. All right. The first question on page 43, "You never did talk to him personally any more that night?"

And your answer: "No, sir."

Is that right?

A. That's right.

Q. "What happened then, when you and him stood there and talked a little bit and he asked you to deputize him and you told him you couldn't do it, you and he shook hands, just what happened then?"

Answer: "Students kept on begging him to lead them and he told them he wasn't over there to participate in none of the violence or anything and he said, 'I am just over here to observe', he said, 'let's walk up closer to the front, I'll walk up closer to the front and see if we can see what is going on' ".

Was that your answer?

A. Yes, sir.

Q. Question: "Now, that was before he made the speech?"

Answer: "Yes, sir, he just walked a little piece up that [fol. 336] way and then when the gas turned aloose, he came back down and that is when he got on the stand and made his speech."

Did you make that answer?

A. Yes, sir.

Q. Question: "Now, when he walked up that way, you know where the flagpole is out in the middle of the Circle?"

And your answer: "Yes, sir."

Is that correct?

A. Yes, sir.

Q. "When he walked up to the flagpole, that was when he had the first encounter with the preacher, Duncan Gray, didn't he?"

And your answer: "Yes, sir, when he was coming back from the flagpole down to the monument."

Is that correct?

A. Yes, sir.

Q. And question number two on that page 44, "And you heard that conversation in which the preacher was begging Walker to help them break this up and get the students to break it up and go back home?" And your answer: "Yes, sir, I heard that."

Is that correct?

A. Yes, sir.

[fol. 337] Q. Is that correct?

A. Yes, sir.

Q. Question: "And the preacher was telling him, didn't the preacher say to him, 'General, these boys will listen to you, please help us break this up and ask them to quit this and go home.'"

And your answer: "He did."

Is that correct?

A. Yes, sir.

Q. Question: "And Walker then said, 'I am not here to break it up, I didn't come here to break it up, I couldn't break it up if I wanted to?"

And your answer: "That is right."

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. Question: The last one on page 44, "In that speech, among other things, you heard him say, did you not, that 'you got a right to protest, protest all you want to, they may run out of gas, and help is on the way, thousands are coming,'".

And your answer: "Yes, sir."

Is that correct?

A. Correct.

Q. "When he said that, when he said, 'Protest all you [fol. 338] want to, you've got a right to protest, keep it up, they may run out of gas, help is coming, thousands are on their way,' that pleased the crowd, didn't it?"

And what did you say?

A. Well, yes, sir.

Q. Well, you answered: "I would say so."

And the next question: "And they cheered and clapped and cheered and hollered, didn't they?"

And your answer?

A. "Yes, sir."

Q. Now, the last question on page 45: "About the time he said that, when he said that, was that about the time the preacher came up to him again?"

And your answer: "The best I can remember, Mr. Smith, the preacher came up to him just as he got upon the stand and he never did quit following him, and when he got upon the stand, he reached up and caught him by the leg and begged him again."

Question: "He begged him to stop it, or asked him to stop it?"

Answer: "Yes, sir."

That was your answer?

A. Yes, sir.

Q. Did that happen?

A. Yes, sir.

[fol. 339] Q. Did that happen at the monument?

A. Up at the monument was the last time he caught his britches leg.

Mr. Watts: Judge, this is all repetition.

Mr. Gooch: Wait just a minute, it is not repetition. He has denied some of these statements on cross examination.

The Court: I know it, counsel. I will not sustain it.

Mr. Watts: All right.

By Mr. Gooch:

Q. "The preacher was still begging him, General Walker, to intercede with the students and ask them to stop their rioting and quit what they were doing and go back to their dormitories?"

And your answer: "That is right."

A. I am going to back up on that a little bit. The preacher didn't have but one word to say to him and I don't think General heard him then. The three men, that is when I got him.

Q. You say what you testified to over there in Mississippi is in error?

A. That is an error on that part, yes, sir.

Q. The next question—you answered, "That is right." And the next question, "That is what he was doing, wasn't it?"

[fol. 340] And you answered: "Yes, sir."

Do you want to back up on that?

A. Now, repeat that question.

Q. That alludes to the same question, that the preacher was asking Walker to stop the rioting. You said that was right. Now, do you say that is wrong?

A. He didn't talk to him while he was on the monument.

Q. All right. Question: "And General Walker then said—is that when he asked him what denomination he was?"

And your answer: "Now, the best I can recall it was just before he got on the stand, or as he was going to the monument, he turned and asked him 'What denomination are you, preacher?' He said, 'Episcopalian'. He turned around and looked at him and said, 'Well, you make me ashamed that I am an Episcopalian.'"

Question: "In fact, when the preacher was begging him to help or to try to get them to stop it, then did he use this language, 'Here is an Episcopalian preacher that makes me ashamed I am an Episcopalian'?"

And your answer: "Well, in those words or something like 'You make me ashamed I am an Episcopalian', I don't remember just exactly the words."

Is that correct?

[fol. 341] A. Yes, sir, that is correct.

Q. Now, on the top of page 47, Question: "Didn't you say on direct examination that everywhere Walker went the crowd followed him?"

And you answered: "Oh, yes, the crowd as well as myself. I watched him every move he made to see what was going to happen."

Did you make that answer?

A. I made that but I want to back up from that.

Q. You want to back up from that?

A. A full crowd never did follow him.

Q. All right. Did some follow him?

A. There were some in front and some behind him.

Q. Well, did some of them follow him?

A. Yes, sir.

Q. All right. Question: "People wanted to see what he was going to do and what he was going to say and when he went up toward the flagpole the first time, and before he made his speech, did the crowd go up along with him then?"

And you answered: "Oh, yes, sir." Did you make that statement?

A. I made that statement.

Q. Is it true?

A. It is not true that they all followed him.

[fol. 342] Q. Did some of them follow him?

A. Of course, some was behind him, yes, sir.

Q. All right. The next question: "It was quite a big crowd, wasn't it?"

And you answered: "Yes, sir."

Is that right?

A. It was a big crowd in area, yes, sir.

Q. Was a big crowd following him?

A. Not no big crowd was following him.

Q. All right. Was a little crowd following him?

A. Yes, sir, there was a small crowd come up.

Q. Question: "And then he got right up just about to the flagpole, didn't he?"

And your answer: "I don't recall just how far he got, he got up there until they charged the gas."

Is that correct?

A. That is correct.

Q. Question: "In other words, there was such a crowd following him when he went up toward the flagpole that first time that the Marshals turned aloose tear gas down there, didn't they?"

Answer: "Yes, sir, but there were students ahead of him, in other words, the students were all up in front of all of us when we went up there."

You made that answer?

[fol. 343] A. I did.

Q. Is it correct?

A. Correct.

Q. "But there was quite a crowd following him and they turned aloose the tear gas?"

And your answer: "Yes, sir."

Is that correct?

A. Correct.

Q. That is a correct answer?

A. Repeat that question one more time.

Q. "But there was quite a crowd following him and they turned aloose the tear gas?"

And you answered: "Yes, sir."

A. No, sir, I still say that would have to be wrong there. There wasn't no large crowd ever followed him.

Q. "Now, we will get back to the speech. After the preacher had begged him to try to help stop it and he said 'You make me ashamed I am an Episcopalian', then you say some of the students were saying, 'Barnett has sold us out, Barnett has sold us out.' And do you remember that when that happened that General Walker said, 'You have been let down but not by Barnett,' and he leaned over and whispered to a young man standing there beside him and then

raised up and said, 'The man who let you down or sold you [fol. 344] out is Birdsong'."

And your answer: "I do."

A. Yes, sir.

Q. Is that true?

A. That is true. I remember that. But I didn't put one statement there I should have put, and he raised back up and said, "I understand you have been sold out by Birdsong."

Q. Well, now, you were under oath when this deposition was taken in Mississippi.

A. Yes, sir.

Q. There was just a bunch of us there in the Courtroom, Mr. Watts, Fred Smith and myself? I believe that was all that was there on your deposition?

A. I think so, yes, sir.

Q. You were not excited, were you?

A. No, sir.

Q. "Do you remember he leaned over and whispered to this young fellow?"

And you answered: "I do."

A. I do.

Q. "Then he rose back up and said, 'The man who sold you out is Col. Birdsong,'?" And you answered: "Yes, sir."

Is that true?

[fol. 345] A. Yes, sir. No, sir, he said, "I have been told Birdsong is the one that sold you out."

Q. You didn't say that when your deposition was taken?

A. No, sir. I done some thinking since then.

Q. Did you do any thinking before?

A. I done some, but I didn't know I was going to get in Court on this thing.

Q. You did know when your deposition was taken it might be used in Court, didn't you? Or did you know that?

A. I didn't think about it either way.

Q. "After this statement of the preacher it looked to you like the crowd was going to hurt the preacher, didn't it?"

And your answer: "I heard three men threaten him, or three people, I don't remember what age, but they were above students age."

A. Yes, sir.

Q. This is not read from the deposition, but you did take the preacher away from there?

A. Yes, sir, I did.

Q. As you testified?

A. Yes, sir.

Q. Now, you got him away from there to protect him, [fol. 346] didn't you?

A. Absolutely.

Q. Now, the one, two, three, fourth question on page 49, "Now, at the time that Walker was making his speech there was quite a crowd around the monument listening to him?"

And your answer: "Yes, sir."

Do you want to change that?

A. No, sir. No, sir, there was a crowd around.

Q. Quite a crowd?

A. They were parked in cars and they could hear him from the buildings on both sides.

Q. How many would you say was around him, aside from the deposition, when he made the speech?

A. Three or four hundred, somewhere in there.

Q. From the deposition again, the one, two, three, four, fifth, "Would you have any idea how many were circled around that monument listening?"

Answer: "There was 400 or 500 anyhow."

A. Well, there could have been that many, yes, sir.

Q. Question: "And a lot of them still had their bricks and their sticks and their bottles in their hands?"

Your answer: "Yes, sir."

A. Yes, sir.

[fol. 347] Q. Is that correct?

A. Yes, sir.

Q. Question: "And you could plainly see those things in their hands?"

Answer: "Yes, sir."

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Question: "After he got through with the speech there he stepped down off the monument and started up that walk towards the Lyceum Building in—and the Marshals?"

And your answer: "Well, yes, sir, he walked that way."

Is that correct?

A. No, sir, I would like to change that a little bit. He didn't get directly off the monument and walk directly up that way. There was three or four or five minutes he milled around before he started that way.

Q. But he did walk up toward the flagpole?

A. Yes, sir, he did walk up toward the flagpole, yes, sir.

Q. All right. The next question: "And as he walked up that walk, just right after he finished his speech, wasn't it?"

And your answer: "Yes, sir."

[fol. 348] Do you want to change that?

A. Well, it was a few minutes after he made his speech.

Q. All right. Question: "When he stepped down, he did talk to two or three people for just a minute after he stepped down off of the monument, didn't he? And then they started up that way?"

Answer: "I don't recall him stopping and talking to no individuals, no, sir."

Did you make that statement?

A. I don't remember him talking to no particular one. People were still shaking hands with him, yes, sir.

Q. All right. "You just don't remember?"

Answer: "No, sir."

Question: "At numerous times that night people would come up and catch hold of Walker and say something to him?"

Answer: "They begged him to lead them several different times."

You made that statement?

A. Yes, sir.

Q. Was that correct?

A. That is correct.

Q. "And several times you saw people who would get ahold of him and attract his attention?"

[fol. 349] Answer: "Yes, sir."

Is that correct?

A. I don't remember—no, sir, they didn't get ahold of him. They shook hands with him.

Q. I am referring now to your questions and answers asked you in Oxford, Mississippi.

A. I didn't recall them getting ahold of him. They were shaking hands with him. As far as getting ahold of him, I didn't see nobody do that.

Q. You did say, didn't you, "I don't recall them catching ahold of him that way. They just walked up and would tell him 'General Walker, lead us. You can lead us and we could get something done.'"

A. Yes, I heard some of the students say, "If you will lead us we can get something done."

Q. All right, the second question on—

Mr. Watts: If Your Honor please, at this point I must object to reading this thing out of context.

Mr. Gooch: I will just read it all.

Mr. Watts: He gets in the middle of it, gets down to where the witness is going to testify and then he stops.

Mr. Gooch: We will offer it all.

The Court: Mr. Watts, on redirect examination you may offer what you think may be admitted, but I can't tell Mr. [fol. 350] Gooch how to cross examine.

Mr. Gooch: I will go ahead and read it all. I will put it in. I have no objections to it: "At numerous times that night . . ." the fourth question on page 50: "At numerous times that night people would come up and catch hold of Walker and say something to him?"

Answer: "They begged him to lead them several times."

To be absolutely correct, "And several times you saw people who would get ahold of him and attract his attention?"

Answer: "Yes, sir."

A. They would shake hands with him.

Q. Question: "Catch him by the arms and try to attract his attention and begging him to do this and to do that?"

Answer: "I don't recall them catching ahold of him that way, they just walked up and would tell him 'General Walker, lead us. You can lead us and we could get something done.'"

Is that what happened?

A. Yes, sir, that's right.

Q. Question: "You wouldn't say that they didn't catch ahold of him?"

[fol. 351] Answer: "It would be hard for me to say either way, because like I say, I couldn't be right beside him all the time. I was curious to see what was going on, myself."

Did you make that answer?

A. I did.

Q. Is it true?

A. It is true.

Q. "You just wouldn't know one way or the other?"

Answer: "That is right."

Now, did you make that statement?

A. Now, that is no way of knowing on which question you asked me that.

Q. Whether they caught ahold of him or not?

A. While I was in sight of him I didn't see nobody catch ahold of him.

Q. I asked you if you made that statement under oath?

A. Yes, sir.

Q. Question: "Just immediately then after he finished making his speech, he stepped down off the monument and did you hear him say anything as he stepped down?"

Answer: "No, all I heard him say, the main thing I heard him say that stuck with me, he said, 'Violence is not the answer,' he says, 'Cuba is yonderway.' He said, 'Protest [fol. 352] all you want to'."

Question: "That was his speech?"

Answer: "Yes, sir."

Is that true?

A. Yes, sir, that's right.

Q. Question: "I am talking about after the speech was over."

Answer: "No, I don't recall hearing none of his conversation then."

Is that right?

A. That's right.

Q. Question: "After his speech was over, he stepped down and started right up that walk toward the flagpole and the Lyceum Building?"

Answer: "He walked in that direction, yes, sir."

A. No, not immediately after he got off the thing.

Q. I am talking about did you make that statement?

A. Yes, sir.

Q. Now, do you want to change it?

A. He didn't go immediately, no, sir.

Q. All right. The answer you gave, "He walked in that direction, yes, sir," and the next question: "And the Marshals?" And you said, "Yes, sir."

Now, did he walk toward the Marshals?

[fol. 353] A. After he got through milling around he walked toward the flagpole.

Q. Question: "And this huge crowd followed him, didn't it?"

Answer: "They followed him and, of course, some of them run ahead of him and throwed things."

You made that statement when your deposition was taken, didn't you?

A. Yes, sir.

Q. Is it true?

A. It is not true it was a large crowd following him. I mean there was a large crowd in the area.

Q. Is it true some of them followed him and run up there and throwed things?

A. Some followed him.

Q. And they throwed things?

A. The ones in front did. He never got close enough for them to throw over him to the Lyceum Building?

Q. Check me and see if I am right. "They followed him and, of course, some of them run ahead of him and throwed things."

A. That is correct. The ones that run ahead.

Q. All right.

A. That's right.

Mr. Watts: That's right.

[fol. 354] Q. Question: "As they went on up there, as he started out, this crowd come in behind and alongside, and as they got on up there some of them got ahead and ran on up and through?"

Your answer: "Yes, sir."

Is that correct?

A. Yes, sir.

Q. "And they went on up and they went past the flagpole a little ways before the tear gas drove them back?"

Answer: "Yes, sir, they would get as close as they could."

Is that correct?

A. That is correct.

Q. Question: "And Walker went on past the flagpole?"

Answer: "Yes, sir."

Is that correct?

A. I made a mistake on a little bit of it. I don't believe he ever crossed the line on the flagpole.

Q. All right. "How far past the flagpole would you say Walker went before the tear gas drove him back?"

And you answered: "Oh, just a very few feet."

Now, is that true or untrue?

A. I don't believe he ever walked past the flagpole.

Q. You did say that on the deposition when it was taken?

[fol. 355] A. I did, yes, sir.

Q. "But he did go on and now at that time, if I understand, it is your estimate that this crowd that was follow-

ing him and out on each side of him, that stood out there, would be 1,000 or more people?"

And you answered, "I would say at least 1,000."

Did you make that statement?

A. I made that remark but I was still wrong about—in other words, I asked you all—You all asked me the question. I understood it wrong.

[fol. 356] Now I'm talking about the thousand people was in the whole area. In other words, I was—somebody asked to mark on the map where it was and I did.

Q. Well, now do you think that question is unfair?

A. I just answered it wrong. I misunderstood the exact meaning of it.

Q. Misunderstood it?

A. In other words, there was a thousand people in the area.

Q. "And when they got up there in the vicinity of the flagpole and Walker passed the flagpole and this crowd all spread out there, those that could threw at the Marshals, didn't they?"

And you said, "Oh, yes, sir."

Is that right?

A. The ones that could throw at them did.

Q. "They threw everything they could at the Marshals, and the tear gas got so heavy that they then fell back?"

And you answered, "Oh, yes, sir, but the wind had changed and blowed the gas back toward the Marshals. You could get a lot closer then than you could at one time."

Did you make that answer?

A. I made that statement.

Q. Is that true?

A. Well, now that's not involving Walker going past [fol. 357] the flagpole.

Q. Oh, yes, it is.

A. No, sir, he never got past the flagpole.

Q. All right. Now, you say that he didn't, but you did say that in Oxford, didn't you?

Mr. Andress: Now, Judge, he's arguing with the witness.

The Court: Just a minute.

Mr. Gooch: Look at this thing and you will see it.

The Court: It will be up to the jury to determine the effect of the answer.

Mr. Andress: That's right.

The Witness: I done a lot of thinking after I give that and studied that thing out.

By Mr. Gooch:

Q. All right. "Question: And some of those that got up to where they could throw, when the tear gas was fired, some of them ran back and others walked back, is that right?"

Answer, "Some of the kids would run, yes, sir." Did you make that statement?

A. Yes, sir.

Q. Is that true?

A. That's true.

Q. "Some of them were running?"

Answer, "Yes, sir." Is that true?

[fol. 358] A. Yes, sir.

Q. "After that happened and at that time, when that was going on, you could still see the blazes and smoke from some of these cars that were burning?"

Answer, "They were burning them all night." Is that correct?

A. Correct.

Q. "They were burning them all time and that was going on, and at that time there was whooping and yelling and cursing and all that sort of thing going on?"

And you answered, "Yes, sir." Is that correct?

A. Correct.

Q. "In other words, just as you described in a moment ago, it was a violent mob?"

You answered, "Yes, sir."?

A. Yes, sir.

Q. The next to the last question on Page 53: "And you would say that this one thousand people that surged up there at the time Walker walked up past the flagpole, that was a violent mob, wasn't it?"

And you answered, "Yes, sir." Is that correct?

A. No, sir, that's not correct. I give it but I—

Q. Wait a minute. Did you make that answer?

A. I made the statement, yes, sir.

Q. Now you say that isn't correct?

[fol. 359] A. That's right, I misunderstood the question.

Q. You misunderstood the question?

A. That's right.

Q. All right. "Question: When the tear gas was fired and got heavy, and you fell back, where did you go then?"

Answer, "I came back down next to the monument.

"Question: And what did you do then?"

Answer, "Just prowled around."?

A. Yes, sir.

Q. "Question: After that, now, after that charge when Walker went up past the flagpole with this violent mob behind him and alongside him and they threw their missiles and you fell back, that wasn't the end of what happened there that night, they continued these waves of surging up there at the Marshals and throwing their missiles?"

Answer, "They throwed things all night, yes, sir, until 5:00 o'clock." Is that right?

A. All except him going past the flagpole.

Q. "Question: That continued to go on until 5:00 o'clock the next morning?"

You answered, "Yes, sir," is that right?

A. Correct.

Q. "And the crowd remained large out there, didn't it?"

And the answer, "It got larger, yes, sir."

A. Right.

[fol. 360] Q. "Question: Would there be any way that you could estimate after Walker went up past the flagpole with this violent mob alongside and behind him, would you

have any way to estimate how many more charges or waves that mob made that night towards the Marshals?"

Answer, "No, sir, I would not."

Is that correct?

A. That's correct.

Q. "It was numerous though?"

Answer, "Yes, sir, it was several of them."

"And they didn't lessen in intensity, did they, they still stayed violent and aroused, that is right, isn't it?" And you answered, "Right."?

A. Yes, sir.

Q. Let me ask you this question: Do you remember, in connection with the protest that General Walker spoke of, that in connection with it, that he hollered, "Good. Good. Keep it up." Do you remember him making a statement like that?

A. Yes, sir; yes, sir, I remember it.

Q. Well, tell us what General Walker said.

A. Well, in reference to the protest, he said, "Good. Good. Keep it up."

Q. All right. On Page 56: "Do you remember a young man coming up to him and asking, 'General, what can we [fol. 361] do to counteract this tear gas?'" Do you remember that question being asked the General?

A. I don't remember being asked directly, the General. I remember somebody coming up and asking—he didn't ask no individual, how—what can you do to counteract tear gas?

Q. All right. Look on Page 56, at the question: "Do you remember a young man coming up to him and asking, 'General, what can we do to counteract this tear gas?'" Your answer, "I remember some of them asking him something or what they could do to smother the tear gas out, yes, sir."

Do you remember that now? You made that statement, didn't you?

A. Well, I must have.

Q. "Question: And what did he say?

"I remember hearing him say that sand or water would do it." You testified to that in Oxford, didn't you?

A. I believe I did. But I remember hearing somebody say that.

Q. "Question: That sand or water would do it?"

Answer, "Yes, sir.

"Question: And do you remember him saying, 'But where can you get sand?', or 'Have you got any sand?'"

And you answered, "No, I don't remember that."

And you didn't remember him making that last one, is that right?

[fol. 362] A. No, sir, I don't.

Q. But you do remember him being asked what would counteract the gas, do you not?

A. I don't remember asking him the question. I remember somebody asking, "How can you put out tear gas."

Q. Well, you don't deny that you—

A. No.

Q. —that you say here that you heard them ask him, do you?

A. Well, I can't deny it, no, sir.

Q. All right, sir. Next question, "You do remember him, though, when they asked him how to counteract it, he said sand or water will do it?"

And you answered, "Yes, sir." Did you make that statement?

A. I made that statement.

Q. "Did you see them making their Molotov cocktails that night, putting gasoline in bottles and setting a wick afire?"

"Yes, sir, I seen that but I didn't know what it was at that time. That is the first time I had ever heard of that.

"Question: Do you remember seeing General Walker standing over in the vicinity where they were making those things and lighting them and blowing them up?"

[fol. 363] Answer, "I remember seeing General Walker when they were throwing them, yes, sir." Did you make that statement?

A. Yeah, I remember seeing him, yes, sir.

Q. "And he wasn't very far from where they were doing that, was he?"

Answer, "I don't recall just how far. I remember him standing in the crowd." Is that correct?

A. There was a crowd around there, yes, sir.

Q. All right, on Page 58, recross examination, by Mr. Smith, addressed to you, Mr. Witt:

"But he did go after his speech up past the flagpole with at least 1,000 members of a violent mob behind him or alongside him?" And you answered, "Yes, sir."

A. I answered, "Yes, sir," but I misunderstood the question. I don't mean there was a thousand people in front of him. There was a thousand people in the area and some of you all should have a map or something where I marked a circle on that after it was over.

Q. "Question: And that did happen?"

Answer, "Yes, sir"?

A. Yes, sir.

Q. Did you make that statement?

A. I made that statement.

Q. You say now that's not right?

[fol. 364] A. There never was a thousand people following him.

Q. "Question: And they were armed with sticks and stones and bricks and they threw their bricks and missiles when they got up close enough to the Marshals?"

Answer, "The people did, I didn't see General Walker with nothing in his hands."

A. That's correct.

Q. Now you have said in answer to some of these questions here, Mr. Witt, that you didn't understand the questions when they were submitted to you, is that correct?

A. That's correct. Sometimes you would ask five questions in one thing for one answer and that's a little hard to give it like you want it.

Q. That's conceivable. Now in connection with your thinking about this matter, prior to the time you gave your

deposition in Oxford, Mississippi, on March the 13th, 1964, had you done any thinking about the incidents on the campus of Ole Miss on September the 30th, 1962?

A. Repeat that one more time, Mr. Gooch, please, sir.

Q. Prior to the time you gave your deposition, had you tried to recollect in your own mind some of the things that went on or most of the things that went on, on the campus at Oxford on the night of September 30th, 1962?

A. I never did give it too much thought until I gave you all that statement there.

[fol. 365] Q. All right. Would you recognize your signature?

A. Yes, sir, I sure would.

Q. I hand you what purports to be a statement—

A. Yes, sir.

Q. —which purports to bear your signature on each page?

A. Yes, sir.

Q. Is that your signature on each page?

A. That's my signature and that's my statement.

Q. And is this the statement?

A. Yes, sir.

Q. Did you make this statement?

A. I did.

Q. Did you, in making this statement, tell the truth as you knew it at that time?

A. The best I knew how.

Q. Do you think at the time you made this statement that the matters that you put in that statement were true to the best of your knowledge and belief?

A. Well, I told it the best I could think it right then.

Mr. Gooch: We would like to offer in evidence, if the Court please, the statement of this witness, for impeachment purposes.

The Court: That's Defendant's Exhibit 1.

[fol. 366] Mr. Gooch: Yes, sir.

(Defendant's Exhibit No. 1, was marked for identification.)

Mr. Watts: Is there a copy anywhere?
Mr. Gooch: No, sir. It's the only one I have.
Mr. Andress: We would like to see it.
The Witness: I have a copy.

By Mr. Gooch:

Q. Do you have a copy?
A. I sure do.
Q. Would you furnish that to Mr. Watts?

The Court: Do you have it with you?
The Witness: No, sir, I don't have it with me.
The Court: Let him see that copy you are offering so he can read it now.
Mr. Gooch: What copy?
The Court: I mean the original so he can read it.

By Mr. Gooch:

Q. You were furnished with a copy of that statement?
A. Yes, sir. I asked for one.

Mr. Andress: Judge, this is all repetition, with the exception of one paragraph here which covers a matter which is not in issue, not relevant to anything in issue. Outside of that, everything is purely repetitious.
The Court: You are offering it for impeachment pur-
[fol. 367] poses only?
Mr. Gooch: That's correct.
Mr. Andress: Take that paragraph out and we have not got any objections to it.
Mr. Gooch: I can't take anything out of a man's statement. He made the statement or he didn't. He said he made the statement. I'm not going to take anything out of it.

(Conference at the bench.)

Mr. Andress: Other than that, Judge, it's purely duplicative of the deposition.

The Court: I will admit all of the statement except the second paragraph on Page 4. The paragraph actually consists of only one sentence.

Mr. Andress: I wonder, Judge, if you would take a pencil and mark that.

The Court: We just done it.

Mr. Andress: So there won't be any mistakes made about it, put a circle around it.

The Court: There won't be any mistakes made about it, Counsel, I will tell you that.

[fol. 368] Q. You did say you did receive a copy of this statement?

A. Yes, sir.

Q. Have you at any time heretofore disavowed this statement to anybody?

A. No. I have let people read it. I have read it to people.

DEFENDANT'S EXHIBIT 1

Mr. Gooch: "Statement of Talmadge Witt of Pontotoc, Mississippi."

"I am Talmadge Witt, 42 years old, I live in Pontotoc County, Mississippi, and I am a deputy sheriff under Sheriff John H. Moore of that county, and have been serving as such deputy since March 1, 1960. I was acting as such deputy on September 30, 1962, and was called by Sheriff Faulkner of Union County to come to Oxford, Mississippi, getting that call about 3 p. m. on the 30th day of September, 1962. Shortly after receiving this call I went to Oxford with Cecil Payne, another deputy from Pontotoc County. We went directly to the campus of the University of Mississippi and arrived there sometime around 4:30 o'clock p. m.

When I got on the campus of the University, the United States Marshals were already around the Lyceum Building, that is, a building with big while columns in front, facing in an easterly direction. There was a paved roadway in [fol. 369] front of the building, and the marshals were lined up along the side of the roadway next to the building;

on the other side of the roadway, and all out in front of the building, were some men and boys and girls, with the roadway between them and the marshals. The crowd out in front of the building was not as big then as it was later, but it gradually grew larger from then on. When I got to this place there was a number of highway patrolmen and other officers in the roadway, between the marshals and the crowd, keeping the crowd back from the marshals, and I joined them and helped to do this.

The crowd grew larger as time passed, and the lights were turned on, on the campus. At this time there was not as much disorder as there was later, there was some loud talk, and some of those in the crowd would throw or flip lighted cigarettes and matches towards the marshals and on the cloth top of some of the army trucks which were there. It is difficult to remember the exact time that events happened, but after I had been there about an hour and a half to two hours, and at a time when I was standing across the road in front of said building, the marshals fired the first blasts of tear gas and the crowd scattered and ran away, and I, of course, went some distance away, also, but still stayed in the area down in front of the Lyceum Building. For some time, after the first tear gas was fired, the [fol. 370] crowd simply milled around, many of them armed themselves with bricks or pieces of broken bricks, rocks, sticks, coca cola bottles and anything that they could get their hands on, and when they could get close enough, they would throw these things at and towards the marshals, and the tear gas would drive them back. The crowd did not seem to have any definite leadership at that time, and simply milled around, hollering, yelling, shouting and talking among themselves.

Somewhere along during this time it seemed that all of the State Highway Patrolmen left the campus, as did also some of the law officers, that is, sheriffs and deputy sheriffs, but I stayed on to render any assistance that I could. Sometime around 8 o'clock p. m., or a little later, I began to hear different ones say, "here comes General Walker." I did not

know him prior to that time, and when I first saw him he was walking towards a Confederate monument which was several hundred yards in an easterly direction from the marshals at the Lyceum Building. People in the crowd around General Walker began to say different things. Several of them began to say, "we have got a leader now," or "here is our. leader." I had on my deputy sheriff's badge, and shortly after General Walker arrived in the territory of the Confederate monument, he came up to me, shook hands and said: "I would like for you to deputize [fol. 371] me to help in this matter." I told him that I did not have authority to do that, that I was a deputy sheriff and was not a deputy in that county.

I was close to General Walker all of the time, from the time when he first arrived, until a considerable time thereafter.

Some few minutes after this, various people were asking General Walker to lead them and to make them a speech and tell them what to do, and after awhile he got up and on the side of the Confederate monument and made a talk. I cannot recall all the things he said, but I do remember his saying these things: "Violence is not the answer, Cuba is that way," and pointed south. He said: "Protest, protest, all you want to, you have a right to protest, and they may run out of gas." He said: "Help is on the way, thousands are coming."

A preacher had been following General Walker around asking him not to lead the crowd, but to get them to stop what they were doing. This preacher said to Walker: "They will listen to you and do anything you say, please get them to stop and go home," and Walker said: "I am here to watch what happens, I am not interested in stopping it," and then Walker asked the preacher what denomination he was, and the preacher replied "Episcopalian," and Walker said: "You make me ashamed that I am an Episcopalian." About this time I heard some seri- [fol. 372] ous threats made against the preacher by people in the crowd, after Walker said what he did to him, and I

was afraid the preacher was going to be hurt, so I took him by the arm and pulled him and carried him out of the crowd. Two men came up to the edge of the crowd and stated that they were friends of the preacher, and asked me what I was doing with him. I told them that someone was going to hurt him if he did not leave, and I suppose they left with him, as I never saw them any more.

After some of the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: "Keep protesting and see if we can get closer." He then started towards the marshals and the crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them. At all times during this, I was near or in sight of General Walker and stayed in sight of him until about 5 a. m. the next morning.

On a number of occasions Walker would walk towards the marshals, or in that general direction, and whenever he [fol. 373] did, a large crowd would fall in behind and follow him. In fact, wherever Walker went, the crowd followed. During the time after the first march towards the marshals with Walker in or near the lead, I heard different statements, many of which I cannot remember, but at one time, in talking with a group about the protest they were making, he said, "good, good, keep it up." I heard people asking how to snuff out or counteract the tear gas, and Walker told them to use water, and right after that they got a fire truck and hose and began to try to use that to stop the gas. I saw a group making Molotov cocktails. They were taking coca cola bottles and putting gasoline in them and putting some kind of wick in them, setting the wicks afire, and they would then throw this towards the marshals. I did not hear Walker say anything about the

Molotov cocktails, but I did see him in the vicinity of where they were being made. During all of this time, when Walker was there, and at the time when he was telling them to continue to protest, the men and boys in the crowd were armed as I stated before, they were throwing the Molotov cocktails, they were setting automobiles afire, and I personally counted sixteen automobiles that were burned. There was a new building going up near the scene of the rioting, and the students and others would get bricks over there, I saw them roll wheelbarrows up loaded with bricks, [fol. 374] and they would break them up and take them in their arms when they went towards the marshals. Many of the lights were broken out around the campus, especially around the flagpole that was between the Confederate monument and the Lyceum Building.

In reading over the foregoing, I notice it appears that what the preacher first said to Walker about stopping the rioting, was said after he got on the monument, and this is not correct. It was before Walker got upon the monument that the preacher was urging him to try to stop the rioting and get them to go home, and it was before he got up on the monument that Walker replied, "I am here to watch what happens—I am not interested in stopping it." It was after he got on the monument or about the time he got on the monument to make the speech that he asked the preacher what denomination he was, and the preacher replied "an Episcopalian." I simply wanted to add this to my statement in order to clear it up.

This the 25th day of November, 1963."

[fol. 375] That is Defendant's Exhibit 1. That is all with this witness.

Mr. Andress: Just a minute, Mr. Witt.

Redirect examination.

By Mr. Andress:

Q. Mr. Witt, have you been a witness before in cases some time?

A. Not like this, no, sir.

Q. How many times have you been a witness?

A. Oh, in JP Court, six or eight times, something like that.

Q. How old a man are you, Mr. Witt?

A. Forty-three.

Mr. Gooch: How old?

A. Forty-three.

By Mr. Andress:

Q. Mr. Witt, this Defendant's Exhibit 1, what lawyer prepared that for your signature?

A. Fred Smith.

Q. Fred Smith is what, one of the lawyers in Mississippi for the Associated Press?

A. He is a lawyer. When I gave it to him I didn't even know what it was all about.

Q. Is he one of the lawyers for the Associated Press over in Mississippi?

A. He is the man that cross-examined me at Oxford, too. [fol. 376] Q. Now did you ever write this out in longhand?

A. No, sir. I have a copy just like that.

Q. But you didn't write this out in longhand and then have him type it up?

A. No, sir.

Q. How long did you talk to Mr. Smith before he fixed this thing up for you?

A. He come out to the courthouse at Pontotoc one Sunday afternoon. We talked there two or three hours.

Q. Did he make any notes?

A. At that time he did, yes, sir.

Q. And then he is the one that fixed this up?

A. Oh, he typed that up in his office on Monday. He wrote it in shorthand Saturday afternoon.

Q. Is this his language or yours?

A. Yes.

Q. Is it his language or yours?

A. Well, he asked the questions.

Q. Uh-huh. Now, of course, this isn't sworn to, is it?

A. No, sir.

Q. Had you ever had your deposition taken before it was taken in this case?

A. No, sir.

Q. That is the first experience you had with a deposition? [fol. 377] A. Yes, sir.

Q. Now when Mr. Smith came up there and talked to you about giving this statement did he tell you he intended to use that in evidence?

A. I don't recall nothing about him saying nothing about what he wanted it for. Maybe he did. In fact, I wasn't too interested in that thing at that time; didn't know anything about it.

Q. Let's see. Is Mr. Smith in the courtroom this afternoon?

Mr. Gooch: No.

Q. Was any other lawyer there with him?

A. Probably his nephew, I believe, was in one of the outer offices when he was there.

Q. Now did you have a lawyer when he was questioning you?

A. No, sir, I didn't need one.

Q. Did you have a lawyer when he presented this statement to you for your signature?

A. No, sir.

Q. Did you submit it to your lawyer before you signed it?

A. No, sir.

Q. Now did you know when this deposition of yours was being taken that it was being taken under an agreement [fol. 378] that nobody would make objections to any kind of questions that were being asked at that time, except as to form, that the objections were reserved until the time of trial?

A. Wait a minute. Start over one more time.

Q. Now at the time your deposition was being taken did you know that all of the objections that either side had to the questions were going to be reserved to the time of trial and therefore, there wouldn't be any objections to any questions being asked you?

A. The idea of that—that was all my part.

Q. Let's see. They waived the signature on these depositions, didn't they? You didn't actually sign the depositions?

A. I didn't sign none of those, no, sir.

Q. How long after—did you ever see this deposition after it was taken?

A. Seems like I looked at it when the boys was with me the other night. I looked at it for a few minutes.

Q. You didn't check it over to refresh your mind to see if it was exactly what you had in mind?

A. You—no, sir.

Q. Now at the time your deposition was taken, you were asked, were you not, what area would encircle that group of 1,000 people and at that time you did draw a circle, a perimeter there, after saying it was, oh, on back in the [fol. 379] surrounding area?

A. Yes, sir.

Mr. Gooch: If the Court please, I object to this part of the examination. He either made the statement or he didn't. He testified before when I asked him about it that it was true.

The Court: I believe he is asking him now whether he drew on the exhibit.

Mr. Andress: Yes, sir.

A. Yes, sir, I drawed one. Somebody gave me a map and I drawed a circle where I estimated the thousand people to be.

Q. We don't want to mark this map up, but how about you coming over here with the ruler and standing here where we can all see it, and kind of circle the area where you say that one thousand people were.

A. This (indicating) is University?

Q. This is University Avenue.

A. It was over—

Q. —wait a minute. Here is University Avenue, University circle, here is the monument, here is the flagpole, here is the Lyceum and here is the YMCA, here is this new Science Hall (indicating).

What is the area you had in mind, as best you can remember, that you drew a circle on that smaller map that [fol. 380] you had at that time, that had the 1,000 people?

A. It was completely around this whole thing. There were people in cars all up and down this street here.

Q. Now when you said, "completely around this whole thing," you made a circle with the pointer that went all the way around the Lyceum Building on the far west, and covered the complete circle and came back kind of out onto University Avenue, didn't you?

A. Yes, sir.

Q. Is that what you meant?

A. That is what I mean. Of course behind were people and a lot of times you wouldn't see what was going on, but up here, way around in here (indicating).

[fol. 381] Q. When you say, "up here," you are talking about—

A. Behind the building.

Q. —Peabody Hall and the Fine Arts Center and the approach to the Fulton Chapel?

A. You could see out these streets but behind the Lyceum Building, you couldn't see.

Q. All right. Were some of these thousand people that you are talking about that were surging around the campus, were they up there by Peabody, by Peabody and by the Fine Arts Center and—

A. Yes, sir.

Q. —and were some of them down here as you mark here, down by Carrier Hall?

A. They was all around there.

Q. Would you say all around the open spaces, around the University circle?

A. Everywhere they could get, they was there.

Q. And down how far on University Avenue?

A. Oh, down here—see, the street angles off right here.

Q. Uh-huh.

A. They was down right to here (indicating).

Q. They were down here at what's marked the Old Post Office Building, right?

A. Yes.

[fol. 382] Q. That's that first street off of University Avenue?

A. That's right.

Q. East of the circle?

A. That's right.

Q. So that—let's see, from the library place back here on the far west behind the Lyceum, down to this street off of University Boulevard, on this scale it shows to be about 1200 feet, doesn't it?

A. I would guess that's about right.

Q. And across—have I got this pointer now in the area that covers the across?

A. Yes, these buildings, and these streets, see, goes out like this. You could see people back in this area here (indicating).

Q. So that if we draw a line north and south through the flagpole, in that circular area, have I got the distance marked right here?

A. Yes, sir.

Q. All right, sir. And that shows over here as being 800 feet, doesn't it?

A. That's right.

Q. So you are talking about a sort of an oval area that's 1200 feet long and 800 feet wide?

A. That's right.

[fol. 383] Q. That is where the thousand people that we are talking about were located in?

A. Yes, sir.

Q. Now, Sheriff, were you leading this crowd in any of the—

A. No, sir.
Q. —activities there?
A. No, sir, I was not.
Q. During these activities, was General Walker doing anything different than you were doing?
A. No, sir.

Mr. Gooch: We object to that as a conclusion on the part of this witness and draws a comparison between two people.
The Court: Yes, sustained.

By Mr. Andress:

Q. So far as these acts of violence that you were talking about, Molotov cocktails, throwing things at the Marshals, and so on, will you state whether or not General Walker did any of those things?
A. No, sir, he did not.

Mr. Andress: That's all.
Mr. Gooch: Stand aside.
The Court: We will excuse this witness if you don't need him any more.
Mr. Watts: Yes, sir.
[fol. 384] Mr. Andress: That will be all right.
The Court: You are excused.
Ladies and Gentlemen, we will recess until 9:00 o'clock the next morning. At that time, be in the jury room and we will call you out from there.

(Thereupon, at 5:00 o'clock, p.m., the hearing was adjourned until Wednesday, June 10, 1964, at 9:00 o'clock, a.m.)

[fol. 387] PROCEEDINGS

(The following proceedings were had outside of the presence and hearing of the Jury.)

The Court: Ladies and Gentlemen, since we have a rather large audience I am going to adopt the practice of having

counsel and the audience remain in their seats at each recess until the Jury has left the Courtroom. I am going to further instruct the audience not to discuss the case either in the halls or the restrooms or anywhere else when a Juror may be present. You, of course, have a right to discuss the case among yourselves, but make very certain you do not discuss it in the presence of any Juror. That would be misconduct on your part.

All right, bring in the Jury.

(Jury in; the following proceedings were had within the presence and hearing of the Jury.)

The Court: Good morning, Ladies and Gentlemen. All right, Mr. Watts.

ZEB JONES, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

[fol. 388] Direct examination.

By Mr. Watts:

Q. Your name, please?
A. Zeb Jones.
Q. How do you spell that?
A. Z-e-b (spelling).
Q. Where do you live, Mr. Jones?
A. Jackson, Mississippi.
Q. What is your business?
A. I practice law there.
Q. For how long?
A. Well, about three months; just getting started.
Q. Are you a graduate of the Ole Miss Law School?
A. No, sir, the Jackson School of Law, Jackson.
Q. Did you go to Ole Miss at one time?
A. Yes, sir, I did.
Q. And when did you graduate from Ole Miss?
A. 1957.

Q. Were you on the campus the night of September 30, 1962?

A. Yes, I was.

Q. What was the occasion for your being on campus?

A. Two of my neighbors, they have students up at Ole Miss, and I drove them up there that night. I knew there would be some excitement also. I had two purposes in mind.

[fol. 389] Q. And whose car did you go up there in?

A. In mine.

Q. Who was with you?

A. Two students, Taylor Robertson and Ben Wells, and two older men friends and myself.

Q. Who were the older men friends?

A. Al Busby and Jack Robertson.

Q. What time did you leave Jackson?

A. About a quarter to five that afternoon, Sunday afternoon.

Q. What kind of a car were you driving?

A. '61 Ford.

Q. Yours?

A. Yes, sir.

Q. What time did you arrive on campus at Oxford?

A. About 9:30 that night.

Q. Will you tell the Jury, please, sir, in your own words from the time you arrived in the outskirts of Oxford what you saw and heard?

A. Well, we arrived there on the campus about 9:30. I parked my automobile—could I use the diagram to show where I parked my car?

Q. Sure, take the pointer there where you can identify places.

A. We came on the highway about here, along here, came [fol. 390] in along the campus. This is University Avenue right here, over toward the middle of the campus here, right along here, and I parked my automobile right along here, I believe, the first road in here. We got out of my

car and walked up toward this area here known as the Grove in here (indicating map).

Q. Now, have another look at that so-called Grove and see if it is the Grove or the Circle?

A. Well, the Circle.

Q. Now, do you see another item up there, another area that is designated Grove, back a little; back a little and above, toward you and up?

A. That's right. I am mistaken. I am mistaken.

Q. All right.

A. This was the Circle we went into and the silos (phonetic) more or less broke up as we got along here, a large crowd, and I just kind of drifted off in this area along in here sort of south.

Q. Identify further that installation at the east end of the Circle.

A. This is the monument right here, the Confederate monument. A lot of students were standing around this area, and they were throwing rocks and so forth, a lot of hollering and yelling.

Q. Were the students in that area throwing the rocks? [fol. 391] A. No, sir, they were a little bit closer up to this area. The Marshals—well, the Marshal—

Q. Get on over where you can see it.

A. This (indicating) is the Lyceum Building which is the Administration Building, and the Marshals were more or less lined up in this vicinity in front of the Lyceum Building, and the students would run up from this area here and throw rocks. Everybody was pretty well scattered out all over this whole area in here (indicating chart).

Q. Okay, you may take your seat. How long did you stay there?

A. Until around 1:30 or 2:00 the next morning.

Q. All right, go on and continue with your outline of events. Tell the Jury what you saw and what occurred?

A. The Marshals were shooting tear gas and, well, as we first arrived on the campus we heard a lot of shooting.

I thought it was firearms being shot. Later we learned it was tear gas. And there was a lot of tear gas in the area, just kind of hanging in the air, and it would burn your eyes and so forth, and students were just running around more or less in just disorganized confusion, and that was about it.

Q. Did you encounter General Walker while you were there?

A. I had been there, I guess, fifteen or twenty minutes [fol. 392] when I saw General Walker.

Q. Tell the Jury about it.

A. I was on more or less the south side of the Circle. I had been there fifteen or twenty minutes, possibly around a quarter to 10:00 that night, and somebody said, "There is General Walker over there," more or less by the statue. I walked over to General Walker and shook hands with him and he was just more or less standing there watching and observing the crowd and doing nothing, just standing there.

Q. How long did you observe him there—did you talk to him?

A. Yes, sir, I did, I introduced myself to him and he said he was very glad to meet me, and that was about the extent of it.

Q. How long did you stay in the immediate vicinity of General Walker?

A. I guess ten or fifteen minutes.

Q. Where did you go from there?

A. I believe I probably walked up toward the—north of the sidewalk, just walking back and forth in the Circle, back and forth from one side to the other.

Q. Did you see anything further from that time on of any significance?

A. Well, there was just a lot of kids. I saw several different college jackets of four or five junior colleges in [fol. 393] the area; a lot of boys running around throwing rocks, hollering, yelling, and just more or less a lot of confusion going on.

Mr. Watts: That is all.

Cross examination.

By Mr. Gooch:

Q. Mr. Jones, had you heard of General Walker before you got up there that night?

A. Yes, sir, I had.

Q. Did you consider him to be a public figure?

A. Yes, sir, he was more or less pretty well known.

Q. Had you heard some of his talks or speeches, or had you—

A. Yes, sir, I had. I heard him speak in Jackson about the—oh, about a year prior to that, I guess.

Q. You did consider him a public figure, did you not?

A. Yes, sir. I don't know what you mean by public figure. He was a well-known celebrity. More or less—

Mr. Gooch: Thank you, that is all.

Mr. Watts: That is all, Mr. Jones, thank you. Bring Mr. Leman in, please.

The Court: I will excuse this witness.

Mr. Watts: May this witness be excused?

The Court: Yes, sir.

[fol. 394] Louis Leman, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Your name, please.

A. Louis Leman.

Q. I just heard one of my co-counsel say you are nervous, Mr. Leman. Are you?

A. Yes, sir.

Q. Where do you live?

A. Crosby, Texas.

Q. Have you ever been on the witness stand before?

A. No, sir, never have.

Q. How old are you?
A. Twenty-five.
Q. Where were you raised?
A. Crosby, Texas.
Q. Where is Crosby, Texas?
A. About thirty miles the other—east of Houston.
Q. How long have you lived in that area?
A. Well, sir, I lived there right after I was born until the War and then we lived at Houston—Houston after the War, and then moved back to Crosby, and lived there ever [fol. 395] since.
[fol. 396] Q. Where were you during wartime?
A. Boston—Milton, Massachusetts, near Boston.
Q. What were you doing there?
A. Father was in the Navy.
Q. In the Navy?
A. Yes, sir.
Q. I thought he was in the Army?
A. No, he was in the Navy.
Q. Where did you go after you left Boston?
A. Went to Houston, Texas.
Q. And did you go to high school in Houston, Texas?
A. Yes, sir, St. Thomas High School.
Q. St. Thomas High School?
A. That's correct, yes, sir.
Q. Now where is St. Thomas High School in Houston?
A. It's on the Memorial Drive or the west side of Houston.
Q. Did you graduate from St. Thomas High School in Houston?
A. Yes, sir.
Q. When?
A. In 1956.
Q. Where did you go from high school? Did you go off to school?
A. Went to the University of Texas.
[fol. 397] Q. At Austin?
A. Yes, sir.

Q. In what year?
A. In 1956, I started.
Q. Did they play Oklahoma that year?
A. Yes.
Q. Strike that. Mr. Leman, did you—what course did you take?
A. Mechanical Engineering.
Q. Mechanical Engineering?
A. Yes, sir.
Q. Did you graduate?
A. Yes, sir.
Q. After how many years?
A. Four and a half years.
Q. With what course?
A. Bachelor of Science Degree in Mechanical Engineering.
Q. And did you then practice that profession?
A. Yes, sir.
Q. For whom did you work?
A. Southwest Oil Field Products.
Q. Where is the Southwest Oil Field Products located?
A. The plant is in Houston, Texas.
Q. How did you happen to go to work for Southwest Oil [fol. 398] Field Products?
A. Well, I planned on it and my father was—it was his company and I had planned on going to work.
Q. What was their general business?
A. Manufacturing oil field equipment.
Q. Where did they put you to work?
A. Mississippi.
Q. Did you live for a while in Mississippi?
A. Yes, sir.
Q. What place?
A. Brookhaven, Mississippi.
Q. Now where is Brookhaven?
A. South of Jackson about 50 miles, I would say.
Q. What size town is it?

A. Oh, 10, fifteen thousand. Maybe a little more, a little less.

Q. Did you make friends and acquaintances in Texas—as you were in Mississippi?

A. Yes, sir, sure did.

Q. Mr. Leman, do you know General Walker?

A. Yes, sir, I do.

Q. What is the occasion of your becoming acquainted with General Walker? He's much older than you are.

A. Well, sir, when he was running for Governor, I found out that, from my father, that his mother, that lady right [fol. 399] there (indicating), and my grandmother were raised together in San Antonio. They went to school together and stayed in the—well, in the same classroom together.

And I was interested in meeting him and so on my vacation, I met him in Baytown, and met him, introduced myself.

Q. Is Baytown close to Houston?

A. It's close to Crosby, sir, about 15 miles, I would say.

Q. You say that was during the political campaign?

A. Yes, sir, that's when he was running for Governor, that's correct.

Q. And tell us about your meeting General Walker.

A. Well, sir, I met him and found out basically that he felt the same way politically that I did, that something was wrong with the country, that—

Q. Just in general, you had a common interest?

A. That's correct.

Q. And did you then become fairly well acquainted with him during the course of that political campaign?

A. Yes, sir, I did.

Q. And did you help him and work for him in the campaign?

A. Yes, sir, I did.

Q. Did you see General Walker any more from the end of that campaign—well, strike that question. Glad I didn't ask [fol. 400] it.

Did you see him any more from the end of that campaign until the Mississippi incident?

A. Yes, sir, as I remember, right after the campaign, he was down in Houston; he came out to dinner, I remember that, yes, sir.

Q. How soon after the campaign?

A. Within a week, I would say, sir.

Q. He came out to dinner with your folks, was it?

A. Yes, sir.

Q. Did you see him any more from that time on, until the Mississippi incident?

A. I don't recall, sir, having seen him.

Q. And where were you working in the latter part of September, 1962?

A. In Mississippi and Louisiana, both. My job—I worked in both places.

Q. What kind of work were you doing?

A. Field engineer, Southwest Oil Field Products.

Q. Were you in the vicinity of Oxford or Jackson or any of those places in the latter part of September, 1962?

A. Yes, sir, I was.

Q. Where were you?

A. At what—well, I was in Oxford.

Q. You were in Oxford?

[fol. 401] A. Yes.

Q. Was your work in Oxford?

A. No, sir, it was not.

Q. What was the occasion, Mr. Leman, of your going to Oxford?

A. Well, sir, it was just like General Walker said, that—

Mr. Gooch: Wait a minute.

Mr. Watts: Well, that's right, skip what General Walker said.

The Court: Why did you go?

By Mr. Watts:

Q. Just tell us what your concept was.

A. Well, sir, I didn't think that the Federal Government had a right to send troops into Mississippi, should

send troops into Mississippi. And I didn't think you could believe what you read in the newspapers and I wanted to see what was going on for myself, and that's why I was there.

Q. And did you go to Oxford?

A. Yes, sir, I did.

Q. And what did you do when you got there?

A. I didn't do anything.

Q. Did you see anybody that you had previously known?

A. No, sir, I did not.

Q. And from that time on—this was on what day of the week, would you remember?

[fol. 402] A. Yes, sir, I got there, I believe, a Thursday night.

Q. That was a Thursday night. From Thursday night, on, until, we'll say, Sunday, the following Sunday noon, just tell the jury, in your own words, what you did and what you saw and what you heard and what happened.

A. From Thursday night and—until Sunday noon, is that the question?

Q. Yes.

A. Well, Thursday night I got in Oxford and I stopped at a filling station several blocks from the campus and talked to some students at the filling station about where would a place be to stay and they said the town, the reporters, the motels were full and it would be rather difficult to find a place in Oxford and suggested I go to Water Valley.

And so I went to Water Valley and spent the night in Water Valley, which is about 19 miles from Oxford.

The next morning I came back to Oxford and had breakfast, and so forth, and I had talked to several students. This would be Friday. Let me see, Friday noon I talked to General Walker.

Q. Talked to General Walker?

A. Yes, sir, I did.

Q. What was the occasion of your talking to General Walker?

A. Well, sir, he had been—I knew he was interested in [fol. 403] the Mississippi situation. I read in the papers where he was interested in what was going on in Mississippi. And I called him up and I told him that the students were behind Barnett, they supported him; that the student newspaper did not; more or less the student leadership was more or less opposed to Barnett; whereas, the students were, did support Barnett and they felt he was doing what was right for Mississippi.

And then I may have—I probably talked to one or two more students.

And then I left and went back to Water Valley and spent the night.

Q. Now, let's see, this was Friday night?

A. Yes, sir.

Q. All right, go ahead.

A. And then the next morning—well, that night I called back, General Walker had told me that he might come to Jackson, that he had an invitation to come to Jackson, and I was interested in hearing Barnett speak and, also, in seeing General Walker and finding out about what was happening in Mississippi.

And when I had first talked to him during the day, he said he might come to Jackson but he was going to come over there and go back. So I called him that night to see if he actually was coming and he said yes, he was, he was [fol. 404] going to Dr. Ney Williams' home in Jackson.

And so I drove down to Jackson and met him there.

Q. Now let's see, when did you get to Jackson?

A. About 2:00 o'clock Saturday afternoon, about 2:00 o'clock.

Q. Let's see, Saturday would have been the 29th, wouldn't it?

A. Yes, sir.

Q. Where did you meet him in Jackson?

A. At the home of Dr. Ney Williams.

Q. I don't guess you know roughly where that is in Jackson, do you?

A. Yes, sir, it's not too far from the football stadium, I believe going north, or like you were going through town, I believe.

Q. Go ahead and tell the jury what happened, what you did.

The Witness: Sir, Your Honor, could I get a glass of water?

The Court: Yes. Mr. Addington, look in the conference room and get a glass, please.

The Witness: Thank you. Well, from Dr. Ney—from Dr. Ney Williams' house—I met General Walker there, of course. And we went to a press conference, I accompanied him, went with him. We went in my car to a press conference.

[fol. 405] And there was a discussion whether or not we were going to go to the, hear Barnett speak at the football stadium and we decided not to but we went on to a press conference and—

By Mr. Watts:

Q. Where was that press conference?

A. I believe it was the Sun & Sand Motel in Jackson, Mississippi, second floor. It was on the second—press conference on the second floor, some room, particular—

Q. Would you have any recollection what press personnel were there?

A. I remember one name, Peter Kyss, K-y-s-s, I believe, but I'm not—

Q. Did you know what outfit he was with?

A. As I recall, it's the New York Times. There were a lot of others. There was about 20 or 30 reporters there.

Thank you, sir, very much.

(Handed water.)

Q. And without bothering the jury with too many details, just tell them generally what occurred at the press conference?

A. Well, they—he, General Walker, read a statement before the news, before the news or TV camera and then—well, a lot of reporters had questions and they would ask him, did he—one reporter, this Mr. Kyss, is the reason I remember his name is, he kept asking him, was there going [fol. 406] to be any violence in Mississippi, did he—and I distinctly remember what General Walker said—

Mr. Gooch: Just a moment.

Mr. Watts: Don't say what General Walker said. That would be hearsay.

The Court: That would be hearsay.

The Witness: Yes, sir. Excuse me.

They asked him about—

By Mr. Watts:

Q. Don't tell what the reporters said or anything but just—well, I guess that pretty much shuts you off from the news conference.

There was a news conference held?

A. Yes, and we left.

Q. All right, sir, where did you go?

A. We went back to Dr. Ney Williams' home.

Q. How long did you stay there?

A. I would say about 30 minutes, sir.

Q. Where did you go?

A. Then we decided to drive up to Oxford.

Q. Where did you go at Oxford?

A. Went to the Mansell Motel.

Q. Now was this Saturday evening or night?

A. This was Saturday night. Arrived at about midnight, as I recall, sir. It was about midnight.

Q. Did you get in the Mansell Motel?

[fol. 407] A. Yes, sir, we did.

Q. Tell us about what you did when you got there.

A. I registered both of us and we went in and went to bed.

Q. You say you registered you both?

A. That's correct.

Q. Now there has been some question that has arisen about how you registered. How did you register?

A. I registered my name and I registered the name of John Waters for General Walker.

Q. Why did you register General Walker under the name of John Waters?

Mr. Gooch: Object to what he had in mind when he registered him under an assumed name. It's immaterial.

The Court: Overruled. Go ahead and tell him why.

A. Because, due to the reporters, sir. There was reporters trying to get ahold of him all the time and he could not sleep at night. We just thinking it would be a lot better if the reporters were not calling and bothering him all night long.

Q. And were you able to get a night's sleep?

A. Yes, sir, we sure were.

Q. And what happened the next day?

A. Well, we got up and ate breakfast and went downtown to the courthouse, talked to the Sheriff, Sheriff Joe Ford.

[fol. 408] Q. Joe Ford. Now could you kind of describe Oxford? Is it laid out on a square kind of like Texas towns?

A. Well, there is a courthouse and streets circled around the courthouse and then there is north and south and east and west streets leading off there basically, and the campus is generally east of town and maybe slightly south of the courthouse, but it's—

Q. About what time did you get to the courthouse?

A. Got to the courthouse about, I would—about 11:00 o'clock, sir, I think—10:00 or 11:00.

Q. What happened then?

A. Well, General Walker talked to Sheriff Joe Ford.

Q. Without saying and going into hearsay and things somebody else said, just tell the jury generally what was the nature of this conference.

A. Well, the nature of the conversation was that the troops had moved in north of Lake Sardis the night before and that—I can't say what Walker said or anything like that

Q. No, they would object to you saying what Walker said.

A. Well, where we resided, were staying, and—

Q. That is, you told the Sheriff where you were staying?

A. The Sheriff, right, and offered to be of any help. [fol. 409] That was the nature of the conversation.

Q. And where did you and General Walker go from there?

A. We went, let me see, I believe we drove through the campus to look at it, we sure did, drove—

Q. About what time of day was this?

A. About 11:00.

Q. Now to get to the campus, and I'll lead you a little here to shorten the thing, you go south from the courthouse square and then turn west to the campus, do you not?

A. Yes.

Q. And after you turned west, you get on that University Boulevard that you can see on the map?

A. Yes, sir. I don't see University Boulevard. Yes, sir, I see it now.

Q. Have you had a chance to look at that map?

A. No, sir.

Q. Walk over there and look at it. Take that pointer with you and let's get you oriented. See the pointer behind you?

Now always—have you ever had any military training?

A. No, sir, I have not.

Q. Always the top of a map is north?

A. Yes, sir.

[fol. 410] Q. Now start there on the east side, which would be your right, and move along Military—or University Avenue or Boulevard, whatever it is.

What is that installation you just ran on to there?

A. University of Mississippi.

Q. All right. What's the circular pattern there?
A. You mean the Circle?
Q. Yes, sir. That is the Circle?
A. That's correct.
Q. What's on the east end of it?
A. The east end of it, there is a monument there. This is the east, yes, sir. And there are buildings around it, of course.
Q. All right. Take your seat again. Now on this occasion, about noon, how far westward toward the University did you get?
A. About noon? We drove through the campus and on out of it.
Q. Did you make the circle?
A. Yes, we did.
Q. What did you observe?
A. Very quiet, peaceful campus, very nice.
Q. Did you see anyone at all out roaming around?
A. There were very few students on the campus at that
[fol. 411] time.
Q. All right. Then where did you go?
A. Then we went—I believe we went and filled up with gas and then we went back to the motel, back to the Mansell Motel.
Q. How long did you stay there?
A. Around an hour, half an hour, something like that.
[fol. 412] Q. How long did you stay there?
A. Around an hour, half an hour or something.
Q. Then where did you go?
A. We went to lunch.
Q. How long did all that—where did you go from lunch?
A. From lunch we went—well, from lunch we went back to the motel again.
Q. And then where did you go from the motel?
A. To a news conference at the—at another motel.
Q. Now, when had that news conference been set up?
A. For about 4:45, and we arrived a little late.

Q. With whom and when were the arrangements first made for that news conference?

A. They were made at lunch with Reporters in the restaurant.

Q. Now, from the time you and General Walker got to Oxford, Mississippi, on Saturday night until the time of this news conference, did either of you see anyone that you knew?

A. I didn't. Let me see. I don't believe General Walker saw anybody he knew.

Q. All right, sir. Tell the Jury, without being able to say what was said, tell them what happened at the news conference.

[fol. 413] A. The rumor was going around that the Marshals were on the campus. That was one thing that happened there.

Q. All right.

A. And, well, a statement was given and questions asked and answers given and that concluded the news conference.

Q. Where did you and General Walker go from there?

A. We went—we went to the campus.

Q. Who was driving?

A. I was driving.

Q. Did General Walker ever do any of the driving?

A. No, sir, he did not.

Q. Where did you go on the campus?

A. We didn't go on the campus.

Q. Was this daylight or dark?

A. Daylight.

Q. How far toward the campus did you go?

A. We went to the edge—could I?

Q. Sure, go ahead and point it out.

A. Is this the railroad track (indicating chart)?

Q. That is the railroad track.

A. We went to right here, we went to this parking lot and turned around and left (indicating chart).

Q. Now, you mentioned that news conference. Who asked for it?

A. The reporters asked for it.

[fol. 414] Q. General Walker didn't volunteer it?

A. No, sir, he was—he was rather reluctant to have a press conference at all, but there were about six or seven reporters that insisted very strongly that he at least give them some kind of a conference, so finally he agreed to have a news conference.

Q. How close did you say you got to the University entrance?

A. To the railroad track.

Q. Why did you stop there?

A. Because the State Police were admitting students only; rather, the Highway Patrol, the Mississippi Highway Patrol.

Q. Where did you go from there?

A. From there we went back to the motel. Well, we went by the Courthouse. It was closed and we went back to the motel.

Q. All right, now, take it on from there and tell us what you did and what occurred.

A. Well, we called sometime or another—I called my brother and told him where I was and we called Jackson and we called back down to the Courthouse and this time the Sheriff was there and we went to—we went back to the Courthouse. And I remember we talked to Clyde Watts. We—you called, in fact, Clyde.

[fol. 415] Q. From Oklahoma City?

A. I believe that is correct. I answered the 'phone.

Q. All right. And—

A. And I went—then we went back down to the Courthouse. We reached the Sheriff on the 'phone and then we went down to the Courthouse.

Q. What did you see at the Courthouse?

A. Sir?

Q. What did you see at the Courthouse, or what happened at the Courthouse?

A. Well, at this time a lot of Sheriffs and Deputies were there and the word had gone around that Meredith was on

the campus and the Marshals were on the campus. Everybody—nobody knew what happened, why it happened, or anything and the Sheriff was pretty sad and—anyway, a representative of the Governor arrived and said—

Mr. Gooch: We object—

Mr. Watts: Don't say what the Governor's representative said. You did find out there was a Governor's representative at the Courthouse?

A. Yes, sir, that is correct. He arrived and left. He wasn't there when we got there but he was there about the time we left, but he was leaving too.

Q. Go ahead and tell the Jury what happened.

A. Well, we left the Courthouse and went to dinner at [fol. 416] the restaurant in downtown Oxford.

Q. About what time did you get there?

A. We got there a little before 8:00. A little before 8:00 p. m.

Q. Okay, go ahead.

A. And, well, we listened—can we say that—we listened to the President's speech.

Q. Don't say what he said.

A. We listened to the President's speech then had dinner. That is what happened.

Q. All right. Go ahead and tell us what else happened.

A. And then we left—we left the cafe and went to the campus, the Ole Miss campus.

Q. How did you happen to go to the campus?

A. Well, after the—after the speech, well, whenever we were leaving, in fact, we were told—can I say what we were told.

Q. You can say what occurred like that.

A. We were told that there had been a disturbance on the campus. The disturbance had broken out on the campus and—

Q. Well, prior to the time you were told that, where were you going?

A. Prior to the time?

[fol. 417] Q. Prior to the time you heard there was a disturbance on the campus.

A. Well, I don't know that we had made up our mind. Probably back to the motel. Every time we got a chance we went back to the motel, but I don't know of any definite plans. We didn't have any plans to go anywhere at all. We were just there.

Q. Go ahead.

A. And we went to the campus and parked the car and went into the campus.

Q. I think you can step down and show—take the ruler and show the Jury where you parked.

A. We parked down in this parking lot right here (indicating).

Q. Is that what direction from the railroad overpass?

A. That would be south. South of the railroad overpass. South and to the east.

Q. Now, what did you do after you parked your car?

A. We walked right up here, walked right across this side of the overpass, and right up the sidewalk, right up the sidewalk all the way to the lights, the area of the lightpole.

Q. Did you notice some barricade out in the street?

A. Barricades?

Q. Or did you pay any attention?

[fol. 418] A. No, sir, but it was dark. I could have missed them.

Q. All right. Go ahead then and tell the Jury what occurred?

A. Well, we were—we stayed in this area, I would say, for around ten or fifteen minutes. It was a short period of time.

Q. Now, what did you see when you got up to that area?

A. Well, there was, I would say, one hundred to a hundred and fifty—maybe one hundred to two hundred people in this area right here (indicating), about a couple of hundred people standing there and talking. Everybody was just talking. I believe I can say this. One of the things they wanted to know—

Mr. Watts: Now, at this point, come up here, Mr. Gooch.

(Conference at the Bench not taken.)

By Mr. Watts:

Q. Now, from this point on, Mr. Leman, the Court will allow you to tell not only what you saw but what people said, so everything you can think of that you heard somebody say, and at this point I want to suggest to you that you just turn back your memory to this evening and endeavor to relive it and tell the Jury just exactly what happened.

[fol. 419] A. Just tell them—

Q. Tell them everything that happened.

A. The entire—

Q. Tell them what you heard, what you saw.

A. The—all the time we were on the campus?

Q. Right. I may stop you and ask a question as we go along.

A. Okay.

Q. But just go ahead.

A. Well, one of the main questions, of course, we had in our mind was "How did the riot start, what happened that started it?" And a lot of students answered that question, and there wasn't any doubt in my mind at all how the riot started, after talking to the people. They said that the—is that all right?

Q. Yes, sir.

A. They said that they were lined up, the State Police were inbetween the students and the Marshals, I mean—yeah, between the students and the Marshals, and at the time they were pushing the students back further away from the Marshals and the Marshals opened fire with tear gas, and this is how they said the riot started.

Then, there was a lot of students that said, "Walker, we want a speech, we want a speech," and, you know, wanted him to make a speech, you know, and I told Walker the [fol. 420] students wanted him to make a speech and he

told me, "Louis, I don't have anything to say to them. I don't have anything to say to these students," is what he said.

And, as I remember, there was a Deputy Sheriff and he was a heavy-set fellow with a badge on. He met us, rather he introduced himself to us at that time when we arrived there, and stood around with us, and we talked to a few people and then we walked—after fifteen or twenty minutes we walked further away.

When we first arrived there there was a lot of tear gas that had been fired, a lot of Marshals, what looked to me was somebody was coming out, shooting tear gas. I would say coming out in this area and shooting it way back in this area (indicating chart), and the crowd—it was sort of the feeling to me, it seemed like, anyway, you know, that they were trying to get after us or something.

But anyway, we walked on—it died down peaceful for a while and we walked on up in here to look, and right around in here, and I would say probably we spent about fifteen minutes in this area in here (indicating chart).

During this time I remember seeing the State Police cars —excuse me, the Highway Patrol, Mississippi Highway Patrol cars start coming out from this area, and they stopped, the students would stop them.

By the way, the students were scattered all over the [fol. 421] campus. There were no large groups. The only large groups I saw of any size would be a hundred and fifty or two hundred right in this area here (indicating), and there was a group somewhere back in here, I guess, and I guess there were people standing around in area here (indicating), and a smaller group, maybe one hundred or something. But there was no—the rest of the students were just scattered out.

You would just see people everywhere, generally speaking, and, oh yeah, the Highway Patrol was leaving and they would stop and the students would ask them why they were leaving. I guess they asked them that, I didn't hear them ask them that. But anyway, they stopped them, and

then they would go on. A whole line of them just left, and about the time they left we walked back to here.

And a lot of words was going around that Barnett had betrayed, betrayed the students and that the Highway Patrol was leaving, "They are leaving us to the Marshals," and everything, and I remember Walker—of course, people were still asking Walker for a speech, and it looked to me like—I guess they—it looked to me like they thought he was about the only one left there with them, but General Walker told me that—he said, "These students think Barnett sold them out," and at that time he walked up and stepped up on the monument and addressed the students. [fol. 422] And he told them, as—I distinctly remember what he said. He said—the first thing he said, he said, "There is no need for violence. Violence is not the answer." He said, "You do have a right to protest." He said, "The troops—the troops—there is no need for the Military in Mississippi," that they should have been watching Cuba. He mentioned the Mississippi Air Force and said, "Cuba is that way." And, oh, yes, he said, "According to the Governor's representative Barnett, Barnett hadn't . . .", he said, "Stand by your Governor, he has not sold you out." That was one of the main things he was making.

He said, "According to the Governor's representative . . .", not according to him, but according to the representative of the Governor, ". . . if anyone sold them out it would be the head of the Highway Patrol in Mississippi." But he said Barnett had not sold them out.

And then he stepped down from there and walked away from the students. I don't remember which direction, but not very far away from that monument and stood around talking for several—for a period, and finally we walked on up to the front, I would say in the area of the flagpole, and maybe we walked right around—well, right around the flagpole and back in this area. We stayed right around in here (indicating) for a while, and the tear gas was getting pretty hard in your eyes, and everything, so we walked on [fol. 423] back into here, and we spent the whole entire

rest of the evening back in this area right in here, right in here and right in here (indicating), and the only other time we went up toward the front that I recall at all was when they had a peace conference. One of the students was arranging for a truce, and one was showing a white flag and we walked, we did at that time, walk back up to the front and got probably the closest to the Marshals we ever got. We were behind some students, and we just watched the peace conference. They stood and talked a while and argued and harangued, and tried to make a deal, I guess. I couldn't hear what they were saying. There was only about four or five Marshals stepped out from the Marshals, and a lot of vehicles were parked around here facing the students. I guess trucks and jeeps and so forth.

And then after—we walked on back and finally there was no more peace conference either.

And, let me see, we just spent the night talking to people back there, discussing the situation, and people would ask General Walker his views on what happened there, and the situation.

And then about—I remember the fire truck and the bulldozer incident. This was all after the peace conference, by the way. There was no more—and then we finally left the campus. Got tired and left about 1:30, I would say, [fol. 424] 1:30 a. m., and walked back down here and got in the car and drove to the motel.

We stopped here and talked to the State Police, or State Highway Patrol, and then we went on back to the hotel. Does that cover it?

Q. That covers it, I believe, Mr. Leman. Have you done your best to cover everything you can think of?

A. I can't recall anything. I mean, there has certainly, I know, been a lot of talk about charges, absolutely—

Mr. Gooch: Well—

Mr. Watts: That is all right. Just—you didn't study any pre-law, did you?

A. No, sir, I did not.

Mr. Watts: I believe that is all.

Cross examination.

By Mr. Gooch:

Q. Mr. Leman, without belaboring the matter as to the details, I take it that you were quite a supporter of General Walker during the time he campaigned for Governor of Texas in 1962?

A. Yes, sir, that is correct.

Q. I believe you said that you thought that his views paralleled—or your views paralleled his, I believe you [fol. 425] said?

A. Well, I certainly agreed with him, that the national situation was poor.

Q. Now, you went down to Oxford, or up to Oxford from Brookhaven on Thursday before the Sunday incident at Oxford?

A. That is correct, yes, sir.

Q. And you went down, I assume, to find out the situation on the campus, the temper of the students and whether or not the students were reacting either toward Governor Barnett, or to the will of the Court, is that right?

A. To find out—first of all, to see what the situation was, and to find out whether the students were for Barnett or against Barnett.

The papers were saying they were against him.

Q. Now, Barnett—now, we are talking about Governor Barnett, the Governor at that time?

A. Yes, sir.

Q. Governor Barnett at that time was still defying the orders of the Federal Court on the admission of Meredith, was he not?

A. Sir, I am not in a position to say whether or not he was defying the Court's orders.

Q. Well, let's see if you know anything about the Court [fol. 426] orders. Did you follow the Meredith case to any degree while you lived there in Mississippi?

A. I did read the papers, yes, sir.

Q. Did you know that Meredith had been ordered by the Federal Court to be admitted as a student at the University of Mississippi?

A. Yes, sir, I believe by the New Orleans Court.

Q. I believe you stated on direct examination you didn't believe in the Court having that right?

A. No, sir.

Mr. Watts: If the Court please, I object to that. No such statement was made. I challenged the record.

The Court: Sustained.

Mr. Watts: That is not fair cross examination. Excuse me.

Mr. Gooch: Just a minute.

Mr. Watts: All right, I will withdraw that last statement.

By Mr. Gooch:

Q. Well, you did say something to the effect that you didn't believe in the use of Federal troops?

A. Yes, sir, that is correct. That is correct.

Q. Then, did you know at that time how a Court order could be enforced?

[fol. 427] A. Well, sir, do you want my views?

Q. Yes, be glad to have your views.

[fol. 428] Q. Yes, sir, I would be glad to have your view.

A. Well, I'm sure with Federal Marshals. A court order should be enforced according to the Constitution with Federal Marshals, according to my understanding of the Constitution.

Q. Just to skip ahead a bit, at the time you got there, the Federal Marshals were the only ones there attempting to enforce the court order, weren't they?

A. No, sir, that's not true.

Q. Who was there when you first got on the campus?

A. Fifteen miles from Oxford, there were 160 something soldiers, Mr. Gooch.

Q. I'm talking about on the campus.

A. Well, that's correct, there were only Marshals.

Q. The only persons on the campus at the time you got there to enforce the court order were the Marshals, were they not?

A. As far as I knew. I couldn't answer that definitely.

Q. All right. All right. You didn't see any troops there then?

A. No, sir, I did not.

Q. All right. Now, did you know that Governor Barnett had blocked the way personally, at least one time, and Governor, Lt. Governor Paul Johnson had blocked the path of Meredith's entrance to the University prior to September the 30th, 1962?

[fol. 429] A. I did not know this firsthand. I knew it from the newspapers, reading the newspapers.

Q. At least you had heard that that happened?

A. Yes, sir.

Q. You knew Governor Barnett was opposing the entrance of Meredith into the University of Mississippi, did you not?

A. Well, sir, I knew that he was opposing action by the Government, Federal Government. I did not know whether he was opposing the actual entry—yes, sir, I would say that, he was opposing the entry of Meredith. I don't know what reason he was opposing it for.

Q. It's immaterial. I'm trying to find out if you knew that Governor Barnett was opposing the entry of Meredith into Ole Miss?

A. Yes, sir, I sure did.

Q. All right.

A. Yes, sir.

Q. You have previously testified, I believe, that you knew that the Federal Courts at that time had ordered Meredith entered into the University of Mississippi?

A. Yes, sir.

Q. All right. Now you got into Oxford on Thursday. Counting back, that would be, Sunday the 30th; the 29th, the 28th—I guess about the 26th or 27th?

A. No, sir, I think Thursday would be—let's see. Sunday [fol. 430] was the 30th. Saturday would be the 30th—29th.

Q. 29th?

A. I mean 29th. Friday, the 28th. I got in there Thursday night of the 27th.

Q. 27th?

A. Right.

Q. Now at that time had you heard from General Walker as to his position relative to the Mississippi matter?

A. No, sir, I had not except the newspaper account. That would be all I heard.

Q. Had you heard a newspaper account or a TV or radio account to the effect that General Walker had made a speech in Dallas to the effect that, "Bring your flag, your tent and your skillets"?

A. I read that in the newspaper.

Q. "Ten thousand strong from every state in the Union," or words to that effect?

A. I read that in the newspaper, yes, sir.

Q. "Now or never"?

A. That may have been included in one of the statements.

Q. Did you hear that he said, "We have talked and listened. It's now time to move," or words of that import?

A. Well, sir, the main thing I understood about what General Walker said, that he was supporting the position of [fol. 431] Ross Barnett.

Q. Supporting the position of Governor Ross Barnett?

A. Right, and against the use of troops. Against the use of troops. He was objecting to the use of troops.

Q. All right. At that time you knew that Governor Ross Barnett was opposing the entry of Meredith into Ole Miss; you have testified to that, haven't you?

A. Yes, sir, I did.

Q. All right. Now the first communication that you had with General Walker after you got to Oxford was when?

A. Was Thursday around—no, I got there Thursday night. It would be Friday, Friday around noon. Friday after—around noon I called him.

Q. Do you know from what place you called General Walker?

A. Yes, sir, I do. It was from a phone in the Mansion House Cafe, I believe it was, a small cafe in downtown Oxford.

Q. The Mansion House Cafe? That's on the—that would be south from the courthouse?

A. Yes, sir.

Q. And on, I guess, the west side of the street, is that correct?

A. Yes, sir, that's correct.

Q. It was called the Mansion House Cafe?

A. I don't—I couldn't say definitely, sir.

[fol. 432] Q. Do you remember making the call on a credit card?

A. Yes, sir.

Q. And do you remember the conversation you had with General Walker?

A. Yes, I do. I sure do.

Q. In that conversation did you tell General Walker that what he needed down there was leadership?

A. I told him—no, sir, I did not. I told General Walker that the student leaders were opposed to Barnett; the newspaper editor was against him.

I told him that the students themselves were actually for Ross Barnett's position. This was very evident. This was very evident on the cam—

Q. Let me ask you this specific question: Did you say to General Walker in that conversation, "General, all we need is leadership"?

A. Absolutely not. I did not say that, Mr. Gooch.

Q. Did you say to General Walker, "How soon can you get here?"

A. No, sir, I did not.

Q. Did you ask General Walker whether he was coming or not?

A. Yes, I may have asked him if he was coming to Mississippi. He didn't—he told me—well, you don't want to know that.

[fol. 433] Q. Sir?

A. Well, he told me that he didn't even know whether he was coming to Ox—I asked him—no, I didn't ask. No, I didn't ask him anything about whether he was coming. He said that he might be coming.

Q. Did you repeat during that conversation a statement to this effect, while you were talking to General Walker: "You say you have a plane standing by." Was that mentioned?

A. Yes, sir, because I—the conversation was that he brought it up that he was invited to Jackson, Mississippi, but he did not know definitely whether he was coming and that to call him later and find out if I was going to meet him in Jackson.

Q. Now this would be on the 28th?

A. This would be on—was Friday. Friday, around noon.

Q. I believe that would be the 28th?

A. That's right.

Q. I am not trying to mix this up because I have confusion running backwards myself.

A. Yes, sir.

Q. Or maybe it's the twenty—

A. It's the 28th.

Mr. Watts: 28th.

By Mr. Gooch:

Q. The 28th. Did you hear him say something to the [fol. 434] effect that, "You say you have a plane standing by"?

Did he say anything in the conversation about having a plane standing by?

A. I don't remember that he did but he could have because he did come over there to Jackson by airplane, so he may have said that.

Q. Do you remember mentioning in the conversation of General Walker a man by the name of Lamar Wilkerson of Walnut Grove, Mississippi, telephone numbers 8881 and 8483?

A. I don't remember who he is or I don't remember mentioning his name. I could have but I don't—don't recall it at all. In fact, the conversation was about, as I have said in the previous testimony.

Q. All right, now, we will skip over and not go into repetition as to other matters but you say you called him again that night, I believe?

A. Yes, sir, around midnight from Water Valley.

Q. And I believe at that time—or did he tell you at that time whether or not he was coming?

A. At midnight, he said he was coming, yes, sir, he did.

Q. Did he tell you how he was coming?

A. Well, I think he did but, sir, I couldn't say definitely.

[fol. 435] Q. All right. Did he tell you he was coming in a private plane?

A. I would say he probably did tell me that, yes, sir.

Q. Did he tell you what time to meet him?

A. No, sir, he just—I'm sure we mentioned a general time that he would be in there around noon or afternoon or something.

Q. And you drove, I assume, then, down from Water Valley to Jackson?

A. That's correct. Sure did, Saturday morning.

Q. Did you check out of the motel there?

A. Yes, I did.

Q. And you met him I believe you stated at Dr. Ney Williams' home?

A. Yes, sir.

Q. You didn't meet him at the airport then?

A. No, sir, I did not.

Q. All right. Now the news conference that was held at the Ole—no, at the, I believe, at the Sun & Sand, you said?

A. Yes, sir, that's right.

Q. That was held sometime on, was that Saturday afternoon?

A. 6:15 p.m., is about when it started.

Q. That would have been the 29th, I believe?

[fol. 436] A. Yes, sir.

Q. And will you tell us just generally what General Walker said at that press conference?

A. Yes, sir, I'll be glad to.

Q. Fine.

A. He repeated his stand in support of Mississippi. He was asked by a reporter whether he had any plans for violence. He said that, very clearly and distinctly—and he said it slowly; that's why I actually never have forgotten when he said, he said, "As far as I am in any way concerned and from what I see here in Mississippi, any violence and blood shed will be initiated by and on the hands of the Federal Government"; that's exactly what he said.

And Mr. Kyss, the New York Times reporter, was standing right in front of him when he said—a bunch of reporters were all around him.

Q. Incidentally, was that press conference televised?

A. The first portion—a prepared statement of the press conference was taken on TV camera. I don't know whether they actually televised it or not.

Q. Let's find out now what he said during the time he was being televised. Is that when he said something about violence?

A. No, sir, I don't—no, he just read a prepared statement.

[fol. 437] Q. What did he say in the prepared statement?

A. I don't remember very well. It was just a general statement about supporting Barnett, as far as I—he might have said he was here in Mississippi—

Q. Did he say he was standing shoulder to shoulder with Governor Barnett?

A. It's possible he did. I don't remember the statement.

Q. Now this was held at the Sun & Sand Motel, I believe you said, on the second floor?

A. Yes, sir, that's right.

Q. Was General Walker standing before some microphones and a TV camera at the time he made that talk?

A. Yes, sir, let me see—I don't know—yes, sir, he sure was.

Q. Do you know whether or not the entire conference was televised?

A. I know that it wasn't.

Q. You know that it was not?

A. Yes, sir.

Q. And you say you remember a question being asked General Walker about violence?

A. Yes, sir, I do.

Q. And what was General Walker's answer?

A. "As far as I am in any way concerned and from what [fol. 438] I see here in Mississippi, any violence and blood shed will be initiated by, and on the hands of, the Federal Government."

Q. All right. Now you are positive that that statement was made at the Sun & Sands Motel?

A. I'm positive, absolutely positive.

Q. All right. Did General Walker answer all of the questions that were put to him at the Sun & Sands Motel there in Jackson on the night of the 29th?

A. No, I don't—I don't—I don't know if he answered all of them. Lots of reporters talked at the same time sometimes. But I think he answered most of the questions.

Q. Now after he had finished his interview, what did he do?

A. We went back to Dr. Ney Williams' house.

Q. Now I am talking about there in front of the microphones, did he walk off of a platform or walk away from—

A. No, we—this TV camera and everything was in one—was in one room. And we talked—after reading the prepared statement on TV, he walked over into the hallway and that's where the questions, all the questions and answers were held, off the TV, in the hallway.

Q. Were there any questions asked him prior to the time he walked away from the TV camera?

A. The reporters obviously, to be right frank, Mr. [fol. 439] Gooch, the reporters all wanted to ask him some questions while they had the TV camera on him and everything and they all asked him at the same time. This was actually a bunch of people asking questions and with camera on him, see, and he did not answer any questions before the TV camera.

Q. All right. It was after he left the camera, before he answered any questions?

A. That's correct, Mr. Gooch. That's correct.

Q. All right. Now immediately after the interview there at the Sun & Sand Motel, I believe you stated that you started to Oxford, is that correct?

A. No, we went back to Dr. Ney Williams' house.

Q. And I guess repacked your clothes or—.

A. Well, we just—

Q. Or were the clothes already packed?

A. Yes, that's correct.

Q. Then when you left Dr. Williams' house to go to the interview, you were ready then to go on to Oxford as soon as the interview was over?

A. Yes, sir.

Q. All right.

A. Well, we decided to go when we got back to Dr. Ney Williams' house.

Q. Then you took off for Oxford about what time?

A. About 7:00 p.m.—let's see, maybe a little later than [fol. 440] that.

Q. Well, I believe it's about 150 or '60 miles from Jackson to Oxford, it is not?

A. Yes, sir, that's correct.

Q. Had you made previous reservations at the motel, Mansell Motel?

A. We made reservations, or somebody made them for us; I don't know who made them.

[fol. 441] Q. Where?

A. Be at Dr. Ney Williams' house.

Q. Is that after the press interview or before?

A. I think it was after.

Q. All right.

A. But I don't remember exactly.

Q. Then you got down to Oxford and you detailed pretty well what you did there. You did visit the campus a couple of times, or maybe three before the night of the riot, is that correct?

A. Once. Well, we went to the campus one time, and did not enter the campus, and another time on the morning, the Sunday morning, we just drove through it, and on through it. Never had seen it before.

Q. Had you seen it before?

A. Yes, sir, I had seen it before.

Q. Had General Walker seen it before?

A. No, sir.

Q. All right. Now, I believe you stated—going on down a little bit further, without repeating—that you went to dinner at the—somewhere. I don't believe you said. Was it the Mansion House Cafe?

A. What time was this?

Q. For dinner on September 30th?

A. Yes, sir, that was at the Mansion House Cafe.

[fol. 442] Q. And do you know how many people were there?

A. I would say twenty or twenty-five, probably, were in there.

Q. Was there anybody eating dinner with you and General Walker?

A. I don't think so, sir. No, sir, I don't remember anybody at the table.

Q. Just the two of you at the table?

A. Yes, sir.

Q. And I hope I quote you correctly, that you said you got there about a quarter to 8:00?

A. Yes, sir, about.

Q. And I believe I quote you right when you say you both listened to President Kennedy's speech?

A. Yes, sir, General Walker listened to it and I listened to it too.

Q. There in the Mansion House Cafe when you were having dinner?

A. Yes.

Q. Do you recall any remark General Walker may have made after having listened to President Kennedy's speech that night?

A. No, sir, I don't remember any.

Q. Do you remember generally what President Kennedy's speech was about?

[fol. 443] A. Well, his speech generally was not no violence, peace and law, as I recall. That was the general text of his statement.

Q. He talked about constitutional authority?

A. Yes, sir, and defiance. Yes, sir, let's see.

Q. And defiance of Court orders, didn't he?

A. Yes, sir. I don't distinctly recall what he said about defiance of Court orders.

Q. Well, I will ask you this specific question.

Do you remember that when the President's speech was over General Walker made the remark relative to the President's speech, "nauseating, nauseating"?

A. No, sir, I don't remember that remark.

Q. Would you say it didn't happen?

A. Well, it possibly did, I—it was in the cafe, I was with General Walker and I do not remember the remark at all.

Q. Then after the President's speech you and General Walker went to the campus, or tried to get to the campus?

A. Yes, sir.

Q. Now you detailed how you parked at some distance away from the entrance to the campus?

A. Yes, sir.

Q. Did General Walker remain there with you in the [fol. 444] car, or did he get out and leave you to park, and start on toward the campus?

A. I think we parked the car and we both got out at the same time, but I might have parked it. But I don't—I don't know. Well, sir, the way I remember it, we parked the car and both got out. He might have got out a little before me and I parked the car, but he wasn't ever—he stayed right there.

Q. He stayed right there?

A. Yes, sir, right.

Q. You are positive that he didn't walk on ahead?

A. Well, he was ahead of me.

Q. For a considerable number of yards, prior to the time you got the car parked?

A. Well, sir, I know that he was ahead of me when he crossed the railroad track, so he must have been ahead of me before we crossed the railroad track.

Q. Did he at any time, as you approached the campus, or that evening, turn and wave to you?

A. Yes, sir, he told me to come on across.

Q. Did he call you by name, or did he just wave at you to come on?

A. He didn't call me by name; I was right behind him. I was in line right behind him on the trestle.

Q. Did he wave come on?

[fol. 445] A. He said (demonstrating) like that, that's right.

Q. As he got near the entrance to the campus, did you notice any groups or clusters of people over on the north side of University Avenue that might have hailed General Walker, or said something to him?

A. I don't—I didn't notice any people on the north side, no, sir.

Q. Did you notice him there at about the time he got to the campus, that he again gave the sign, "Come on," (demonstrating)?

A. The only time I saw him give that sign was along at the bridge.

Q. Was a lot of people on University Avenue that night?

A. Yes, sir, it was pretty thin—the lights—they were scattered out, but it was a pretty long walk. There was more on the sidewalk, I guess, walking with us. There would be three or four people right in there immediately walking with us.

Q. Was the people—excuse me.

A. And there might have been people on the other side, I don't recall.

Q. Were people strung out pretty well all up and down?

A. I would say that would be a good description.

[fol. 446] Q. Would you estimate the time you and General Walker got to the campus that night?

A. I would say it was around 8:45. 8:45 p. m.

Q. You have detailed that as you approached the area of the monument, you estimate, I believe, and correct me if I am mistaken, that there were a hunded and fifty to two hundred people in that area.

A. Yes, sir, that is—now, that is the area surrounding the light and the monument and that area.

Q. I am talking about as distinguished from up near the Lyceum Building or the YMCA. Now, I understood you to say that in the area of the monument?

A. That is correct. That—

Q. You figure there were about a hundred and fifty to two hundred people?

A. That is correct.

Q. Did the crowd hail General Walker as he came up on the campus that night?

A. Several individuals recognized General Walker and met him and he would introduce himself, and some people were saying, "There's General Walker," but as far as any massive hail, there was none at all.

Q. Several individuals would say, "Here's General Walker!"

A. Yes, sir.

[fol. 447] Q. Did they say anything about, "Here is our leader."

A. Some people might have said that. I don't remember that.

Q. My question—

A. Maybe they did. A lot of them wanted him to lead them, that is for sure.

Q. They did try to get him to lead them?

A. Oh, yeah.

Q. Now, was any question asked him about where his volunteers were, or anything of that sort?

A. That question might have been asked.

Q. Do you know what his answer was, or if he made any answer?

A. No, I don't remember. I couldn't answer that because I don't remember the question or the answer.

Q. All right. Now, as he got there to this hundred and fifty or two hundred people in the area of the monument, you have stated that a number, or some of the crowd, or whoever it was, spoke to him and said, "Here is General Walker, here is our leader," or something to that effect.

Am I quoting you fairly accurately?

A. Well, yes, sir, and several of them walked up to him and introduced him. And some of them asked him how to drive the Marshals out, stuff like that, and he said—well, any way he said, "You don't."

[fol. 448] Q. All right. Now, you have also said that you stood around there ten or fifteen minutes and they were trying to get him to speak?

A. Yes, sir, that is correct.

Q. Then I believe you said, and I believe you took the pointer and traced a route from a point near the monument north to the sidewalk, up to about even with the flagpole, that you say you and General Walker walked?

A. I would say it was about along the—

Q. All I am recollecting now—go ahead. All I am recollecting now is about.

A. About in this area here (indicating).

Q. Tried to get your picture. I don't want to misquote you at all, just trying to bring it out here.

A. All right.

Q. Traced the route you and General Walker took after you had been greeted by these persons down at the monument?

A. Well, sir, it would be hard—I couldn't—it would be hard to exactly trace the route.

Q. I understand.

A. We didn't go very far up, and we just—we might have come back down this way some.

Q. Well, now, how far did you go?

Mr. Watts: Wait just a minute, let him finish.

[fol. 449] Mr. Gooch: Just a minute, Mr. Watts, this is cross examination.

Mr. Watts: The witness can finish his answer.

The Court: I know that, Mr. Watts. You may finish your answer, Mr. Leman.

A. This (indicating) is the area of the route we took, generally speaking. It might be wrong a few feet, but not very far.

Q. All right. You have indicated a route from the monument to a point near the flagpole, have you not?

A. Yes, sir, that is correct. That is true.

Q. I am saying you got to the flagpole, but the way you marked it with the marker, you got nearly up to the flagpole?

A. That is correct.

Q. Do you know whether you went past the flagpole?

A. No, I don't. We didn't at this time. We sure didn't.

Q. All right. Now, at that time was there just you and the General walking along there, or were there others there too?

A. A Deputy Sheriff was with us and there might have been one or two others, or three. There was no—just three or four of us, and—just three or four in other words.

[fol. 450] Q. Incidentally, you mentioned this Deputy Sheriff. Do you recall General Walker asking the Deputy Sheriff to deputize him?

A. No, sir, I don't recall him asking him that.

Q. You were there right with General Walker at the time you met the Deputy Sheriff?

A. Well, sir, the way it was, I would usually be a few feet away, and I heard some of the things he said and a lot of things I didn't hear, because I might have been talking to somebody myself.

I was with General Walker, but I didn't try to stand right by him and hear everything that was said.

Q. Now, at the time you walked on the campus, you and the Deputy Sheriff and General Walker and perhaps one or two others were walking westward down toward the Marshals. You were walking westward towards the Marshals weren't you?

A. We walked westward, that is correct, yes, sir, toward the Marshals.

Q. All right. Now, at that time what was going on around the Lyceum Building?

A. Well, you couldn't actually see. It really is hard to say. It was very hard to see. There was a lot of commotion going on up there, and I am assuming, like—well, there was, in fact, there would be a few students around, [fol. 451] or figures. You would see figures scattered all over. There were figures scattered all over the campus, but only the groups were right here and right here (indicating) and I guess right here (indicating).

Q. Did you see anything—

Mr. Watts: If the Court please, the witness can't answer if he gets almost through and then Mr. Gooch interrupts.

The Court: Mr. Watts, sometimes it is hard to determine whether he has finished the answer.

Mr. Watts: If he would just wait half a second, or even a second.

The Court: Had you finished Mr. Leman?

Mr. Gooch: I shall not interrupt you again. I would like for you to tell me all of it.

A. That is all right.

Q. At the time you and General Walker and the Deputy Sheriff and one or two others got up near the vicinity of the flagpole did you see any evidence of stones and sticks and bottles and missiles being hurled at the Marshals?

A. I am sure I saw people. Well, from where? I wouldn't say I saw them. What I have to do, sir, is try to remember whether I saw it then or later on. I did during the night see people throwing stuff, but you could not —you couldn't—not around us, there wasn't anybody [fol. 452] throwing. I know that for a fact.

Q. Could you see the Lyceum Building?

A. No, sir, you could see tear gas and all, coming out, and you could see lights and you knew it was there, but I don't guess you could see it.

Q. Could you see the lights from the Lyceum Building?

A. Not on the building.

Q. Did you ever see the Marshals?

A. Yes, sir, I did.

Q. Were they visible from where you were standing?

A. No, sir, they were not, unless they ran out. Now, I seen them during the night, I saw Marshals come out from there, and—at least I couldn't swear they were Marshals, but they were chasing students, and they would come out.

Q. Did you see any students hauling any brickbats from the new construction down there around Hume Hall?

A. Yes, sir, sometime during the night I saw students carrying bricks; I did.

Q. You don't know at what time?

A. No, sir, I don't. I couldn't say.

Q. Was it about—

A. I couldn't say the time. Excuse me.

Q. Was it about the time you and General Walker got [fol. 453] on the campus?

A. I don't remember seeing any students hauling bricks then. I just remember people there.

Q. Go ahead and take your seat. Now, after you and the General and the Deputy and these several others, as you have named, went up near the flagpole, on the way back did you see an encounter between General Walker and a minister?

A. Yes, sir, I sure did.

Q. I am sure you didn't mean to leave that out?

A. No.

Q. I just bring that to you. Now, did the minister implore General Walker in words, tones or sentences to help stop the rioting?

A. Yes, sir, he told General Walker, "You can stop the rioting." And General Walker said, "I have nothing to do with the students, I have no control over the students," was the words. "I have no control over the students."

Q. Did he say something to this effect, or perhaps verbatim, "I didn't come here to stop it. I wouldn't stop it if I could," or, "I couldn't stop it if I could."

A. He said—he may—well, I gave you what he said. I don't remember him saying he could or would or wouldn't. I remember distinctly he told the minister, "I have no control over the students." He told the minister that. He [fol. 454] was very polite.

Q. The minister had told him words to the effect, "General, they will listen to you, you can stop them"?

A. That is correct.

Q. And General Walker, according to you, said, "I have no control over them"?

A. That is correct.

Q. Now, after you had taken the stroll up toward the flagpole and returned again to the monument you say the students again urged him to make a speech, is that correct?

A. Yes, sir.

Q. How many students would you say were down there around the monument at the time this urging for the speech occurred?

A. I would say there were two hundred and fifty people in the crowd at the time he was speaking. I—sir, there was no way I could say for sure.

Q. Mr. Leman, I realize fully everything you say is an estimate. Nobody was counting them, nobody was trying to count them.

A. Right.

Q. I assume there was a considerable state of turmoil?

A. That's right.

[fol. 455] Q. I assume further it was impossible to remember everything that was said or done that night. Do you agree with that?

A. Yes, sir.

Q. But be that as it may, it was a group consisting of some two hundred or two hundred and fifty or less or more, and General Walker did agree to make a speech?

A. Yes, sir, he turned and told me that the students ". . . think Barnett sold them out." And he got up there and talked with the students.

Q. Well, now, give us the best you can—I realize it is repetition—what General Walker said in his speech to the students that night?

A. He said—he said, "There is no need for violence. Violence is not the answer."

Q. All right.

A. He said, "The troops—what you are doing here, in effect, we should be worried about Cuba." He said, "Barnett didn't sell them out." He said Barnett was a good Governor and . . . that—he urged support for Barnett.

Q. He urged support for Barnett?

A. That is correct.

Q. Did he say who did sell them out?

A. He said that if anyone sold them out, according to the Governor's representative, which he had heard at the

[fol. 456] Courthouse, that it was the head of the Highway Patrol.

Q. Did he mention the word Birdsong?

A. Yes, sir, he did.

Q. Did he lean over and ask somebody who the head of the Highway Patrol was?

A. Yes, sir, he asked me.

Q. Was that after he had said "Barnett sold you out," and—

A. No—

Mr. Watts: Just a minute. I object to that. He did not say "Barnett sold you out." That is what the news report said. I object to that statement purporting to have been this witness' testimony. The witness testified he said, "Barnett did not sell you out." Mr. Gooch is asking the question "Barnett sold you out".

Mr. Gooch: Could I ask the question?

Mr. Watts: No, sir. I have no objection to you asking the question, but I object to you not staying in the record.

Mr. Gooch: Now, Mr. Watts—

Mr. Watts: Yes, sir.

The Court: Just ask the question.

By Mr. Gooch:

Q. Isn't it a fact General Walker first said, "Your Governor has sold you out," to which the crowd hollered, "No, no, no." And that he leaned over to you and you said it [fol. 457] was not Barnett, it was Birdsong, and he straightened back up and he said, "Your Governor did not sell you out. . ."

A. No, Mr. Gooch, that isn't the way it happened.

Q. Wait until I finish.

A. Excuse me.

Q. "Your Governor did not sell you out, it was Birdsong."

A. That is not the way it happened, again.

[fol. 458] Q. All right. All right. I again say to you that I have the right to ask these questions.

A. Yes, sir, I realize that.

Q. Well, now I hope you will show me the same courtesy I am trying to show you. Wait until I finish my question.

A. Excuse me, yes, sir.

Q. Did he say words to this effect: "Keep up the protest"?

A. No, sir, I don't remember him saying anything about keeping up anything.

Q. Did he say, "You have every right to protest"?

A. He said, "You have a right to protest," he did say that, I remember it.

Q. But you say he did not say, "Keep up the protest"?

Mr. Watts: If Your Honor please, I object to that as repetition.

The Court: Overruled.

A. No, sir, he did not say "Keep up the protest."

By the Gooch:

Q. Did you hear him make a statement to the effect: "They," referring to the Marshals, "may run out of tear gas"?

A. Are you talking about in this speech?

Q. Yes, sir.

A. No, sir, I don't—don't at all.

Q. Did you hear him say—

[fol. 459] A. He didn't say that, sir, no, he did not.

Q. All right, did you hear him say during this speech, "Thousands are on their way"?

A. No, sir. No, sir, I—

Q. Did he say it?

A. No, sir, he didn't, Mr. Gooch. If he did, I definitely do not remember him, anything about that. I was pretty close to his speech.

Q. Did he say to those students who were around listening to his speech, "I want to compliment you on what you are doing here tonight"?

A. No, sir, I don't remember that either.

Q. Now you mentioned Reverend Duncan Gray on cross examination as an incident that occurred when he was walking back from the monument, or from the flag—the vicinity of the flagpole.

Did any other incident occur involving the Reverend Duncan Gray during General Walker's speech?

A. Yes, sir, it did.

Q. Tell us about that.

A. He, Walker, was talking to the students. I think he had just started, hadn't been talking very long. And Reverend Gray started walking up to—well, just pushing his way up to Walker, speaking. I don't remember what he was saying but he was speaking.

[fol. 460] And Walker said, General Walker said, "Your minister wants to speak," or something like that.

And then somebody pulled the minister away from the, away from the group and then I saw the minister and this fellow just move on back, away from the crowd. And Walker continued his speech.

Q. Is that all that occurred?

A. Regarding the minister, is that—

Q. Yes, sir.

A. Yes, sir, that's all I remember.

Q. Did you ever hear General Walker say, "Here is an Episcopal minister that makes me ashamed I am an Episcopalian"?

A. Yes, sir, I heard something about him—I did hear him say—the minister had just said something. I don't remember what he said. And it was something about bringing in the church.

And I don't recall whether this was the earlier point or during the speech. It may have been both—no, it couldn't have been both.

But I do remember the minister using the, bringing religion into it, into this Oxford thing.

He somehow said that religion or—well, he brought up the subject of religion and Walker did say that, "I am

ashamed of being an Episcopalian," or "you make me ashamed—" or something like that, I don't know.

[fol. 461] The question was said, it surely was.

Q. Now after General Walker had finished his speech, what did General Walker do?

A. Moved away from the group that was standing around there and talked to some people for a period, for a while.

Q. How long a period?

A. Oh, I would estimate 10 or 15 minutes.

Q. Then what did you do?

A. Then we decided to get, go up and look and see what was going on up front and we walked up towards the west, walked west.

Q. How far west did you walk?

A. I would say up to right up in here about (indicating).

Q. Now you have indicated on this second westward trek a point, I believe, about half-way between the flagpole and the edge of the street in front of the Lyceum Building?

A. I indicate a point about right in here, sir, about right in here (indicating).

Q. All right.

A. I would say about 30 feet or so the other side of the flagpole.

Q. About 30 feet past the flagpole and west of the flagpole?

A. That's correct.

Q. Sir? Had you finished?

[fol. 462] A. That's correct, yes, sir.

Q. Now at that time who was with you and General Walker?

A. There was two or three other individuals who I do not know who they were or remember them, and myself.

Q. Was the Deputy Sheriff there?

A. No, sir, not this time, he was not there.

Q. Were any of the—

A. At least I don't remember him at all.

Q. I'm sorry.

A. Excuse me.

Q. Now at the time you went up there past the flagpole, just you and the General and one or two or three individuals, did anybody have any sticks or stones in their hands?

A. Nobody with us did at all, sir.

Q. Was there anybody following along behind you and General Walker and the two or three that you didn't know?

A. There were people all over the campus. We were not in any large group at all. There was nobody behind us—maybe you could walk back 50 feet and there might be some people but we just walked, three or four of us walked up to the front and walked on back.

Q. And nobody of a large crowd of 15 or 20 or 500 or what-not weren't following you?

A. No, sir, Mr. Gooch, they surely weren't.

[fol. 463] Q. Now I believe you said that the General made one other trek up to the—

A. Yes, sir, we walked up the front during the peace conference.

Q. Well, now who led the peace conference or was there a leader?

A. Well, there was one student I saw, saw him standing with some kind of, waving something, I don't remember what it was, some kind of flag, and so if you want to call him the leader, maybe he was the leader.

Q. I don't know whether he was or not. I was just asking if somebody led them.

A. Well, sir, I don't know that there was any leader at all but a bunch of the students were hollering, "Peace, peace," or something, or "peace conference," and they advanced up after, as the Marshals quit firing and everything and everybody quit, anybody—everybody stopped throwing and there was a group of students up front. I would say a hundred or something like that, gathered around during the peace conference.

Q. Where was General Walker at the time of the peace conference?

A. Standing behind the students.

Q. Just with his arms folded, I assume—

A. Just standing there.

[fol. 464] Q. —was the pose. And was the Deputy Sheriff with him at that time?

A. No, sir, I don't think he was.

Q. Was anybody with him but you?

A. There was two or three other people. We were talking to—all through the evening, sir, we would talk to different people, so I'm sure there was somebody with him.

Q. Did you hear any of the peace conference talk?

A. No, sir, I couldn't hear it.

Q. You couldn't hear a thing that went on?

A. No, sir, you could tell they were talking. I could hear the voices but I couldn't tell what they were saying at all.

Q. And after you had participated, or after you had gone up there—I won't say "participated,"—had—after you had gone up there, you came back down near the monument and remained there the rest of the evening?

A. That's correct, we—after that, sir, we came back and we remained the rest of the evening in this area and in here (indicating), this area in here the rest of the evening—four hours, in fact.

Q. So you stayed there on that campus that night, you and General Walker, from around 8:45 until about 1:30 or 2:00, I believe you said—

A. That is correct. That's correct.

[fol. 465] Q. —and just stood there milling around on the campus?

A. That's correct. That is absolutely correct.

Q. Now you do recall that at the interview in Jackson before you proceeded to Oxford, that General Walker at that time was urging those who were listening to him to stand behind Governor Barnett?

Mr. Watts: Excuse me. Object to it as purely repetition.

The Court: Overruled.

Q. Go ahead.

A. Well, sir, the points that stand out in my mind that Walker was urging were, one, they opposed the use of troops in this situation and that this—and, also, support for the position taken by Barnett, of legal and Constitutional resistance to the situation, to the forced integration at Ole Miss.

Q. All right. Again I ask—it is repetition, but I want an answer—

A. Yes, sir?

Q. —that he did make his position clear at Jackson before he went to Oxford, that he wanted his hearers as well as himself to support Governor Barnett, is that correct?

A. He said he supported and urged people to support Ross Barnett.

[fol. 466] Mr. Gooch: That's all. Thank you.

The Witness: Support the position of Barnett.

Mr. Gooch: That's all.

The Court: Any redirect?

Mr. Watts: Very short.

Redirect examination.

By Mr. Watts:

Q. Mr. Leman, during the course of that entire evening, what was the longest period that General Walker was ever out of your sight?

A. About a minute, and I knew where he was then.

Mr. Watts: I believe that's all.

Recross examination.

By Mr. Gooch:

Q. At any time—wait just a moment. One more question: At any time that you were going in a westerly direction from the monument toward the Lyceum Building, was there

any, ever any tear gas fired at the group, however small, of which you were in?

A. Sir, there was tear gas anywhere in that area, firing everywhere. I saw them rolling down on the ground, I saw them—in fact is, they were firing all the way back to the crowd. At times they were firing all the way back to the crowd back by the monument, coming down there. People would have to move to get out of the way.

[fol. 467] Q. Was that happening at the time you and General Walker got on the campus?

A. Yes, sir, sure was.

Mr. Gooch: That's all. Thank you.

The Court: I'm going to excuse this witness.

Mr. Watts: Just a minute. Let me ask just one more question. It's always bad luck to....

Further redirect examination.

By Mr. Watts:

Q. Mr. Leman, did you during the course of that evening and the entire evening, was General Walker ever out in front of a crowd with no one between him and the Marshals?

A. No, he never was. He never was.

Q. Did he ever, or, so I won't be in a position of leading you, tell us what his gait was as he walked around that area?

A. A very slow walk.

Q. Did he ever get out of that slow walk?

A. No, sir, he did not.

Mr. Watts: That's all.

The Court: I'm going to excuse this witness.

Mr. Watts: Yes, sir, I would like to have him excused.

The Court: You are excused. We will recess until a quarter of 11:00. Keep your seats, please, in the audience until [fol. 468] after the jury has left the courtroom, and be back in your seats at a quarter of 11:00.

(15-minute recess.)

Mr. Watts: Call Mr. Holland, please.

If Your Honor please, at this time we would like to present a deposition. This is the deposition of a witness, Joe Ford, taken in Oxford, Mississippi, March 12, 1964, by agreement of the parties, and the deposition was attended by Mr. Gooch and myself.

With the Court's permission, Mr. Andress will read the answers and I shall read the questions.

I assume it is understood that the witness was sworn?

I notice I didn't ask him.

The Court: Yes.

JOE FORD, testified by deposition as follows:

By Mr. Watts:

Q. What is your name?

A. Joe Ford.

Q. What is your business?

A. At the present time I am an automobile and tractor dealer.

Q. Mr. Ford, have you been Sheriff of Lafayette County?

A. Yes, sir.

[fol. 469] Q. Were you the County Sheriff on September 29th through October 2nd, 1962?

A. Yes, sir.

Q. Did the disturbance incident to one James Meredith at the University of Mississippi occur while you were Sheriff?

A. Yes, sir.

* * * * * * *

Q. Now Mr. Ford you were Sheriff between that period of time?

A. Yes, sir.

Q. And did an incident occur at the University of Mississippi between that period?

A. Yes, sir.

Q. Did you have occasion between these dates to become acquainted with former Major General Edwin A. Walker?

A. Yes, sir.

Q. Where did you first see him?

A. In the Sheriff's Office.

Q. Would you outline into the record, please, sir, the nature and extent of that conversation and acquaintance?

A. It was on a Sunday morning, I am not positive, but it was somewhere between 7:00 and 8:00 o'clock, General Walker came into the Sheriff's Office. He introduced himself. I don't recall the young man who accompanied him, but I asked him his business in Oxford with reference to [fol. 470] several phone calls that had come into the Sheriff's Office in connection with General Walker—

Mr. Gooch: Now if the Court please, we object to the rest of the testimony, as to what General Walker may have said.

The Court: The rest of that sentence?

Mr. Gooch: Yes, sir.

The Court: Sustained as hearsay.

A. —I referred him to the telephone calls that had come to me, some of them made statements to the effect that they had been asked to come to Oxford. I questioned General Walker with reference to whether—his plans in Oxford—

Mr. Gooch: To which we object.

Mr. Watts: Just a minute.

Mr. Gooch: Which we object to the rest of the answer.

The Court: Sustained.

A. —I informed him since he was here as an observer—

Mr. Gooch: I object to that, if the Court please, as to what he may have told General Walker. It's hearsay so far as this defendant is concerned.

The Court: Sustained.

Mr. Andress: This is the witness himself, Your Honor, testifying as to what he said.

The Court: Let me read the rest of the answer. Let's [fol. 471] see. I will overrule it and permit that.

Mr. Gooch: Note our exception.

A. I informed him since he was here as an observer that I had no excuse to ask him to leave but that we wanted no one here that would cause any disturbance or any feeling of emotion that would call disturbance. He assured me that his activities here were of his own personal interest and simply as an observer.

Q. Did you see him again after that incident on Sunday morning of September 30th?

A. I did.

Q. Would you outline that meeting for us, please, sir?

A. That was approximately 8:00 o'clock on the same date, Sunday night, in the courtroom in the Lafayette County Courthouse.

All county officers who were here in connection with the University situation were asked to meet in the courtroom. General Walker was present at that meeting. He did not address the members of that meeting. He was present, however, and was on the courtyard lawn after the meeting. I didn't make any personal contact with him.

Q. Did someone address the meeting of the county officers in the courthouse?

A. Yes, Judge Moore from Jackson.

Q. Would you remember in substance what he told the [fol. 472] group?

Mr. Gooch: To which we object. It would be hearsay.

The Court: Sustained.

Q. Had there been a substantial group of local sheriffs and law enforcement officers assembled in Oxford?

A. I don't know the exact number but at one time or another during the course of those few days I was informed that practically every sheriff in Mississippi was here.

Q. Were there a substantial number of these peace officers assembled within the courthouse that night?

A. They were, I don't know the exact number, there was a good many of them.

Q. Was that the last you saw of Walker then?

A. Yes, sir.

Q. Did you see him again at any time while he was in or around Oxford?

A. No, sir, I did not.

Mr. Watts: I believe that's all.

Mr. Gooch: No cross.

Mr. Watts: All right.

Turn now over to the next deposition here, David Channell.

DAVID CHANNELL, testified by deposition as follows:

[fol. 473] Direct examination.

By Mr. Watts:

Q. What is your name, please?

A. David Channell.

Q. Your residence both on campus and at home?

A. Odom B. Dorm on campus, and 740 McDowell Road, Jackson, Mississippi, at home.

[fol. 474] Q. Who are your parents?

A. Mr. and Mrs. C. E. Channell.

Q. Your age?

A. I am twenty.

Q. Are you a student in Mississippi University?

A. Yes, sir.

Q. What school and what class?

A. I am in the School of Commerce and I am a junior.

Q. Were you at school in September of 1962?

A. I was.

Q. Did any unusual incidents happen on the campus that night?

A. Yes, sir, there was a very unusual incident, one which we were not accustomed to. We had what you might say was a riot.

Q. In what area did that take place?

A. It took place in front of the Lyceum Building, the place commonly referred to as the Grove.

Q. Were you present during the course of that incident?

A. Yes, sir, I was.

Q. When did you first come on the campus that night and realize there was something unusual taking place?

A. We were coming back from the football game in [fol. 475] Jackson that week-end and on the way back we had a little car trouble and I didn't get back until about 8:00 o'clock. We knew that there was something wrong because we were listening to reports on the radio.

Q. What was the general nature of those reports?

A. They said there was a Negro admitted to the University of Mississippi, that he was on the school grounds. They said that tear gas had been fired and there was a riot going on.

Q. When you arrived on the campus where did you go?

A. I walked straight up to the Grove here just to see what was going on.

• • •

Mr. Watts: We marked there Exhibit 1, if Your Honor please, a plat almost identical to the one on the Board, except much smaller. Will it be permissible if I step over by the plat and point out, Mr. Gooch, the same locations on this plat?

The Court: Yes, sir, if they are the same.

Mr. Watts: Yes, sir. Mr. Gooch has a copy of it, I am sure.

• • •

(Continuing to read from deposition.)

Q. Now, David, directing your attention to Exhibit No. 1, which is a scaled plat of the University of Mississippi [fol. 476] area, is this the Grove in the center of the area?

A. Yes, sir, it is.

Q. Now, orienting it, the top is to the north, and the left is to the west. From which direction did you approach?

A. We came down University Avenue and we had to hitchhike since the car wouldn't run, so this boy let us off right here at the bridge. He had to get his car across the campus and he lived in the Phi Delta Theta House, and he let us off right here at the corner of University Avenue right across the bridge.

Q. Then where did you go?

A. We proceeded to go on up into the Grove.

Q. Was there a substantial crowd in the Grove?

A. Yes, sir, there was. There was a crowd all the way along University Avenue and the Grove.

Q. Could you give us anything like a rough estimate of the size of that crowd?

A. I couldn't tell you exactly. I imagine it would be around 3,000 people at least.

Q. Had tear gas been fired?

A. Yes, sir, it had.

Q. Did you mix on with the crowd?

A. Yes, sir, I walked on in and started to talking to some of the boys and asked them what had really happened, [fol. 477] and the story about it. All we could get was radio reports and some of the announcements were not too positive, but we did know that tear gas had been fired.

Q. How close did you get to the ring of Marshals that surrounded the Lyceum Building?

A. I couldn't get very close. I guess we just walked right up into here.

Q. By "here" you are pointing into this circle that is called the Grove?

A. Yes, sir, next to the flagpole.

Q. And in the center of the circle as appears on this Exhibit No. 1, there is a cross between two sidewalks?

A. Yes, sir.

Q. And there is a circle within that, and is that what you identify as the flagpole?

A. Yes, sir, that is the flagpole.

Q. I wish you would tell us what you saw when you got up in that area?

A. When I got up in that area there were small groups of students and they were charging the Marshals, throwing rocks, but they were all spread out. There was a group over here—

Q. By "here" you are pointing to the southwest?

A. Yes, sir. It was very sporadic. They would run up there and throw rocks and run back.

[fol. 478] Q. Did you stay there all during that time, the intervening time that followed that?

A. Yes, sir, I did. I just milled around and went over to the Y and talked to some people over there.

Q. I wish you would give us a narrative running account of everything you saw, or everything you heard, and what occurred?

A. As I said, I arrived at about 6:00 o'clock and I walked up into the Grove and started talking to some boys to see what had really happened. I guess I went over to the Y and talked to some boys over there. I met a boy from South Carolina that was up here and I talked to him. He told me a girl had been killed, so I walked on back down towards University Avenue.

Q. Was that eastward?

A. It was going this way. The Y is here.

Q. You are pointing—I will have to orient you here, David. The Confederate monument is on the east side of the Grove and the Lyceum Building is on the west end of the Grove. It will help us when we read this in Court if you can use points of the compass and directions.

A. All right. We walked eastward. I was standing around by the Confederate monument and I saw General Walker walking up. He was with a short man, it was a Deputy Sheriff or a Sheriff, I don't know which, and I as-

[fol. 479] sumed he was from Texas. He came up and he was standing around and there was a whole bunch of people gathered around General Walker. He started talking.

• • •

Mr. Gooch: Wait just a minute. We object to that next answer, if the Court please. A conclusion.

The Court: I will admit it.

Mr. Gooch: Not res gesta.

• • •

A. Everybody got mad at him because he wanted to put the riot down. He said violence was no way to do this thing and so everybody got mad at him. Then these Episcopal ministers, I assume it was Duncan Gray and Wofford Smith, they climbed up on the monument, the Confederate statue, and they started implying that the people out here were very low class people. That upset a few people so they started to pull them down. They got them away right quick and it was the Deputy Sheriff who helped get them out of there that was with General Walker. Then General Walker told us, he said we ought to be concentrating our efforts in Cuba instead of against our own people. He continued to say there was no sense in having any violence, that constitutionally you could protest but not with violence.

Some students asked him to lead us and he said, "No." [fol. 480] He said, "I can't take part in a violent demonstration." He said that wouldn't be right. Later he walked on up into the Grove and I walked with him, I guess there was about five or six students that went with him. He walked up into the Grove and looked around, he and the Deputy Sheriff and the students. He then turned around and went back out. He walked out of the Grove and went back down to the Confederate monument, I think not exactly to the Confederate monument, he came down and stood across the street over here in front of the Biology Building and Hume Hall. It is on the east part of the campus. He stood there and this boy, I can remember this real well, this boy from Natchez, Mississippi, his name is James Dykes, he had been shot in the leg. At the present time, or then, he was attending Co-Lin Junior College in Wesson, Mississippi, and the only reason I know who the boy was was this boy who was with me was from Natchez

and he pointed him out to me and told me who he was. He came up and two boys had to carry him, one under each arm. He was carried up to ask General Walker if he could put him on a white stallion and lead us and General Walker at that time shook his head like that (indicating) and said, "No". He said that it wouldn't be right.

Q. Go ahead with your narrative of what occurred after you had this talk with this boy. Was this statement of [fol. 481] putting him on a white stallion, was that stated in jest?

A. At the present time emotion was running rather high and the boy couldn't walk, his leg had been shot and there was blood all over his pants leg. I imagine he was shot by birdshot, or maybe some form of shotgun. They took him on off and General Walker stood there and people kept talking to him and asking his views, his political views and so forth.

Q. Now, up to that time had he made any move at all toward the Lyceum Building, or toward the Marshals?

A. Yes, sir, he walked on into the Grove at the time that I walked with him and some more students did, he walked on into the Grove about halfway or three fourths in there and he just stood around looking and then he turned and we walked out. The only reason I went with him was just to talk to him because I had heard a lot about General Walker.

Q. Did he at any time get out of a normal ordinary walk?

A. No, sir, he never did. In fact, he was walking pretty slow, if you ask me, for his size.

Q. To identify him, did he have on a rather large white hat?

A. Yes, sir, he had on a large Stetson hat and I believe he had on a beige suit. I believe he had on a beige suit, [fol. 482] but I remember that white hat better than anything. He was with this short Sheriff or Deputy Sheriff who was accompanying him.

Q. Back at the time you first arrived on the campus, do you think sometime shortly after 8:00 o'clock, and between that time and the time you saw General Walker, were you out in the area of the Grove back and forth all the time?

A. Before I saw General Walker?

Q. Yes.

A. Yes, sir, I was.

Q. Were you in a position where if there had been a mass charge of as many as 1,000 people or even 500 against these Marshals that were led by three individuals out in front of them, were you in position to where you would have had to have seen it?

• • •

Mr. Gooch: To which I object as a conclusion on the part of this witness.

The Court: Overruled.

• • •

A. Yes, sir, I would have seen it.

Q. Did anything of that kind occur at all?

A. No, sir, it did not.

Q. First, did anything like that occur prior to Walker's [fol. 483] speech on the monument?

A. No, sir.

Q. And did it occur then after Walker's speech on the monument?

A. No, sir.

• • •

Mr. Watts: I believe the rest of it is repetition. We will waive it. Cross examination?

Mr. Gooch: On page 13 of the deposition, question.

• • •

Q. And you saw General Walker almost immediately after you got on the campus?

A. No, sir, I didn't. I would imagine it was about forty-five minutes to an hour later. I can't place time after that

because I had no radio and no way of knowing the time. I didn't have a watch.

• • •

Mr. Gooch: On page 14, the first question on the page.

• • •

Q. And you did see groups from that big crowd of people charge the Marshals or go up toward the Marshals and throw bricks and stones, or did you?

A. Well, there were not 3,000 people taking part in what was going on there. As I said, there was a large group of students lining University Avenue, students and towns-[fol. 484] people. In the Grove, itself, and around University Circle, I could not estimate that because it was dark but it wouldn't be anywhere near 3,000 people there.

Q. Well, give me your best estimate on that?

A. Well, I would say 1500 or 2,000.

Q. In the Grove itself, to be specific now?

A. To be specific exactly in the Grove there wouldn't be more than 500 or 600 people. You see, the streets were lined in front of the Y and all around the Engineering Building and the Chemistry Building.

Q. Did you see the Marshals fire any tear gas?

A. Yes, sir, I did.

Q. You say that some had been fired before you got there?

A. Yes, sir, it had.

• • •

Mr. Gooch: Now, on page 18, at the one, two, third question.

• • •

Q. After General Walker had something—had said something about a peaceful protest, according to you, where did he go then?

A. He stayed around and he carried on a conversation with some of the students and the townspeople who were there at the time.

[fol. 485] Q. Then where did he go?

A. He walked on up into the Grove. He and the Deputy Sheriff walked west toward the Lyceum.

Q. The Deputy Sheriff?

A. And some more students.

Q. Did anybody go with him?

A. Yes, sir, I for one went with him.

Q. About how many followed him?

A. I guess there were maybe five at the most, four or five.

Q. How far did you go?

A. He walked about half way or three quarters of the way up into the Grove.

Q. What did he do?

A. He just looked around and then he walked back out.

Q. Did he say anything else there?

A. No, sir, not a thing.

• • •

Mr. Gooch: On page 23.

• • •

Q. Did you ever hear anybody ask General Walker to attempt to stop the violence?

A. No, sir, no one asked him to stop the violence.

Q. Nobody asked him at all?

[fol. 486] A. Not a soul. The people there, I assume, were for what was going on and General Walker was the only one against it. He tried to tell the students that they would accomplish nothing.

• • •

Mr. Gooch: Down at the bottom of the page.

• • •

Q. Did you consider General Walker to be a public figure?

A. Yes, sir, I would.

Q. Would you say he was a national public figure?

A. Yes, sir, I would.

• • •

Mr. Gooch: On page 26, one, two, three, four, the fifth question.

• • •

Q. Then, General Walker, according to you, never at any time did he climb part of the way up on the Confederate statue to address the group?

A. If he did, I didn't notice it. I am sure he didn't.

Q. You are positive he did not?

A. No, sir.

Q. In connection with the talk that you heard Walker make?

[fol. 487] A. I am not positive that he didn't climb upon that statue, he could have and I didn't notice it.

Q. Well, you were there within seven feet of him?

A. Yes, sir, but at the time I couldn't notice if he climbed up there or not. He might have stepped up on the first step, but if he had mounted it real high, I would have noticed it.

• • •

Mr. Gooch: On page 27.

• • •

Q. Did you ever hear General Walker mention the name of Birdsong?

A. Birdsong?

Q. Yes.

A. No, sir.

Q. Would you say he did not say anything about Birdsong?

A. Who is Birdsong?

• • •

Mr. Gooch: On page 28, the fourth question.

• • •

Q. I believe you said earlier in your testimony that there was a riot situation on the campus?

A. That is the impression I got. They said that tear gas had been fired and the students were running around.

[fol. 488] Q. Did you observe a riot condition when you got there?

A. There was a lot of fighting going on.

Q. Were there any charges towards the Marshals by anybody?

A. Yes, sir, there were sporadic charges by little groups of people all over the campus, from behind the Lyceum and the sides.

• • •

Mr. Gooch: The third question on page 29.

• • •

Q. Did General Walker go up to where the fire truck was?

A. No, sir.

• • •

Mr. Gooch: The last question on page 30.

• • •

Q. Do you know what time General Walker left the campus?

A. No, sir, he was gone about 11:00 o'clock, I am sure, but I didn't know what time it was. As I said, I lost track of time.

• • •

Mr. Gooch: On page 36, the third question from the [fol. 489] bottom.

• • •

Q. Then after he made that talk where did he go?

A. After he made that talk?

Q. Yes.

A. Well, he went on up into the Grove about halfway to three quarters.

Q. To the flagpole?

A. Yes, sir, to the flagpole.

• • •

Mr. Gooch: That is all I have to offer.

Mr. Watts: Turning to page 27 of Mr. Gooch's cross examination where the question was asked, "Would you say he did not say anything about Birdsong?" And the answer: "Who is Birdsong?" And continuing to read;

• • •

Q. My information is he was the head of the Mississippi State Patrol?

A. I think he mentioned the Highway Patrol but I forgot the guy's name.

Q. What did he say about the Highway Patrol?

A. People at that time were saying that Governor Barnett had sold us out and General Walker said, "No, it wasn't, to the best of his knowledge, it was Birdsong or the [fol. 490] Chief of the Highway Patrol." I assume it was Birdsong.

Q. He said Birdsong sold them out, is that what he said?

A. I don't know how he put it, that the Governor of Mississippi is a good man and he would not turn against his people, and he said the Chief of the Highway Patrol was the one that let the Marshals on the campus. That is the way it went.

• • •

Mr. Watts: Now, on page 36 he read the question: "To the flagpole?" And the Answer: "Yes, sir, to the flagpole," and continuing:

• • •

Q. Then he came back?

A. Yes, sir.

Q. Then what did he say?

A. Then what did he say?

Q. Yes.

A. He just stood around and people were asking him questions and that is when Gray and them got up there.

• • •

Mr. Watts: That is all.
Mr. Gooch: Nothing further.

[fol. 491] CECIL HOLLAND, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Your name, please, sir?
A. My name is Cecil Holland.
Q. Your residence?
A. Bathesda—Chevy, Chase, Maryland.
Q. Your Business or profession?
A. Newspaper reporter.
Q. Tell the jury what paper you work for, Mr. Holland.
A. The Star, Washington, D.C.
Q. How long have you been in the newspaper business?
A. All my life.
Q. Would it be a personal question to ask you how long that's been?
A. It's been about 30 years. In business itself.
Q. What school, journalism school, were you a graduate from?
A. None.
Q. How did you get into the profession?
A. Well, I attended the University of Chattanooga and took a part-time job as a Sophomore there and—
Q. Stayed on in it?
[fol. 492] A. Stayed on in it ever since, except for Army service.
Q. What branch of the service were you in?
A. Army Air Force.
Q. And how long have you worked for the Washington Star?

A. Off and on since '38, 1938. I left twice and went back.

Q. Were you directed by your paper to proceed to Oxford, Mississippi, any time during the latter part of September, 1962?

A. Yes, sir.

Q. Did you go there?

A. Yes, sir.

Q. I wish you would just tell the jury, Mr. Holland, please, sir, in your own words, from the time you arrived at Oxford, what you saw, what you heard, what you did and what occurred?

A. Well, I arrived there late on a Friday evening. I had come, I had left Washington Friday afternoon and had an assignment before I got there and I rented a car in Memphis and drove down there.

And I got there late and could not get a place to stay in Oxford, so I drove down to Waterford and had a motel room there.

[fol. 493] Saturday I went back to Oxford. I worked there and finished my story and then went back to Waterford, where I spent the night.

And Sunday morning I got up fairly early and came up, had breakfast, and visited the campus, heard about some troops being brought in at a place I forget now somewhere about 15 miles out of town. We visited that place.

Later went back to the campus and couldn't get on and—because the State Patrol had thrown up barricades.

Later we went out to the airport and were there when the Marshals landed.

Eventually back to the motel and then back to the campus where we waited from 5:30 or 6:00 until we were admitted to the campus grounds at about 7:00.

We stayed there—we walked up toward the Lyceum Building, trying to find someone to talk with particularly from the Justice Department.

We stood out in front for quite a while. Mr. Guthman came out, he said he had one telephone call—

Mr. Gooch: We object to what Mr. Guthman said.
Mr. Watts: Don't say that.

By Mr. Watts:

Q. Who was Mr. Guthman?

A. He was a public relations man for the Justice Department.

Q. Where did he come out of?

[fol. 494] A. He came out of Lyceum Building and we asked him for a chance to talk with him.

Q. Well, now was this daylight or dark?

A. It was dark by that time.

Q. All right, go ahead and tell us what happened, what you saw.

A. Well, while waiting for Mr. Guthman to return, the Marshals had us move—there were a dozen or more reporters gathered out in front. The Marshals had us move around to the side.

Q. Excuse me. Were there any AP reporters among them, or did you know—

A. I don't know. Could possibly have been. I just don't know.

Q. All right, go ahead.

A. I knew some that I had worked with at other places and I know we were together part of the time but there was a milling back and forth and the crowd was—the group of reporters were changing all the time.

Q. You say there were eight or ten of those reporters?

A. Oh, at least that. I made no number of, count of them. We were—

Q. Now, Mr. Holland, so we will orient yourself and the jury, would you step down here just a minute?

North, east, west (pointing) the Confederate monument, [fol. 495] the Lyceum Building?

A. Yeah.

Q. This area is known as "the circle". Could you take this ruler and point out the position where you and this group of reporters were?

A. We were directly in front of the Lyceum Building right there (indicating).

Q. That would be east?

A. Yes, east.

Q. Yes, sir. All right, sir. Take your seat.

A. The Marshals would not let us go through and we were waiting for someone to talk to there because we didn't know what was going on.

Q. If it will help you, stay there at the chart.

A. Well, while we were standing there, the Marshals asked us to move over to the side.

Q. Yes, sir.

A. And we were moved over to this side of the building, which I believe would be the south, I believe so.

And I stayed right in that—some of the reporters went over there (indicating). Who they were, how many, I don't know, because we more or less dispersed then and it was dark and people were milling around and we moved over here and stayed there (indicating), at least for quite a while.

Q. Now for the benefit of the record, "here," would be [fol. 496] just south of the Lyceum?

A. Yes, it was right in this area here (indicating).

Q. Yes, sir.

A. I believe it led down to a gym or some building down this way, I don't know (indicating).

Q. All right, sir. Continue then with your account.

A. Well, we stayed there and I was—I was there when the—I had moved up to this corner as near in front of it as I could get on the outside of the Marshals and I was standing there when the—simply because I wanted to—didn't want to miss Mr. Guthman—when the first tear gas started.

Q. Describe that incident to us in as much reality as you can remember.

A. Well, I was standing back here at one point and when the order came for the Marshals to don their tear gas masks, and I moved back somewhat—

Q. Do you remember that order?

A. Just the call, "gas," is all I could distinguish. And it came from—it sort of seemed to me to be picked up and carried around the building, I don't know.

And I was there when that call came. And they took out the gas cannisters and then the call came, was for them to—I forget the, what the technical name was, but anyhow, they returned the cannisters to their pocket and [fol. 497] took off their masks.

And I moved back up here for the same reason that I said: I was trying to see when Mr. Guthman would come out. I stood there and was standing there (indicating), when the gas was actually fired.

Q. Tell us about it.

A. Well, there was just a sudden order and gas flew and I turned immediately and retreated down this way (indicating).

Q. Now where were the Highway Patrolmen when that order came?

A. Well, there was a large group at the scene—I had walked straight up and down this way (indicating) and there was some groups, some parts of them came this way and some had moved, as best I could tell, into this direction.

Q. Where were the students?

A. Well, into the trees where students had been. I couldn't see at that particular time and I moved up behind them simply to keep an eye on the entrance of the Lyceum Building.

Q. Now when gas was fired, was there only one round or was it a salvo-type of operation?

A. Oh, there was quite a bit of gas fired there. I don't know how many rounds or what it was.

The wind seemed to be blowing from this direction [fol. 498] (indicating), and it seemed to carry it right back towards us where we were.

Q. Yes, sir. What occurred then?

A. Well, there was sporadic firing from time to time. Sometimes heavy, sometimes not so heavy; sometimes we

would be driven away back down this way (indicating) to get out of the way of the gas.

Q. What happened to the highway patrolmen when the gas was fired?

A. Well, some of them, they withdrew, too, and some of those that had come down in front here came out with tears streaming from their eyes, just as—well, as anyone in the area that caught any of this gas. They did not have gas masks on when I saw them.

Q. And from that time on, Mr. Holland, what was the activity of the students or the Marshals, whoever they were, out in front of the Marshals?

A. Well, I couldn't say who all was out in front because it was somewhat dark and this tear gas, the clouds were—

A. Yes, sir.

Q. Going back and forth. More of the activity seemed to be on this side than over here (indicating), though at times there was some activity down this direction (indicating).

Q. What do you call "activity"?

[fol. 499] A. Well, there would be cries and shouts and then the Marshals would move out and throw some tear gas and then they would come back and there might be a little lull and then it would be resumed.

Q. Did you ever see a generalized movement or mass charge of a large number of students?

A. From where I was and with the tear gas that was there, I could not distinguish anything because I quickly got a lot of tear gas in my eyes.

Q. Yes, sir.

A. And I just—I had to go way back down here (indicating) and then I would come back and you would catch some more and then you would move back again because—and it was fairly dark on there and the lights, there was no general lights and I could not tell what was happening down in this area. I couldn't see any movements of people except small groups maybe that come up in this direction this way (indicating).

Q. And what would those small groups do?

A. Well, I could see people there and then I might see the Marshals move out. I couldn't see what they did because I kept back on this side (indicating).

Q. Did you see any rocks, bricks, bottles, missiles or anything of the kind in the air, flying around?

A. Well, I didn't only see them, you could hear things [fol. 500] hitting places and I don't know exactly what they were or what else because—

Q. Were there other newsmen around you?

A. At that time, no, because I had lost track of all of them. I had moved up and down and I don't know what happened to them, only by hearsay later as to what—

Q. Well, don't tell the hearsay. Go ahead and tell us what happened, just draw us a picture.

A. I stayed in this area back down in here for quite a while, must have been an hour or more (indicating).

Q. Yes, sir.

A. Just how long, I am unable to say because—and I consulted my notes the next day, I could not find just what the timing was in this because—

Q. As a reporter, did you keep notes of your activities?

A. I didn't attempt to at that time.

Q. I see. Go ahead.

A. I finally decided that I wanted to come around and get on this side (indicating) and I didn't think it was quite wise to move down this way, come from this area, I didn't, and being a civilian I didn't know what—I just couldn't tell what was going on, so I—

Q. Could you estimate the time from the period the first gas was fired until you decided to move and did move?

A. It was an hour or more. Could have been an hour [fol. 501] and a half but I'm inclined to think it was something a little less than an hour and a half, I—

Q. Yes, sir, but—what would you fix as the time when gas was fired?

A. Well, I know that pretty well because it was right—I kept that time because we were also interested in check-

ing it later because it was about the time the President was speaking. It might have been a minute—I don't believe there was more than a minute or two's difference in the time, and I think he was supposed to be speaking at 10:00 o'clock, Washington time. I mention that only because I kept my watch on Washington time.

Q. What would that have been local time?

A. 8:00 o'clock, I believe, at that time.

Q. And you think it was within a minute or so—

A. I think it was very close. I couldn't say definitely.

Q. All right, go ahead.

A. Well, eventually I decided that I wasn't, not accomplishing anything here. I wasn't—I was unable to get into the building.

Q. Yes, sir.

A. And I came back down this way and I think somewhere down here (indicating) is the gate, I'm not quite sure where it is. But I asked the highway patrolman there which was, how could I get out to the, I think it was, high-[fol. 502] way 6, I believe, that ran out to the airport.

Q. Yes, sir.

A. It went on that side of University (indicating). And he said, "It's down there," and about that time some man alone in a car came by and I asked him if he would give me a ride and he was kind enough to do so.

Q. Could you identify that individual?

A. I can't by name. He told me his name. He was an English instructor or some instructor. I won't even be sure it was an English instructor now.

Q. With the college?

A. With the college.

Q. Yes, sir. Go ahead.

A. Well, at any rate, he said he would like to see what was going on, on this side, so somehow he brought me in something around like this (indicating) and we came out somewhere in an area—I don't believe we were down this far. We could have been because we made a left turn and turned back up the, this driveway that goes—no, wait a minute. I have got it wrong.

Came back around in this way somewhere (indicating). I don't know where, quite how we came in because I was not familiar with the campus at that time.

Q. Yes, sir.

A. Then we drove to turn back up this way (indicating), [fol. 503] and just about the time we did that, there was a, quite a mass of students. I can't estimate the number but—

Q. Yes, sir.

A. —the car was surrounded and there must have been some activity up here that I don't know what it was.

[fol. 504] Q. Could you see that far from where you were?

A. You could see some activity going on but I couldn't tell what it was. Of course, the Marshals would move out that way with a very heavy barrage of tear gas.

Q. From the time you drove up there in that car could you see well enough toward the Lyceum to make out the form of specific Marshals?

A. I could see individuals and I assumed they were Marshals because of their helmets and jackets.

Q. That is you could see shapes and forms?

A. Shapes or forms, yes, sir, but there was quite a barrage of tear gas that came at that time, and this man who picked me up said, "I want to get out," and I said, "I do too," so he took me out and somehow, I think we came back down here (indicating). He brought me down University Avenue and let me out at the corner. I am not sure whether it is Main Street or not. I believe it is about one block further from the Ole Miss Hotel. I had left my car at the Ole Miss Hotel and I wanted to pick it up.

Q. All right. Very briefly, after you left the campus, just go ahead and tell us what else you saw?

A. Well, since I had no room in the motel myself, I—a friend of mine with the Baltimore paper had told me that I could use his room as my headquarters. He had a special 'phone set up in there and I went in there and talked [fol. 505] briefly with him for some time and then I started

back to the campus. I believe at that time he told me what news—what developments he had.

Q. Well, don't tell me that, you are not supposed to say what he told you.

A. Well, I am just saying he told me that, and then I told him I would go back to the campus. His was a morning paper so he had to keep much closer to the 'phone than I did. Mine was an afternoon paper. So, I had a lot more time.

So, I got my car, which had been parked down there, and started back and decided then I would stop at the Mansion Restaurant and get a cup of coffee.

Q. Where was this—was it the Mansion Restaurant or the Mansion House?

A. Mansion House, I—one or the other. I am not sure. It was about, I suppose, not more than a block from the intersection of University and Main Street, heading toward the square.

Q. To identify it, about how—about halfway between University and the Courthouse on the square?

A. Roughly that I would say.

Q. And on the west side of the street?

A. You have got me now on that. It was on the left as you head toward the Courthouse. I suppose that would [fol. 506] be the west side.

Q. Typical of an airman, but go ahead. How long did you stay there?

A. Well, I went in with the intention of getting a cup of coffee and it suddenly occurred to me I hadn't had anything to eat since breakfast. I asked the proprietor if I could get something and he said well he didn't know.

Q. Well, did you eat there?

A. He said, "I think all my help is gone." But he said, "If my help is not gone I will fix it for you myself."

Q. Where did you go after you ate?

A. I immediately went back to the campus.

Q. Tell the Jury what you saw?

A. Well, I got back there and just moved around in the Circle on the east front of the Lyceum building where most of the activity was taking place.

Q. What was that activity at that time?

A Well, it varied. It was throwing of rocks, bricks, sorties toward the building.

Q. Was it any organized operation you could see?

A. There seemed to be some measure of organization; to what extent it was I can't say.

Q. Well, just describe to the Jury what groups would participate, and how many there would be, and what they [fol. 507] would do.

A. I can't give any estimate in numbers. It would just be a big crowd there. The main trouble with estimating number of how many were participating was the fact that there were so many onlookers there including some women.

Q. What were the onlookers doing?

A. They were just watching.

Q. How were they—what was their activity?

A. Well, a lot of them were standing on steps of building, just watching the activities going on. There were some bricks that were being thrown, there was some source of bricks that would be brought up there, and they would take them and break them on the curbstone. They seemed to have something of a supply system.

Q. Go ahead and tell us what else you saw?

A. Well, I moved around from time to time there, from one part of the campus to another. First, from the right side facing the Lyceum Building to the left side, as the activity would change and I talked to some—some of the students very briefly and very casually. I kept an eye out. I was trying also to find General Walker.

Q. Did you ever find him?

A. I did.

Q. Could you point to the Jury with the pointer where [fol. 508] you found him?

A. To orient myself.

Q. Get oriented. There is the Circle right in the middle.

A. I found him—

Q. First, put your finger, your pointer on the monument.

A. Here is the monument here, and I found him roughly in that area there.

Q. I see. All right.

A. He was standing under—in the shadow of a tree, as I recall.

Q. Was that generally as you pointed, generally south of the monument?

A. South, southeast.

Q. All right, go ahead. What was he doing?

A. He was standing with a young man that I met later and recognized as having been with him down at the Ole Miss Hotel.

Q. Had you attended a news conference or something at the Ole Miss Motel?

A. No, I was late getting there for that. I came in while it was going on, but by this time the Marshals had moved on to the campus and I did not stay for that.

Q. But you did see this lad with Walker at the motel?

[fol. 509] A. Yes, sir, I did.

Q. Were you able to identify him later on?

A. When I met him, yes, sir.

Q. Did you actually meet him and shake hands with him?

A. Yes, sir.

Q. Now, what was Walker and this boy doing?

A. They were standing there.

Q. Tell the Jury what was going on, who was around them, what was being done and what was said.

A. Well, I had wanted to see General Walker. I had heard he was on the campus and I had, while watching trying to observe what else was going on, I had kept my eye open for him.

Q. Just go ahead and tell us without getting into hearsay.

A. I finally saw someone that I thought I recognized by the poor lighting that we had, which was General Walker. I had met him before so—

Q. Where had you met him before?

A. I had met him in Washington, D. C.

Q. Under what circumstances?

A. He was a witness in a Senate hearing there and I met him one night when I had arranged to try get an ad-
[fol. 510] vance copy of his testimony.

Q. Was that along in April, 1962?

A. I can't remember the month. Must have been about that time.

Q. Could you recognize him from that previous brief acquaintance?

A. I thought I recognized him.

Q. All right, sir. Go ahead and tell us what happened.

A. I went up to him and asked him if he was General Walker, and then I introduced myself. He introduced me to this young man whose name I never—if I got it, I didn't recall it, and we talked at some length there.

Q. Did you stay right in that place, or did you move around?

A. We stayed there a little while. While we were there I think the General—some activity had occurred up on our left, which I think would be the south side of the Circle there.

Q. Would that be up toward the Lyceum?

A. Up toward the Lyceum. The General asked the young man to go up and see what it was, and I think while he was gone—I am not positive about this—that I suggested that we move. I wanted to move up closer to see if I could see what was happening.

[fol. 511] Q. What was the visibility from that point, Mr. Holland?

A. It was pretty difficult to see. It was pretty difficult to see because not only was the lighting very poor, but also there was often tear gas or something that was in the air, and it was hard to see.

Q. What was the weather conditions that night? Was it wet or dry?

A. I recall it was a pretty pleasant evening other than—

Q. Do you know whether it was overcast or moonlight?

A. I don't recall that.

Q. All right, sir, go ahead.

A. Well, we moved at my—I suggested we move, because I wanted to get up closer. We moved from about right there (indicating) to maybe right in here somewhere where this crosses here, coming down.

Q. What did you observe from that position?

A. You couldn't see too much more.

Q. What was your gait as you moved up there?

A. Pardon?

Q. What was your gait as you moved up there? Did you walk or did you run?

A. We just walked across the street.

Q. How long did you and General Walker stay there?

[fol. 512] A. Well, I talked to him there and while I was talking to him there there was quite a bit of activity that occurred over on this side of the Lyceum.

Q. What was that activity?

A. Well, it seemed to me, as I recall now, that they began throwing Molotov cocktails and things, and so I left General Walker and walked over to see what it was. I went by myself there.

Q. Was that the first activity of that kind you had seen?

A. I believe it was.

Q. What did it look like, a bright flash?

A. Oh, yes, sir, a bright flash when a bottle would burst.

Q. Who went with you over there?

A. I went alone.

Q. All right, sir. What did you observe?

A. I saw some of the activity going on, saw some of the bottles being hurled.

Q. Did you see them making the missiles?

A. Not at that time, but later.

Q. Where was that activity?

A. In the same area.

Q. How were they making them?

A. Pouring gasoline into bottles, or some kind of con-
[fol. 513] tainer, and throwing it.

Q. Then what happened?

A. I walked back to talk some more to General Walker, and I believe I talked with him then. I am—to be frank to say, I can't remember whether I left him once or twice.

Q. Uh-huh.

A. I think it was twice.

Q. Yes, sir.

A. And then I came back and we talked some more.

Q. Have you tried your very best to recollect in detail that incident?

A. I have, and I just can't recall whether it was one or two times I personally left.

Q. Yes, sir.

A. And always alone.

[fol. 514] Q. All right, go ahead.

A. I left and came back. And assuming I did leave again, I came back a second time, and a group, there was a group around him of three or four, as best I could tell. So I did not go up to him that time but went off to watch something else, and that was the last time I saw him.

Q. You have been a newsman, you say, some 30 years?

A. Yes, sir.

Q. Did you see him any more that evening at all?

A. Not any more, on the campus. Not until the next day.

Mr. Watts: I believe that is all, Mr. Holland.

Cross examination.

By Mr. Gooch:

Q. Mr. Holland, did you say anything to General Walker about having led a charge?

A. I did.

Q. Did he affirm or deny it?

A. He didn't answer.

Q. Now as I get the testimony you got on the campus there before the gas was fired and you stayed there for a considerable length of time. I guess you were trying to observe everything that a newsman tried to observe?

A. Correct, sir.

Q. Then you started walking away from the tear gas, [fol. 515] came back over on the east side of the campus, I suppose you milled around with the crowd there some?

A. Very much so.

Q. Did you fix, attempt to fix the time? You fixed the gas being discharged about 8:00. What time would you say you got back around to the—

A. I think it must have been about 11:00 or later when I got back because I know, having left there, I went down—I stopped and had dinner before I came back.

Q. Then you didn't get on the east side of the campus, you did come back on the north side?

A. I come back on the east side, but I didn't get out of the car. I drove by—he let me out at the corner. I walked down to get my car, spent some time talking with my newspaper associate friend, started back to the campus, stopped and got dinner. So it must have been 11:00 or later when I got back on the campus.

Q. Now the only conversation you had with General Walker, I believe you asked him—did you say to him, "I hear you led a charge?"

A. Or "I understand you led a charge." I understand you led a charge.

Q. What was his reply?

A. There was no reply.

Q. You say you have known General Walker for some time?

[fol. 516] A. I had met General Walker a few months previously when he came to Washington to testify.

Q. Did you consider General Walker a public figure?

A. Yes, sir, I considered him a public figure.

Q. Did you consider him a national figure?

A. Yes, sir.

Q. Now I assume at the time that you were down there you went down there to write a story, did you not?

A. Yes, I did.

Q. And you did write a story?

A. Yes, I did.

Q. Did you carry that story under a byline?

A. Yes, sir, I did, or my office did. I have nothing to do with that.

Q. I mean—what does it mean when you have got your "by somebody," does that mean they wrote the story?

A. It means they generally wrote the story. There might be some changes or additions but—

Q. In other words the story, if they say it is "By Cecil Holland," the story is principally by Cecil Holland, but they might add a few things?

A. They might add something, yes.

Q. They don't change the context, or do they?

A. Well, I don't quite understand.

Q. I am trying to find out what it means when you have [fol. 517] got a byline in a newspaper.

A. Well, the context on a matter of this kind is mostly descriptive and things of that kind.

Q. Well, who would have given the description to the newspaper, if it was carried under your byline, before the story was written?

A. Basically what I gave them would be it.

Q. I hand you here, sir, what purports to be a photostatic copy of Evening Star, and over on the right-hand side under the headline, "Troops Fire Over Oxford Mob After Quelling Campus Riot, Meredith Registered, Two Die, Scores Hurt, Bulletin," and then, "By Cecil Holland".

Now did you write the story as appears in this paper?

A. I wrote a large—most of the story. Some inserts I did not write.

Q. Would you say for the most part the story that appears under your byline in the Evening Star on the date October 1st, 1962, was matters that you reported to your newspaper?

A. Yes.

Q. Now you were in no way connected with the Associated Press, were you?

A. I was working alone.

Q. You were an employee of the Evening Star?

[fol. 518] A. Yes.

Q. You had no connection whatsoever with the Associated Press? Personal?

A. You mean personal connection?

Q. Personal.

A. Personal, that's right.

Q. And this story that you have written here, was that written based on the Associated Press report, or what you saw and observed?

A. I saw no Associated Press report.

Q. Did you see any Associated Press report before you wrote this story?

A. No. You mean actual copy or something?

Q. Well, any newspaper reports or anything?

A. No, I was told about some.

Q. Did you use any Associated Press report in writing the story you wrote under your byline on October 1st?

A. Not personally, no.

Mr. Andress: Judge, I can hardly see the witness with Mr. Gooch standing there. Perhaps it would be easier if he took his seat.

The Court: Well, Counsel, I permit Counsel to stand up here when they are asking witnesses about an exhibit. Go ahead, Mr. Gooch.

By Mr. Gooch:

Q. Do you identify this paper as being a photostatic [fol. 519] copy of the edition of the Evening Star of October 1, 1962?

A. I do.

Q. You identify the byline of Cecil Holland?

A. I do.

Q. Would you say that that story was written in the main by yourself on information you furnished the Star?

A. Information I furnished the Star, yes.

Q. And—

A. It was sent by telegraph. Let me—may I state—pardon me. I was thinking of an earlier edition. A lot of this was telephoned.

Q. Telephoned?

A. Yes, sir.

Q. All right, but at the time you wrote the story you had neither seen nor talked to the Associated Press reporter?

A. The only qualification I would say I might have spoken, said hello to one that, if I had seen him, that came from Washington. But not any discussion.

Q. Did you get any information on which you wrote this story from any Associated Press reporter?

A. No, sir.

Q. Did you see any news releases by Associated Press reporters before you wrote this story?

[fol. 520] A. No, sir.

Mr. Gooch: We would like to offer in evidence, if the Court please, this Defendant's Exhibit 2, I believe it would be and I would like permission to read it to the jury.

The Court: Have you seen it?

Mr. Watts: No, sir, I haven't seen it. Mind if I ask the witness a qualifying question?

The Court: Yes, sir.

Mr. Watts: I notice something in here about an incident that occurred on the Oxford square the next day. Did you see General Walker on that square?

A. I saw him off the square one time.

(Conference at the bench.)

Mr. Watts: Do I understand, Mr. Holland, you did not see Walker on the square?

A. If I may answer.

Mr. Watts: Sure.

A. I saw him when he came down to the Mansion House restaurant and tried to get in.

Mr. Watts: That was the following day?

A. Yes, sir, this is the following day. This new lead is based on what happened in the square that day.

Mr. Watts: The next day?

A. The next day.

[fol. 521] Mr. Watts: And how long did you see Walker at the Mansion House restaurant?

A. Well, he came up and tried to get in. The door was locked. He turned and left and that was the last I saw of him.

Mr. Watts: That is the extent of your contact with him the following day?

A. Yes, sir.

Mr. Watts: If the Court please, I object to any— Well do you have any comment in here about Walker being on this square that was not acquired from your seeing him on the square?

A. No, other than what I saw there.

Mr. Watts: And what you saw was at the Mansion House restaurant at least a block and a half from the square?

A. Yes, sir.

Mr. Watts: If Your Honor, please, except where it has the comment about Walker being on the square, it obviously came from somewhere else.

[fol. 522] The Court: That may be a matter of cross examination. I will permit Mr. Gooch to go ahead and ask additional qualifying questions.

Mr. Watts: Excuse me. Might I finish looking at the article, please?

By Mr. Gooch:

Q. What I am specifically asking you now, Mr. Holland, and the things that are interesting to me in connection with this question, is not what happened on Monday morning, October the 1st. I am confining the matter now to the matters reported in this article as happening on the campus of Ole Miss between 8:00 o'clock, p.m., on September the 30th, 1962, and, say, 12:00 o'clock, midnight.

Now in connection with that, does this article that you have written for the Evening Star represent accurately your portrayal of the things that you saw and observed there on the campus of Ole Miss that night?

A. Well, sir, I haven't read the article. I don't know whether I have read it since I dictated it and if you would be specific and ask me points, because I—my office might well have inserted some material in the story.

Q. Might have. I just was wondering because it was under your byline.

A. Well, that is not unusual.

Mr. Andress: Your Honor, the story under his byline is about what happened the following day. The story that's [fol. 523] in here about what happened on the campus is on the byline of one Tom Joyce and we ask that the Court look at that.

The Court: I'm going to wait until Mr. Gooch finishes attempting to qualify the witness.

Mr. Andress: All right, sir.

Mr. Gooch: Where is Tom Joyce?

Mr. Watts: Down at the bottom where it's underlined in red.

Mr. Andress: The story about what happened on the campus is the Tom Joyce story. This is the Oxford mob in the City of Oxford the following day.

Mr. Gooch: You haven't read this then, Brother?

Mr. Andress: I read it pretty good.

Mr. Watts: I move to strike the family relationship.

Mr. Gooch: I want to offer in evidence the story that this gentleman wrote who says he wrote concerning the matters that happened on the campus at Oxford, Mississippi, between 8:00 p.m., and 12:00 midnight, on September 30th, 1962.

Mr. Watts: To which we have no objection to anything in there that occurred the night of September the 30th.

The Court: All right, I will admit that part of it.

[fol. 524] That's Defendant's Exhibit 2, Mr. Nuss.

Mr. Watts: If Your Honor please, on second thought, I will object to the article because that's not—something this man has written is proper for cross examination.

Now a newspaper article per se is hearsay and I think it is grossly improper to just—we all know how newspaper articles, the problems we have—and I think in cross examination of a witness, you can ask a man if he said certain things but laying a newspaper article before a jury with all the other things that are in there is grossly improper and I must object to it.

The Court: Overruled.

Mr. Watts: Yes, sir.

Mr. Gooch: Let me get down to now where we—I am reading now from the Defendant's Exhibit 2.

Mr. Andress: Judge, we are going to object to his reading from it until it has actually been proven up and introduced.

The Court: It's been admitted, Counsel. I just got through admitting it.

Mr. Andress: Oh, you did admit it?

The Court: You may proceed.

Mr. Gooch: I would like to finish this in one time.

[fol. 525] The Court: You don't think you will have time?

Mr. Gooch: No, sir, it's quite lengthy.

The Court: Ladies and Gentlemen, we will recess until 2:00 o'clock. Keep your seats in the courtroom, please, until after the jury retires.

(Defendant's Exhibit No. 2, was marked for identification.)

(Thereupon, at 11:53, a recess was taken until 2:00 o'clock, p.m., of the same day.)

[fol. 526] Afternoon Session

(2:00 o'clock, p.m.)

The Court: All right, Mr. Gooch.

Mr. Gooch: I am waiting for the witness.

CECIL HOLLAND, resumed his testimony on cross examination as follows:

By Mr. Gooch:

Q. Mr. Holland, for continuity, I believe that just before the noon recess, I had asked you if you reported to your newspaper on October 1st, 1962, your version of the events that had occurred on the campus of Ole Miss between, we'll say, 8:00 o'clock, p.m., and 12:00 midnight of September the 30th, 1962?

A. Yes, sir.

Q. Did you understand that to be my question?

A. Yes, sir.

Mr. Gooch: And Your Honor had admitted into evidence this article.

The Court: Relating to that period of time.

Mr. Gooch: I will not read what happened on October the 1st. This is just, as I view it, on this witness' story relating to the events on the campus: "The campus rioting—" I am beginning here on Page 6, Mr. Watts.

Mr. Watts: All right, sir.

[fol. 527] (Sotto voce conference between Counsel.)

EXCERPTS FROM DEFENDANT'S EXHIBIT 2

Mr. Gooch: "The campus rioting punctuated with gunfire from the rioters' ranks broke out last night as students and many outsiders vented their anger over the entrance of Mr. Meredith to the 114-year-old institution.

"The riot raged throughout the night as students and outsiders repeatedly attacked several hundred Marshals who had brought the Negro student to the campus late in the afternoon.

"Regular Army troops were ordered here from their staging area in Memphis, Tennessee, when the situation rapidly got out of hand under the cover of darkness.

"Mississippi's Lt. Governor, Paul B. Johnson, Jr., visited the campus at the height of the rioting and warned Justice Department Officials, who are here, to expect more violence and possibly bloodshed during the day.

"The Lt. Governor was said to have expressed fears that many from outside Oxford, outside of Oxford, were on the way here to join in battle against integrating the University.

"One of those killed in the campus rioting was a French newspaperman Paul Guihard, representing the London Daily Sketch and a French news agency. After one of the early student forays, he was found dead with a wound in [fol. 528] the back.

"A 23-year-old jukebox repairman, Ray Gunter, of Oxford, also, was fatally shot. He was taken from the University campus to Oxford Hospital, where he was pronounced dead on arrival.

"A United States Marshal, Graham Same, was critically wounded by a gunshot in the neck and was flown to the hospital at the Memphis Naval Air Station for emergency treatment.

"Another Marshal was wounded in the thigh by rifle fire.

"Newsman Bill Crider of the Memphis staff of the Associated Press was wounded in the back by a burst of birdshot. Several members of the Mississippi State Patrol also

were wounded. Mr. Crider's wounds were not serious. He was treated and soon returned to the campus."

I'm omitting a reference to the Friday incident.

Mr. Watts: Right.

Mr. Gooch: "United States Marshals attired in riot jackets and helmet liners earlier had turned back the attackers time after time in a battle they fought with tear gas and smoke bombs.

"The attackers used bricks, iron pipes and, as the night wore on, turned to Molotov cocktail bombs made from soda bottles filled with gasoline.

[fol. 529] "Cars and television trucks were smashed and one was burned as rioters turned on a newspaperman and television cameraman with a widely separated number of attacks.

"Mr. Walker, the man who led the troops ordered by President Eisenhower into Little Rock in 1957, in another desegregation crisis, led a thousand college youths in one charge that fell back a hundred yards from the Marshals. Mr. Walker jumped on the campus Confederate memorial and yelled, "If you can't win, go home, don't stay at the University. But let's not quit. We can win."

"The Marshals, while armed, used only their tear gas bombs and never fired on their attackers.

"A Justice Department spokesman inside the beleagued building said one time they fired warning shots in the air and another time punctured a fire hose being used by the students. They were harassed and under danger from intermittent gunfire which came from a hidden sniper who potted away at the buildings.

"The plight of the Marshals was becoming increasingly serious, as the first military unit arrived on the campus. This was the Oxford contingent of the Mississippi National Guard which had been federalized by the President. Its commander, Capt. Murray Faulkner, a nephew of William [fol. 530] Faulkner, the author, who lived in Oxford, was among those injured. He was struck on the arm with a hurled brick.

"The students and the outsiders borrowed, as one said, a bulldozer and a fire engine and used these in an effort to run down the Marshals and get close enough to hurl bricks. The bricks and timber used to set barricades on the drives leading to the Administration Building were taken from a Science Building under construction close at hand.

"The Marshals, for the most part, stayed close around the building, except for forays to drive the attackers back. They captured 31 prisoners during the night's rioting. Two of these were operating the bull dozer and the fire truck. The truck made two successful runs close to the Marshals before it was stopped amid a cloud of tear gas. The operator, a Justice spokesman said, was not a student.

"Most of the actions and the bitterest fighting took place in front of a tree-spotted park-like area called University Circle. It is adorned with a monument as a memorial to the Confederate dead of the Civil War.

"The whole area is strewn today with debris of the fighting. Empty tear gas cannisters, smashed and burned auto-[fol. 531] mobiles and television trucks, broken bricks, logs and slashed fire hoses.

"The rioters went wild when they learned that Mr. Meredith, who had been denied admission three previous times to the University, had been brought without incident on the campus.

"Obscenity filled the air. The rioters' wrath was directed more at the Marshals than at the Negro student who had been housed under heavy guard in an apartment on the campus to await enrollment today.

"It came after Deputy Attorney General Nicholas deB. Katzenbach and other high Department of Justice Officials, who arrived here in an air force plane, conferred with the University Officials, including Chancellor J. D. Williams in the Main Administration Building. With a wild assortment of yells, screams and curses, the rioters moved on the Marshals surrounding the building. 'You blank Negro lover,' and, 'Why don't you bring Kennedy down here,' were some of the cries that filled the air thick with flying brick bats.

"When word filtered into the ranks of the rioters that a Marshal had been shot and seriously wounded, a cheer went up. The rioting broke out in frightening fashion as darkness came.

"In a short while Mississippi State police, several hun- [fol. 532] dred strong were withdrawn from the immediate fighting area and then moved off the campus.

"This left the Marshals and a small contingent of Army Engineers, sent here as a house-keeping unit for the Marshals, to hold off the repeated attacks.

"With State Police gone, the entrances to the University campus were left wide open and anyone who wished could walk down the darkened streets toward the Administration Building. The building was often bathed in drifting smoke from the bombs that had been set off.

"As unexpectedly as the State police roadblocks were called off, they were restored four hours and 45 minutes later just as the Regular Army forces began appearing on the campus.

"This blocked off the University grounds from groups of men who seemed to be heading there in increasing numbers.

"The night's wild disorders came after an ominously quiet weekend here marked only by a few hijinks over Ole Miss's football victory over Kentucky Saturday night at Jackson, the state capital.

"Tensions began building up when reports filtered through the town that some move could be expected soon to bring the Negro student here for registrations.

"Rumors flew thick and fast and the tension grew as [fol. 533] word came that President Kennedy had taken control of the Mississippi National Guard. Angry mutterings were heard then and later about this action.

"The State police, which had disappeared from Oxford late Friday, returned in force early Sunday. They sealed off the campus and would permit no one except students and those living on the campus. Newspapermen who had been given press quarters in the Administration Building were denied admittance.

"Early in the morning the engineers had arrived at Graham Lake, 15 miles from Oxford, and set up a housekeeping camp for the Marshals.

"At 2:00 p.m., amidst all sorts of rumors, the Marshals arrived at the Oxford University Airport. First, a DC-6 and then four two-engined planes had landed and all were filled with Marshals.

"Chief United States Marshal James McShane and his Assistant, Jack Cameron, descended from the four-motored plane and went to a telephone with Mr. McShane clutching a fistful of dimes.

"Soon seven Army trucks drove up. The Marshals, numbering about 70, lined up near the tracks in straggly military fashion. They stood and waited.

"A little later an Air Force jet swooped down and disgorged Mr. Katzenbach and other Justice Department [fol. 534] Officials.

"After more telephoning and conferring the officials and Marshals climbed into troop carriers and three sedans and took off from the airport.

"Midway to the highway they met a Mississippi Highway Patrol car carrying Col. T. B. Birdsong, State Safety Commissioner, and University Chancellor J. D. Williams. Another conference followed and then the caravan moved off. [fol. 535] By this time hundreds had gathered at the airport and lined the road leading into town. Much to everyone's surprise the caravan turned abruptly into one of the University gates without opposition from the State Police guard. Within a few minutes the empty troop carriers came out another gate and went back to the airport. The Marshals quickly surrounded the Administration Building and three hours later Mr. Meredith was brought to Oxford. He landed in a small plane at the airport accompanied by John Dohr of the Justice Department and a Marshal, and was taken without incident through a gathering throng along the road to the University.

The reporters, not allowed in, watched from the entrance several blocks away. They could hear yells and jeers occa-

sionally and got frequent reports from students who came and went.

As dusk came the mood of the crowd within the University grounds and outside began to change.

At the airport Mr. McShane was asked by a young woman in toreador pants for his autograph for her son. A few hours later a mob, first of students and then students and outsiders, was crying for his blood.

About dark reporters suddenly were allowed within the grounds. Television cameraman Gordon Yoder, of Dallas, and his wife, a native of Jackson, Mississippi, were the first [fol. 536] to reach the University circle. Mr. Yoder left his car to take pictures and was set up. As State Police stood by went back to his car where both he and his wife, who was driving, came under attack. Headlights were kicked out, windows smashed and eventually the rioters began rolling the car to overturn it with Mr. and Mrs. Yoder inside. The State Police took them out and away as the mob wrecked the car. Mr. Yoder also lost a camera. At the entrance to the Administration Building a Shreveport television man was manhandled, and an Atlanta, Georgia, reporter was struck by the cry, "Damn Yankee, go home."

Three troop carriers, one with a Negro driver, was the target of some of the rioters. Flaming torches were hurled at the canvas tops of the truck and the Army men were kept busy putting out the fires.

It soon became evident that Attorney General Robert F. Kennedy and the President had sent too little force to cope with the situation and it was too late, for the moment, to get in support and forces.

Edwin O. Guthman, the Justice Department public relations officer who had come to Oxford came out and said in ten minutes he would meet with reporters at a nearby motel for a briefing on what had happened. The briefing still has not been held and the reporters contact with Mr. Guthman inside the Administration Building had been by [fol. 537] telephone.

The students and others kept pushing in on the Marshals standing shoulder to shoulder around the building. There were cries, "tear gas" and the Marshals donned their masks and took out their containers and readied their tear gas guns. Then the order would come, "Hold gas" and a little later, "Secure gas."

All of a sudden the explosion came. The order came and this time a cascade of canisters and tear gas bombs fell amidst the advancing students. A squad of State Police and newsmen were caught in the fumes. Mr. Guthman explained later that Chief Marshal McShane gave the order after a piece of iron pipe had been hurled at a Marshal and left a big dent in his helmet liner.

Inside the building Col. Birdsong was asking the Justice Department official if they wanted the State Police to remain. He was told they did. A Mississippi official recommended that Military troops be called out and at 8:30 p. m. central standard time the order for troops went out. Then the State Police, angered because they were caught in the first tear gas barrage and resenting, it seemed, the presence of the Marshals, began withdrawing. Orders came up to them to keep back from the fighting lines. Conditions rapidly worsened without the presence of the State Police. The attacks on the Marshals grew bolder and more and [fol. 538] more people, including women and girls, were pouring into the fighting area. There were advances and threats, depending upon the volume of tear gas."

Now, Mr. Holland, does that article which I have read concerning the incidents on the campus reflect the report that you made to your paper?

A. In most particulars, yes.

Q. I believe you have stated, and this is repetition, but I wanted to ask it again, if I may, that that report was made without conference or consultation with any AP newsman, is that correct?

A. Yes, sir, that is correct.

Q. You had not—do you know a reporter for the AP by the name of Van Savell?

A. No, sir.

Q. Had you ever met him?

A. No, sir.

Q. Had you talked to him prior to the time you wrote that story?

A. If I did, it was just among a group of reporters without knowing.

Q. Did you read or see any AP news report prior to the time you called that story in to your paper?

A. No, sir.

Mr. Gooch: That is all.

[fol. 539] Redirect examination.

By Mr. Watts:

Q. Mr. Holland, you have talked to AP personnel, including Mr. Leon Pearl of New York, the chief counsel for the Associated Press, haven't you?

A. Since that time?

Q. Yes, sir.

A. Yes, sir, since that time.

Q. When and where was that conversation held?

A. With Mr. Pearl?

Q. Yes.

A. It was in Washington, D. C.

Q. Is Mr. Pearl in the room?

Yes, sir, the gentleman standing there, is that the man?

A. Yes, sir.

Q. Roughly when was that conversation held?

A. I just have to guess now.

Q. Well, this year, last year?

A. I think it was last year, I believe.

Q. Now, if I understand, Mr. Holland, this long article that counsel has read has the by-line, "By Cecil Holland, Star Staff Writer". That is yourself.

A. Yes.

Q. Now, you answered his question that some of these [fol. 540] statements in the article were reported by you to your company or to your paper; is that right?

A. I didn't quite understand.

Q. You answered, as I understood it, Mr. Gooch's question to you that some of the statements he had read were reported to you by your paper?

A. Yes, sir.

Q. And do I take it, then, some of them were not?

A. Some of the statements in that story were not mine.

Q. Were not your story?

A. Were not mine.

Q. Now, let me ask you particularly about this statement. "Mr. Walker, the man who led the troops ordered by President Eisenhower into Little Rock in 1957 in another desegregation crisis, led 1,000 college students in one charge that fell back 100 yards from the Marshals. Mr. Walker jumped on a campus Confederate monument and yelled, 'If you can't win, go home. Don't stay at the University; let's not quit, we can win.'"

Is that your language?

A. No, sir.

Q. Did you report anything even approximating that to your paper?

A. No, sir.

[fol. 541] Q. Did you see General Walker at any time on the Confederate statue?

A. No, sir.

Q. Did you see him or ever talk to anyone specifically who did see him, that purported to state that Walker led a charge against the U. S. Marshals?

A. No, sir.

Q. Now, then, do you know what an AP news release is?

A. Yes, sir.

Q. Or a wire service release?

A. Yes, sir.

Q. Directing your attention now to the Plaintiff's Exhibit 3-M and we have, as I understand it, if Your Honor please, a stipulation that all of these exhibits—I will ask the reporter to give us the number, one through, as I remember, 9-G are original wire service reports by the Associated Press. Do we not have that stipulation, Mr. Gooch?

Mr. Gooch: The stipulation was there would not have to be any proof of authenticity but we could still make objections to admissibility.

Mr. Watts: Yes, sir, I understand, but it is admitted, is it not, that these documents I hold in my hand are official wire service reports from the United Press—I mean the [fol. 542] Associated Press, I am sorry, and might I inquire did these come from the New Orleans office or the Fort Worth office?

Mr. Gooch: New Orleans office. That is what you asked for.

By Mr. Watts:

Q. Now, Mr. Holland, you are an experienced newsman, are you?

A. Yes, sir.

Q. Are you experienced in the make-up of news articles and reports?

A. Yes, sir.

Q. Do you know what a teletype wire service release is?

A. Yes.

Q. Directing your attention to the Plaintiff's Exhibit 3-M, and particularly this language right here, starting with, "Walker then said . . ." do you see that language?

A. Yes, sir.

Q. I will read you this statement that is attributed to your by-line in this Defendant's Exhibit 2.

"Mr. Walker, jumped on a campus Confederate memorial and yelled, 'If you can't win go home. Don't stay at the University but let's not quit; we can win.'"

Now, will you please read that wire service release [fol. 543] there?

A. "Walker then stood on the Confederate monument not far from the Administration Building and addressed his followers 'If you can't win, go home,' he declared. 'Don't stay at the University. But let's not quit; we can win.'"

Q. Now, I will ask you for your expert opinion as a newsman connected with this paper, having read that news release and having read this article under your by-line, will you tell the Court and Jury, please, sir, what was the source of that language Mr. Gooch read to the Jury?

Mr. Gooch: To which we object, being a conclusion on the part of this witness.

Mr. Watts: Let me ask a preliminary—

(Conference at the Bench between the Court and attorney for the Plaintiff.)

By Mr. Watts:

Q. Now, Mr. Holland—

The Court: I will sustain the objection.

By Mr. Watts:

Q. Now, Mr. Holland, did the Washington Star have any other reporter on the Ole Miss campus that night?

A. No, sir.

Q. Directing your attention to another article here in Mr. Gooch's—rather, the Defendant's Exhibit 2, which is an article here by Relman Morin, Associated Press staff writer.

[fol. 544] Directing your attention to that article which has a headline as you see there, I will ask you if the New York—as you were, if the Washington Evening Star had the Associated Press wire service?

A. Yes, sir.

Q. Did they have at that time any other wire services?

A. Not unless possibly something like a newspaper syndicate, sir, but—

Q. I mean, did they have the United Press?

A. They did not.

Q. And directing your attention further to a statement on page 1 of this Defendant's Exhibit 2, "The rioting in Oxford came after former Major General Edwin Walker had appeared in the square clad in a dark suit and wearing a ten gallon hat, the Associated Press reported."

Is that your language?

A. No. I mean, it is rather obvious I—

Q. Is that same language under your by-line?

A. Yes.

Q. Have you previously related to this Jury a complete and ultimate detail everything you saw on the Ole Miss campus that you could remember on the night of this incident?

A. No, sir, I haven't. I have just sketched generally [fol. 545] what I—

Q. Have you outlined generally, as best you could?

A. Yes, sir, as best I could from my present recollection after this period of time.

Q. And have you outlined as best you recollect everything you knew about General Walker?

A. Yes, sir, I think so.

Q. And as to any statement in here about General Walker that you have heard Mr. Gooch read, did you report those to your paper; yes or no?

A. None of those statements I reported.

Q. Now, Mr. Holland, what is the mechanical or technical newspaper procedure that would result in these quotations that you have read and that you have heard, in this particular quotation I just read to you a moment ago which says, "The rioting in Oxford came after former Major General Edwin Walker appeared in the square clad in a dark blue suit and wearing a ten gallon hat, the Associated Press reported."

My question is: What is the mechanical newspaper procedure that would cause an article like that to appear in an article that has the by-line "By Cecil Holland, Star Staff Writer"?

A. Well,—while I was writing the general story and quite often in a case like this I may not have all the in-[fol. 546] formation and other information will be included in the story from the Associated Press. It is done quite frequently.

Q. Now, then, turn, please, sir, to the next page, which is the Plaintiff's Exhibit 4-D and I will ask you to follow this language to which I place my finger and let's compare that language in the Associated Press news release with this language in this Defendant's Exhibit 2 that is presented under your so-called by-line.

"Mr. Walker jumped on the Confederate memorial and yelled 'If you can't win, go home. Don't stay at the University but let's not quit. We can win!'"

Now, will you read that Associated Press news release, please?

A. "Walker then stood on the Confederate monument not far from the Administration Building and addressed his followers: 'If you can't win go home,' he declared. 'Don't stay at the University, but let's not quit; we can win.'"

Q. I will ask you to compare that statement that Mr. Gooch read out of your by-line article with that verbatim quotation from the Associated Press news release, and tell me what, if anything, there may be in the way of difference in those two statements.

A. Well, the first paragraph is somewhat different. One [fol. 547] says—my story says he jumped on the campus Confederate memorial and yelled, and the other says Walker then stood on the Confederate monument not far from the Administration Building and addressed his followers.

Q. All right, sir.

A. The quoted part seems to be identical.

Q. In your final conclusion, did that quoted part in this article come from this?

A. I have no recollection of writing it.

Mr. Watts: If the Court please, we move the Court to strike, and admonish the Jury not to consider this statement in this Defendant's Exhibit 2 which is presented to the Jury since it is shown that this part of the article was not written by this witness.

The Court: Overruled.

[fol. 548] By Mr. Watts:

Q. One other thing. Mr. Holland, did you have any, have a conference with your personnel back in your office concerning this alleged statement that Walker had led a charge?

A. Yes, sir.

Q. Would you relate that, please, to the jury.

Mr. Gooch: I object, if the Court please, to what may have occurred in the confines of his building or with his staff.

The Court: That would be hearsay.

Mr. Watts: All right, I think that myself. . . .

By Mr. Watts:

Q. Mr. Holland, when you conferred with Mr. Leon Pearl, the gentleman whom you identified there, did you give him this copy of the newspapers?

A. No, sir.

Q. Did he already have it when he talked to you?

A. I don't recall whether he got it or not. He was going to the paper to get some.

Q. I see. And did he ask you what in that article was your language and what wasn't, or do you remember?

A. I don't remember that.

Mr. Watts: I see. That's all.

Mr. Gooch: No further questions.

The Court: I am going to release this witness, if you don't need him.

[fol. 549] Mr. Watts: Yes, sir, we would appreciate his being released.

The Court: All right, you are excused, Mr. Holland.

Mr. Watts: Thank you, Mr. Holland.

Mr. Gooch: Thank you, Mr. Holland.

Mr. Watts: Might I check out with this witness about his . . .

The Court: Surely.

(Sotto voce conference.)

Mr. Watts: I might suggest to the Court that this deposition was, also, taken at Oxford, Mississippi, on March the 12th, 1964. Mr. Gooch and myself being present.

Mr. Gooch: This is Mr. Watt's deposition.

Mr. Watts: Sir, it was my deposition, yes, sir.

ROBERT CARRINGTON, testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. What is your name, please?

A. Robert Carrington.

Q. Your residence both on the campus and at home?

A. Byhalia, Mississippi, and Lester Dormitory.

Q. What town in Mississippi?

A. Byhalia.

[fol. 550] Q. Who are your parents?

A. Mr. and Mrs. R. E. Carrington, Jr.

Q. You are a student at Ole Miss?

A. Yes, sir.

Q. What school?

A. Business.

Q. What class?

A. Junior.

Q. Were you on the campus the night of September 30th, 1962, when the disturbance occurred?

A. Yes, sir.

Q. What time did you arrive on the campus?

A. I was here all day.

Q. Did you arrive out in the area called the Oval that night?

A. Yes, sir.

Q. Were you there when tear gas was first fired?

A. Yes.

Q. How long had you been there?

A. I had been there since about 4:00 or 5:00 o'clock.

Q. From just before they fired the tear gas and until I stop you, give us a narrative account of what you saw and what occurred.

A. I didn't understand that. Would you repeat the question.

[fol. 551] Mr. Watts: The question was repeated.

A. That afternoon I saw them when the Marshals came in the campus. I saw them when they were down by the park, the roadside park, I saw them coming in then and I went on up to the Lyceum and I saw them getting off the trucks and surrounding the Lyceum and I stayed there all afternoon until everything occurred. I saw everything.

Q. Did you see the tear gas when it was first fired?

A. Yes, sir.

Q. Describe to us what happened.

A. Well, I was standing behind the crowd and some boys hollered out, "Gas," and I started running back towards the "Y" and they, the students, were all running around just crazy like. They didn't know what was coming off. I saw Marshals start running out towards the crowds and that is when I took off. I left.

Q. Did you come back?

A. Yes, sir, I ran back towards the "Y", I ran behind Fulton Chapel but I came back in a little while.

Q. Were you out in this so-called grove area there pretty much all during that time?

A. No, sir.

Q. Where were you?

A. I was over close to the Fine Arts Center and around the "Y".

[fol. 552] Q. That is north and northeast of the grove?

A. Yes.

Q. Were you where you could see what was happening out in the grove?

A. Yes, sir, I could see the Marshals running out there and some of the students throwing things at the Marshals, throwing bricks and things.

Q. Did you ever hear that General Walker had come on the campus?

A. Yes, sir, I heard he was there.

Q. Between the time of the first tear gas being fired and the time you heard that Walker was on the campus, was there anything approximating an organized charge of a large number of people with a leader in front of them—

Mr. Gooch: Object to that as calling for an opinion and conclusion.

The Court: Overruled.

Mr. Gooch: Note our exception.

A. No, sir.

Mr. Watts: I think the next is just argument of Counsel there and a similar question. Now the second question on Page 7.

Q. After you heard Walker was on the campus, tell what did occur out here in the Oval in the proximity of the Marshals?

[fol. 553] A. I never did see because I was at that time a good distance from the grove. I just heard scattered reports of people just telling me that people were just running up and hitting the Marshals and everything and I never did see it. I never actually was in the heat of it. I have asthma and I couldn't take that tear gas.

Q. How far were you from where this happened?

A. I was around the Mississippian Office.

Q. Where is that? You are looking now at Exhibit 1, which is a plat of the campus area and this circle in the middle is the grove and here is the YMCA.

Mr. Watts: I think the jury knows where the YMCA is, so. . . .

A. The Mississippian office is right here.

Q. That is the Journalism Building?

A. Yes, sir. I was right in this area right in here.

Mr. Watts: In order to identify that, perhaps I should point it out on the chart. Journalism (pointing).

Q. Where were you when you heard that Walker was on the campus?

A. I was at the Mississippian Office.

Q. Did you stay at the Mississippian Office all the time after that?

A. No, sir, I stayed at the Mississippian Office until about 12:00 o'clock, and then I went to the Fraternity House.

[fol. 554] Mr. Watts: I believe that's all.

Cross examination.

By Mr. Gooch:

Q. You never did see Walker, did you?

A. No, sir, I never did see him.

Q. Were there lots of bricks and stones lying around the Lyceum Building?

A. Yes, sir, the next morning.

Q. Okay.

Mr. Gooch: That's all.

Mr. Watts: Turn over to Page 3, the deposition of Duncan McFarlane.

DUNCAN MCFARLANE, testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. What is your name, please?
A. Duncan McFarlane.
Q. Your residence both on the campus and at home?
A. Yes, sir.
Q. What is it, where do you live?
A. On the campus on Odom Dormitory, B-10.
Q. And your home address?
A. Natchez, Mississippi.
Q. What street?
[fol. 555] A. 1803 Wheeler Drive.
Q. And your parents?
A. A. D. McFarlane.
Q. Were you a student at Ole Miss in September of 1962?
A. Yes, sir.
Q. What school?
A. In the school of business and commerce.
Q. What class?
A. I was a Sophomore.
Q. Were you present the night the disturbance took place on September 30, 1962?
A. Yes, sir.
Q. Outline to us in narrative form what you saw and what occurred.
A. I arrived on the campus about 8:00 o'clock, maybe a quarter until, and there was tear gas being fired at that time.

I was in the grove from about 8:00 until approximately 1:00, maybe 2:00 o'clock, and the students were throwing bricks and bottles at the Marshals and they were shooting tear gas back.

There would be little groups of maybe three or four people that would charge up there and throw bricks and

retreat and then they would fire tear gas and then an-
[fol. 556] other little group would go up there and throw theirs.

Then they burned a couple of cars and there was some shooting going on but I couldn't find out where it was coming from, but there were guns being fired at the time. This just went on a pretty good while, all night, in fact, until I left about 1:00.

Q. Did you hear that General Walker was on the campus?

A. Yes, sir, I did.

Q. Did you actually see him and get around him?

A. He was pointed out to me from a distance but I did not hear him talk.

Q. Did you ever at any time after you heard that Walker was on the campus, observe an organized charge of a large number of people toward the Marshals all at one time?

Mr. Andress: Did such an incident occur?

Mr. Gooch: I think you read the question.

Mr. Watts: Yes, that's the rest of my question.

Q. Did such an incident occur?

A. No, sir.

Q. Did anything occur other than what you have outlined in the general narrative that you have told us involving a large number of people in the crowd?

A. No, sir.

Q. Were you in the grove all during the period of time from the time you heard that Walker was on the campus
[fol. 557] for, we'll say, an hour after that?

A. Yes, sir, I was.

Q. If an organized charge of as many as 500 or one thousand people had occurred, would you have seen it?

A. Yes, sir.

Q. Could you give us roughly the distance from the Confederate statue to the Lyceum Building?

A. I would say roughly it was a little over 100 yards.

Q. Were you ever during the period that you heard Walker had come on the campus for an hour thereafter out of the so-called grove area?

A. No, sir.

Q. Outline to us during this period of time just what you saw and what occurred.

A. Well, when I heard he was there, somebody said he was there, a group of people down at this statue where he was, it was where he was I guess because a bunch of people went down there, and I was back up front near the flagpole, that is where I stayed most of the time around the flagpole.

Q. Right at that point, when you heard he was there and a group of people went down toward the monument, did all of the people that were up in the grove go down there or just part of them?

A. No, I would say part of them went down there because there was still a good number of people around the flagpole.

[fol. 558] Q. What activity was taking place up near the flagpole and in that area while this other group went down to the monument?

A. These little groups were still throwing.

Q. Was there anything organized about the operation?

A. No, sir.

Q. Was there any change in the activities that occurred up next to the Marshal's after he made his speech at the monument that you have outlined?

Mr. Gooch: I object to that as calling for an opinion and conclusion.

The Court: It's good. Sustained.

Mr. Watts: All right, sir.

Q. Between the time you first heard that Walker was on the campus and the time that you saw the people going down there to the monument, was there any organized charge against the Marshals?

A. No, sir.

Mr. Gooch: Where is that coming from?

Mr. Watts: Bottom of Page 6, top of Page 7.
Mr. Gooch: Oh, I see.

Q. Describe for us just what happened in terms of this activity in the grove area between the time you heard Walker was on the campus and when you saw all the people going down to the monument.

[fol. 559] A. Well, part of the people left and went back down there and others stayed at the front and continued throwing bricks and the Marshals continued to shoot tear gas back and the people would just run up and throw and fall back to the flagpole or further back and then after the tear gas would clear out of the way, they would go back up again and throw.

Q. Assuming hypothetically that when Walker arrived on the campus,—

Mr. Watts: Let me look at that. That might be . . . .

Q. Assuming hypothetically that when Walker arrived on the campus, two leaders of the mob met him, one waving a big Confederate flag, that the two men took him by the arms, positioned themselves in front of 1,000 people and marched on the Marshals, were you in a position to where you would have seen that, had it happened?

Mr. Gooch: We object to that as calling for an opinion and conclusion of the witness.

The Court: Sustained, Counsel. We are not going into hypothets, Counsel.

Mr. Watts: All right, sir. The rest of that, I believe, still refers to that one question, so that will be all at this time.

Cross examination.

By Mr. Gooch:

Q. You never did see General Walker, did you?

[fol. 560] A. Yes, sir, he was pointed out from a distance. He was with three or four people and people were around him and he was pointed out to me.

Q. Did you consider him a public figure?
A. Yes, sir.
Q. There was a considerable number of rocks, stones, and bottles, and so forth, thrown at the Marshals?
A. Yes, sir.
Q. You say little groups or groups would go up and throw their missiles and then retreat when they would fire gas?
A. Yes, sir.
Q. Did that go on all the time or continuously?
A. Yes, sir, it did.
Q. Did you throw any of those rocks, bricks and bottles?
A. Yes, sir.
Q. Okay.

Mr. Gooch: Well, to get continuity:

Q. How many was in your group when you threw them?
A. Two or three.
Q. Just two or three of you; there was never more than two or three that would go up at any one time?
A. Possibly four or five, maybe six.
Q. Not over six?
A. No, sir.
[fol. 561] Q. Would ever go at one time?
A. No, sir.
Q. You said groups of two, three, four or maybe six would run up and give—throw their missiles or whatever they had in their hands at the Marshals and then come back?
A. Yes, sir.
Q. Where would they come back to, the main crowd?
A. Right past the flagpole, yes, sir.
Q. Now where was the main crowd that was watching all of this?
A. There was about 20 or 30 people behind the flagpole.
Q. You mean east of the flagpole?
A. Well, just a straight line parallel to the Lyceum Building behind the flagpole, they were grouped around there.

Q. How many were in that group?

A. 300, 400 or 500 students.

Q. And the group that would go up and throw their missiles would come out of that group, run up and throw their missiles and then come back to that group?

A. Yes, sir.

Q. Then some more of that group would go up and throw their missiles and come back, is that the way they did it?

A. Yes, sir.

[fol. 562] Q. But they were almost a solid line north and south just about where the flagpole was, is that right?

A. Not a solid line. They were just mingling around.

Q. About 400 or 500 people were in that group?

A. Yes, sir.

Q. And from that group came these missile throwers, is that right?

A. Yes, sir.

Q. Where were you getting those rocks and stones and bricks?

A. I heard that the bricks were coming from the new Science Building they were building back behind the statue back down there.

Q. Where did you get yours?

A. Off the ground, the people were bringing them up in a wheelbarrow and, I think, they were just dumping them around the flagpole.

Q. That is right in where all this group was standing?

A. Guess—by the flagpole, most of the people were back behind the flagpole.

Q. When you reached to get your missiles, where would you get them?

A. Off the ground, those that had been thrown and those that had been left around the flagpole.

Q. That had been dumped right in this group of several [fol. 563] hundred that were gathered around the flagpole, is that right?

A. No, they were dumped up in front of them.

Q. They came up in front of the group that was standing, and those that wished to would come out of that group, pick up their bricks and rocks and go throw them, be fired at and retreat back to get some bricks, is that the way it went?

A. Yes, sir.

Mr. Gooch: That's all.

Mr. Watts: Robert Lee Watkins is next.

[fol. 564] Mr. Watts: All right, on page 3, by Mr. Watts.

• • •

Q. State your name, please.

A. Robert Lee Watkins.

Q. Your address at school and home?

A. Labuve 83, University of Mississippi, and 1110 North Spring Street, Waynesboro, Mississippi.

Q. In what school are you enrolled?

A. Business school.

Q. What class?

A. I am a junior.

Q. Were you a student in September of 1962?

A. Yes, I was.

Q. Were you present on the campus the night of September 30, 1962, when the incident of that date occurred?

A. Yes, I was.

Q. What time did you arrive on the campus that evening?

A. Approximately 4:00 o'clock or 4:30.

Q. Where did you go?

A. First I went back to my room and unpacked my clothes. I had been home for the week-end, then I went back up to the Lyceum Building where there was a large crowd gathered.

Q. Orienting you for the purpose of this deposition, [fol. 565] we have Plaintiff's Exhibit No. 1, which is a scaled plan of the University and shows the Confederate monument on the east end of an installation called the Circle, it shows the Lyceum Building on the west end, and shows the YMCA up here on the northeast, and as you

give your answers, if you can, remember the compass directions and it will help us to follow them later.

Now, when you first arrived in the area of the Circle where did you go?

A. I first went to the north end of the Lyceum Building, between the Lyceum Building and the Math Building, which is Peabody.

Q. What did you see?

A. At the time there were a lot of Marshals gathered around the Lyceum and lined around the Lyceum Building and a lot of students were gathered there.

Q. In your own words, give us a narrative account of what you saw, heard, and what occurred?

A. You mean at this time?

Q. From that time, and just carry it right on through.

A. That afternoon it started out and it was just, I don't know, it must have been 200 students there, and as time went on more students gathered there and things got rough, and a little later on some of the Marshals fired [fol. 566] the tear gas and everybody ran back then, ran back in the Grove, a lot of students did. They just spread out and a lot of people started throwing bricks and bottles and things at the Marshals and more tear gas was fired. This kept on going and went right until, I guess, I don't know what time in the morning. During this time we were up in the Grove but I was there most of the time. I only left a couple of times and went back over to the dorm and came back and all during the time I saw these students throwing things.

Q. Just tell us what the activity was that was directed by the students against the Marshals. Son, do you know what a charge is?

A. Yes, sir. Just during the course of the riots there were just students, I don't guess I ever saw any organized, I know I never saw any organized charge during the course of the riot. There would just be several students, maybe three or four at a time, that would charge in and throw

bricks at the Marshals and they would go back and they would shoot tear gas and it would clear up and then some more of the students would come in but there was nothing organized that I saw. If anything had been organized, I don't think the Marshals would have stood too much of a chance of defeating us on the University at that time.

• • •

[fol. 567] Mr. Gooch: To which we object to the last part of the answer as an opinion and conclusion of the witness.

The Court: Sustained.

• • •

Q. Did you hear or learn that General Walker was on the campus at any time?

A. Yes, sir, I heard a little later on, it was later on, not that afternoon but that night, I heard that he was there.

Q. What did you do when you heard he was there?

A. I was standing up close to the statue as you come off University Avenue when you first come to the Circle there that circles by the Lyceum Building, and the boy that was standing with me, we were standing over between the statue and the YMCA Building and they said that General Walker was there at the statue. We walked over there and I think he was standing there talking to some of the students or something, some of them were talking to him, and somebody told him to get up and give us a speech. He stepped up beside the statue, I don't think he stepped upon it, he stepped up right beside the statue and maybe up on the side of it or something and just talked to the students.

Q. Now, prior to the time he stepped on the statue and started to make a speech, were you in a position where [fol. 568] you could see what was occurring out there in the Circle area?

A. Yes, sir.

Q. Prior to the time he stepped upon the statue, was there any charge against the Marshals that involved a large number of people?

• • •

Mr. Gooch: To which we object as leading, suggestive, and calling for a conclusion and an opinion of the witness.

The Court: Sustained.

• • •

Q. Now, then, exactly where, with respect to the monument, was Walker when you first got over there?

A. When I first got there, he was standing down beside the statue, if I remember right, he was standing down kind of on the east side of it and I was standing on that side, I guess it would be the north side of the statue instead of the east.

Q. What attracted your attention to the fact that he was there?

A. Somebody told me that that was General Walker. I didn't know him.

Q. How far from the statue on the north side were you?

[fol. 569] A. I guess at the time they said General Walker was up there by the statue, I guess I must have been about, to the best of my knowledge, about twenty or thirty yards away.

Q. In which direction from the statue?

A. In the north direction of the statue toward the YMCA Building.

Q. Now, looking at the chart, can you see that the YMCA is north of the statue and slightly to the west?

A. Yes, sir.

Q. From that position could you see what was going on in the Circle?

A. Yes, I could.

Q. How long had you been in that area there that you have outlined just now?

A. I don't know, I had been in the Grove there inside the Circle, I had been in and out of there the whole time,

all the afternoon and a part of the night. And I was standing there, I guess, for five minutes.

Q. From the time the first tear gas was fired until you heard that Walker was coming on the campus, had you ever left the area so far that you could not see what was happening in the Circle?

A. No, sir.

Q. And up to that time had there been any charge at [fol. 570] all?

A. No, sir.

* * *

Mr. Gooch: I object to that as an opinion and conclusion.

The Court: Sustained.

Mr. Gooch: And ask that the Jury be instructed not to consider it.

The Court: The Jury is instructed not to consider the last question and answer.

* * *

Q. Tell us what you saw and what occurred when you went over to see Walker?

A. I walked up there and I noticed he stepped up, I believe he stepped up on the side of the statue, and he was talking to the students and only two things stuck in my mind that he said in the course of his speech. I think he said at one time that this was not the correct route to Cuba, I remember that statement. He said there should be no violence used out here, that the students shouldn't use violence, that this was not the proper course to end this riot, and to better our relations here on this campus and everything. I thought he was more or less trying—

* * *

Mr. Gooch: I object to that, if the Court please, as a [fol. 571] conclusion.

The Court: You are talking about the balance of the answer?

Mr. Gooch: Yes, sir.

Mr. Watts: I wish Your Honor would look at the last sentence. Is that admissible?

The Court: Yes, sir.

• • •

A. . . . I walked off, I got a little mad with him.

Q. Was there any general reaction then of the crowd at any time during this speech as to whether they were pleased or displeased with what he was saying?

• • •

Mr. Gooch: I object to that as calling for an opinion and conclusion of the witness.

The Court: I think I will permit that.

Mr. Gooch: All right.

• • •

A. It seemed to me that most of the students were displeased. That was the general opinion that I got. I know several of the students standing around, a lot of them around me, began walking off from him.

Q. Did he at any time during this speech encourage or suggest to the students that they take violent action of any kind against the Marshals?

• • •

[fol. 572] Mr. Gooch: I object to that, leading and suggestive.

The Court: Overruled.

• • •

A. No, sir, he didn't. He didn't suggest it at any time, as a matter of fact, it seemed to me and a lot of the other students that he was trying to put down the riot. He said that violence shouldn't be used out here.

Q. Where did you go, you said you walked off, to what area did you go then?

A. I just walked off toward the YMCA Building and stood over there beside the street.

Q. Were you in a position where you could still see Walker and see what the crowd was doing?

A. Yes, sir, I was, I guess, fifty yards off from him or so and I was standing in the Grove, in the edge of the Grove beside the street across from the YMCA Building.

Q. By the Grove, you mean the Circle, where it says the Circle on this plat?

A. Yes, sir, inside the Circle.

Q. What happened after the speech that Walker was making at the monument?

A. Nothing.

[fol. 573] Q. That is after you went back toward the YMCA and from that position, what did you see happening?

A. Just the same thing that had been doing—been going on all the time, the crowd just broke up it seemed to me and people just went on doing what they had been before. While he was speaking a lot of people were still running around throwing bricks and everything, everybody didn't come in to hear him speak. A lot of people didn't know it, I don't guess I would have known he was up there speaking if someone hadn't told me.

Q. While he was speaking, were there still people down here in contact with the Marshals or in the general area where the Marshals were?

A. Yes, sir.

Q. Did you see Walker again after the speech on the monument?

A. No, sir, I don't think I did.

Q. After the speech on the monument, were you in a position where you could and would have observed had there been an organized large scale charge of as many as five hundred or one thousand people?

* * *

Mr. Gooch: To which we object, leading and suggestive.

The Court: I don't think I will permit that, counsel.

[fol. 574] Mr. Watts: All right.

The Court: At this point.

Mr. Watts: That is all.

Mr. Gooch: Go to page 19, please, Mr. Andress, the last question.

• • •

Q. Did you see Rev. Duncan Gray or anybody else trying to talk to General Walker during the time that he was about to make his speech or was making his speech?

A. No, sir, I did not.

Q. Did you hear General Walker telling the students that Col. Birdsong was the one who had sold them out?

A. No, sir, I didn't hear that.

Q. Did he make any statement to that effect?

A. No, sir, I don't think he did. Not while I was there, he didn't.

Q. How long was General Walker's speech?

A. I don't have any idea how long he spoke. I was there, I guess, five or ten minutes, something like that.

Q. Were you there when he finished his speech?

A. No, sir, I was not.

Q. You had walked away?

A. Yes, sir.

Q. You don't know what happened to General Walker [fol. 575] after he finished his speech?

A. No, sir.

• • •

Mr. Gooch: Go to page 22, the last question.

• • •

Q. Did you hear General Walker allude to the fact that he was ashamed to be an Episcopalian?

A. No, sir, I didn't hear that.

Q. Did you participate in any of the missile throwing?

A. Yes, sir, I did, some of it.

Q. Could you see the Marshals at the time you were throwing at them?

A. Sometimes I could and sometimes I couldn't. The tear gas was so thick sometimes.

Q. Did you throw any before you heard General Walker make his talk?

A. Yes, sir.
Q. Did you throw any afterwards?
A. Yes, sir, I did.

• • •

Mr. Gooch: I believe that is all.
Mr. Watts: The deposition of Mr. McRae, page 3.

• • •

[fol. 576] Q. State your name, please.
A. Alpheus McRae.
Q. Your address, residence at home and school?
A. I live in Laurel, Mississippi, and I go to school here at the University.
Q. Who are your parents?
A. Mr. and Mrs. A. H. McRae, Sr.
Q. What school are you in?
A. Law school.
Q. What class?
A. Fourth semester.
Q. Were you a student at Ole Miss in September of 1962?
A. Yes, sir, I was.
Q. Were you present the night of the incident that occurred on the campus on September 30, 1962?
A. Yes, sir, I was.
Q. Will you outline to us, please, sir, where you were, what you saw, and what occurred and what you heard?
A. Yes, sir.
Q. From after the time the first tear gas was fired by the Marshals.
A. I was in front of the Peabody Building at the time the first tear gas bomb was shot. We were listening to President Kennedy on the radio, a girl had a small portable [fol. 577] radio and when the first tear gas bomb shot, we all turned around and saw it, and the next thing we knew two hit around where we were standing and we all left from where we were and ran in back—let's see, what is this?

Q. To get oriented, I will point out here this chart, Plaintiff's Exhibit No. 1, which shows the circle with the monument on the east, the Lyceum on the west, the Peabody Building.

A. We ran right back here behind the Fine Arts Center and then we heard a few more tear gas bombs being shot and we came around the Fine Arts Center over by the YMCA over here and went back out to the flagpole and there I met a girl from my hometown who was overcome pretty bad with tear gas and she asked me would I take her back to her sorority house which was down here on Sorority Row and by the time I got back everything was back—around where things were going on, everything was pretty much in a mess and people were just milling around and I met up with a bunch of my friends right around Rick Dormitory which is down from the Circle. We stood around there trying to see what was going on and then we left from there and went across the Grove here to University Avenue because some of the Marshals at that time were coming down this street here that the dormitory is on and we watched from down there and later on that evening we went up here to one of the professor's house who lives over [fol. 578] the railroad track, or he used to live there, to get a drink of water because we couldn't get back to our dormitory, we would have to go right through where all the rioting was going on and so we just tried to stay out of the way of as much of it as we could.

Q. Did you learn that evening that General Walker was on the campus?

A. The first time that I knew General Walker was on the campus was when we came back up University Avenue and saw a big crowd in front of the statue. When we got there I said, "Who is that talking?" I had never seen General Walker and I just knew of him. I had heard of him. Someone said, "It is General Walker." I decided I would go up there and see what he had to say. I was not there at the beginning of his speech but I assumed he had

only been speaking for a few minutes. I was there through the rest of his speech.

Q. Tell us the best you can remember what you heard?

A. When I got up there, he was talking about that we had been betrayed, he never would mention the man's name but he said or inferred that it was the head of the Highway Patrol that had betrayed us and had let the Marshals on the campus. I didn't know what kind of stand he was taking because I had known he was at Little Rock during that situation and I said, "Is he with the Government or [fol. 579] what?" I asked why he was there and so they said, "No, he is just here." Then I heard him say that we had a right to protest but that we did not have any right to violence and if any blood was shed, let it be on the hands of the Federal Government and not our hands, and then at that time there were a lot of students that were here—were in front of there, students and people, I don't know who, that booed him.

Q. Did you hear it?

A. Yes, sir.

Q. All right, go ahead.

A. This has been a good while ago.

Q. Yes, just do the best you can.

A. I can't really remember the rest of what he said that night. It was just along those same lines, and then he got down from the little statue there.

Q. Just before he got down did you know a little minister here, Rev. Duncan Gray?

A. Yes, sir, I know him.

Q. Did you see him there?

A. Yes, sir, he was standing on the left of the statue.

Q. To the left, would that be the north toward the YMCA?

A. Yes, sir.

[fol. 580] Q. Did he get upon the statue?

A. Yes, sir, I saw him try—I don't remember whether he actually got on the statue or not. I remember him trying to get up there and I remember somebody pulling on him and

then they lobbed one of those tear gas bombs and they lobbed it real high.

When Walker got down, I turned around and walked back and we were standing over there by an automobile and that thing lobbed right about as far as from me to you from where we were standing so we decided we had better get out of there so we went on back down to the bridge again.

Q. Were you close enough to the monument at the time you saw the minister there to tell or hear, or overhear, any conversation between him and Walker?

A. No, I would be telling a story if I said I did. I didn't hear anything.

Q. Just keep it absolutely accurate as to what you saw and what you heard and nothing else.

What occurred then after the talk on the monument that you saw?

A. I saw General Walker get down as I said, when he got through with his talk, and from his talk I thought he was telling us to calm down, now, that is the impression I got. So, I just turned around, I figured the whole thing was [fol. 581] over and so I got down and turned around and as I said, walked back to the car where I saw three or four people that I knew and I don't know where he went or what he did after that.

Q. Did you see which direction he got down from?

A. You mean he got down from the statue?

Q. Yes.

A. There was another guy with him and the last time I saw him he was standing with the other man that came with him.

Q. About how long was that after his speech that you saw him standing there?

A. A minute or two at the most.

Q. And that is the last time you saw him?

A. Yes, sir.

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Mr. Watts: That is all.

Mr. Gooch: That is all.

[fol. 582] HAROLD JAMES SCHNEIDER, testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. What is your name, please?
A. Harold James Schneider.

Mr. Gooch: Wait a minute. May we identify this as being another deposition Mr. Watts took in Mississippi?
Mr. Watts: Okay. That is accurate.

Q. What is your residence on the campus and at home?
A. 1341 Leavell A 35, on campus and I live at Laurel, Mississippi.
Q. What is your school?
A. Law.
Q. What class?
A. Second.
Q. Were you on the campus the night of September 30, 1962?
A. Yes, sir.
Q. When the incident occurred?
A. Yes, sir.
Q. Were you in the area of the circle?
A. Yes, sir.
Q. Were you there when tear gas was fired the first time [fol. 583] by the Marshals?
A. I was over by the Fine Arts Center.
Q. Is that north of the circle, I am pointing now to Plaintiff's Exhibit No. 1, which is a plat of the University?
A. The Fine Arts is north of the circle.

Mr. Watts: I oriented you again. I will skip that question.

Q. What did you see and what happened then?
A. I ran down by Fulton Chapel and over towards Ricks Dormitory, right in here, and stayed there for a little

while. Then I came over and walked down through the grove by this Geology Building, the old building that looks like a tower, and then somebody said General Walker was talking up at this Confederate monument and I went on up there.

Q. What did you see?

A. He had already started talking and I stayed a little while and they shot some tear gas and I ran down University Avenue.

Q. Did you hear any of his speech?

A. Yes, sir, a little bit.

Q. Would you outline to us what you heard him say?

A. All I can remember is, he said something about a peaceful demonstration, that is all I can remember.

Q. Could you tell what the reaction of the crowd was to his speech?

[fol. 584] A. No, sir.

Mr. Watts: The next question I think is probably leading. That's all. Turn then over to the next witness on Page 3, a similar deposition, Henry Edwards.

Henry Edwards, testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. What is your name, please?

A. Henry Edwards.

Q. Your address at school and at home?

A. Yes, sir. My address is Box 394, Richton, Mississippi.

Q. Who are your parents?

A. Mrs. Henry Edwards.

Q. What dorm are you in at school?

A. Leavell, 824.

Q. Were you on the campus the night of September 30, 1962?

A. Yes, I was.

Q. Were you in the area of the circle at the time tear gas was fired first?

A. Yes, I was.

Q. I wish you would tell us what you saw or heard and what happened.

A. You want me to start just before the firing of the [fol. 585] tear gas?

Q. Right.

A. I was standing on the front lines near the front of the Lyceum Building on the curb there and there was a large number of people there and it was just about dark and I can't tell you what caused it or anything and anyway the first tear gas was fired, into the group standing there, it was about 6:30 or quarter to 7:00, I don't know what time it was, whatever time it gets dark, and tear gas was fired into the group there and the group scattered way back into the grove there.

Everybody was scared out of their wits and of course the firing sounded like a large gun going off when it was first fired.

The people moved back and they kept firing tear gas then to scatter everybody out and the group moved way back to Hume Hall and the people began gathering bricks, stones and things up there, people gathered these and started throwing at the Marshals and the Marshals kept firing and the people kept throwing.

Q. All right. Tell us just exactly what your observation of the activities of the crowd was.

A. At what time?

Q. Go on and in natural sequence tell us.

A. There was no organized activity of any kind that I [fol. 586] saw any time during the night. People were just running back at random and gathering stones and anything they could find, rocks and bottles, where people would drop them on the ground, and of course if they could find a rock or a bottle or something, they would gather it up and go up into range of the Marshals and throw it and they kept

firing tear gas. It was just the same thing, it was a mad confusion.

Q. Did you ever see General Walker on the campus?

A. Yes, sir, I did.

Q. When and where?

A. I saw him near the monument and I would say the time was around quarter of 8:00.

Q. What was he doing?

A. At the time I was about 50 yards from there and I heard someone say, "There is General Walker or here is General Walker," so I moved down towards the monument there.

I got down there and it was a large group, I wouldn't say a large group, but a group of people around him and they were talking and carrying on and everybody was saying, "Lead us, lead us, here is our leader, here is our leader," and "speech, speech, here is our leader, here is our leader," and I stood around for a few moments there and people were still saying, "Here is our leader," and "speech, speech," and things like that.

He acted like he didn't want to give a speech because he [fol. 587] was talking about something else and he got up on the monument and he made his speech.

Q. Do you remember what he said?

A. No, I don't remember very much of it. He made some comment about Cuba. He said, "This is the long way to Cuba," or, "This is the wrong way to Cuba," I don't know which one it was, and the minister started getting up on the monument and I saw an arm and a shoulder reach up and pull him down.

Q. Did you hear any conversation between him and General Walker?

A. Yes, sir, when the minister was getting up on the monument, Walker asked him what was his faith and he said he was an Episcopalian and Walker said, "Well, he was, too, and that made him ashamed of his faith," or that he would denounce knowing him or something or other. He said that the people had a right to protest. He didn't

say what to say to protest or anything, he just said they had a right to protest.

Q. Do you remember anything else he said?

A. No, that is about all I can remember.

Q. Did you observe what he did after the speech?

A. Yes, I did.

Q. Tell us about it.

A. He dismounted from the monument there and in get-
[fol. 588] ting back to the sidewalk there a group of people, not rushed him, but gathered around him real close and I couldn't get in that group, it was real tight, and they were talking to him and shaking his hand and things of this nature. I didn't get right up to him, I don't know what was said then. I guess this group around continued talking to him 10, 15 minutes, something of that nature.

Q. There was this conversation with respect to the monument?

A. It was on the side of the monument, I believe it was on the south side of the monument.

Q. Now this chart you are looking at—

Mr. Watts: And we oriented the chart.

Q. When he first got down there, where was he?

A. I believe he was on either the east or the northeast part of the statue there because I was standing on the east to get the advantage of the wind that was blowing in that direction that kept the tear gas off.

He would be on the east or the northeast part of the monument and he dismounted from that same side there and I believe he moved around to the south side of the monument and this tight knit group of people were still around there and they were talking and he was talking.

These people talked to him 10, 15 or 20 minutes, something like that.

[fol. 589] After that the group started moving, not in a hurry, no urgency, by this time the people had had some time to cool off and they had been in a terrible pitch before and they had had some time to cool off and there was no

urgency and no fast walking about the group as there had been before.

They moved up the sidewalk and then as they approached the flagpole, they swerved to the left and pushed on and there is a flower bed on the edge of the grove here. They stopped short of the edge of the grove and in the edge of the flower bed.

I remember the green flowers there were growing and blooming at that time. There was no activity of the group, there was no missile hurling and some guy on the front was waving a white flag of truce.

The Marshals recognized that this was something different from what had been happening and they stopped firing. There was no missile hurling on the front of the Lyceum Building and there was no tear gas firing. I can't say about the other side as to what was going on there but on the front there was no tear gas firing and no missile throwing at that time.

Q. Did you observe what Walker did?

A. As we walked up there sometimes he would talk and sometimes not, it was just a slow casual walk up there. He walked up there and stopped and a student, I assume it was [fol. 590] a student, came from behind the Marshals line and stopped in the middle of the street there and he said he had been inside and he had seen this Marshal that was cut on the throat and dying and he asked if a Senior would step forward and represent the group and nobody stepped forward and he said, "Will even a Freshman or a Sophomore step forward and represent the group?"

Some guy stepped forward, I don't know who it was, I don't have any idea, this guy stepped forward and this student pleaded with him to represent the group and to tell them all to quit rioting, that he had seen this Marshal inside that he was dying and what a sight it was with the blood and everything.

This student in the street pleaded to them and the general answer was, "No."

Q. The general answer was, "No," I don't hear too well?

A. Yes, the general answer was, "No," there was no expressed, "No, we won't give up," or anything but the people were just disappointed to see this person.

Q. Where was Walker during this time?

A. He was standing, not exactly on the front, but in the front. You can't say the front because sometimes there were people in front of him and sometimes he would be on the front.

[fol. 591] There was a front line there but you can't say he was leading it. I might have been leading it or anyone else that was on the front there might have been leading it because sometimes he would be ahead and sometimes we would be ahead.

Q. Go ahead.

A. After this the crowd sort of generally consented, "No," that they weren't going to stop fighting now, the group started moving back, just moving back slowly and as the whole group got past the flagpole, moving back towards the monument, some of the group filtered out and went back and started hurling missiles again and the Marshals started firing and the people started throwing, it was the same thing over again.

Q. Was Walker with this group when it went back to throwing missiles?

A. No, he wasn't. He was in the group that continued on toward the monument, and upon the shooting of the tear gas it was getting thick in there again and I stayed with the group a short while but the tear gas was getting thick there so I moved over towards the biology and engineering building in that direction, to get this cool wind that was blowing from that direction and the last time I saw Walker, he was moving towards the monument and in the direction of the monument and the "Y" Building there, in that direction.

[fol. 592] Mr. Watts: That's all.

Cross examination.

By Mr. Gooch:

Q. Now when you came down to the Lyceum, after you got to your dormitory, how many people would you estimate were around in front of the Lyceum?

A. In front?

Q. Yes, in front of the Lyceum?

A. I would say at least several hundred were in front of the Lyceum Building.

Q. Now was that before dark?

A. Right, before dark.

Q. And as the evening went on and the night came, the crowd did increase tremendously, didn't it?

A. Yes, I believe there was an increase in the crowd.

Q. What was the first evidence you saw of any actual disturbance any place other than people just standing out there in front?

A. Well, there were cigarette butts being flipped on top of the truck that was parked there and there were taunts and jeers and things, "Yankee go home," and things of that nature.

Q. And some profanity?

A. Yes, some. Quite a bit. Were—

Q. Were not pebbles being thrown?

[fol. 593] A. I didn't see any pebbles being thrown. There might have been.

Q. Now were you up near the front when the first tear gas was fired?

A. Yes, I was. I was standing on the front.

Q. What happened then?

A. The group just scattered; everybody was scared and they ran. A lot of them moved way back; some of them just scattered all over. After this first tear gas was shot, there were numerous other tear gas bombs shot off.

Q. The crowd got pretty mad, didn't it?

A. Yes, sir, it did.

Q. They were highly aroused, weren't they?

A. Yes, they were.

Q. And they began to arm themselves with bricks, sticks, stones and anything they could get ahold of?

A. Yes, sir.

Q. When they did that, what did they do with them, these sticks and stones and bricks that they had armed themselves with?

A. Well, they threw them at the Marshals who were lined up around the Lyceum Building.

Q. Describe how they threw them at the Marshals.

A. These people would just run up to within throwing range of the line of Marshals and throw them and run back [fol. 594] before the Marshals had a chance to hit them over the head with a billy stick or shoot them with a can of tear gas.

Q. You say General Walker made his speech about 8:00 o'clock?

A. That is right.

Q. Where did you say you were when you first heard that Walker was on campus?

A. I was in a south-southwest direction of the monument where the cool air was blowing in, the fresh air.

Q. Just what was it you heard about Walker?

A. I heard somebody say, "Here is General Walker, here is General Walker."

Q. People were excited about it, were they not?

A. Yes, they were.

Q. Had you heard any of his radio speeches or his television appearances?

A. I had heard something, I had not read it or heard it over the radio, some friend made some comment about Walker was supposed to bring some men or something of that nature.

Q. How many men did you hear he was supposed to bring?

A. I don't know.

Q. Did you hear the statement that he had 10,000 coming?

A. There was a large number.

[fol. 595] Q. A large number?

A. Yes, sir.

Q. What else did you hear Walker say?

A. I have already said that the people had a right to protest, he said that.

Q. Have you told us everything that you heard him say?

A. Yes, I believe so.

Q. You didn't hear him say about, "You've been sold out"?

A. Oh, yes, he did. Someone said, "Our Governor has sold us out, our Governor has sold us out," and he said, "No, your Governor didn't sell you out. It was Birdsong and the Highway Patrol Department."

Q. Immediately after he completed this speech, I believe you said he got down off the monument and started up the sidewalk towards the Lyceum Building?

A. No, sir.

Q. Towards the flagpole and the YMCA Building?

A. No, I said after he got down from the monument, then this tightly-knitted group of people got around him there and I didn't get up into the group to see what was going on and they stayed there for five, ten, fifteen or twenty minutes or something of that nature.

These people were talking to him and after that, after a period of time, the group started moving toward the Ly-[fol. 596] ceum Building up the sidewalk.

Q. And there was a group around him or with him, is that correct?

A. Well, he could have been with the group.

Q. Well, one or the other. He was with them or they were with him, is that right?

A. Correct.

Q. And they went up, they got almost to the flagpole and then he veered left, you say?

A. To the left.

Q. Then went past the flagpole on the left side, going to the Lyceum Building, that is your statement?

A. Yes, sir.

Q. Walked right on up and got to a flower bed just across the street from the Lyceum Building, is that right?

A. That is right.

Q. And that happened within five or ten minutes after he finished making his speech?

A. Something like that period of time there.

Q. What became of all this crowd that had been listening to him down there if they didn't go with him?

A. It was not a large crowd to begin with.

Q. How many?

A. I don't know.

Q. Did you say there was about 50 or 100 when you got [fol. 597] there and more probably came in?

A. No, I said 50 or 60 and I said more could have come and more could have left.

Q. Did that 50 or 60 go with him?

A. They weren't following him. He wasn't leading any group.

Q. I asked you if they went with him?

A. Yes, they were with him.

Q. Where were you at that time?

A. I was in this crowd.

Q. You were with the crowd. Did you have anything in your hand?

A. No, I didn't.

Q. Had you had anything in your hand down there that night?

A. I had rather not answer that.

Q. You won't say whether you had thrown bricks or rocks or sticks or stones or not?

A. No, I won't answer that.

Mr. Gooch: That's all.

Mr. Watts: Now I would like to go back and read some more of the cross examination he left out. It is rather short. Would you turn back to Page 20, please, sir. I think the last question Mr. Gooch read:

"Question: Did you hear the statement that he had [fol. 598] 10,000 coming?

Answer: There was a large number.

Question: A large number?

Answer: Yes, sir."

Q. Were you expecting him to come and bring those men?

A. No, I wasn't.

Q. Why wasn't you if you had heard it?

A. Well, because I am not a follower of General Walker and I have nothing against the man and I never have had anything for him.

Q. You realized, of course, that he is a public figure?

A. To some people.

Q. And he is known through the press and over the radio and over the television, is he not?

A. Yes, he is.

Q. His is a familiar name in the public?

A. It was not so familiar at that time.

Q. It is now?

A. Yes, sir, very familiar now.

Q. When you heard he was down at the monument, you went down there?

A. Yes, I did.

Q. Was there quite a crowd down there?

A. There was a group of people there, yes.

Q. How many would you say?

[fol. 599] A. I don't know. I was on the front again because I tried to find out what was going on and I was on the front there.

There were 50 or 60, I would say, when I first went up there and some more might have come behind me and some more to my left, I don't know, because I was looking ahead to him, looking toward him.

Q. How close were you to General Walker?

A. At that time I must have been 15 feet from him, or 20 feet.

Q. Did you hear the beginning of his speech?

A. Yes, I did.

Q. How long did he speak?

A. That is hard to say. I would say 10 or 15 minutes.

Q. Just tell us what he said during that 10 or 15 minutes?

A. It has been quite a while, I can't remember exactly what he said. He did talk about Cuba, he said, "This is the long way to Cuba," or "This is the wrong way," the word I could not hear because there was some noise, people milling around and everything.

He said that people had a right to protest and then the minister tried to get up on the monument with him and he asked the minister what faith he was and the minister said he was an Episcopalian and he said, "Well, this makes [fol. 600] me ashamed to know you," or "ashamed of you," or, "I denounce you," or something of that nature.

Q. What had the minister done or said to make him ashamed that he was an Episcopalian?

A. I don't know.

Q. Did you hear the minister tell him, "General, you can stop this if you would," or "help us to stop this"?

A. No, I didn't hear that.

Q. Did you hear anything like that at all?

A. No, I didn't.

Q. Did you hear the minister tell him that these people would go home if he asked them to?

A. I could see that the minister was saying something to him. I couldn't tell what was said.

Q. You didn't understand anything that the minister said?

A. Not that I recall.

Q. Didn't you gather that the minister was trying to get General Walker to advise the sudents to quit their demonstrating and go home? Wasn't that your impression?

A. I don't know, you can't tell about ministers.

Q. And you are not much for ministers?

A. Some.

Q. But you do know that General Walker said, "Here is an Episcopalian minister that makes me ashamed to be an [fol. 601] Episcopalian"?

A. Something to that effect, yes.

Q. What happened to the minister then, when he said that?

A. I saw an arm and a shoulder reaching up above the crowd and pulled the minister down.

Q. In other words, when Walker said that somebody reached up and pulled the minister down?

A. I don't know whether they pulled him down when he said that or whether he was just pulled down, I don't remember when he said it.

Q. Do you know what became of the minister?

A. No, I don't.

Q. What else did you hear Walker say?

A. I have already said that the people have a right to protest, he said that.

Q. Did he say, "You have got a right to protest, keep it up"?

A. I didn't hear him say, "keep it up," there.

Q. You didn't hear him say that?

A. I heard him say we had a right to protest. He didn't say protest by any manner. He didn't suggest any manner of protesting.

Q. He just said you have got a right to protest in any manner, is that right?

[fol. 602] A. No.

Q. What did he say about "any manner"?

A. He said that he said these people had a right to protest but he did not advocate any manner of protesting, he didn't say, "Go out and hit them with a brick," or anything of that nature.

Q. Did you hear him say, "I compliment you on the protest you have made," or "I congratulate you on the protest that you are making here tonight"?

A. No, I don't remember that.

Q. Would you say he didn't say it or do you say that you just don't remember?

A. I would say I don't remember.

Q. If Walker, prior to making his speech, walked up to the flagpole or in the vicinity of the flagpole and stayed up there for some time and observed what was going on up towards the Lyceum, looking towards the Marshals, did you see that?

A. No, I didn't.

Q. Where were you during the five, ten or fifteen minutes before Walker started to make his speech?

A. I was in the south-southwest direction near the biology and engineering department over there in the fresh air.

Q. You didn't see Walker up around the flagpole before [fol. 603] he made his speech?

A. No, I didn't see him up there.

Q. Have you told us everything that you heard him say?

A. Yes, I believe so.

Mr. Watts: Now skipping the rest of that, it seems to be repetitious, over further in the cross examination, a question by Mr. Gooch, Page 26. Let's see, I think, didn't he read the last question on Page 25, "Towards the flagpole"? I believe he did, according to my notes here, and he quit after saying, "These people were talking to him and after that, after a period of time, the group started moving towards the Lyceum Building up the sidewalk."

Q. You say that was five or ten minutes after he got down off the monument?

A. Something like that.

Mr. Watts: Page 26, second question.

Q. Something like ten minutes that the group got around him, how big a group was that, would you say?

A. The group that was right around him was just a small number of people, ten or twelve.

Q. As he started towards the flagpole and the Lyceum, other people fell in behind, didn't they?

A. No, the group was not led by any one person, neither was it led by any one group of persons. It was just a [fol. 604] casual walk, there was no hurry, there was no

rock throwing at that time, the group just ambled up in this direction.

Q. That is what you said. Now the thing I am asking you is not what kind of walk it was but five or ten minutes after his speech, he started up the sidewalk that led to the flagpole and the Lyceum Building?

A. That is right.

Q. And there was a group around him or with him, is that correct?

A. Well, he could have been with the group.

Q. Well, one or the other. He was with them or they were with him, is that right?

A. Correct.

Q. As they went up, they got almost to the flagpole and then he veered left, you say?

A. To the left.

Mr. Watts: I think he read the rest of that. I believe that's all.

The Court: Ladies and Gentlemen, we will recess until five minutes of 4:00.

(15-minute recess.)

[fol. 605] Edwin A. Walker, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. You can't smoke in here. Give us your name please.

A. Edwin A. Walker.

Q. Where do you live?

A. I live in Dallas at 4011 Turtle Creek Boulevard, Dallas, Texas.

Q. Where were you born and raised?

A. I was born in Kerr County at Center Point, Texas, about sixty miles west of San Antonio.

Q. What year?

A. In 1909.

Q. What was your schooling?

A. I went to grammar school in Center Point about three miles from the farm house and then I went on to high school there and at Schriner Institute at Kerrville about thirteen miles away, the County Seat. And then to New Mexico Military Institute, where I finished high school.

Q. Was that where you and I first became acquainted? [fol. 606] A. Yes, it was, I believe.

Q. Where did you go from there?

A. I went to the Academy, United States Military Academy at West Point.

Q. Did you graduate from the Academy?

A. Yes, sir, I finished there and was commissioned after completing the course, four years course at West Point, in 1931.

Q. Did you become a professional soldier?

A. Yes, when you are commissioned you have a certain requirement to do. Then you make a decision later and it is expected that you continue for the rest of your service.

Q. Did you attend various advanced service schools?

A. Yes, sir, I did, throughout my Military career. You continue going to school, Service schools in the Military Service.

Q. In what branch of the Service were you?

A. Well, my basic branch was Field Artillery. But I also went to the Air School and flew airplanes and then I also commanded an Infantry, as well. So it was—I got some of Air Force, Artillery, Infantry.

Q. Did you become a rated pilot?

A. No, I didn't.

Q. You were commissioned a Second Lieutenant, were [fol. 607] you?

A. Yes, sir.

Q. Did you—prior to World War II or shortly prior to World War II did you have any specialized training? That is, did you change your branch or your MOS in any way?

A. Yes, it was changed to the extent that specialized in guerrilla warfare, commando, airborne, and I even joined a unit that was ski trained, preparing for World War II in mountains; all these activities in mountain training, commando unit, they are referred to as commandoes often, rangers, or guerrilla warfare.

Q. In your early Army career, in the Lieutenant area, we will say, did you participate in any Army athletics in physical fitness programs?

A. Yes, sir, the Army in those days had quite a physical fitness program. They were rather strenuous and also, as a sideline I was continuously playing polo and training horses, riding until midnight.

Q. Did you and I have further acquaintance in those days?

A. Yes, sir, we did. We ran together a time or two on the polo field.

Q. And during the months immediately prior to World War II where were you stationed?

A. Well, they were moving us awful fast then, the [fol. 608] regular establishments, and I came back from Hawaii one month before Pearl Harbor, after two years had ended there, a two-year tour there. In those days it was foreign service because that wasn't a state. And I came back and was moved every four or five months, as we were moving, getting ready for World War II. I went to Augusta, Georgia, for three or four months, Camp Atterbury, Indiana. These were with different divisions, training and getting ready for War, and then Fort Clark, Texas, three different divisions.

Q. Where did you have your paratroop training?

A. At—I left the Fort Clark Division which—to go to Fort Ethan Allen, Vermont, a small station, and this unit was getting prepared to go overseas, a voluntary unit, for hazardous duty, and I joined it in 1943.

Q. Did you have combat experience during War time, World War II?

A. Yes, sir, I did.

Q. What was that?

A. In the Mediterranean and European Theatre. Also in the Asiatic Theatre.

Q. Were you the recipient of any decoration?

A. Yes, I was.

Q. Very briefly, just start at the top and give us two or three of them.

[fol. 609] A. Well, the Legion of Merit, the Bronze Star, the Silver Star, the Ulchi Medal from Korea, the Croix de Guerre, French, and the British Medal, and the Norwegian Order of St. Olaf.

Q. Did you have combat service in Korea?

A. Yes, I did.

Q. With what unit?

A. With the Division Artillery, commanding the Second —the Division Artillery of the Second Division, and the Infantry Regiment. I was a Division Artillery commander, and then an Infantry Regiment of the Third Division, the Cotton Balers, Seventh Infantry of New Orleans, the Cotton Balers. That goes back to the Revolution.

Q. When did you come back from Korea?

A. I came back from Korea in '53. I went over in '51.

Q. Was Korea in those days classified as a theatre of warfare?

A. Well, the overall out there was a theatre, with overall headquarters in Japan. And it was referred to as a police action.

Q. Who was your commanding general? I mean your commanding general in Japan?

A. A General Mark Clark was there most of the time.

[fol. 610] Q. And who was his superior? Under whom did you ultimately—who was above Gen. Clark?

A. General Clark was to the—to Washington, D. C., the Joint Chiefs of Staff.

Q. Was General Macarthur in the chain of command anywhere?

A. General Macarthur had just made a speech or two on the Pacific Coast on his return after his release and—one speech, I believe, out there.

Q. Well, to shorten it a little, did you serve under General Macarthur in Korea, or had he already been released?

A. No, the effects of the policy in what had come because after the release, because I went over there immediately thereafter.

Q. I see. Now, then, after returning from Korea did you have Military Service in America, and particularly were you given any command in the Fourth Army area?

A. After my return from Korea I went directly to Fort Bragg, North Carolina, as assistant division commander of the Airborne—82nd Airborne Division.

Q. Then where?

A. Then I went back to Formosa, as advisor to the Commander in Chief of Chiang Kai-shek's Army. Then from there I came back to Hawaii and served for a year and a [fol. 611] half as Division Artillery Commander in the 25th Division that was stationed in Hawaii.

Then from there I came to the United States and was assigned to—this was, now, '57 and I was assigned to the District Command, command of the troops, the reserve district of the entire State of Arkansas, and there I was stationed in Little Rock.

Q. Was that the 19th Corps in those days, or do you have the correct designation?

A. Yes, it changed while I was there. We had to reorganize it. I was briefed on this reorganization out of Fourth Army Headquarters which is at home, went down, I was on leave at home and I went down to Fourth, to the headquarters and got briefed on the necessity of reorganizing this whole district structure.

Q. Where was your headquarters at that time?

A. My headquarters was right in the City of Little Rock.

Q. After the reorganization were you and I in further contact?

A. Were you and I in any further contact?

Q. Yes, after you reorganization at Little Rock?

A. Yes, I used to see you from time to time on Military activities with respect to going and going around through [fol. 612] the states, because we reorganized and extended the command from then just the Little Rock area to several states, to include a portion of—oh, I forget which, but there were several states involved, part of Louisiana, Oklahoma and Arkansas.

Q. Did any unusual incident of a semi or Military or semi-Military nature occur while you were Corps Commander at Little Rock?

A. Yes. There was the incident that the Military referred to as Operation Little Rock, and that came about a month, say a month or so—I got up there about the latter part of August and I think this came about about a month later in '57.

It was referred to as Operation Little Rock by the Military Service in the plans and this—there was no planning for it at the time. I went there strictly as District Commander to command the reserve, the Reserve District of Arkansas, and this was the integration requirement on Central High School that began around the 27th of September, or 28th, sometime within a few days of that area.

Q. What was your rank at that time?

A. I believe I was just promoted to Major General with my second star, as I went to this—to Little Rock, because when I came out of Hawaii it is a One Star job to Command [fol. 613] Division Artillery, so I am sure I must have gotten a promotion just about that time.

Q. And when you were first assigned that command did you have any regular troops under your command? That is, regular Army combat type troops?

A. No, in that command you only have the reserves of the state. These are the people in the state that are doing business all over the towns and communities and about their requirements in general, it is two hours at night a week of training at the Armory, and they are strictly busi-

nessmen, and everybody in the community that are in the reserves.

And they train two hours a week in the Armory and then they have two weeks training requirement in the summer, usually where the organization gets off and goes to a regular Army post and trains in the field, or whatever its requirement is, depending on what type unit it is.

Q. In connection with your Operation Little Rock, did you have any combat type troops transfered to your command?

A. Well, there was a few regulars, to go back on the other question. My headquarters was set up with about fifteen people that were on permanent duty keeping the headquarters running, fifteen or twenty, say, in our requirement. It took that to keep the staff organization up and [fol. 614] fulfill the requirements to the State people, the reserves.

Now, your question with regard to—

Q. At the time then of the operation at Little Rock were any combat type regular Army units attached to your command?

A. Yes, there were. There was an organization that came from Fort Campbell, Kentucky, part of the 101st Airborne Division.

Q. What was the strength of that unit?

A. Pardon? That unit was finally decided to be 1,000 people.

Q. How long did it remain under your command in Little Rock?

A. I would guess that was—I can't say definitely, but pretty close to the end of the school year. Maybe just after the school year—I believe—I believe certain portions we began to send back earlier than that. We would get 150 or 200 men back, and they were always very anxious to get out and get back, and they were always wanting to get back to their regular training. They didn't like what we were doing, and we were anxious to get them out, the regulars,

get them back to their normal job. And so we were getting them out just as much as we could.

It would have been somewhere between, say, April and [fol. 615] the end of the school year. I think there were still a few of the regulars there at graduation.

Q. Were you assigned a mission as commander of those troops?

A. Yes, I got the command by being the senior officer in the state. I was designated as commander when they knew that Federal forces were going to be used in Little Rock. I was designated as commander, then the senior member in the state, actually while the press kept saying I commanded the 101st Division in Fort Campbell, Kentucky, I didn't at all.

I took command of these troops, these troops came under my command as they flew across the state boundary into Arkansas and landed there at Little Rock in the outskirts of town at the—I believe they landed out there at the airport ten or twelve miles from town.

Q. Was this 101st Airborne Division the whole division or just a task force out of the division?

A. Well, in a form it is a task force, because you don't get just 1,000 men from any organization in the Army. It was sort of a made up task force, for what the requirements would be to fit the mission, that particular mission. [fol. 616] Q. While you were performing this mission, was there any violence of any kind that occurred?

A. Well, there was one minor incident, I remember, one very minor incident.

Q. Was there anything that occurred in the nature of a riot or anything like that?

A. No, there was no rioting. There were some antagonism and some people standing and protesting. There was quite a protest at Little Rock, at Central High School, quite a protest.

And I think there could have been violence. In fact, in Washington, when I was—

Q. Just a second. Let's don't get to Washington. Might be here the rest of the day.

Continuing then with the aftermath of that incident, did you have any contact with the Department of the Army after that, after the incident had terminated?

A. You mean the entire military operation?

Q. In simple language and to shorten this, did you try to resign when that was over?

A. Oh, yes, I turned in my resignation before I left Little Rock.

Q. Was it accepted?

A. No, it was refused. It was—I was called in and they—

[fol. 617] Q. Was your tour—excuse me?

A. They wanted me to explain why and I told them why—

Q. No, you don't know why—

A. —and they refused—

Q. I think you understand from the trial this far all you can testify is what went on in your own mind, not someone else's.

Did your tour of duty terminate at Little Rock?

A. Did my term—

Q. Did you terminate that tour of duty in Little Rock and transfer somewhere else?

A. Yes, in '59, I was ordered to, 1959, I was ordered to Germany to command the 24th Infantry Division.

Q. And did you assume that command?

A. I did.

Q. And without getting too much into detail, did you have, while you were on that assignment, did you have some incident or misunderstanding with anybody that resulted in national publicity?

A. In Germany?

Q. In Germany?

A. Yes, I did. After 17 months with the Division—

Q. Just very briefly, what was the general nature of that?

A. Well, I was attacked by the press, stirred it all up [fol. 618] over what was a paper in Europe. It's an English paper, incorporated in Maryland—

Mr. Watts: Just a moment. He wants to—

Mr. Gooch: If the Court please, I move that the answer, that he was attacked by the press, be stricken as not responsive; it's wholly irrelevant and immaterial to any issue in this case.

The Court: Sustained.

The Witness: Well, can I say I was attacked by a newspaper?

Mr. Watts: No, wait just a minute.

The Witness: Maybe I should have said a newspaper.

Mr. Watts: No, hold on just a minute. You listen to my question, Mr. Witness, and for once in your life, now, I have got command over you.

By Mr. Watts:

Q. So if you will, just try to understand my question and answer it very simply, why, I think we will get along pretty fast.

Did some adverse publicity that caused you to become involved in nation-wide newspapers appear in a newspaper, the Overseas Weekly?

A. Certainly did.

Mr. Gooch: If the Court please, we object to that. Irrelevant and immaterial to any issue.

The Court: What is the materiality, Mr. Watts?

[fol. 619] Mr. Watts: The materiality is, if Your Honor please, about this time there was a, the start of what expanded into a running feud between this witness and the press.

The Court: Yes, but how was the Associated Press involved in that?

Mr. Watts: They were, as would come out later, they gave him a pretty rough time.

The Court: Well, I'm not going to permit it until there is some proof.

Mr. Watts: All right, sir. We will have another look at it before I go back into that.

By Mr. Watts:

Q. Were you relieved of your command in Germany after a telephone call with some official in the Pentagon?

A. Yes, sir, I was. I was relieved and moved to the higher headquarters up at Heidelberg.

Q. And from there, where did you go?

A. I was in that headquarters about, from April to November, and was assigned in October to the top training in operations in supervisory job of the entire Army in the Pacific, in Hawaii, the Theatre Headquarters in Hawaii.

That assignment was—came in October.

Q. Now was that in the nature of a demotion or promotion?

[fol. 620] A. Well, that was a higher job than I had been in training and supervision of troops because it included all the Army troops in Laos, Vietnam, all the Southern Pacific Area.

Q. After you were relieved as Commanding General of the 24th Infantry Division, were charges of any kind instituted by anyone against you, investigation?

A. None at all.

Q. Were not. Was any investigation held by a military authority?

A. Yes, sir, it was what we call in the service a preliminary investigation but that it—it's an investigation which has to be repeated to even prefer charges.

Q. Was any punishment of any kind imposed upon you?

A. No, there wasn't.

Q. Did any—well, strike that. That may be a little off the target there.

Where did you go from Germany then?

A. From Germany I came back to the United States and had a couple of periods of three weeks' leave and I was due reassignment in the States.

I had had my full tour of duty with the Division, you might say, except for being relieved. I had served longer than the previous 20 commanders that had commanded it, with the Division, before I was relieved.

[fol. 621] And I came back to the States and went to Heidelberg, to the Central Army Headquarters there.

And then that lasted until about—I took a couple of leaves to the United States for three weeks and the second time, why, my orders were—everything was re-arranged so that I was—didn't go back.

Q. Was any action taken by any headquarters, either Department of the Army or European Headquarters, to initiate an investigation of your actions while commanding general of the 24th Division?

A. Oh, yes, that was initiated—I remember the date because it was—my relief was the same day in Germany, I—on April the 17th, that the Bay of Pigs failed.

Q. But in a different year?

A. The same year.

Q. Sir?

A. It was the same year, my relief, '61, April the 17th, was the day the Bay of Pigs failed and that's the same day I was relieved in Germany.

Q. Now then very briefly without getting into the details, what was the basic issue that was involved in this investigation of you that attracted national publicity?

Mr. Gooch: If the Court please, we object to that as being irrelevant and immaterial to any issue in this case.

[fol. 622] (Conference at the bench.)

Mr. Watts: All right, sir. I will be very brief.

By Mr. Watts:

Q. Very briefly now and without getting into any politics or philosophy or anything that might keep us here the rest of the week, you just tell the Court and jury very simply what that issue was for which this investigation was initiated.

A. Well, may I ask a question? Does that previous objection hold?

Q. Yes, that previous objection holds. You just tell the Court and jury—

A. Okay. We were involved over the training program of the 24th Infantry Division.

Q. And in simple language, what was the objection to your training program?

A. I considered that all soldiers should know who the enemy was and I thought the enemy was where it is and where everybody refers to it. I was teaching them all I could about that enemy and what I thought they should know about it.

In this type of warfare, why, everybody's got to know it down to the last soldier, even the Lieutenant, because in this type of warfare today, why, everybody may be on his own anywhere and every Lieutenant or every Sergeant may be responsible for the lives of 15 or 20 men, cut off, not seeing anybody for 10 or 15 days, he's got to make his [fol. 623] decisions about whether he would rather be a prisoner like they were in Korea and—I guess—nobody is supposed to be a prisoner, don't think I am advocating that.

But those decisions, when you are cut off 15-20 days under the most dire hardships, why, certainly people would have to make their own decisions.

Q. Now that's enough on that. I think you have covered it. Now let me ask you if that training program of yours was given a name within the Division?

A. Yes, it was referred to and got quite a bit of run across the press here, as the "Pro-blue program."

Q. Pro-blue program?

A. Right.

Q. Now what was the effect of that training program on the 24th Division under your command?

Mr. Gooch: If the Court please, I hate to object—

Mr. Watts: This is very short, if Your Honor please.

Mr. Gooch: I see no materiality about what effect anything had on the 24th Division.

The Court: I will permit it.

By Mr. Watts:

Q. All right, sir. Go ahead. You are permitted to tell what you observed, the effect of this training program to be on the training of this Division. Keep it short.

[fol. 624] A. I observed the best Division in the United States Army when I got through with them—and I wasn't half through.

Mr. Gooch: I renew my objection.

A. And it raised the morale, it gave the soldiers an objective, as it does young people, and it gave them a purpose for being overseas away from their families with great sacrifices.

Q. How did your church attendance program react?

A. Church went up—attendance went up about five-fold.

Q. What happened to delinquencies?

A. I worked, talked to the Chaplains once a week about—by the hour.

Q. What happened to the delinquencies after you initiated the program?

A. Delinquencies went down. The Division was holding the record in Germany for the delinquents. Had the least record of delinquency.

Q. I believe that's all. Now then were you punished in any way for this program that you had initiated and carried through in your Division?

A. No, but I think everybody—this is all on reflection. I was certainly not punished. There was no position to punish me for—

[fol. 625] Q. What action was taken by the Department of the Army or your Superior Headquarters?

To shorten it, did you receive—

A. After an investigation, 900 pages and 267 exhibits, where you sit down in a preliminary investigation and discuss all your psychology and what you think with an investigating officer, who's one promotion above you—

Q. Three-star General?

A. Yeah, three-star.

Q. General Brown?

A. Sir?

Q. General Brown, was it?

A. General Brown.

Q. All right. Did you receive any punishment? Yes or no?

A. No, I did not.

Q. What action did General Brown's investigation result in?

A. Cleared my training program. It had been cleared a month after it was written by the next higher command, the next—the star above me had cleared it within three weeks and told my boys it was the best program in Europe.

Q. And where did you go from there?

A. Well, where did I go from there?

Q. Yes, sir.

[fol. 626] A. Well, this investigation mostly took place in Europe and by this time—this was through the period I was at Heidelberg at the Army Command Headquarters and then I took some leave to the States and was in the United States for these leave periods and then the second leave, I didn't go back. It was all arranged.

And I was due to come home. I was awaiting orders all the time I was at this Army Command Post back to the States: My tour of duty over there was up.

Q. In short and simple language, did you resign?

A. Yes, I resigned.

Q. What's the difference, on the termination of a professional Army Officer's career, between a resignation and a retirement?

A. The difference is, when you retire, that you have available to you and it's—you get all your benefits and your retired pay and all your fringe benefits, like medical, hospital and post exchanges and so forth.

Q. Were you ever—

A. When you resign, why, you cut off all that. That is no more. You have no rights to any retired pay or any

fringe benefits, medical or post exchanges or anything.

Q. For your then rank, what were they, roughly, in amount?

A. About $15,000 a year.

[fol. 627] Q. Have you drawn one dime from the Army since your resignation?

A. No, I haven't.

Q. Or from any Governmental source?

A. No, I haven't.

Q. Now since that period of time, have you engaged in activities that have resulted in your name becoming apparent to the American public in various newspapers, magazines and other news media?

A. Yes, several activities.

Q. Have you, since your experience in Germany, had any conflict with reporters connected with the Associated Press?

Mr. Gooch: If the Court please, I believe the issues in this case are limited to the Savell story.

Mr. Watts: I thought General—

Mr. Andress: There is malice, Judge—

(Conference at the bench.)

The Court: Go ahead, Mr. Watts.

By Mr. Watts:

Q. After you resigned from the Army, where did you go?

A. I went to Center Point.

Q. Was that your family home?

A. That's right, where my father lives and my brother.

Q. Live on a ranch?

[fol. 628] A. What we call a small stock farm.

Q. How long did you stay there? Oh, roughly.

A. A month and a half or so until I moved to Dallas—month, maybe.

Q. Where did you go?

A. I moved to Dallas.

Q. And has that been your home since then?

A. Yes, sir, it has.

Q. Now did you have some type of a venture in politics?

A. Yeah. Yes, sir.

Q. You have held no public office?

A. No, sir.

Q. Now did you have an occasion in September of 1962, to go to the State of Mississippi?

A. Did I have a what?

Q. Did you have occasion in the latter part of September of 1962, to go to Mississippi?

A. I went to Mississippi in the latter part of 1962, right, in September.

Q. And prior to that time, had you been to Mississippi, for instance, making speeches or any—

A. Yes, I had been to Mississippi. I made a speech over in Mississippi either in December or January of sixty—well, it would have been December, '61, or January of '62. I can get the date but I don't know—I don't—it was six [fol. 629] or eight months before the September, '62, trip.

Q. Now did you learn from either the press or any other source that along in September, an incident involving the possible use of military force was building up in Mississippi?

A. Yes, sir, I did.

Q. And what parallel was there, if any, between what was developing there and what you had experienced in Little Rock?

A. Well, there was quite a parallel over the use of military forces, was building up. The question became whether there was going to be military forces used just as it was over in Little Rock, whether there was going to be military forces used. And I had set in on the military side of the decision, whether the military forces would be used in Little Rock in September of '57.

[fol. 630] Q. And at that time did you make any type of investigation or study of the Military—the impact upon military forces of this type of duty?

A. Oh, I would say yes, definitely. It wasn't a formal study, but with all the staff meetings and all the contact you had to have in the Military you certainly came out with a position with respect to the whole situation and what you had to understand, the whole constitutional process to be able to tell how any soldiers could operate or would operate.

Q. And did you develop any personal concept as a result of that experience toward the use of Federal troops within the borders of the states, for purposes of this kind?

A. I certainly developed a concept with respect to the use of Military forces in strictly civilian domains and under civilian problems, and what is the civilian traditional method of handling our processes.

Q. Did you have any contact or—strike that.

When did you consider the possibility of personally going to Mississippi? That is with respect to the end of September?

Was it the first, middle or last part of September, or was it the previous month.

A. I am back on the other question. I don't think we [fol. 631] completed it.

Q. That is all right. Let me worry about that.

A. Okay.

Q. You let me worry about that; you answer the question.

A. Say about the 25th or 26th of September of 1962 was the decision, when I made a decision that I would go to Mississippi, but only if Federal troops were used.

Q. And did you, pursuant to that decision, make any public utterance?

A. Yes, through that period I had made some public utterances.

Q. What was the first of these public statements you made? I don't mean the exact time, or just tell us where was it? Or to simplify it, was it in Shreveport or some—was it over the Party Line Station at Shreveport?

A. It could have been. I would have to refresh my memory. There was three or four or five I made a week, and it may have been over Party Line Station. I made one statement over Party Line Station from Shreveport, Louisiana; then from Dallas.

Q. You heard Mr. Gooch's opening statement, the statement that you had sought out the press and insisted on giving numerous statements to the press. Tell the Court [fol. 632] and Jury exactly what occurred?

A. Over the statements?

Q. Yes. Did you seek out the press or did the press seek you out, or both?

A. Sometimes you would find I would ask them if they would want a statement, as I had for months, and months and months, and sometimes they would come to me and ask for a statement, and sometimes neither, and sometimes they would complain, "You don't tell us you want to make a statement, how do we know it?" And sometimes—most of the times they don't print what I say anyway, so you don't know where you stand with the press.

Q. Did you have any personal acquaintances within Mississippi you talked with over the developing situation there?

A. Yes, I had some friends over in Jackson.

Q. Were they people with whom you had had contact during the previous speaking engagements?

A. Yes, sir, people that I had met and that I knew on different trips to Mississippi.

Q. Without getting into too much detail, just tell us what you did in preparation toward making up your mind whether you were going to go to Mississippi or not?

A. Well, all during this period there was much discussion about Mississippi, the sovereignty of the state, the [fol. 633] violation of the Constitution, the Governor's position, and so forth, and my interest extending from Little Rock, even went back further than that. My interest during that month if they—I recall hearing that month that Cuba was very, very hot and serious in the news.

And this was taking most of my interest through this period, this August-September period.

Q. Did you—

A. And we were working on all the information we could get on Cuba. It was obvious in September that there were missiles being placed in Cuba. And it is also obvious, by releases in the press and the headlines that Cuba was getting and the statements that were going back and forth and the reports on Castro, it becomes perfectly obvious, even by the statements of officials in Washington, that Cuba —that there were missiles in place, and supposition that there was, and there wasn't any doubt of it; and that Military forces, foreign forces were moving into Cuba.

Q. Now, did you talk to somebody in Mississippi?

A. At what time, please?

Q. Shortly before September the 30th? To simplify the thing so it won't take too much time, didn't you or not call Dr. Ney Williams, or did he call you?

A. Yes, sir.

[fol. 634] Q. That is what I am trying to get around to.

A. Yes, I called Dr. Ney Williams several times, probably. Every now and then I call him, maybe once a month, or I might get a couple of calls in a week, just like I call a lot of people.

I called Dr. Ney Williams sometimes three or four times a week, say around the first week of September.

Q. Were you in contact with him one or more times since then, between then and September 30th?

A. Yes, I called him. We were, I believe—say Friday, the 28th.

Q. And what—did you make arrangements of any kind?

A. Yes, we discussed what was going on. Now, we are getting down to the area of—close to the area, say, between the 25th and 30th, right?

Q. Yes, sir.

A. All right. In this area I may have talked to him a day or two before. I can't remember. But it wouldn't have made any difference because the whole conference was

about—getting information about what was going on in Mississippi with regard to the situation there, what is happening and what the people in Mississippi think, and what he knows about the Governor's situation and what has been said. And I think I even asked him to subscribe to a [fol. 635] paper, the Jackson Ledger, for me, and I—we made—say the Friday, then, we would have discussed over the telephone conversation, I probably got so interested in what was going on over there, and the statements that were beginning to look like there was definitely going to be used the Military forces, Federal forces, in some form.

Q. Did you approve of the use of Federal forces in some form in Mississippi?

A. Well, it wasn't my position to approve anything, but I was interested in the use of Military forces.

Q. That is what I am talking about. Did you approve or disapprove of the concept of using Federal Military forces in Mississippi?

A. Yes, based on what I think, I don't think the Military forces, and it is pretty hard on moral and they don't like this business in which they are not used for what they are for, and I think it takes more than we have done in this set up to establish the right of the Federal Government to march in with bayonets, either 1,000 or 20,000 troops, Little Rock or Oxford.

Q. Did you make arrangements with Dr. Williams that you might go to Jackson?

A. Yes, sir, in the conversation back and forth it was about what the situation was. I said, "I will probably come over," and hinted to him to find me a place to stay.

[fol. 636] "Probably come over," and talk firsthand with him about it.

Q. Did you go?

A. Of course, at that time I focused on the whole state of Mississippi. I went—

Q. Wait just a minute.

A. I say I went about—well, that would have been Friday we were talking about?

Q. Right.

A. So it would have been Saturday I went over there, on the 29th, to Jackson.

Q. At that time did you have a present intent to go to Oxford?

A. Certainly not.

Q. How did you go?

A. I flew to Jackson in a friend's 'plane.

Q. Would this have been on Saturday, September 29, 1962?

A. Yes, sir.

Q. All right. Take it from there on and just tell the Court and Jury what happened the rest of the day and that night.

A. The rest of the day and that night, I landed, I guess it is an hour and a half, I have forgotten the time I left Dallas, but a friend had an airplane.

[fol. 637] As I remember, he and I were in it, and we landed in Jackson about, say between 11:00 and 12:00 o'clock on Saturday. This the 29th of September.

And this friend, Dr. Ney Williams, met me at the airplane, and, as I remember, he was by himself with a car, and he took my friend, who owned the plane and myself to lunch.

We sat around the table and talked and I had discussed —he asked me if I wanted to go to the football game that night and I said yes, I would go to the football game with him. And he finally said, "Well, I will put you up, you can stay right here at the house."

I said, "Well, I better stay somewhere else." I didn't want to cause him any trouble. And he said, "No. I want you to stay here at the house."

So the idea was, I would spend the night after the football—this was a 8:00 p. m. football game at night. Ole Miss was playing, I believe it was the University of Kentucky that night. And we went to lunch.

Q. Who was the friend that took you over there?

A. Joe Allred.

Q. All right. After lunch what did you do? Very briefly. You are not into the lawsuit yet.

A. Cafe for lunch, and he, knowing I was going to the football game, he had a couple of tickets, as I remember, [fol. 638] but they were not together, so we stopped at a place or two in town to get the tickets together. I didn't go in. He said he had to straighten out the tickets, and then we on down to a printing company which—where the man—the friend that had the airplane, either Mr. Williams wanted him to take something back to Dallas, I believe it was, or maybe—I didn't pay much attention to it, I didn't go into the printing company, but this pilot picked up something there, and we parted from him there and left him so he could—he was going on back to the airplane. And I went on with Dr. Ney Williams to his home.

Q. Did you meet Louis Leman there?

A. Well, Louis was either there, or I believe he was there, or just arriving, or something, right.

Q. Had you had some kind of previous 'phone call with Louis that brought him there?

A. Yes, he had called me from Mississippi and said that he was over there and we had discussed what the situation was and I said, "Well, if you want to talk to me . . ." I believe there were two telephone calls involved, and finally he found out definitely, I said, "If you want to see me you can come on down to see me at Jackson." He asked me when I was getting in and I probably didn't know the first call and later I did and I told him and he showed up at—said, yeah, he would come on down.

[fol. 639] Q. Now, then—

A. We met at Dr. Ney Williams' house.

Q. Did you spend the afternoon at the Williams' house?

A. Yes, we spent the afternoon.

Q. And what did you decide then, or what did you do?

A. Well, there were—Dr. Ney had his call coming in and out about the situation and we discussed the situation, what was going on with respect to Mississippi and the possibility of the use of Military forces, and how far they

had been committed, or if they had been committed, with respect to the decision to commit them, and what plans had been made for their commitment, and what they knew about it over there.

Q. Did you finally learn troops had been committed or would be?

A. Yes, during that afternoon why it became very obvious that Military forces had been committed.

Q. And what did you do then?

A. To a Military operation.

Q. Did you—

A. Toward Oxford.

Q. The question was: What did you do then?

A. I had some coffee.

Q. After you finished what did you do? I am not trying [fol. 640] to trap you. Did you and Louis Leman go to Oxford?

A. Well, I am not too sure.

Q. What time?

A. Yeah, but that is later. What did we do then? We had a press conference. People were calling about a press conference, and we went to some place called the Sun & Sands Hotel, or motel, I believe. That was about 6:00 o'clock. I gave—I made—I talked to Ney and his wife and we discussed telephone calls that were coming in to him and he got a call from Oxford from somebody, and there was a little excitement over a call that he was getting that somebody thought that Meredith was being moved in that afternoon, and he called a friend, I believe, in the radio station and asked him if he had heard anything. And this sort of thing, as we sat around in the parlor and I had moved my suitcase in to spend the night, and I would say about, say, somewhere between 4:00 and 5:00, that I wasn't going back; that there had been enough definite information on commitment of Military that there was going to be something definitely in the use of Military forces and we, in the meantime the press had called, and we gave them the final answer on the press conference at the Sun & Sands,

and we were supposed to be there at 6:00 and Ney went on with his wife to the football game, as I remember, and we told him I wasn't—I wasn't going, and I gave him his [fol. 641] ticket back.

Q. You say you were supposed to be over there at 6:00 o'clock?

A. Sir.

Q. You say you were supposed to be over there at 6:00 o'clock, over where?

A. At the Sun & Sands Motel for the press conference.

Q. Did you show up?

A. Yes, sir. A little late, I think, because the traffic was so heavy and we had to cross a lot of this football traffic.

Q. Did you have a prepared statement for the press conference?

A. As I remember I did have a prepared statement.

Q. You still have a copy of it?

A. Should be in some of the files.

Q. And did you give that statement to the press personnel there at the conference?

A. As I remember, I did, right.

Q. And how long did that conference last?

A. Well, there were sort of two parts to the conference and it didn't last—I would hope or guess or say—over fifteen or twenty minutes, I guess, at the most, getting in and out and away from it.

Q. What were the two parts?

[fol. 642] A. Well, the first, you went into a TV room and there were two, as I remember, legged cameras there, these three-legged TV cameras. I think there was two but it was obvious it was a set-up in all this light, and the set-up is to question you and twist things around as much as you can.

I recognized this. That is why I usually prepare a statement. I prepared a statement and gave it to them. I don't remember, the man may have questioned me a time or two. I may have answered or I may have not, but I know I got mad at him because I didn't like his questions. They were

vicious. So I turned around and walked out right in his face, and walked out in the hall and there were six or eight others there.

The TV man was taking over, of course, and I walked out in the hall and got around the other people and let them ask their questions so the press could get a chance and not let the TV take advantage of the newspaper people and the local boys, right?

Q. I don't know. Did you call that press conference, or did the press call it?

A. Well, I actually don't know. I didn't—we talked about a press conference and I have got many friends in Jackson. When you go over to Jackson they always want to talk to me and I have got a lot of friends in the press over there [fol. 643] and Mr.—Dr. Ney talked to a press man. I can't tell you how that got arranged, whether it was on his instigation or out of the house we were in or whether it was that they heard I was there and asked him if I would hold a press conference, or not, it could work either way.

[fol. 644] Q. Where did you go after the press conference?

A. I went to—we went back to Dr. Ney Williams' house.

Q. How long?

A. Well, by this time we were getting through the press conference and had made early in the afternoon a commitment of troops and I had made statements that I would go to Mississippi if there was a commitment of troops.

Q. But the question was, how long did you stay at Williams' house after the press conference?

A. I went over—I went there, oh, I guess we were there half an hour or so getting a last message or whatever Dr. Ney had left for us and telling the maid goodby and thanking her for the coffee and getting our bag back in the car and—

Q. Where did you go?

A. —getting in the car. We started then—

Q. Hold it just a minute.

The Court: Let's go ahead and recess. That seems to be a good stopping point.

Ladies and Gentlemen, we will recess until 9:00 o'clock, in the morning.

Keep your seat in the audience until after the jury passes out.

(Thereupon, at 4:55 o'clock, p.m., an adjournment was [fol. 645] taken until the following day, Thursday, June 11, 1964, at 9:00 o'clock.)

[fol. 648] Proceedings

EDWIN A. WALKER, having been previously sworn, testified further as follows:

Direct examination (Continued).

By Mr. Watts:

Q. Your name, please?

A. Edwin A. Walker.

Q. You were on the stand yesterday, weren't you?

A. Yes, I was.

Q. As I remember, we had just about reached the point where you had concluded your news conference and went on from Jackson to Oxford, Mississippi. How did you go?

A. I went in a car with a friend of mine, Louis Leman.

Q. Was he the only one who was with you?

A. Yes, sir.

Q. Did he drive?

A. Yes, sir.

Q. Where did you go?

A. Sir?

Q. Where did you go?

A. We left—we went to—drove up through the campus about, I would say somewhere along about midnight when [fol. 649] we first got into Oxford, and went on to the Mansell Tourist Court, which was about two miles west, or a little northwest of town, where we stayed.

Q. Did you check in?

A. Yes, sir.

Q. Did you check in there?

A. I didn't. Louis Leman checked in for me. I didn't get out of the car.

Q. General, do you have a little touch of artillery ears?

A. Quite a bit, right.

Q. Which is your best ear?

A. Left.

Q. All right. Who did you have register in?

A. Louis Leman got out of the car and went in and registered. I didn't go in.

Q. Did you understand that he was registering you under the name John Waters?

A. I didn't when he went in. When he came out he told me he had registered me under the name John Waters.

Q. What was the purpose of that?

A. Well, I know what his purpose was. I didn't say anything. I knew what his purpose was. He just has to answer all the telephones and just to keep him from being bothered by the press and calls coming in continuously.

[fol. 650] Q. What did you do the next day? First, did anything significant happen that night after you got in?

A. No, I don't remember anything significant. Nothing.

Q. Well, what happened the next day?

A. The next day we got up and went—it was Sunday morning, September 30th, and we drove down to the cafe to the right, further away from town. This cafe—this Mansell Tourist Court was way out about a mile and a half or two miles from town, out in a pretty lonely area.

Q. And did any newsmen show up that morning?

A. Yes, I remember—yes, three newsmen showed up at the door.

Q. At what door?

A. At the door of our apartment.

Q. About what time?

A. I don't remember the exact time. After we got—

Q. I don't ask for the exact time.

A. After we got back from breakfast, I will say.

Q. Relate what happened.

A. Louis went to the door and opened the door and they wanted to see me. I saw the discussion pro and con. He didn't seem to know whether to let them in or not, so I stuck my head out the door and told them I had nothing to say.

Q. Did you arrange to meet the newsmen later?

[fol. 651] A. Not at that time. At that time I had no idea of having a press conference. Later I did.

Q. Go ahead and tell us what happened. Did you go on to town after that?

A. We did some calling and—telephone calls. I was keeping my Dallas home notified about what was going on, and I had gotten word, I believe, the night before when we came in, probably made a call back to Dallas, and I had gotten word that someone had taken my car from my house in Dallas and gone off with it and nobody knew where it was, and they thought it had been stolen, and then in the morning we were discussing the car on the 'phone, and then there was a call, probably, to Jackson; talked to Ney Williams some time during the morning. And during that time there were calls that went out of that tourist court, trying to catch Sheriff Ford and see when he would be in. And there was a call with regard to the location of Judge Moore, I believe. I was trying to find him. I had heard he was in Oxford up from Jackson. Judge Russell Moore, whom I had heard represented Gov. Barnett—Gov. Barnett.

Q. All right, sir. Where did you go then from the tourist court?

A. We went to—we went to Oxford and I can't remember the exact sequence, but at one time we were on the campus again, just driving through it in the daylight; we had driven [fol. 652] through it in the dark, just not stopping, didn't see anything but what you could see at night, on a very quiet campus, and everybody was away for the week-end,

and then I am bringing this up because I don't remember the exact time but I know we drove back through the campus just looking at it, a big beautiful campus. I had never seen it before.

Q. Did you go to the downtown area?

A. Yes, I went to Oxford and at that time—sometime during the morning stopped in and talked to Sheriff Ford.

Q. All right.

A. I believe—I believe I said before at one place that I stopped in that night when we came from Oxford, but I am not sure of the time. It seems to me it was this—I know, now, it was this morning.

Q. Do you remember just very generally what the visit was between yourself and Sheriff Ford?

Mr. Gooch: To which we object.

A. Yes.

The Court: Do not testify what Mr. Ford said. That would be hearsay.

[fol. 653] Mr. Watts: Do I understand he can say what he said before?

The Court: Yes.

By Mr. Watts:

Q. All right, sir, tell, relate to the jury, please, what you told Sheriff Ford.

A. I told Sheriff Ford that I had gotten in from Oxford and I let him know where I was staying and told him I was out at the Mansell Courts, and told him that I hadn't come up to Oxford for any violence, that I was very interested in what was going on, and to see for myself what was happening in Oxford and that I would be happy to assist him in any way I could, if he wanted, if there was anything he wanted, I would be happy to help, and that I would be at the Mansell Hotel.

Q. All right. Now then how long did that conference last?

A. Oh, I would say it last 15 or 20 minutes. He was interrupted a time or two by a telephone.

Q. And where did you go from there?

A. Now, this could have been the time we just drove back to the campus and around it and in, and it could have been before this.

But basically, there wasn't anything to do in particular except go have lunch.

Q. Well, it's relatively immaterial, but just carry this [fol. 654] sequence of events on from then.

A. We went to the Mansion House Cafe for lunch.

Q. Now, do you remember—to orient everybody's thinking, where was this cafe from the courthouse?

A. Well, the courthouse is—the whole City of Oxford, 5,236 people, something like that, is a typical—like many of our cities, where it's got a beautiful big old white, colonial courthouse in the center of the square and most of the town is just a block and a half, the key part of the city, the business area is just a block and a half off the courthouse square, with the four streets running center off of each end of the building on each corner of the ends, and off the center street.

And a block and a half, I believe it's the west side, is the, down the street, in the first block, about two-thirds of the way down, is the Mansell—is the Mansion House Cafe, Mansion Cafe. It's just a normal, just a cafe, that's all.

Q. Now, I don't believe you are oriented. As a matter of fact, the Mansion House Cafe is a block and a half due south of the courthouse, down Main Street, towards University Avenue.

Does that straighten your orientation out?

A. A block and a half due—

Q. Due south of the courthouse. Now do you recollect [fol. 655] now the relative location of these areas?

Then you go from the courthouse to the Mansion House Cafe on the west side of the street, then on down to University Boulevard, where you would turn right and go to the campus.

Now am I straightened out on my directions?

A. I thought it was in the first block but you probably know.

Q. All right, sir. Now then that is where you ate lunch, is that right?

A. Yes.

Q. All right. Where did you go after lunch?

A. We went on back to the Mansion House—Mansell Court, Mansell Courts, motel.

Q. And then where did you go in the afternoon?

A. We went to a press conference.

Q. Where?

A. At the Ole Miss Motel, about a block and a half from the courthouse.

Q. Would you describe that press conference please, sir, to the jury.

A. How it was set up?

Q. Well, just give them a running account. They weren't there and you were. Just tell them what you saw and what happened.

[fol. 656] A. Well, the press conference was set up at the cafe by continuous requirements of the press all the time I was eating, at the cafe when we were eating lunch.

Q. All right, go ahead.

A. And I said if I held a press conference—I told them I wouldn't—many of them that came by, practically couldn't eat my lunch for people coming up and wanting a press conference and asking me question, and I wouldn't answer their questions.

And finally said, after I had been bothered about six times in the middle of the meal—which was all right, I finally realized that he—that it was a little bit . . . trying to be antagonistic with their questions and being on top of me continuously, and I finally said, "All right, if I hold a press conference, I know where you all are. You are at the Ole Miss." I had heard that.

"The Ole Miss Motel and if I have a press conference, I'll join you down there and let you know by calling in,

I'll call in and let you know at that place and let you know.'"

I think I said 2:00 o'clock, "I'll let you know," for a 4:30—4:00 or 4:30 press conference.

Some of them came on back and said, "I can't make that because my press has got to go to press sooner than that. I want some answers right now."

[fol. 657] And so it was sort of argumentative and I, sometimes as a fairness to the press, you tell one you are not going to talk and then you try—then the other one asks you to talk to them, it's not quite fair, if you said you are going to meet them, you ought to give everybody the same, equal break.

And so I got a little bit ugly about it. I said, "You heard—" I said, "I can't help what time everybody goes to press, print at a different time. You've got to wait, that's all."

And so this was set up for 4:30 at the Ole Miss.

Q. Motel?

A. Motel, in town, sir. And we were a little bit late getting there.

Q. Of this group that came by your table, were any of them Associated Press personnel or did you know?

A. I don't know. They were in-state and out-of-state, of Mississippi. I couldn't identify them.

Q. Yes, or no, did any of them identify themselves as AP personnel?

A. As far as I know, they didn't identify themselves as any particular one.

Q. The answer is "no"?

A. No.

Q. All right. And what happened then, after you had [fol. 658] this—after you had gone to lunch, did you go back to your motel?

A. We had been back to the motel. Now we are at a press conference.

Q. All right, go ahead and tell about the press conference.

A. After lunch, I had been back to the motel. We had finalized and made the call that we would have the press conference.

And then we went back to the, went to the press conference I have been discussing.

And we were about 30 minutes late getting to the press conference.

Q. All right.

A. Due to telephone calls, or something, that had delayed us. When we got there, one of the reporters said—I just walked out in the center of the court and it looked like they were going to hold the press conference right outside in the center of the court and it was no particular set-up or any arrangement or anything. There were just six or eight of them standing around.

And one of them said, "Your press conference has sort of been scooped."

And I said, "What do you mean?"

And he said, "Well, they have gotten word that the [fol. 659] Marshals are on the campus."

And so there were questions. We went on with what few were there, three or four or five.

And four or five people standing around, watching. And I made a statement and some questions were asked and that seemed to be enough and I would say—

Q. Let me ask you a question here.

Was that statement you made a written statement?

A. I had written out a statement before I got there and I used that statement as a lead-in, which I usually do.

Q. Do you have copies of the statements that you issued there and elsewhere?

A. I don't have them right here. I think they are in the files and records.

Q. Now you have, or have you not previously given to Mr. Gooch or to Mr. Cravens, his partner, during the course of taking your depositions these written statements?

A. Yes, sir, we have.

Q. And they are of record in court in your depositions?

A. Yes, the ones they have got have been handed to them from us.

Q. And was it one of those written statements that you read at this press conference?

A. Yes, it is.

Q. And then do I understand it, you were asked several [fol. 660] questions after that was over?

A. That's correct, yes.

Q. Now where did you go then after your press conference was over?

A. We went to the courthouse—no, we drove by the courthouse and drove back out to the campus and there was a policeman standing way down at the bridge and the railroad and he wasn't ever letting—he wasn't letting any cars come through.

And he stopped us and he said, "You can't go in."

And so we turned around and we on back to Oxford.

Q. And what happened then? Did you go to the courthouse?

A. We went to the courthouse.

Q. All right. What happened at the courthouse?

A. Well, I had talked to Sheriff Ford earlier in the afternoon and then we'd talked to him again sometime from the Mansell Motor Court and at the courthouse, went in the courthouse and there were, say, 15 or 20 people standing around downstairs and most, six or eight of them must have been Sheriffs. And I met them all.

Somebody introduced me around to the Sheriffs. I think it was Sheriff Ford. And there were people on telephones back in the corner.

And I asked—we talked to several of the Sheriffs and [fol. 661] they were trying to get a call through to Jackson at the time. They were—they wanted—

Mr. Gooch: I object to what the Sheriffs may have said.

Mr. Watts: No, don't—

The Court: Sustained.

By Mr. Watts:

Q. Just tell what happened and what you said and who you saw. Did you see any people—any representative there of the Governor?

A. Yes, after 10 or 15 minutes—

Mr. Gooch: We object. It would be a conclusion on the part of this witness.

Mr. Watts: It's common knowledge—

The Court: If he knows, I will permit him to testify.

By Mr. Watts:

Q. If you know, did you or did you not, yes or no, see a representative of the Governor there at the courthouse?

A. Yes, I did.

Q. All right.

Mr. Gooch: To which we object on the grounds that's a conclusion on the part of this witness.

The Court: Overruled.

Mr. Gooch: Exception.

By Mr. Watts:

Q. And after this conference at the courthouse, did you [fol. 662] go then back to the Mansell Court or did you go eat your dinner?

A. In the deposition, I believe I said I went back to— I went to eat dinner.

But actually we didn't. We went on back to the Mansell Court.

I had forgotten we went back there again.

Q. Well, that's all right, those immaterial things I am not concerned with.

You did go to the Mansion House Cafe then, which was about a block and a half south of the courthouse and ate?

A. Yes, went there for supper.

Q. All right. Relate to the jury what happened while you were in the Mansell—while you were in the Mansion House Cafe eating?

A. We got in the Mansion House Cafe, which is just a street cafe along the side of the street as we have identified. And I went in at about five or ten minutes to 8:00 on September the 30th, and sat down at a table and ordered our meal.

And somebody walked in the front door with a radio and it was announcing that Kennedy's, Mr.—the President's speech was coming on.

And the radio was sitting up near the front and he sat [fol. 663] it on a heater or something up there and we were sitting back about four or five tables back and I couldn't hear it. And when it started, I walked up there and there was two or three people standing there. It was up by the counter, check-out counter, at the door.

And I stood around and listened to President Kennedy's speech from the time it started until just about the last of it before—

In the meantime, why, it looked like our meal was coming and I went back and sat down and started eating dinner.

Q. All right, go ahead from there.

A. The speech was completed and, with Louis Leman, he was with me, the only one.

There were other people in the—

Q. Excuse me right there, General. At this point, don't worry too much about those details. We don't care about the other people.

Just hit the highlights and tell us what happened after that.

A. We were—we ate dinner, got up to pay the bill, were delayed at the counter talking to some people that came in, delayed by my request for a carton of cigarettes.

About that time somebody stepped up—we had finished dinner—somebody stepped up and said, "While—while I

was standing at the counter, "There is trouble going on, [fol. 664] on the campus," and I said, "Oh, is there?"

And he tried to get me into a conference and I wouldn't—

And I finished my business with paying the bill and getting cigarettes and went on out the door and got in the car with Louis.

And I said, "After we got in the car, I said, "That feller said there is some trouble. I don't know who he is. At the campus. Let's drive on out there."

Q. And did you?

A. Yes, we did.

Q. Where did you go?

A. We drove out Oxford (sic) and I guess a mile, mile and a half to the campus, whichever direction it is, you go out University Avenue.

He was driving. I didn't pay much attention to directions and the road, but it goes on out in a mile and a half of the campus and you got back to that same bridge and the policeman was stopping people there.

Q. Now, as you left the Mansion House Cafe, going south, you turned west onto University Boulevard. I wish you would pick up that ruler right there in front of you and go to the plat and show the jury approximately where you parked and where this roadblock or policeman was.

Do you see the pointer there on the desk?

[fol. 665] A. (Indicating) University Avenue coming out of Oxford would come right down this route and gotten to the railroad tracks, which there is a bridge over the railroad tracks, which is right there.

It's a big, wide street and right here there was a policeman standing in the center of the street, waving, stopping cars, not in contact with them but, with the cars, but you could see him up here.

So you stopped right in here and we turned right in here. I got out of the car right here, as we decided to park after the police stopped everybody.

There were also cars parked up here that had been parked up here evidently beforehand. You could see them

in the street, maybe three or four, on up this way—no, it's on up this way, further.

But we turned right here short of the railroad track and I got out of the car, walked across the bridge. You could hardly tell this is a bridge, it's so smooth over the street.

This is a big, deep gully and tracks down in here. Parked right here.

Louis, after the car turned, I got out and he parked the car in this area and I walked on across the bridge.

Q. Did you walk in the street or where?

[fol. 666] A. No, I walked right on the sidewalk, right here. There was a sidewalk going across.

Q. Would you trace the course then that you took from the railroad overpass onto the campus?

You can step out a little further, it's all right. Move the chart there so you can—kind of a tight fit for a big man.

Mr. Watts: Excuse me, if Your Honor please, may I back the chart up just a little, kind of tight fit for him?

[fol. 667] A. The question was where I went from there? I walked right on up the street here on the sidewalk, always on the sidewalk, and I went right on up the sidewalk to the campus, here to this area. A big lamp post here, and I stopped right in this area (indicating chart).

Q. All right. Tell the Jury just what occurred in that area?

A. When I got here there must have been, oh, anywhere from seventy to one hundred students around this whole area, say within one hundred yards, or seventy-five of this lamp post, and down in the street here. You are coming uphill, sort of, here, and this is the main light that is on the whole campus, actually, this evening.

It's the big overhanging street light, sort of hangs over and hangs over a third of the street here, and it is right on this corner.

And the campus, it is a dark night, it is very dark. They—I got up here and talked to students that were hanging around in this area. Nobody—there wasn't any mass welcome, or any mass knowledge that I was there and a lot of them don't even recognize me; a lot of them don't know who I am.

Pretty soon I would walk—I would walk into a group, or they would walk up to me and say, "You are Walker," and then you would hear them tell somebody else, but—[fol. 668] Q. How were you dressed?

A. I was dressed just about like I am now, with the hat on.

Q. Big white hat?

A. White hat, normal—

Q. Texas hat?

A. Texas hat.

Q. Okay, go ahead.

A. I stood around in this area talking to the students for ten or fifteen minutes. I even got, at this time, talking to students—the light extended, as you say, the light would show you people about in this area at the time. There was just this one light, and the basic other light through the evening that was even near, was way up here, a very small light (indicating).

Q. By "up here," you are pointing to what installation?

A. Well, it was—it was right along here. I am talking about the Lyceum Building. That was the Lyceum Building, or Administration Building. You could see one tiny little light, like a candle light, practically, from this distance. At night it looked a long way up there, longer—it looked a long way up there, and it appeared to be. Because distances at night look long and you—you can't see that distance. You [fol. 669] couldn't even see—you could vaguely, if you thought you knew what the outline of this building was, you might have—you might try to make it out. I couldn't even—couldn't have even drawn the outline of the building from any area in here. But, this is dark, it is overly dark in this area, because these are tremendous trees, great big pine

trees and they go up thirty or forty feet and they are all overlocked in the top. So, there is no seeing the sky or anything. You are under trees, it is very, very dark. So, you don't see the tops of buildings. You might see the tops of a skyline of a building in a light sky if you didn't have the trees, but you can't stand in here and see even the second story of this building.

Q. All right. Go ahead.

A. And that is true of this building (indicating). That night I couldn't see that building. I didn't even know this building was on the campus until the next day.

This is a dark area. You can—as people walk past the light maybe up in the distance you can catch his image or watch him go by.

Q. Now, then, excuse me just a minute. I think you have covered that adequately. As you arrived there, where you have your pointed, had you walked along the sidewalk or along the street?

A. I have walked all the way along the sidewalk, never [fol. 670] getting off the sidewalk.

Q. Where the Circle starts does the sidewalk on which you were walking enter into the street? Approximately in the area of the street line.

A. It either ends right here, it goes at least this far, or it turns to the left a little, I am not sure.

Q. At that point what did you do?

A. Well, for fifteen or twenty minutes I was discussing—asking questions about what was going on and saying "hello" to people that wanted to meet me and wanted to talk to me, and a lot of the people indicated they were interested in me for an autograph, or something like that.

Q. All right.

A. And I asked them about the situation, what was going on. I—

Q. Now, at that point, did this group have any leadership that you could identify?

A. No, there wasn't any leadership. They were just—they looked more like bystanders, enthusiastic and inter-

ested and, certainly interested in the activities there that night, but as far as leadership, they were just students moving around talking to each other in twos and threes.

Q. Speaking of activity, what was the activity on further to the West, up towards the Lyceum building?

[fol. 671] A. Well, when you got to this point (indicating) you began to smell tear gas. I no sooner got here than I recognized tear gas.

Q. Had you smelled tear gas before?

A. Oh, yes, plenty of time.

Q. Go ahead.

A. And, talking to people in this area, it began to make you weep, and you recognized that it was tear gas. Then within five or ten minutes you saw tear gas being fired from this direction out into here (indicating).

Q. Could you hear any reports?

A. Oh, yes, you can hear them go off. You can hear them two or three blocks, at least, at night. Maybe if it is a very still, quiet night, you might even hear them half a mile.

Q. How did the report of these weapons compare with the report of a GI Army rifle?

A. Well, a Army rifle is sharper, got more of a crack. I just—

Q. All right, sir. Go ahead.

A. Now, the students in the area, after you get up here, you see a few more. Nobody is standing for any particular time or reason, or just moving around talking to each other.

Q. Now, stop just a minute. You made a statement, "As [fol. 672] you get up here." Did you ever get up "here"?

A. No, I never got near this building. But I am trying to describe the—from what I can hear and tell, there were students going in and out of the YMCA.

Q. Now, excuse me.

A. Which I couldn't see and never got near.

Q. When you said, "As you get up here," do you mean you went up there?

A. No, I didn't mean I got up here, but as you get up here—I was describing the situation as I can, the situation around the campus there as I know it.

Q. Put the pointer back to where you were.

A. I was back in this area here (indicating).

Q. Did you see the individual who was here in Court a couple of days ago, this Sheriff Witt, the heavy-set Sheriff?

A. Yes, I saw Sheriff Witt. I met him right in here (indicating).

Q. Near the monument?

A. Right. That was within fifteen or twenty steps of the monument.

Q. All right. Tell us about that meeting.

A. Either I had said "hello" to him or he said "hello" to me, and I shook hands with him, and asked him, probably, what was going on, and we discussed what was going on on [fol. 673] the campus.

Q. Did you ask him in seriousness or in jest or in any other manner about deputizing you?

Mr. Gooch: If the Court please, the form is objected to.

Mr. Watts: I will withdraw it. What I want to cover here is what, if anything, was said about his deputizing you, if anything, or do you remember?

A. Well, there was a statement in jest, "Well, why don't you deputize me, Sheriff?" And, of course, I suspected he couldn't do it. I never heard of deputizing anybody out under a tree.

Q. All right, go ahead. Did the Sheriff then—did you have any association with him, or any contact with him from then on?

A. I probably talked to him a few minutes at different times. I saw him two or three times, either as I went past him or as he walked past me, or something.

Q. Did you consider him as one of your associates at that point, or—

A. Well, I considered him as one on the campus that would keep the students from getting hurt, and being in any violence.

Q. Go ahead and tell us what you saw, and what happened.

[fol. 674] A. The students—there was, as I came in that area, the students finally, as the word went around, in five or ten minutes, within this location, this local group I am talking about that you could see, the word went out, "Walker is on the campus," and I did hear a remark, "We have got a leader now."

The prevalent question, the ones that would come up and stand around and talk was wanting to know if I would speak to them, and I told them, "No," I had nothing to say to them, and would continue to reverse the conversation to ask them about what had happened, and what was going on, and got the word that it had started at 8:00 o'clock when the tear gas was fired directly at the backs of the Marshals and into the students in mass, and I was trying to put the picture together, what had happened.

Students were saying that they were being shot at, and I was immediately told, or within five or ten minutes of being in this area, that two people had been killed. And they referred to a girl, a student that had been hit with a missile of some type and had been killed and carried off, and they referred to the killing of a Highway Patrol that had been taken off on a stretcher.

Q. Did you later learn some of those reports were inaccurate?

A. Yes, sir, I later learned that they were not so.

[fol. 675] Q. All right. Go ahead. From that point where did you go and what did you do?

A. There was other questions from the students, "Well, will the Government use Military force?" I sort of avoided it. It was obvious that the students were using Cuba, "Why not be in Cuba?" And, "Why take Military forces on the campus?" And the question was, "Will they?" And my answer, I didn't know whether they would or wouldn't.

It seemed pretty obvious to me, but I wasn't saying anything because nobody knew what was going to happen.

It was obvious that the Marshals were already on the campus, and had been on, evidently, since about 4:00 or

4:30, according to what the students told me, and they wanted to know if I would speak to them.

Q. Oh, yes, incidentally, in that direction, did they ask some of you—did some of them ask you to lead a charge?

A. Not—that wasn't the prevalent question right then. They—

Q. Well, was you asked?

A. They were asking me if I would lead them, and would we get organized. It was obvious for a charge. "Are you going to be our leader?" And, "Will you lead us?" And—

[fol. 676] Q. What was your answer to that question?

A. I ignored that question, and said, "No, you are not supposed to, you are not going to close with the Marshals, you are not going—there is not going to be any violence. You are not—it won't do you any good to approach the Marshals.

Q. All right. Go ahead. Where did you go from there, from the vicinity of the statue?

A. Just in this area right around here (indicating).

Q. Do you know where the flagpole is?

A. At that time I didn't know where the flagpole was. You couldn't see it. Later in the evening I found out where the flagpole was.

Q. You now know—you now know where the flagpole is, don't you?

A. Yes, sir, I do.

Q. How far toward the flagpole did you go in that period of time from the monument area?

A. Not past about this area (indicating). But most of the whole time was spent right around in here, because this is where the students were, in small groups, and this was permeated with tear gas, and tear gas was rolling out to about this line (indicating chart).

Q. For the sake of the record, where you said, "Not past this area," did you point to an area approximately half

[fol. 677] way between the monument and the flagpole?

A. Half way between the monument and the flagpole, or a little bit over half way.

Q. All right. And did you in this period of time walk westward at least to that point? Yes or no?

A. During this period, yes.

Q. What was your gait?

A. Walking slowly.

Q. Was it—all right.

A. And with no particular course because people would be coming by, or I would stop to talk.

Q. And what did you do when you got to the furtherest point westward?

A. I tried to see what was going on up in this area. You could see from back here, but it was so dark you had to go a little forward to see a little more, and I could see the tear gas coming in this area. And I could see people up in this area, students in groups of one, two or three, moving around. I would say there were thirty or forty that you could see at any one particular time. They were all doing something different. And wandering around, and one might throw something. I could see the motion of throwing.

Q. And—

A. And then there would be fire gas fired—tear gas [fol. 678] fired back in that area.

Q. Then how long did you stay at that particular point between the monument and the flagpole?

A. Between the monument and the flagpole? I was in this—I couldn't identify—

Q. I don't believe you heard the question, General.

A. About ten or fifteen minutes before—

Q. Before you turned around and went back?

A. Right.

Q. And tell us what happened as you started back, and after you started back?

A. Well, I was up here, to answer your question, about three to five minutes.

Q. All right. Thank you. Then, what happened after you left and started back?

A. I went on back and went to talking to people. And by this time there was a movement, I could hear automobiles coming over in this way (indicating).

Q. Did you ever become acquainted that evening with a preacher, Rev. Duncan Gray?

A. Oh, yes, I did.

Q. Did you know who he was at the time?

A. No, I had never seen him before, and didn't, no.

[fol. 679] Q. Did you see a preacher along about this time, or somebody you could identify as a preacher?

A. Yes, sir, right in here (indicating). He was wearing a black coat and a high collar.

Q. Did he approach you or did you approach him?

A. He approached me.

Q. And tell the Jury—you may take your seat now.

Tell the Jury as nearly as you can remember what the conversation was between this preacher and yourself, and tell what his actions and demeanor was.

A. Rev. Duncan Gray, later identified as Rev. Duncan Gray—I didn't know who he was. And he approached me in sort of an argumentative mood make demands that I do this and I do that and—

Q. That you do what? What did he ask you to do?

A. Well, during the—I don't remember, but it was perfectly obvious that he was very excited, and that he was very argumentative, and his approach was not quiet in any way, and I just turned and walked off.

Q. Well, what did he ask you to do?

A. Well, then, the next time I stopped he came up to me again, and this time he grabbed a hold of my sleeve and pulled on it, or my arm, and was argumentative again and either I walked off or moved over, or turned my back [fol 680] and he moved around on the other side of me, and started in an excited mood, and sort of frenzied, demanding that I stop the students. And, "You can stop them," and, "You certainly cannot let them do this." And, "This is terrible."

Q. All right, sir. Go ahead and tell us what you told him, as nearly as you can remember?

A. I asked him whether, if he belonged on the campus, if he was attached to the campus, or had duties on the campus. It was my understanding that he said he did.

Q. All right. And what did you say?

A. I said, "Well, why don't you stop them?"

And he kept right on. It was just sort of in a manner that was not where you could converse with him quietly. And—

Q. What else did he say to you, or what else did you say to him, that you can remember?

A. I probably said—I did say, "Well, what denomination are you?" And he said, "I am a peace Episcopalian." And I said, "You make me ashamed to be an Episcopalian."

Q. And then what happened? Roughly in what area were you when this occurred, with respect to the monument?

A. About twenty steps west of the monument, there in the Circle.

Q. You started to tell us something about automobiles [fol. 681] and probably I interrupted you. You started to tell us something about automobiles. Will you go ahead and relate that incident to the Jury?

A. Automobiles started out, as you face the Lyceum, on this left road coming out. I think I pointed to it.

Q. Yes, you identified that.

A. I could hear them coming and I had no idea what they would be, what the automobiles would be coming out from the Lyceum area, and I asked a student or somebody standing around the area what was that. There was always people walking back and forth, west back to the east, and I said, "What is that, what is that?" And one of them said, "That is the Highway Patrol leaving."

Well, that didn't seem to make any sense in what was going on, so I stepped over to the curb and looked right down in the cars to identify them myself, and I was about twenty steps down the road from the monument. I stepped

right out on the curb and looked right down in the car to see if they were leaving.

Q. General, up to that time had you participated in any way in any activity of the crowd that was throwing things at the Marshals?

A. I hadn't participated in any way, none at all.

Q. Did you assume any command over this crowd?

Mr. Gooch: I object to that as a conclusion on the part [fol. 682] of the witness, if Your Honor please. He can tell what he did.

By Mr. Watts:

Q. Well, let's—

The Court: Mr. Gooch, I am going to permit this witness to answer that.

By Mr. Watts:

Q. Did you assume command of that crowd?

A. I certainly did not.

Q. Do you know what I am talking about when I say, "assume command"?

A. I certainly know what it means to assume command.

Q. And did you at any time prior to seeing these Highway Patrolmen leave position yourself in the vicinity of anyone that you knew had a rock or a missile?

A. None that I saw. I didn't position myself near anybody that had any rocks or any missiles.

Q. At this period of time what was the very closest point you were to anyone who you could identify as throwing something at the United States Marshals?

A. At least half way across that whole Circle, which would be over a hundred and fifty yards.

Q. Were you, or were you not, as you approached and arrived at that monument taken ahold of by men on each side, and taken by the elbows?

A. I certainly was not. At no time was anybody taken [fol. 683] ahold of me and I am sure there wasn't—there wasn't any reason to take ahold of me. I wasn't going anywhere.

[fol. 684] Q. When you arrived at the monument, was or was not a leader of the mob waving a big Confederate flag? (Indicating) Yes or no?

A. No, there was not.

Q. All right, sir. Now then as you returned from this position between the monument and the flagpole and saw the highway patrolmen in the cars, as you have outlined, did you hear any comments from the crowd concerning the highway patrolmen or the situation as it then existed?

A. Yes, I did. The word began to pass around through the students that, "Barnett has sold us out."

And there was a build-up of enthu—of excitement over a rumor that Barnett was selling them out and that—just seemed to be more excitement over it and more—

Q. Up to that time, had you been requested to speak on the monument?

A. Yes, I had.

Q. Or anywhere in that area?

A. I had been continuously requested to speak.

Q. And up to that time, had you spoken?

A. No, I had not. I said definitely that I had nothing to say.

Q. After you heard this word going through the crowd that Barnett had sold them out, did you do anything?

A. Yes, finally another group said, came back by me [fol. 685] and said, "Well, General, please talk to us."

It wasn't all in the words, "Making a speech." They, a lot of them said, "Won't you talk to us? Won't you say something?"

Well, the group came back and another came by and said, "Please, talk to us."

And I said, "All right, I'll—I'll talk to you."

Q. Up to that time and including that time, were you and any group around you met with a heavy barrage of tear gas about 75 yards from the Lyceum steps?

Yes or no.

A. Certainly not, no.

Q. Now then after you had decided to talk to these people, tell the Court and jury what you did and what you said.

A. They said, "Come on," this group, "And stand up here."

Well, sort of spontaneously there had been a group of students, about 150 had moved around on the east side of the monument, were in that general area.

And as I moved around with one or two or three, somebody said, "Stand up here on the monument."

And the students began to gather around, sort of a spontaneous group of about not over 150 students, standing in the south—on the east side of the monument, in the [fol. 686] street.

I got up on the edge of the monument. It was only about —stepped up on the edge, which was about a foot or foot and a half high. I could just see over the crowd well, the group there, which was about 150 and sort of fringed out into other people standing other places and even way out of hearing distance.

Q. And did the monument have a base on it?

A. Well, that's what I have described, this base which was, you could stand up on, put you up about, I would guess, 15 or 18 inches higher than the street.

Q. Now I wish you would tell this jury—and I know it's been difficult to remember under those circumstances exactly what you said—tell them as nearly as you can remember or in substance what you said to this group of people.

A. I told them that this was not the place for violence, that nobody came to Mississippi—I definitely told them in these words, "That nobody came to Mississippi for violence, that no violence was intended."

And there was a boo and a mass boo when that statement was made, and yells, "He's not going to do anything. What's he here for?"

And it was just a mass psychological opposition through the crowd.

[fol. 687] And even some of them turned and started on off. And each time you would wait to watch and let it calm down again.

I said, "If there is any blood shed at Mississippi, at Oxford," or Mississippi, "it will be on the hands of the Federal Government."

I told them that truth and the seriousness, tragedy of this situation was in a sign that was on their own airport, which said, "Cuba, that way (indicating)."

I had decided only to talk because of this rising crescendo that Barnett had sold them out, which was getting them excited.

And I had just been to the Sheriff's office and the courthouse.

And so I wanted to tell them that, to quiet them down, that this wasn't true, that Barnett had not sold them out.

I remember very distinctly, I had thought of Birdsong's name and I couldn't think of anything but Birdwell and that seemed the natural thing, and I knew that was wrong, so I turned down and Louis Leman, who had been with me at the courthouse, was standing on my right, and as I wanted to tell them about, that Barnett had not sold them out, that a representative of the Governor, whose name I would not mention to the students—it was Judge Russell [fol. 688] Moore who had come up to the courthouse to talk to the Sheriffs, which I had lis—sat in on when I was at the courthouse.

And I didn't, wouldn't refer to his name. I only said, and I made it very clear twice, "That this is a representative of your Governor saying this. I am not saying this but I am telling you what I just heard at the courthouse this afternoon. And the representative of your Governor

was there and he said that his orders and his desires had not been carried out that afternoon with regard to what had hap—what had transpired on the campus, "That the head of the highway patrol had escorted, with others, of course, which the students knew, but the highway patrol had, head of the highway patrol had escorted Meredith on the campus.

And I couldn't think of the—the students said, "Who?" And I didn't think it made any difference to tell them. And I couldn't think—I thought of Birdwell and I knew that was wrong and I turned down to Louis Leman and I said, "What was the fellow's name," sort of under my breath, and he said, "Birdsong," and I said—I said, "The man, the Gov—the representative . . . was referring to Birdsong. He said that Birdsong had not carried out the decisions and the desires of the Governor."

Q. Now General, at this point, and quoting from the [fol. 689] news report of the Associated Press, the language of the reporter, Van H. Savell, I will ask you specifically, did you or did you not make these statements to these people at that time:

"I heard Walker say that," and here are the statements, "Governor Barnett had betrayed the people of Mississippi."

Did you or did you not say that?

A. I did not say that.

Q. "But don't let up now. You may lose this battle but you will have been heard."

Did you say that?

A. I did not say that.

Q. Did you say, "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

Is that your language?

A. It certainly is not. I did not say that.

Q. About how long did this speech last?

A. About five, seven minutes. Five to seven.

Q. What—oh, incidentally, did you, either during the course of the speech or at the end of it, again see the Reverend Duncan Gray?

A. Yes, this delayed it a little, you might say, during the early part of the speech.

[fol. 690] I can't just remember where but somebody started clambering up on the monument and grabbing hold of my leg, as I remember.

And the Reverend is a very tiny, little feller, very, very small. And he was sort of clawing his way up. And the students were booing him and I stopped and I didn't know what was going on and I looked down and made some remark, "I believe your Reverend wants to speak."

I may have even said, "He has a right to speak, too, if he wants to speak. But I am talking now."

Q. And did you then repeat the statement that his action, or something about a Presbyterian—strike the Presbyterian —Episcopalian—

A. I didn't remember this. It's come up in testimony. I may have said it again at the time. I remembered saying it once before when he met me out there. I may have said it.

But it was very obvious that the students were pretty mad about the situation and any word I might have said that was wrong, somebody was going to hurt him because there was a student crossed in front of me, ready to take him on, and quick. And it was—Mr. Gray was in a little rough situation and I was—

Q. What happened then at that point?

A. Well, the Sheriff, or somebody—and I recognized [fol. 691] a Sheriff or looked like a law enforcement agency, reached up there with, or somebody else reached up and put him on the first ledge and somebody else took him from there and led him off.

Q. Have you since learned that it was this Sheriff Talmadge Witt that did that?

A. I have since learned that it was Sheriff Talmadge Witt.

Q. All right. Then tell the jury now, in your own words, and you may take your pointer and step back to the chart, tell the jury just exactly what you did, what you saw, what you said and what you heard from the time you made that speech on, for the next, we'll say, 30 or 40 minutes.

A. Well, the students had begun to boo and protest and I held their attention, got them back a little bit, trying to give them the word on Barnett.

But some of them had moved out, and the rumor was going around in the fringes, "He's not going to do anything."

But basically, I kept the group there with the statement —oh, I had said during the speech that, "You can protest," that, "You have a right to protest, but this is not the place for violence."

The—

[fol. 692] Q. Go on over to the circle there, put your specs on so you can see.

A. Well, I do need—no wonder I have been having trouble.

I am standing right on the edge of the monument, facing this way. This group was right in here. I stepped off the monument, I don't remember which, one of the—I have heard this way or this way (indicating).

But I walked right out in here. And the people, after a talk, want to talk to you.

So there immediately were students around me here and I stood here and definitely turned my face so I could see, look this direction, and watch this group of students.

So the boy, whoever he was, the boys that were talking to me, talking about what was going on, and Cuba, and so forth, I turned and stood right in this area and watched this crowd disperse.

Now the most of it, as the ones that had left, gone these directions, but the most of this crowd, group of 100 to 150, moved on down this direction (indicating).

Now they would go this way and come on back out here and I watched the students come on back through here and go back to what they had been doing up in this area.

I saw one or two groups go through here—a group, say, was four or five, six.

[fol. 693] Some of the group, you could obviously tell by them passing that they were just walking and talking and that they were headed on back up in this area.

Of course, some of them were back up here as they had been before, before I went on the monument, up here throwing rocks and getting tear gas continuously thrown out in this area.

There was hardly a time within 10 or 15 minutes that there wasn't a blast of tear gas, say five dispersed tear gas, that would come in about this area.

So I stood right in here and talked and watched the whole crowd disperse. I wanted to see it disperse. It did.

Some of them mozied along down here, some of them stopped and stood here.

Students went on back up here and went to rock throwing again. Others went out in this area and worked in this way to rock throwing.

I was talking to people in here and finally, after I—when I saw this whole thing had dispersed, go on back to what they were doing, moving off in every area and then there was just, oh, back again, the way it looked, when I came on, 50 or 60 standing around in different places in this whole—I turned around, talked to these boys a few minutes.

As one testified, we talked there 10 or 15 minutes and [fol. 694] about Cuba and the inter—the general situation in the world and what was going on and there were—I turned and walked from person to person or in generally up, on up to this area again (indicating).

Q. What was your gait as you walked?

A. Just slow walking, watching and looking and trying to see all the time.

[fol. 695] Q. All right, take your seat again.

A. This is taking at least fifteen or twenty minutes.

Q. On that walk did you get as far as the flagpole, or where, with respect to the flagpole? Just tell the Jury.

A. I got up within ten or fifteen steps of the flagpole and stopped and looked again, watched to see what I could see.

Q. Then did you go on past the flagpole?

A. Not at that time. I stood around there for a few minutes and moved a little bit to the left or to the right, and then the next ten or fifeen minutes, why, I moved up a little bit more to see if I couldn't see more clearly.

All the time you are trying to see. I am trying to see the Lyceum Building. I haven't seen it yet. I mean up to this time in my conversation.

Q. All right. Go ahead.

A. So, in the next—we have already covered, say, fifteen or twenty minutes after the speech. Now, this is going on for five hours, all evening. It didn't all happen as the radio runs it off, like when they speed up these radios and TV's so that everybody is dialing every direction at once. This is spread out over much time.

[fol. 696] Q. Did you finally then get up in the immediate vicinity of the flagpole?

A. I am up to about ten steps short of the flagpole.

Q. Ten steps is thirty yards. Not thirty feet, thirty yards.

A. Okay, then, I move up to fifteen or twenty feet from the flagpole. I am still trying to see something, you are still trying to see, you are looking right, you are looking left. You still can't see those buildings. The limbs of the trees, now, are about the height of your ceiling here, at the edge of the ceiling.

Q. Now, were there people in the area while this was going on?

A. Yeah, all over the area. No big group. No big racket. You would hear a holler and look over that way, or you would hear a student say something or you would hear a burst of tear gas, then you—or you would hear a racket, say like somebody was beating up some tin, or—basically it turned out to be automobiles.

Q. Did you lead anybody at that time?

A. No, I certainly did not.

Q. Did anybody in your immediate vicinity at that time throw any rocks, sticks, stones or missiles in the direction of the Marshals?

A. Nobody around me at all. There were—I was—there [fol. 697] was boys off forty or fifty steps. I could see people that were moving back and forth from the Marshals, or like they were trying to get up close to them.

Q. Did you at that time participate in any of such activities?

A. I did not.

Q. Did anybody at that time, or at any time after you made the speech on the monument come up and grab you by the arm and you march in front of a large number of people toward the Marshals?

A. I certainly did not. That never occurred.

Q. At any time while you were there that night did you see anything that approximated 1,000 people in one place at one time doing the same thing?

A. Never from the time I got on that campus until the time I left did I see anybody approximating 1,000 people, that I could even see at one time or that were together at one time. Nor was there even 500 together at any one time. Nor was there even 100 massed up together to do anything. No. There wasn't even twenty massed up to do anything. They were just scattered out in groups of fours and fives and you could see that they didn't even know what each other was doing. Not a single one had any connection with what another was doing.

When they talk about thousands on the campus, people [fol. 698] are talking about dormitories and where they have been fifteen minutes before.

Q. Wait just a minute. I am not talking about what people are talking about. What I want to do is get what you saw and what you did.

Now, after you were there in the vicinity of the flagpole this first time, after the speech, what did you do? Did you stay there the rest of the night or did you leave?

A. I didn't leave until about 1:00. Between 1:00 and 1:30, 1:00 to 1:30 or 2:00, or something. About 1:30.

Q. And did you stay all that period of time in the vicinity of the flagpole?

A. No, the whole—that is eight, nine—9:00 o'clock until 1:30, you have got about three or four and a half hours. You get tired and boring. I was staying most all of that period between, back in the area over here by the monument and to the left of the road.

Q. And how long at that time, after the speech, did you stay in the area of the flagpole? Ten or fifteen minutes, thirty or how long?

A. Well, what is the vicinity of the flagpole?

Q. I would say within fifty feet of the flagpole.

A. Oh, about ten—five to ten minutes. Ten minutes, say.

[fol. 699] Q. Where did you go from there?

A. Back toward the monument, and toward the left.

Q. Did you again that evening go westward toward the flagpole and the Lyceum Building.

A. Yes, I walked up just a little to the left of the flagpole maybe an hour later and stood around in that area listening to some racket up on the left, which I couldn't see, and tear gas was being fired and it rolled out by me.

Q. Were you west of the flagpole at that time?

A. At one time I was about ten steps west of the flagpole, just watching and looking and trying to hear a bulldozer, once, and another time when a car was being beaten up. I couldn't see either one.

Q. All right. From the time you left the flagpole area and went back to the monument area what did you do in the area of the monument at that time?

A. I talked to students and people that were around and stood just by myself a lot of the time, just watching what was going on, and talked to Mr. Cecil Holland in this time.

Q. Now, he was the news reporter that was here yesterday, was he?

A. Yes, he was.

Q. About how long did you talk to him?

[fol. 700] A. Oh, about fifteen or twenty minutes, then I think I saw him once again for two or three minutes, or saw him in passing as he went one direction and I stayed where I was.

Q. At any time for the rest of the night after you had been on the monument, did you participate in any activities of the crowd which involved throwing things at the Marshals?

A. I certainly did not.

Q. Did you see boys going back and forth past the area where they were carrying bricks, rocks and other things?

A. I saw—

Q. Yes or no?

A. Yes.

Q. Okay. Did you, during that period of time, see a wheelbarrow, a boy pushing a wheelbarrow with anything, rocks or bricks in it?

A. No, I never saw a wheelbarrow.

Q. All right. Now, then, just tell the Jury from this time on—by this time I mean after this second trip you made toward the area of the flagpole, tell the Jury what happened, and what you saw?

A. This is probably around 10:00 o'clock.

Q. Right.

[fol. 701] A. Up around the flagpole you can—I saw people throwing rocks and the gas coming out, but I—probably the most significant incident was I was still back at the monument, or in that area. May I use the map?

Q. Sure.

A. There was a tree here, a fir tree. These are all big pines up about ceiling high and there was a fir tree standing in here, right along here on this side of the road (indicating map) and I spent a lot of time under that. There was a block here, say, right by this light, where I stood and talked to some students during the evening with my foot on a block of concrete. It was a permanent block. I don't know whether it was a curb, but about that high (indicating) and, but at this particular time, we will say around

10:00 o'clock, between 10:00 and 10:30, something like that, I heard and was standing either here or here—I spent my time right in this area mostly, and I heard a student—there seemed to be something, yelling or something about a truce, and somebody went by and I said, "What are the students trying to do?" And, "What are they going to do?" And, "What do I hear?" And he said, "A group of students are going forward to try to have a truce."

And I didn't go directly, but I moved on up into this area to see if I could hear more. You never could be sure [fol. 702] of any of the word you were getting was exactly right, and when I got up here I noticed a group of, say, twenty or thirty students in this area, a little more congested than normal, and it looked like they were being quieter and yelling back and forth to the Marshals.

And I still wasn't sure what this was all about. I couldn't tell what they were saying, but the tone of events was sort of changing, with respect to the students and the Marshals right in this area.

Then I noticed that there were three or four students walking up forward of the group, and they were right up in this area, and then the thing finalized with three or four students—three or four Marshals coming out right here, and beginning to talk to these three students. And I could, by this time, I walked on up into this area, and this group of about fifteen, say, had moved on up here. I was way back behind them, maybe fifty or sixty steps, watching this, and I saw three—about two or three or four of them talking to the Marshals up here in sort of a loud tone. But I still couldn't hear what they were saying.

About ten or twelve students moved up here. So, I easily walked right on up behind this group to see what I could hear, and there was at least twenty steps distance from this three to this group, and I sort of stuck my head in be- [fol. 703] hind those lines of students standing here, and listened to this truce conversation that was going on about —I couldn't tell what they were saying, but it was an argument, and it became pretty—looked like it was a stand-off

and nobody was getting anywhere, and somebody in this group hollered, "Well, you can't do anything with those people," and I didn't say anything. I finally saw that that was about the end of it and I just walked off and left them all up there and walked back in this area here (indicating).

Q. Would you know if there was a flower bed up there somewhere?

A. I believe there was a little tiny flower bed right around this flagpole, but you don't see that much at night. You do recognize it when you cross one of these walks. These are not curbed walks, but this walk is, as I remember, it was just a flat laid brick walk that sort of runs easily into the grass.

Q. All right. Take your seat.

Now, you say there was a bulldozer incident that occurred sometime that night?

A. Well, first, there was a fire truck incident, then there was a bulldozer incident.

Q. Did you participate in that?

A. I certainly did not; neither one.

[fol. 704] Q. What was the fire truck incident?

A. Well, I heard a vehicle coming up from some direction. I never could identify where, but I was back left of the monument standing twenty or thirty yards from the monument and I heard the noise, like a vehicle coming on the campus.

And it—some students,—I said, "What is that?" And he said, "Well, I think somebody has gotten that fire truck."

I said, "Where on earth would they get a fire truck?"

Well, there was some conversation about they would go to town and take it away from the fire department or something—they. And I stood and watched, and this noise finally stopped just short of the flagpole, evidently from the way it was coming, and there was no more vehicle noise any more. I couldn't see where this vehicle come from, I couldn't see the vehicle.

Q. Did you go over in that direction?

A. After the thing stopped and they said there was a fire truck parked over there, why I went over to take a look, and it was short—it was east of the flagpole and just a little to the right of the walk, facing sort of toward Lyceum.

Q. All right, sir. Now, what about the bulldozer inci-
[fol. 705] dent?

A. The bulldozer was later, as I remember the sequence. The bulldozer—there was a noise coming up from the left, way down south of the Lyceum Building. Sounded like the direction of travel—it sounded like two or three hundred—at night, maybe closer, but it sounded like a couple of hundred yards away at least, from the Lyceum.

And I asked a student, I said, "What is that, sounds like a tank coming." And he said, "Oh, that is that old bulldozer down there on the—grading or something they were doing down there, they have gotten that old thing to running."

And I heard the racket, the noise, the movement of the engine coming closer and closer, and I could hear it sounded like it was up on the left side or south side of the Lyceum Building. I am still back over in this area, over by the fir tree that I designated, right in that area. You still can't see vehicles. You can't see vehicles in front of the Lyceum Building, too dark. You are looking under a dark bunch of trees. And I looked up toward it to see if I could see in. I moved up to about, oh, about a little bit south of the flagpole, wandered on up there, hoping that I could see it, on that walk, along about up to that walk, just south of the flagpole.

[fol. 706] Q. Were you ever—

A. About twenty steps from the flagpole. Huh?

Q. Were you able to see the bulldozer?

A. I never saw the bulldozer, no. I didn't. And then I—a student came by and I said, "What are they doing?" He finally, during the course of the conversation he said, "They are trying to—they are going to put a sandbag on the accelerator, they are going to head it toward the Lyceum Building."

Q. And did you have anything to do with that?

A. Certainly did not. And it didn't get anywhere. The—it wouldn't get anywhere. It took one bounce at the curb, or something, and died. You heard it just go dead.

Q. From there on did you have anything to do with the activities of the students toward the Marshals?

A. I never have had anything to do with the activities of the students toward the Marshals. The answer is no, I didn't.

Q. You say you left about 2:00 o'clock?

A. 1:30 or 2:00.

Q. Where did you go?

A. We went—we walked, just walked off the campus. Nobody knew we were going, or anything. Just tired. I am tired. We went on down to the car where I said it was [fol. 707] parked, got the car and headed back toward the Mansell Motel.

Q. All right. Go ahead and tell us what you did the rest of that night. Skip any irrelevant details you can.

A. We stopped on the way, I would say about half way, I don't know the distances, but it was out of town, and I believe it is beyond—at least half way to the Mansell House.

We stopped at the side of the road. There was a group of people on the right. There was sort of an, old garage, and a commercial building or two sitting out there by themselves, and then there were ten or fifteen Highway Patrol cars sitting on the left of the road in a bunch.

We parked on the right. I talked to three or four people there, including one student who was out of his—run out of his dormitory and didn't have any place to stay. They were hunting places to stay. And one of them said, "You can still hear them." This was an hour later. He said, "You can still hear them shooting on the campus." And we listened to it. And I am not sure I could hear it, but they kept saying, "Don't you hear that?"

And I had talked there for about an hour to a group of people on the right, three to four to five, going and coming, [fol. 708] and then I would move over and talk to the Highway Patrol who had gotten out of their cars and were stand-

ing around talking. I went over and talked to them for ten or fifteen minutes.

Q. Did you see anybody you knew?

A. Well, not right at that time, no, we had been there anywhere from forty-five minutes to an hour or an hour and fifteen minutes. From then on then I called somebody to come down and join us from the other direction, from the Mansell Motel where we were. And they come on down there and joined us, and take us on back to the Mansell.

Q. That is—did you call somebody to come get you?

A. Sir?

Q. Did you call somebody to come get you?

A. Right.

Q. Whose car were you in at that time?

A. Well, up to this time I had been in Louis Leman's car.

Q. Did he go somewhere else then?

A. No.

Q. What was the occasion of your calling somebody to come get you?

A. Well, we knew—we picked up that somebody was [fol. 709] following us as we came out of Oxford. In other words, we had already gotten into Oxford and we turned on this highway, I believe it is 6. And we had—either Louis or I said, "There is a car tailing us, right behind us."

So, we pulled off the road and he went on by. He pulled right over the hill and he stopped. We moved up on him and saw him again and were recognized and we went on ahead again and here he came again. So, it was obvious that he was following us or watching our car. We had known we were followed. We saw a man at the Mansell Tourist Court Sunday morning.

Q. Did you understand whether it was a newsman or some official?

A. Well, it must have been an official. Too new of a car for a news man. It was some designated person. Perfectly obvious.

Q. And go ahead and tell us what happened between then and the time you went back to the motel?

A. Well, I called friends who had come into the motel and said, "Come on down here and join us here, we are right down the road. You will see us, I will watch for you, come on down here and join us." And when they got there I hadn't seen them before since leaving Texas, say, and maybe some of them for weeks or months, and we kind of talked a few minutes, and then we got in their car and left Louis' [fol. 710] car and we got in their car which actually come—and the car they were driving, and went on back to the Mansell—Mansell Motel.

Q. Did Louis go with you too?

A. Yes.

Q. Where did you leave his car?

A. We left his car sitting there.

The Court: Let's stop at this point for a recess. Ladies and gentlemen, we will recess until a quarter until 11:00. Keep your seat in the audience until after the Jury files out.

(Short recess was had.)

[fol. 711] Q. Now I believe when we took a recess, you were telling the jury about going back to the motel after you changed cars?

A. Right, sir.

Q. And did you spend the rest of the night at the motel?

A. Yes, I did.

Q. Did anything of any significance happen at all?

A. Nothing of any signficance.

Q. What time, roughly, did you get up the next morning?

A. That would have been Monday morning, October the 1st. We got up about, oh, about 9:00 o'clock, 8:30 or 9:00.

Q. Where did you go?

A. I went back to Oxford. To Oxford.

Q. Did you go to the University area again?

A. No, I did not.

Q. Where did you go in Oxford?

A. We drove to Oxford within a block of the courthouse square.

Q. Was there any rioting or anything of the kind going on there?

A. No, not at that time.

Q. Was there ever, that next morning, that you had any observation of?

[fol. 712] A. Yes, just before I left town, about 10 or 15 minutes before I left, there were some sporadic shooting and people running and soldiers trying to catch people.

Q. Did you participate in that in any manner?

A. Certainly did not.

Q. Were there military personnel around the town of Oxford when you went down there?

A. Yes, there were.

Q. Did you eat there that day?

A. Yes, I ate what we could get of a breakfast there.

Q. Roughly what time with respect to being early, middle of the morning, or late?

A. Oh, it would have been around, I guess, somewhere around 10:00 o'clock, or 9:30 or 10:00.

Q. Where did you go then from there?

A. We—I left in the car with Louis Leman driving and several other people, for Jackson, Mississippi.

Q. And what happened?

A. We were stopped going out of Oxford, about two miles, at a roadblock, military roadblock.

Q. And what occurred at that point?

A. At the outskirts of Oxford where we were stopped, Lieutenant on a radio and eight or ten soldiers around blocking the roads and checking people going out of town, we were stopped and told we couldn't go any further, to park [fol. 713] on the side of the road.

Q. All right, sir. Continue.

A. And wait.

Q. Continue.

A. We sat in the car and talked to the Lieutenant, who was on a communciation system out of his radio jeep to his Commanding Officer, and I heard some of the discussion back and forth.

They couldn't make up their minds about anything or what to do, anything except reporting that I was there, I'm sure.

And that—I told them and they saw—he stopped us across the road from him and he said, "You just as well wait," and we got—I got in the car and sat 15 or 20 minutes and talked to him a few minutes and sat in the car with two ladies that I knew and three men that were in the car. There were about five.

Q. Is that the same car you had left in or was it a different one?

A. That's the same car that I had been in all the time, Leman's car.

We were headed back to Oxford and this was out about, I would say, about two miles from the center of town, on the outskirts of Oxford.

Q. Were all these people with you when you left? Who [fol. 714] was in the car when you left Oxford?

A. These same people, all of them, got in the car after we had some coffee at the drugstore.

Q. All right. And were you taken into custody there at the roadblock?

A. Yes, I was.

Q. By whom?

A. The military.

Q. And what, where were you taken?

A. I was told to get in a jeep. I said I would follow in our car and he said, "No, you would get in the jeep," and we were driven back—I said, "All right, my car will follow."

And I got in the jeep and they drove us back to the Administration Building, the Lyceum, on the campus.

Q. And where were you taken from the Administration Building and by whom?

A. I was taken from the Administration Building to the Federal Building in Oxford, the Post Office Building, right on the courthouse square.

I was taken there by Marshals out of the Lyceum Building.

Q. All right. And what occurred when you got to the courthouse?

A. When I got to the courthouse, why, after standing [fol. 715] around, they didn't seem to know what to do, why, they said, "Come on upstairs," and we were under guard. There were four guards on me from the Lyceum Building. They had held me in custody in the Lyceum for over an hour.

Q. Who is "we"?

You said, "We were under guard."

A. Well, a friend of mine that got out of the car with me, got in the jeep with me and stayed in the Lyceum Building with me. And then he went on to—he got in the car with the Marshals when we drove, when they forced, put us in the car and never released us, kept us under guard, in the Lyceum, and he—he and I, because he got out of the car with me and then we—at the Federal Building, why, the two of us, they said, "Come on upstairs."

We were under guard. And two or three big Marshals, or four. And went upstairs.

Q. Were you taken before a United States Commissioner?

A. Yes, I was.

Q. Were you told that you were being charged with some type of a Federal crime?

A. Yes, while we were up there, after 10 or 15 minutes, why, they finally, somebody came in the door. I think it was a Marshal. And gave me an arrest order, charge.

Q. Was that a warrant for your arrest?

A. Yes, it was.

[fol. 716] Q. And were you able to learn with what you had been charged?

A. Yes, I learned what I had been charged with.

I was charged for assaulting Marshals, for assault, for conspiracy, for insurrection against the Gov—the United States, for seditious conspiracy.

Q. And did this U. S. Commissioner, to refresh your recollection, one Omar D. Craig, did he take any action in your case?

A. Well, after this, and we had been served with the charge or the complaint, why, 10—I don't know what was, they were going to do.

We were sitting in a room under guard and they said—all of a sudden somebody came in and said, "Come this way." And we walked across the hall and they opened their door and there was a whole courtroom set up with 30 or 40 people in it.

Q. And what, right quick, happened in that courtroom?

A. Omar Craig was at the head of the court. I learned his name later. And in that courtroom they said that I was being brought to decide, to determine the amount of the bond.

And I asked them, I said, if—"This has nothing to do with, based on what I have been charged with of moving this out of the State of Mississippi," and then his answer [fol. 717] was no, it wasn't, it didn't have anything to do with it.

And I said to him again specifically, I said, "Is this hearing just for establishing the amount of bond?"

And he said, "Yes, it is," which, of course, is false; that is not true.

Q. Was anything said about a lawyer?

A. Yes, he said, "You have a right to get counsel."

I said, "I can't get counsel here. My counsel would be outside of the state."

And he said, "You—" when he said it, he said, "I'll give you an hour, hour and a half to get counsel."

I said, "I can't get counsel here."

He said, "Well, if you—" Well, he said, "You can either—" the inference was, you can use our counsel.

Well, I didn't want their counsel.

And, "An hour and a half," I said, "I can't get counsel outside of the state."

Q. Did you waive—

A. And I said again—this was probably the time I repeated, this is what I said, "Is this only for the purpose of deciding the amount of the bond?"

And he said, "That is all it's for."

Q. Did you waive your right to a counsel at that hearing?

A. I did not. The conversation ended like that.

[fol. 718] Q. Were you given the right to have a preliminary hearing?

A. I certainly was not.

Q. Did you waive your right to a preliminary hearing?

A. I did not.

Q. And what happened to you then?

A. I said, "Can I have a minute to go out and talk?" Yes. And he said, "Yes," and so we went out in the other room and I took my friend, I said—

Q. Don't tell what you said out in the other room.

A. Okay. And we came on back in and either I repeated some questions or asked him what effect this would have on —if this had anything to do—oh, I also said, "I am going to be free after this is over to go and come as I please?"

And he said, "Yes, that is right, under bond."

Q. And did you make preliminary arrangements to make your bond?

A. I said, "All right, I waive the hearing," when it came to that point.

Q. And at that point then you did waive the preliminary hearing?

A. On the bond.

Q. I see.

A. Right, on making a bond.

Q. All right, sir.

[fol. 719] A. But my previous question was a hearing about anything else they did.

Q. I see. And did you, were you taken then— Strike that. Where were you taken?

A. I was taken back into the room where we had been, just a vacant room with tables and chairs and, let's—we

sat there 10 or 15 minutes and then finally somebody came in and said, "Come on down."

And they took us downstairs to the Post Office Building. This is the building facing the courthouse.

Q. Right.

A. Yeah, the center of the square. It's the Post Office Building in Oxford. We were taken downstairs into a little room on the side of the hall, little tiny room.

And there was a desk there and a phone and a Marshal, or whoever he was, my guard was sitting right in front of me.

Q. And where were you taken from that room?

A. From that room, that was the—I was taken out of the building and on an airplane to Springfield.

Q. Were you given or served with any type of a court order to take you to Springfield?

A. I was not.

Q. Did you know where you were going?

A. They refused to say whether they were taking me to—[fol. 720] where they were taking me—where I was going or give me any telephones to call or let anybody know where I was going.

Q. And what happened to you then?

A. I—oh, when they got me at the bottom—away from the phone and away from the desk and my friend with me, they got me to the bottom of the courthouse, the Federal Building, going out the back door, they turned around and started searching me and taking—searching me and telling my friend he could go no further.

Q. How were you taken to Springfield?

A. We were driven from there to the airport, four men in the car. They got lost going to the airport. Finally got there.

I was gotten out of the car, walked over to a plane that was all ready to go and got on this Ranger plane, it looked like, and marched on the plane.

They wouldn't tell me where I was going, they wouldn't tell me where, where I could phone anybody or where anybody could catch me.

I was put on this airplane and it was ready to go and I heard some of the crew say something about Springfield as I got on the plane. I didn't say anything.

Got on the plane. And engines started and off we went and I looked at the clock, I think about 5:00 o'clock, took off.

[fol. 721] Q. Did you find out where Springfield was, which Springfield?

A. Well, on the plane the only thing I said to anybody on the plane, I said, "Now I heard the word 'Springfield,' is that Springfield, Illinois? Where is this plane going?

He said, "No, that's Springfield, Missouri."

Q. And did you get to Springfield, Missouri?

A. We landed then at Springfield, Missouri, about an hour and a half later and were met there.

Q. Where were you taken?

A. Somebody met us and we were taken to the Springfield Prison, medical—called a prison medical center, U.S. Prison, Medical Center.

Q. And were you advised what type of an institution that was?

Mr. Gooch: Now, if the Court please—

The Witness: I asked the man in the car—

Mr. Watts: Wait just a minute.

Mr. Gooch: I object to that as a conclusion. It's wholly irrelevant and immaterial to any issue in this case, as to what happened—

The Court: Overruled, Counsel.

Mr. Gooch: Note the exception.

By Mr. Watts:

Q. Were you advised, yes, or no, what type of institution that was?

[fol. 722]. A. Not until I got in the car. I said, "Where are we headed?" When I got in this automobile. It was obvious, the man that was driving was, seemed to be—

Q. I don't care about the driver.

A. And I asked and he said, "You are going to the Springfield Medical Center."

I said, "I object. I don't want to go there." And, "I'm not going there under free will."

He said, "You are going there, that's our orders," and he took me there.

Q. Did you later find out what type of institution that was?

A. I certainly found out immediately what type it was. There was a sign on the road going in saying what it was.

Q. What was it?

A. U.S. Prison, Medical Center.

Q. What, did it have anything to do with mental patients?

A. It's basically for mental patients, criminal, mentally insane.

Q. Were you incarcerated in that institution?

A. I certainly was, in a six-by-eight cell.

Q. For how long?

A. For six days.

Q. Then where did you go after you got out, where did [fol. 723] you go?

A. I went to—I went back to Dallas.

Q. And when you got back to Dallas, did there come to your attention a news report or a couple of news reports that were printed in the Fort Worth Star Telegram under the byline of the Associated Press?

A. Yes, they did.

Q. And are those the reports that you heard me read to the jury when this trial first started?

A. Yes, I have heard those reports read to the jury.

Q. Will you tell the jury please, sir, just what effect it had upon you when these Fort Worth Star Telegram reports of the Associated Press came to your attention?

A. Well, it's very humiliating and degrading and, of course, very hurtful, hurt your sense of feeling and it's depressing and just unbelievable that these sort of reports could be going out clear all over this part of the country where I have so many friends and all over the west part of the state, in this Fort Worth Area, and even into the Dallas Area, saying that you had been leading charges on a campus of students and then that you are six days in a cell for insane people as a criminal.

Mr. Gooch: Just a minute.

Mr. Watts: Just a minute, skip the insane.

Mr. Gooch: I move the answer be stricken. That is not [fol. 724] in this case.

The Court: Sustained. The jury is instructed not to consider it.

By Mr. Watts:

Q. Now I am talking strictly about these articles in the Fort Worth Star Telegram, about your leading this charge.

A. Oh, I see. Well, that I am leading a charge and that this is putting out the word, it would make anybody naturally look like they were crazy, people and your friends and everybody all over the country would think you were crazy that read the press saying that.

Mr. Gooch: We object.

Mr. Watts: Don't say what they thought, that's right.

The Court: Sustained. The jury is instructed not to consider it.

The Witness: Well, this is my feelings—

Mr. Watts: Let him—

The Court: Just a minute.

The Witness: I'm sorry, Your Honor.

The Court: The jury is instructed not to consider any part of the answer relating to what someone else may have thought about the reports.

By Mr. Watts:

Q. Well, what I am trying to get is, what you thought in your own mind when you read this article that you, as [fol. 725] a former Major General of the United States Army, had led a charge of students.

A. Well, I felt humiliated, after being in the service for 30 years, and you got millions of friends in the service and then you, as a Major General, I was humiliated and degraded throughout the entire military service as well as—

Mr. Gooch: We object, as to where he was degraded.

Mr. Watts: What you thought.

The Witness: Let's stick to the Fort Worth and Dallas and friends in Texas—

Mr. Watts: Wait just a minute. He wants to object.

Mr. Gooch: I move the answer be stricken from the record.

The Court: It's stricken.

Mr. Watts: That's right.

The Court: The jury is instructed not to consider it.

By Mr. Watts:

Q. Now what I am asking you is what you thought in your own mind when you read this article in the Fort Worth Star Telegram. You have covered it fairly well but finish the rest of it now as to what impression it had on you personally.

A. Impression of humiliation.

Q. How long had you, as an individual, been reading [fol. 726] this newspaper?

A. I read this newspaper all—off and on all the time when I have been in Texas, from time to time.

Q. All your life?

A. Right.

Q. And what was the position with which you, as an individual, had held the Fort Worth Star Telegram all of your life?

Mr. Gooch: I object to that as wholly irrelevant and immaterial to any issue in this case.

The Court: Overruled.

Mr. Gooch: Note our exception.

By Mr. Watts:

Q. Go ahead and tell the Court and jury.

A. Well, it's one of the major press papers in the State of Texas and certainly it has a high circulation among farm and ranch people all over the South, southwest part of Texas, and you find it everywhere in ranch people and where my many friends are and where I am known and where I know people, and just humiliation to think about it and I was—I thought about it night and day for a long time. It's just a—

Q. Did it affect your sleep any?

A. Well, sir, certainly, you end up nights thinking about what you can do to bring—to recover.

[fol. 727] Q. Did you have any way to explain or to counteract this publicity?

A. No, no way. You just know it's gone out and that's what everybody's thinking, they have every right—

Mr. Gooch: We object to what everybody is thinking.

Mr. Watts: Don't tell that.

The Witness: All right.

The Court: Sustained.

By Mr. Watts:

Q. Just tell what you thought, not what the others were thinking.

Mr. Gooch: Move the Court to instruct the jury not to consider it.

The Court: The jury is instructed not to consider the last part of the witness' answer relating to what anyone else may have thought when they read the article.

By Mr. Watts:

Q. In other words, just tell what you thought they thought—

Mr. Gooch: They thought?

The Witness: What I thought they thought?

Mr. Watts: Strike that.

By Mr. Watts:

Q. I am trying to find out what you thought up between these two ears (indicating). I don't care about anybody else.

A. Well, I thought I was well humiliated, well degraded, [fol. 728] well deceitful and false information.

Q. Did you consider that prior to that time you had any type of reputation in the area where you were born and raised, so far as being a peaceable, law-abiding citizen was concerned?

A. Well, I certainly did. I—

Q. Had you ever been at any time charged with a crime before?

A. No, I hadn't.

Q. Now speaking of crimes, what finally happened to you, so far as these charges of crime were concerned?

A. These charges were all placed against me on October the 1st, and the Government found, or the—the charges were all dropped, the court found—

Q. You don't know what the court found.

A. Well, the charges were dropped, and insufficient evidence, there wasn't any proof of it.

Mr. Gooch: Just a minute.

Mr. Watts: No, you don't know anything about the evidence.

By Mr. Watts:

Q. You had been out up until the time these charges were dropped, you had been out on bond, hadn't you?

A. That's correct.

Q. Was your bond released?

[fol. 729] A. Yes, my bond was released. The charges were dropped.

Mr. Watts: I believe that's all.

Cross examination.

By Mr. Gooch:

Q. General Walker, I believe you have testified that you were born in Center Point and I believe that's in Kerr County, I guess?

A. Yes, sir.

Q. That is a rather stable, God-fearing, law-abiding community, is it not?

A. Yes, sir.

Q. You came up in the atmosphere that law and order must be obeyed, didn't you?

A. Yes, sir.

Q. You attended the schools there in Center Point and then the Shriner Institute, I believe you have stated?

A. Yes, sir.

Q. Shriner Institute is a military school, is it not?

A. I believe it had an organization in it and it's by choice.

Q. All right. And did you take the military training afforded in Shriner Institute?

A. No, I did not.

Q. Shriner Institute is a private school as distinguished [fol. 730] from a tax-paid school, is it not?

A. It may still be. I believe it was at that time.

Q. It's a very good school and you can get a good education there, can you not?

A. Yes, sir.

Q. You are taught law and order there, aren't you?

A. In all schools, yes.

Q. Then you went to New Mexico Military Institute?

A. Right, sir.

Q. Is that a military school?

A. Yes, sir.

Q. Did you have any choice there but to be in the military units?

A. No, it's a state school.

Q. And the courses there are based on, as well as academic education, based on military ideas and ideals, are they not?

A. Yes, sir.

Q. Then from New Mexico Military Institute, I believe you stated that you entered West Point, is that correct?

A. Yes, sir.

Q. You do not attend West Point as a matter of right, do you?

A. Will you restate that question?

Q. I say, you do not attend West Point as a matter of [fol. 731] right; I mean by that, General, that you must be appointed, based on qualifications, is that correct?

A. Yes, sir, but anybody has a chance to apply for those qualifications, anybody in the country.

Q. I realize that, but you can't enter West Point like you would enter the University or TCU or some place of that sort; you have to apply and it's competitive, isn't it?

A. There are some more requirements but you have requirements for every school.

Q. All right. But you have to receive an appointment from some Senator, or Congressman or the President, to get in West Point, do you not?

A. No, sir.

[fol. 732] Q. Well, I have been misinformed.

A. You have, Mr. Gooch, because you can get an appointment from other sources. You can take it competitive.

Q. What are the other sources?

A. Competitive examination.

Q. Doesn't the appointment still have to come from a Congressman, a Senator or the President of the United States, even after the competition?

A. The source of that appointment can come from other sources. As I understand, they can—they may come through those hands, but they are based purely on com-

petition, and they may come without the people seeing the person or knowing them.

Q. Did you go there on competition, or were you appointed?

A. I was appointed from Texas.

Q. All right. You took the four year course, I assume, at West Point?

A. Yes, sir.

Q. Is that a school that is designed, among other things, to teach leadership?

A. Not just for that purpose.

Q. No.

A. It teaches leadership.

Q. I said among other things, General.

[fol. 733] A. Yes, sir.

Q. You completed that course there at West Point within the four year allotted period of time, did you not?

A. Yes, sir.

Q. At the time of your graduation from West Point I believe you stated yesterday that you had an option to either go on with the Military career, or resign, is that correct?

Mr. Watts: If Your Honor please, that is—a—

A. No, sir, not exactly.

Mr. Watts: No such thing.

The Court: He is asking, and he answered.

A. It is changed from time to time. Whether it is two or four, I don't know what it is now. But they can keep you in the Service for a certain length of time.

By Mr. Gooch:

Q. That is my point.

A. That is the requirement, see.

Q. My next—

A. Then—but everybody knows that before they come in, so you see there is no decision to make when you come

out of there. Now, if a boy wants to get out, he can get out whenever his time is up, whatever that happens to be, two or four years. It is varied. Sometimes they are not too strict about it. On whether there is a country emergency, whether they don't need them, or they do.

[fol. 734] But, in general, everybody goes to West Point with the idea that that is a career for them, and then quite a few of them drop out after their time is up.

Q. My point was that after a certain length of time, which you say varies from time to time, you have your choice of either staying in for a Military career or resigning your commission, is that correct?

A. Generally, yes. Nobody presents this choice. You just go—you don't consider it. Yes, the answer is yes.

Q. You elected, then, of course, to make the Military your permanent career by staying in, did you not?

A. Yes, sir.

Q. All right. It is obvious I don't know too much about the rank and file above that of corporal, but as I understand, you come out with a Second Lieutenant's commission, is that correct?

A. Yes, sir.

Q. And I believe you stated, and I may be in error in this, that you got out in, did you say 1930?

A. '31, sir.

Q. 1931. And you rose rather rapidly through the ranks from Second Lieutenant to Major General; is that correct?

A. I rose along with my classmates.

[fol. 735] Q. Are the—strike that.

Is the procession from a Second Lieutenant to a Major General based entirely on seniority, or is it based on aptitude and training, and records?

A. Both.

Q. All right. Did you advance along with your classmates, or did you surpass some of them, or some of them surpass you?

A. Some of them surpassed me and I advanced along with some of them.

Q. Did you surpass any of your classmates?

A. Yes, sir.

Q. All right. Now, you spoke yesterday of after you graduated from West Point that you have opportunities, and I didn't know whether you said opportunities, obligations or commands, to continue your Military education. Which is it, General?

A. You have the requirement and opportunities both, in the Military Service.

Q. All right. That is the question I am asking you.

A. Both, sir.

Q. And I believe you stated you availed yourself of opportunities to do some work in the air division, Air Force?

[fol. 736] A. Right, sir.

Q. As a commando, or guerrilla warfare?

A. Right, sir.

Q. And perhaps artillery, or was artillery originally what you set out to be?

A. Artillery is basically right.

Q. All right. Now, in the training for this commando, or guerrilla warfare—by the way, what is guerrilla warfare, General?

A. It is warfare in smaller groups with less organization; a large organization getting special training to fight guerrilla warfare, like you have seen reported in Vietnam.

Q. It is sort of small group action that requires special training to rush in rather quickly, hit an objective and withdraw, being able to live off the land, something of that sort?

A. To have guerrilla training you must have all other training, and this is on top of the other training you have had, and that includes to fulfill any requirement of striking the enemy in any size numbers.

Q. All right. And that, as distinguished from drawing battle lines and digging trenches and digging in, shall we say, for a long seige, is that correct?

A. Basically right, yes.

[fol. 737] Q. All right. Now, when did you receive your commission as a Brigadier General?

A. I received it in 1953, on leave in Texas.

Q. 1953. Now, that was based, I believe you stated, on seniority, on leadership, on education, and perhaps I don't know, but maybe you can enlarge on, but at least are those factors considered in your advancement?

A. Yes, they would have to be, like they are in any profession.

Q. All right: You mentioned also in your direct examination that up to around, and I believe I am correct, I am not sure—sometime around '60 or '61 you were in command of the 24th Division in Germany; is that correct?

A. From '59 to '61.

Q. Yes, sir.

A. Right, sir.

Q. All right. I believe you also said with considerable pride that you thought the 24th Division was the best outfit you had seen?

A. Yes, sir.

Q. And you attributed that to your leadership, did you not?

A. Not entirely. I had some good men in it, and they made the organization.

Q. That's right. It takes all men to make the organiza-

[fol. 738] tion, is that right?

A. That's right, sir.

Q. The General is successful when he can get the cooperation of the subordinates, isn't he?

A. That certainly helps.

Q. It also permeates from his own staff down into the foot soldiers, shall we call them, the privates.

A. Even the corporals, Mr. Gooch.

Q. All right. You took a good deal of pride in the fact that you had been able to bring that 24th into what you considered a great organization, is that correct?

A. Yes, sir.

Q. Now, prior to the time you had the 24th in Germany you stated that you had an assignment in the State of Arkansas. Can you tell us when you received the assignment to the State of Arkansas?

A. Well, sir, I received it before I left Hawaii, and I had some leave in there on change of station and—say a month and a half or two months.

Q. Well, I was just trying to get at the timing that you were in charge of the Arkansas—and frankly I didn't get just the correct name of your title in Arkansas. Will you give me that, please, sir?

A. Arkansas Military District, parenthesis Reserve, I believe, parenthesis closed, and then the title changed dur-
[fol. 739] ing that period of time because we were doing—reorganizing the Reserve all over the United States, and it had something in it with regard to Corps 8—no, I have forgotten it. Maybe General Watts will remember. I think part of Oklahoma was in it. 8th Corps Reserve?

Mr. Watts: 19th.

A. 19th Corps Reserve.

Mr. Gooch: You mind letting the witness testify?
Mr. Watts: Excuse me.

By Mr. Gooch:

Q. My question originally was: Do you remember when you assumed command of the Arkansas unit?

A. I went there within two or three days of the first of September, as I remember it.

Q. I was trying to get it as related to the time of the Little Rock incident.

A. Yes, sir.

Q. Which you have testified about.

A. Right, sir.

Q. And would you say about how many days you were in charge of the Little Rock contingent before the Little Rock incident occurred?

A. About twenty-five or thirty days.

Q. At the time you went to Little Rock I assume you knew nothing about an incident that might occur later on?

[fol. 740] A. No, sir, I didn't.

Q. I believe you also testified, coming down chronologically, that you resigned your commission as a Major General in 1961?

A. Yes, sir, I did.

Q. At that time I believe you also stated, and contradict me if I am wrong, that you had an option of retirement or resignation; is that correct?

A. Well, they wanted me to retire but I didn't want to, so I resigned.

Q. I assume the answer to my question is "yes", you could either take a retirement or you could resign, is that correct?

A. Yes.

Q. All right. Now, had you taken retirement, I believe you testified that your emoluments, pay and fringe benefits and so forth would have amounted to around $15,000.00 a year?

A. Something in that area, right, sir.

Q. And by your resignation you forgave or forfeited any right to that retirement benefit; is that correct?

A. Right, sir.

Q. Then you returned to the State of Texas, you stated. Now, you stated yesterday, without giving a reason, that [fol. 741] you had reasons for retiring—I mean for resigning from the Army rather than retiring. Did you make those reasons known at the time you resigned rather than retired?

A. Not all of them, no, sir.

Q. Well, did you make some of them known?

A. Yes, sir.

Q. What were your reasons, or some of your reasons, if you don't care to give them all, as to why you resigned rather than retired?

A. Well, the difference between retiring and resigning is the pay, and you are in subsidy of the Government, the

taxpayers money, when you retire, and I felt that I wanted to be able to speak, if I wanted to speak, or if I decided to say anything, I wanted to be able to free to say just what I wanted, and without any strings attached, and I didn't feel that it would be fair to everybody and say everything you want when you want, so I wanted to resign.

Q. You wanted full freedom to express your opinion on any subject that you cared to; is that a fair statement?

A. I wanted the freedom as I have stated, Mr. Gooch.

Q. You wanted the guarantees of the Constitution of the United States of freedom of speech, did you not?

[fol. 742] A. I just changed, Mr. Gooch, from the title of General to the title of Mister, and I expected the things to happen that happen when you do that.

Q. You expected what?

A. I expected the rights and so forth to change as it would from getting out of the uniform of a General to getting into civilian life. I wanted the title Mister, not General. That is the way I am now. I have no right to be called by the title of General. People can call me whatever they want to, but I don't sign my name General, and I don't intend to, and I don't have any right to. I am a Mister.

Q. Do you object to my calling you General?

A. I can't object to it, no, sir.

Q. The rank of Major General is a respected rank, is it not?

A. A General in the Army is a very respected rank, yes, sir, and certainly some of the other ranks ought to be more respected.

Q. And the rank of a Major General is respected in all climbs among all people, is it not, sir?

A. Yes, sir.

Q. It is rather a sacred trust, isn't it?

A. So is corporal.

Q. Well, I believe a Major General is just a wee bit [fol. 743] higher than corporal, if I am not mistaken; is that correct?

A. Yes, sir, you are right.

Q. All right. Now, upon your resignation from the Army I believe you stated you went back to your home for a short period of time and then moved to Dallas. At the time of your resignation, did you receive a considerable amount of publicity concerning your resignation and the events leading up thereto?

A. Yes, sir, there was quite a bit of information in print about it.

Q. Did you then decide upon a political career, speaking career, or what, General?

A. I decided to speak and talk to people and—

Q. Did you expect to receive some kind of emolument from the speaking you engaged in?

A. Well, I assume I did. I had to have some way to live.

Q. Was that the way you chose to live, by your speaking engagements?

A. Partially.

Q. I don't intend to pry into your financial affairs, unless you want to reveal them, but $15,000.00 a year is a good deal of money, isn't it, General?

A. Quite a bit.

[fol. 744] Q. You felt you could manage on your speaking engagements as well, I assume, as you could have on your retirement pay?

A. Basically, at that time, Mr. Gooch, I just considered I could always get a job. I wanted to be Mister and get a job.

Q. Did you apply for a job?

A. Well, I talked to people about jobs.

Q. Did you ever take a job?

A. Well, a fringe one, you might say, or semi-one.

Q. What was that job?

A. Well, as you asked me about later, did anybody ever pay me for anything, I will say, "Yes, they did."

So, not much of a job, but fringe things. I have done things that people have paid me for.

Q. What was the first job you had after your resignation?

A. Well, the first job you might say, first started with my Dallas speech in December, I believe December or January, '61 or '62. December if it was '61, or January if it was '62.

Q. It must have been '61, because you made a lot of speeches before September, 1962, didn't you, General?

A. Quite a few, yes, sir.

Q. Where did you make your maiden speech? Do you [fol. 745] recall?

A. Made my major speech?

Q. Your maiden, first speech you made after you got out of the Army.

A. My first speech was made in Dallas, as I recall, to about 6,000 people, with a committee from all over the State of Texas, to include, I believe, Gov. Coke Stevenson as Chairman; ex-Gov. Coke Stevenson.

Q. Did you receive pay for making that speech?

A. There was no plan before the speech to pay me. I believe after it was over they had a little money left over that they gave me.

Q. From then on down to the present, have you engaged rather extensively in speech making all over the country?

A. I have been making speeches across the country, yes, sir.

Q. Is there a constant demand on you and your time for speaking engagements, General?

A. Yes, sir, off and on and continuously, yes, sir.

Q. Has that continued right on down to the present time?

A. Well, there have been changes when it went up, the requirement, and when it went down through this period.

Q. You mean it has fluctuated?

[fol. 746] A. It fluctuates.

Q. Did it fluctuate before the Oxford incident, or have you been more in demand since the Oxford incident than you were before?

A. I certainly wouldn't say that following the Oxford incident it went up. Certainly it didn't.

Q. Well, did it go down?

A. Well, it wasn't going up, it wasn't staying where it was. Yes, sir.

Q. All right. How many times did you have speaking engagements prior to the Oxford incident? Do you have any records of that?

A. No, I don't have any records.

Q. Do you have any record of how many you have made since the Oxford incident?

A. No, sir, not in—not laid out anywhere.

Q. All right. You testified a moment ago you did gain—have some employment shortly after or sometime after your resignation? Where was that employment? You said the Dallas speech in December, I believe you said, of 1961; that would have been about a month after you got out of the Service?

[fol. 747] A. No, sir, I didn't say I had a job, had a job or anything. I had a consultant card that I used and then I—

Q. Who employed you?

A. I was paid once or twice for contact work which—

Q. By whom, please, sir?

A. Mr. Arthur Leman.

Q. Is that the father of the young man who testified here yesterday?

A. Right, sir.

Q. That was with the Southwest Oil Products, I believe he stated was his employer?

A. Yes, sir, down in Houston.

Q. You did some work for them?

A. Contact work, yes, sir.

Q. In the nature of what, please, sir?

A. Oh, it's oil well equipment and oil field equipment and as I knew a lot of people and was going around the country, why, I could ask people if they couldn't use Southwest Oil Products.

Q. General, didn't you testify on your deposition that it was to talk about Americanism?

A: Yes, I— That's part of the contact work with respect to their factory, and so forth. I was in their firm two or three times and talked around the men in the factory.

[fol. 748] Q. All right. Now you stated that your first major speech or maiden speech—it must be coincidental—was made along in September of 1961, or January of 1962, do you remember which it was?

A. May I refresh my memory off of—

Q. Yes, sir.

Mr. Watts: What would you like to have? The deposition? What would you have—

(Witness leaves witness chair and returns.)

A. Dallas, December the 12th, 1961.

By Mr. Gooch:

Q. It has been called to my attention by my associate counsel that I inadvertently said 'September." I meant to say December, 1961 or January, 1962.

A. Yes, sir, I think, answering the question, was about the Dallas speech?

Q. Yes, sir.

A. It was in Dallas on December the 12th, 1961, sir.

Q. That was about a month and a half after you got out of the Army, is that correct?

A. Yes, sir.

Q. Now, General, are you a member of the John Birch Society?

A. Yes, sir, I am a home member.

Q. How long have you been a member of the John Birch Society?

[fol. 749] A. I joined the John Birch Society when I was in Little Rock: I think it was the spring of '58 or '59. '59, probably.

Q. Are you active in that organization?

A. Not too active.

Q. Do they provide speaking engagements?

A. I'm too busy.

Q. Do they—

A. Sir?

Q. You are too busy, did you say you are too busy to take part in that organization?

A. Yes, sir.

Q. All right. Is your time pretty well occupied, General?

A. Yes, sir, I think so. Maybe some of it is wasted but I stay pretty busy.

Q. Are you able to keep something going at all times, is that correct?

A. Oh, I am interested in what's going on all the time.

Q. Do you do a good deal of writing?

A. Yes, sir, but I am not good at it.

Q. Well, do you do it, that's the question I'm asking?

A. Oh, research and reading and writing.

Q. Do you sell it?

A. Yes, sir, after it's well-edited and read over and takes [fol. 750] a lot of time to get my writing into print because I am not—

Q. What is the name of your publication?

A. We go under the name, I and one other fellow, as "The American Eagle Publishing Company."

Q. And where is that located?

A. In Dallas.

Q. And how long has it been in existence?

A. Sometime in 1962, say the—I don't remember the exact date. June, July, August, somewhere in the center of 1962.

Q. Who is your associate?

A. Mr. Robert Surrey.

Q. Does it have a subscription list or do you sell it by the copy or do people subscribe to it or how do they pay for it?

A. We don't have any regular publication. Whenever I get something on a particular subject or that I think would interest people, why, I, we print it under the title of the

American Eagle Publishing Company and send it to friends or distribute it or we do have a subscription group that is set up just to get anything we print at any time.

We have got no regular—and they were told they have no regular time of publication.

Q. Do they pay a subscription fee for it per year?

[fol. 751] A. A group of people do.

Q. About how many subscribers do you have, General?

A. About 250 or 300 subscribers. Sir?

Q. Are those the subscribers?

A. Yes.

Q. How do the others purchase copies of the publication?

A. Well, there are friends in different areas and they see a copy with them. We often send out a mailing of two or three thousand to our friends.

Q. And do they pay for that when they receive it?

A. Not that I—some do, some don't.

Q. Well, now you mentioned in your deposition, "Friends of Walker."

Is that the same as the publication list of the American Eagle Publishing Company?

A. No, but they overlap. No, sir, but they overlap.

Q. What is the organization known as "Friends of Walker"?

A. Just a vague organization. They are groups in the country that call themselves "Friends of Walker". There are some in California, there are some in Arizona and there are some in Dallas and they are different places. They have—people step up and say, "We are friends of Walker," and that's all they say.

[fol. 752] Q. Do they make a contribution to you?

A. Some, as groups, and some as individuals. It's—there is no organization in particular to it.

They may have organized a little group locally and call themselves, "Friends of Walker".

Q. Are those groups still in existence?

A. Oh, I think so.

Q. Now in the spring of 1962, did you take a venture into politics?

A. Yes, sir.

Q. Did you announce for the office of Governor of the State of Texas?

A. Yes, sir.

Q. Do you know where you made your announcement?

A. I believe I made it in Austin, sir.

Q. Well, I was just wondering. Some of the reports, or one of your publications said you may have made it in Chicago. I wasn't sure about that.

A. I may have.

Q. Well, do you remember where you made it?

A. I have a Chicago speech here. February the 9th, 1962, and I believe I—I believe the sign-up date, if it's the same as it was this year, which I don't remember, is February the 3rd. Is that right?

Q. I think that's somewhere around near. I was just [fol. 753] trying to find out where it was that you made your first announcement?

A. I don't know, sir.

Q. But anyhow, you did subject yourself to the primaries for the year 1962?

A. Yes, sir.

Q. You made an extensive campaign, did you not, General?

A. Yes, sir, that's where I met Mr. Leman.

Q. You covered the state as best you could during the time from your announcement until election day, did you not?

A. Yes, sir, that was my objective.

Q. You received press reports concerning your ideologies and ideas during the Governor's campaign, did you not?

A. Yes, sir.

Q. And you were serious about running for the Governorship, weren't you, General?

A. Yes, sir.

Q. You weren't running for the governorship just for publicity, were you?

A. I was running to be Governor of the State of Texas, Mr. Gooch.

Q. Along with the duties of the Governor of the State of Texas is one of the leadership of the people of the State, is it not?

[fol. 754] A. Yes, sir.

Q. You wanted to be the leader of the people of Texas, or you wouldn't have announced for Governor, is that correct?

A. Wanted to be Governor of the State of Texas.

Q. All right. Now, after your race for Governor, which I believe, the primaries were in May of 1962, I believe they were, is that correct, General?

A. I don't know.

Q. Anyhow, after the race for Governor in May of 1962, you did engage in speaking engagements thereafter, did you not?

A. I was campaigning throughout the State of Texas.

Q. No, I mean after the election, did you still continue to make speeches?

A. Yes, sir.

Q. Did you usually receive press notices and coverages on the speeches you made?

A. Maybe so, maybe not, sir.

Q. Well, there has to be some publicity concerning a speech or a speaker before you can get an audience, doesn't there, General?

A. Yes, sir, but they can sure let you go into town and not say a word about it.

Q. I am getting down to the next question. You stated [fol. 755] that you had been able rather successfully to get press conferences because the press sought you out and on occasions you sought the press out; did you make that statement, somewhat to that effect?

A. Yes, sir, about a certain area and time, yeah, that's a good statement. Yes, sir, I'll stick by it.

Q. All right. You were able, were you not, at most any time you choice to get a group of reporters, when you would advise that the—advise them that you had a statement to make, is that not a fact?

A. What period are we talking about? During the campaign?

Q. During the campaign and after the campaign, down, we'll say, until September 30, 1962?

A. Mr. Gooch, it doesn't matter how many, whether you get a group of reporters or not. It's what they say after you've talked to them. You can talk your head off to a group of reporters for two hours. They question you and then they go out and print nothing and you are just wasting your time.

Or they print something that doesn't mean anything. I don't think it means any particular thing, my answer, I'm not trying to—but the point is, it's a question of what they say, it's not whether you get a group of physical people looking at you. They'll come and look at you any time and [fol, 756] you'll think, "Oh, boy, this is going to be great." And when you get through, there is nothing in print. Or they put it down when it doesn't say what you intended or it's drawn out of context.

Now right now, the whole thing is, the effort—nobody will say anything you say about foreign policy or Cuba or DM or—they won't even talk about it.

They won't even mention MacArthur, what I say about MacArthur. So what's the point about getting a bunch of people together? I'm not—this is off the—just so it's understood. It doesn't quite make it clear that when—just because you can call people together,—oh, they'll come together. I have had the most wonderful groups of people together, say, in Portland, and some of the biggest press conferences I ever saw.

When you get to looking for what happened, nothing.

Then you try to go into a town, many places, or you are going into a town for a speech, if they don't want to carry you, they won't. You would think they would that day. And

then sometimes else you may think, "Well, maybe they won't carry that," and maybe they will say something good about you or at least tell the public you are there.

Q. Anything else, General?

A. Oh, there are a lot of things, Mr. Gooch, but we can go on with your story.

[fol. 757] Q. Go right on, if you have got something else to say.

Mr. Watts: If Your Honor please, I don't think this is proper testimony.

The Court: Let's go on.

Mr. Gooch: He hasn't answered the question. I will reask the question. I asked him if he had any difficulty in getting press conferences. That was the question I asked to start with, Your Honor.

Mr. Andress: I think he answered it, Judge. Said he could always get a group of people together.

The Court: You may answer it again.

The Witness: Your Honor?

The Court: You go ahead and answer the question.

The Witness: Will you repeat the question, sir?

By Mr. Gooch:

Q. Did you have any trouble from the time you started making your speeches—we will generalize now—from December of 1961 down to September 30th of 1962, getting news reporters, newspaper reporters to come to you when you wished to have a press conference?

A. Yes, I do.

Q. All right, tell me about it.

A. Many times when your most important subject comes up, situation of what's going on in this country or things that I would know about, the press doesn't want to hear about it. Not going to print, so there is no use them coming [fol. 758] to me.

Q. Have you been denied at any time a press conference when you had asked the press to come and receive a statement from you?

A. I don't have any right to make them come to me, sir.

Q. That wasn't what I asked you. Have you been denied —have they told you they weren't going to come and listen to you at any time?

A. I wouldn't be put in that position. I wouldn't give them that chance.

Q. Then I assume when you have called a press conference, you have received the press, is that correct?

A. When I called a press conference, I have received the press, the press has come, as I remember, except there have been times when the press didn't show up, as we thought it would, or I thought it would.

Q. Well, I'm just asking the question now, which I will repeat once more, at the times you have asked for a press conference, you have gotten a press conference, haven't you, General?

A. Basically, yes, Mr. Gooch. Right.

Q. All right. All right. Now in September or let's go back a little further, from the time that the primary was over in May of 1962, when you ran for Governor, and the 30th day of September, 1962, did you learn of the litigation [fol. 759] in the State of Mississippi concerning the entry of one Meredith into Ole Miss University?

A. In general, I learned about it, right.

Q. Did you consider at that time and during that period that the question of integration throughout the United States, and particularly the South, was a subject of national interest and perhaps national controversy?

A. Yes, sir.

Q. Did you keep up generally with the Court battle involving the entry of Meredith into Ole Miss?

A. Oh, not in detail from day to day. Just in general.

Q. Did you learn prior to September 30, 1962, that the Circuit Court of Appeals at New Orleans had made a final order directing that Meredith be entered as a student in the University of Mississippi?

A. I knew an order had been—a court order had been issued. I don't remember whether I knew it was the Cir-

cuit Court—that Meredith would be entered in Mississippi, yes, sir.

Q. Well, you knew that long prior to September 30, 1962, that the Courts had ordered the entry of Meredith into the University of Mississippi, did you not?

A. Yes, sir. Yes, sir.

Q. You were well aware of that prior to September 25th [fol. 760] or 26th or 27th, 28th, 29th or 30th of September, were you not?

A. Yes, sir, I was aware of it.

Q. You knew that the Courts had said that Meredith must be entered, did you not?

A. In effect, yes, sir.

Q. You knew that, or did you know that Governor Ross Barnett was opposing the entry of Meredith into the University of Mississippi?

A. Yes, he was, sir.

Q. Did you ever learn from any source that Governor Barnett ever changed his position in opposition to the entry of Meredith into the University of Mississippi?

A. Changed from opposing it to not opposing, or assisting it?

Q. That's right.

A. From opposing it to assisting it?

Q. Or being passive about it? Let me rephrase the question:—

A. No, sir, as far as I am concerned, he was opposing continuously the entry of Meredith.

Q. And that was right on down to the time that Meredith was actually on the campus, wasn't it, General?

A. As far as I know, he was.

Q. And, as a matter of fact, in your speech to the stu- [fol. 761] dents on the campus, you told them that Barnett was still standing fast against the entry of Meredith on the campus, didn't you?

A. As I remember, in my speech, it was, as I said it, that I told them that Barnett had not betrayed them and that Barnett, in effect, that Barnett is standing opposing, the same as he had been standing all the time, was my idea.

Q. You knew that Barnett was openly defying the judgment of the Federal Court which ordered the entry of Meredith into Ole Mississippi, didn't you?

A. I knew that he was opposing it.

Q. You knew prior to the time that you had any utterances relative to going to Mississippi that Governor Barnett had blocked the entry of Meredith into the Registrar's Office at Ole Miss, didn't you?

A. You—the question with respect to him personally?

Q. Yes, sir.

A. I knew he had been on the campus and that he had stood opposing and blocked the entrance of Meredith, yes, sir. I think that answers the question.

Q. It does. Prior to the time that you went to Mississippi, were you or not informed that Governor Barnett, as well as the Lt. Governor, had been held in civil contempt by the Circuit Court at New Orleans for forcibly blocking the entrance of Meredith into the University of Mississippi?

[fol. 762] A. I don't know that I had heard that, if you can refresh my time and the date of that, I might be able to say but I don't think I had heard it, but he may have.

Q. I think it was around the 25th of September.

A. Now this was contempt?

Q. Yes, sir.

A. That Barnett had—question, sir—

Q. As to whether or not Governor Barnett had been held in civil contempt by the Circuit Court of New Orleans for disobeying the orders of the Circuit Court?

A. Yes, sir, and there had been an appeal made and that Barnett, as representative of the state, had a requirement before the Supreme Court to go back into court and to be heard for himself and the State of Mississippi.

Q. All right.

A. And this was the position, as I understood it, about that time.

Q. But you did know that an Injunction had been issued out of the Circuit Court in New Orleans prohibiting Bar-

nett, Jackson (sic) and those knowing about the Injunction, for Barnett and Johnson and the School Board to cease and desist from preventing the entrance of Meredith into the University of Mississippi, did you not?

A. I understood that was a ruling in some court. I'm not sure that I knew that was the—which court it was. [fol. 763] But I knew that had been a ruling in some court and I—there was other activities on the other side that had gone about in the Courts, opposing that.

Q. All right. But you did know that there was a court order decreeing that Meredith be entered into the student body at Ole Miss as early as, we'll say, the 25th of September, 1962, did you not?

A. As early as—what date?

Q. September 25th of 1962?

A. Yes, sir.

Q. Now General, are you familiar with how the processes of the Federal Courts are carried out?

A. I wasn't too familiar at that time. I am becoming more familiar all the time.

Q. Well, you know that the United States Marshals serve the same function in Federal Courts as Sheriffs and Bailiffs and Deputy Sheriffs in State Courts?

A. I don't know that I considered it. That they have the same functions as the Sheriffs in a county?

Q. Yes, sir.

A. No, I wouldn't consider that they had the same functions as the county.

Q. No, I said insofar as enforcing the judgments of the court, did you have any knowledge—

A. Oh, you have a right to force the en-judgment (sic) [fol. 764] of a court by Marshals, right.

Q. That's the very question I asked you.

A. Right, sir, that's what I wanted to tell you. Sure, I know that.

Q. All right. And that the Marshals are charged with the duty of enforcing the judgments of the Federal Courts, are they not?

A. Yes, sir.

Q. And you knew—

A. I don't quite compare them to Sheriffs, though.

Q. Well, I was trying to draw an analogy. I don't know that I am slandering either one of them. I respect both offices.

A. So do I, Mr. Gooch.

Mr. Watts: I don't think that's a proper comment, if the Court please.

The Court: I don't think there was any harm by it, Counsel.

Mr. Watts: No, I don't think there is any harm.

The Court: Let's recess until 2:00 o'clock, Ladies and Gentlemen.

(Thereupon, at 11:57 a.m., a recess was taken until 2:00 o'clock, p.m., of the same day.)

[fol. 765]

Afternoon Session

2:00 P. M.

Cross examination (continued).

By Mr. Gooch:

Q. General Walker, just before the noon recess we were discussing the various Court orders in connection with Meredith's entrance into the University of Mississippi, and you have testified concerning your knowledge of those. That was the substance of our interrogation and answers before the noon recess, was it not?

A. That I had general knowledge of them, yes, sir.

Mr. Gooch: We now offer in evidence, if the Court please, a certified copy of the Order vacating stay, recalling mandate, and issuing new mandate forthwith in the United States Court of Appeals for the Fifth Circuit, No. 19475, James H. Meredith, on behalf of himself and others simi-

larly situated, Appellant, versus Charles Dickson Fair, President of the Board of Trustees of the State Institutions of Higher Learning, et al., Appellees.

Mr. Watts: No objection.

The Court: That is Defendant's Exhibit 3?

Mr. Gooch: Yes, sir.

The Court: It is admitted.

[fol. 766] Mr. Gooch: At this time we would like to read a portion of it—it is all in, but I will read the injunction. This is an opinion by the Fifth Circuit Court of Appeals in New Orleans, dated the 27th day of July, 1962.

EXCERPTS FROM DEFENDANT'S EXHIBIT 3

"The case is reversed and remanded with directions to the District Court forthwith to grant all relief prayed for by the Plaintiff and to issue forthwith a permanent injunction against each and all of the Defendants-Appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the Plaintiff-Appellant, James H. Meredith, to the University of Mississippi under his application heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said Defendants-Appellees, or any of the classes of persons referred to from excluding the Plaintiff-Appellant from admission to continued attendance at the University of Mississippi. Pending such time as the District Court has issued and enforced the orders herein required and until such time as there have been full and actual compliance in good faith with [fol. 767] each and all of said orders by the actual admission of Plaintiff-Appellant to, and the continued attendance thereafter at the University of Mississippi, this Court herewith issues its own preliminary injunction enjoining and compelling each and all of said parties to admit Plaintiff-Appellant to, and allow his continual attendance at the University of Mississippi, further prohibiting and preventing

said parties, or any other of them, from excluding said Plaintiff-Appellant from attendance to and continued attendance thereafter on the same basis as other students at the University of Mississippi."

(Said Defendant's Exhibit 3 was marked by the Reporter.)

Mr. Gooch: We next offer in evidence the Opinion by Judge Hugo Black of the Supreme Court of the United States in the same captioned case as the previous number, filed September 12, 1962, in the Circuit Court at New Orleans; was entered the 10th day of September, 1962, in Washington.

(Conference at the bench, between Court and Counsel.)

(The instrument next above referred to was marked Defendant's Exhibit 4.)

DEFENDANT'S EXHIBIT 4

Mr. Gooch: The instrument is entitled "Supreme Court [fol. 768] of the United States, October Term, 1962, James H. Meredith versus Charles Dickson Fair, et al. Order. Upon consideration of the application of counsel for the movant and of the opposition of the respondents thereto, it is ordered that the orders of Circuit Judge Ben F. Cameron of the United States Court of Appeals for the Fifth Circuit of July 18, 1962, July 28, 1962, July 31, 1962, and August 6, 1962, purporting to stay the effectiveness of the mandate of the United States Court of Appeals for the Fifth Circuit, be, and the same are hereby, vacated and that the Judgment and Mandate of said Court shall be effective immediately.

Be it further ordered that the Respondents be, and they are hereby, enjoined from taking any steps to prevent enforcement of the United States Court of Appeals' Judgment and Mandate pending final action by this Court on the Petition for Writ of Certiorari now on the docket."

And that is signed by Hugo L. Black, Associate Justice of the Supreme Court of the United States, September 10, 1962.

[fol. 769] Mr. Gooch: Will you mark this, please, as Defendant's Exhibit 5.

(Thereupon, Defendant's Exhibit 5 was marked for identification.)

Mr. Gooch: For identification, this is the order—

Mr. Watts: No objection.

Mr. Gooch: —is the order signed by the United States District Judge, S. C. Mize, for the Southern District of Mississippi on September 13, 1962, following the two other instruments which have been introduced.

The Court: Have you offered it?

Mr. Gooch: I am about to offer it. I was identifying it. We now offer it in evidence.

The Court: Defendant's 5 is admitted.

Mr. Gooch: The same style and number of the case as previously indicated.

DEFENDANT'S EXHIBIT 5

"ORDER GRANTING PERMANENT INJUNCTION"

This matter is now before this Court by virtue of the Mandate of the United States Court of Appeals for the Fifth Circuit and the Mandate of Mr. Justice Black of September 10, 1962 setting aside all stays granted by Judge Ben F. Cameron and putting into effect the mandates of the Court of Appeals for the Fifth Circuit enjoining the Trustees and officials of the University of Mississippi from [fol. 770] taking any steps to prevent enforcement of the mandates of the Court of Appeals for the Fifth Circuit, and this Court having now considered the mandates of the Court of Appeals for the Fifth Circuit of July 17, 1962, July 27, 1962 and its final order of August 4, 1962, and this Court having considered the mandate of July 17, 1962, wherein

the Court of Appeals reversed the judgment of the District Court with directions to this Court to issue an injunction as prayed for in the complaint and by its mandate of July 27, 1962 ordered that the judgment of that Court issued as and for the mandate on July 17, 1962, be recalled and amended by making explicit the meaning that was implicit as expressed in its opinion dated June 25, 1962 and ordering that this Court "forthwith grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the [fol. 771] plaintiff-appellant from admission to continued attendance at the University of Mississippi.

And by its mandate of August 4, 1962 the Court of Appeals reaffirmed its orders of July 17, 1962 and July 27, 1962, in the following language: "All of our orders of July 17, July 27 and this date, therefore continue in full force and effect and require full and immediate obedience and compliance."

Now, therefore, it is here ordered, adjudged and decreed that the plaintiff, James Howard Meredith, be and he is hereby granted all the relief that is prayed for by him in his complaint and that the defendants, Charles Dickson Fair, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Louisville, Mississippi; Euclid Ray Jobe, Executive Secretary of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Jackson, Mississippi; Edgar Ray Izard, Hazlehurst, Mississippi; Leon Lowrey, Olive Branch, Mississippi; Ira Lamar Morgan, Oxford,

Mississippi; Malcolm Mette Roberts, Hattiesburg, Mississippi; William Orlando Stone, Jackson, Mississippi; S. R. Evans, Greenwood, Mississippi; Verner Smith Holmes, McComb, Mississippi; James Napoleon Lipscomb, Macon, Mississippi; Tally D. Riddell, Quitman, Mississippi; Harry Gordon Carpenter, Rolling Fork, Mississippi; Robert Bruce Smith, II, Ripley, Mississippi and Thomas Jefferson Tubb, [fol. 772] West Point, Mississippi, Members of the Board of Trustees of State Institutions of Higher Learning; James Davis Williams, Chancellor of the University of Mississippi, Oxford, Mississippi; Arthur Beverly Lewis, Dean of the College of Liberal Arts of the University of Mississippi, Oxford, Mississippi, and Robert Byron Ellis, Registrar of the University of Mississippi, Oxford, Mississippi, and each of them, their agents, servants, employees, successors, attorneys and all persons in active concert and participation with them be and they hereby are permanently restrained and enjoined.

13th of September, 1962.

Mr. Watts: Let's see that last document, please, sir. Thank you.

Mr. Gooch: Next one is a certified copy of the order of the Circuit Court, certified May 14,—

September 25, 1962, by the Circuit Court.

Mr. Andress: Is that a final order or is that still on appeal?

Mr. Gooch: As far as I know, it's a final order. I know nothing further about it.

Mark that as Defendant's Exhibit 6.

(Thereupon, Defendant's Exhibit No. 6, was marked for identification.)

Mr. Gooch: I say to you it has not so far been set aside, [fol. 773] Mr. Andress.

The Court: Are you offering 6?

Mr. Gooch: Yes, sir.

The Court: 6 is admitted.

Mr. Gooch: (Reading)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS, PETITIONER,

vs.

EDWIN A. WALKER.

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DEFENDANT'S EXHIBIT 6

This Court having on September 25, 1962 issued orders requiring Ross R. Barnett to appear before this Court today at 10:00 a.m., to show cause, if any he has, why he should not be held in civil contempt of the temporary restraining orders entered in this action on September 25, 1962, and Ross R. Barnett having been given notice of the orders to show cause, and it having been regularly called on the calendar for hearing at 10:00 a.m., this day, and Ross R. Barnett having failed to appear or respond in person or by counsel, and having failed to deny the factual statements contained in the verified application of the United States, and of the appellant and

The Court having heard and received evidence on behalf of the United States and of the appellant, and having deliberated and considered the legal issues involved, now renders its Findings of Fact and Conclusions of Law and Judgment as follows:

FINDINGS OF FACT

1. Since this Court entered into its order of July 28, 1962, and the District Court for the Southern District [fol. 774] Mississippi entered its order on September 13, 1962, requiring the admission of James H. Meredith to the University of Mississippi, Ross R. Barnett, as Governor of the State of Mississippi, has issued a series of proclamations calling upon all officials of the state to prevent and obstruct the carrying out of the Court's orders with respect to the admission of James H. Meredith to the University. Two of these proclamations were issued by Ross R. Barnett on September 24 and September 25, 1962.

2. On September 25, 1962, this Court entered its temporary restraining orders restraining Ross R. Barnett from interfering with or obstructing in any manner or by any means the enjoyment of rights or the performance of obligations under this Court's order of July 28, 1962 and the order of the District Court of September 13, 1962.

3. At approximately 4:30 p.m., on September 25, 1962, Ross R. Barnett, having full knowledge of the existence and terms of this Court's temporary restraining orders, went to the office of the Board of Trustees of Institutions of Higher Learning in Jackson, Mississippi at a time when James H. Meredith was due to appear at the office and be enrolled as a student in the University of Mississippi, pursuant to the order of this Court. When James H. Meredith arrived at the office and sought to enter for the purpose of enrolling, Ross R. Barnett deliberately prevented him from [fol. 775] entering and told him that his application for enrollment was denied by Ross R. Barnett.

4. On September 26, 1962, James H. Meredith sought to enter the campus of the University of Mississippi, in Oxford, Mississippi. He was prevented from entering by Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Ross R. Barnett.

5. The conduct of Ross R. Barnett in preventing James H. Meredith from enrolling as a student in the University of Mississippi has been with the deliberate and announced purpose of preventing compliance with the orders of this and other federal courts.

Conclusions of Law

1. This Court has jurisdiction of the person of Ross R. Barnett.

2. Ross R. Barnett is in contempt of the temporary restraining orders entered by this Court on September 25, 1962.

JUDGMENT OF CIVIL CONTEMPT

Upon the foregoing findings of fact and conclusions of law:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

Ross R. Barnett is in civil contempt of the temporary restraining orders of this Court entered September 25, [fol. 776] 1962; that such contempt is continuing; and that Ross R. Barnett shall be committed to and remain in the custody of the Attorney General of the United States and shall pay a fine to the United States of $10,000. per day unless on or before Tuesday, October 2nd, 1962, at 11:00 a.m. he shows to this Court that he is fully complying with the terms of the restraining orders, and that he has notified all law enforcement officers and all other officers under his jurisdiction or command:

(a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;

(b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.

Nothing herein shall prevent a later assertion of a charge of criminal contempt against Respondent.

Jurisdiction is hereby reserved for such other and further orders as may be appropriate.

Judges Jones, Gewin and Bell dissent from that portion [fol. 777] of the judgment imposing a fine upon the Respondent.

[fol. 778] Filed in the Court of Appeals on September 28, 1962.

By Mr. Gooch:

Q. Now, General Walker, prior to your going to Jackson, Mississippi, prior to September 30, 1962,—and to back up a moment, what was the date that you actually went to Jackson, Mississippi, from Dallas?

A. September 29th.

Q. 29th. Prior to September 29th had you held press conferences at any place or places in which you expressed yourself concerning the Oxford, Mississippi, incident?

A. I had held press conferences the previous week with respect to the sovereignty as a state and objections to Military forces being used in the state.

Q. All right. I am not sure that you mentioned this in your deposition or in answer to questions on direct examination, but did you issue a report or a news release to be carried on Party Line over station KWKH, Shreveport, Louisiana? On Wednesday, September 26, 1962, at about 7:30 p. m.

A. I think that is the date. It is in the deposition.

Q. That is right.

A. I can verify it, and my attorney.

Q. I will hand you what has been marked as Defendant's [fol. 779] Exhibit 2 to your deposition at the time it was taken. Has a notation, "Station KWKH, Shreveport, Louisiana, Party Line, Wednesday, September 26, 1962, at about 7:30 p. m., by Ted Walker."

Mr. Watts: No objection.

By Mr. Gooch:

Q. Now, do you identify, or can you identify—I better mark this as Defendant's Exhibit 7. Excuse me, General.

A. All right.

Q. Defendant's Exhibit 7.

(The instrument above-referred to was marked Defendant's Exhibit 7.)

Q. I hand you what has been marked as Defendant's Exhibit 7 and ask you if you will identify that as the news release that you gave over the Shreveport station on September 26, 1962?

A. That is identified.

Mr. Gooch: I will read Exhibit 7.
The Court: Are you offering it, Counsel?
Mr. Gooch: I am offering it.
The Court: It is admitted.
Mr. Gooch: Excuse me, I am sorry.

DEFENDANT'S EXHIBIT 7

"It is time to move. We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court. Rise to a stand beside Governor Ross Barnett at [fol. 780] Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every state in the Union. Rally to the cause of freedom. The battle cry of the Republic. Barnett, yes, Castro, no. Bring your flags, your tents and your skillets. It is time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi. The last time in such a situation I was on the wrong side. That was in Little Rock, Arkansas, in 1957, and 1958. This time I am out of uniform and I am on the right side and I will be there."

Now, General, is that the speech you delivered from that radio station at that time?

A. It certainly is.

By Mr. Gooch:

Q. Now, at that time, that being September 26, 1962—so, apparently, from that statement, particularly the last four words, you had made up your mind then to go to Mississippi, had you not?

A. Yes, sir, I had if and when troops were used.

Q. Well, now, let's pause right there. There were no troops used until after the Marshals had been attacked on the campus of the University of Mississippi on the night of September 30; is that correct?

A. The troops had been committed.

[fol. 781] Q. Now, do you know of the commitment of those troops, General?

A. Yes, I do.

Q. Do you have any troop commitment on that?

A. Yes, sir. I think you will find press reports in the newspapers of the 29th that said the President was committing troops. I believe there was much discussion about it, on the commitment of troops for a week.

Q. I believe it was September 30, to be exact. I am trying to ask you if you knew about the commitment of troops at that time? No, that wasn't what I asked you.

A. Well, I didn't say that. That there was a commitment of troops. I said that I was told if and when troops were going to be used—I didn't know they were going to use them, the troops now.

Q. The question was my error entirely. You did commit yourself to go, but you say it was a conditional commission, to go only if and when troops were used?

A. Additional commission—that was the only commission. I was only going if and when troops were used.

Q. You knew at the time you went on the campus that night that there were no troops on the campus, didn't you?

A. I had no way of knowing it.

[fol. 782] Q. After you got to the campus you knew the troops were not there, didn't you?

A. I didn't see any at the time I got on the campus.

Q. Did you make any inquiry to see whether or not there were any troops there or not, General?

A. I listened to the conversations with respect to whether there were any troops on the campus, and asked questions about whether or not troops were on the campus. Yes, I did query about it, whether they had seen any troops on the campus.

Q. What was the answer to the query?

A. I didn't find anybody that had seen any.

Q. As a matter of fact, the troops didn't come in until after the Marshals had become beleaguered, isn't that correct?

A. Mr. Gooch, I cannot answer that question unless you have some definite proof that there was no soldiers on the campus. In my opinion, there is bound to have been some soldiers on the campus. I was at Little Rock and I know what happened. And I know you can't just tell troops, go somewhere, and have them there for yourself.

Q. Well, in your deposition, I can't get the page and number now, but I can if necessary, you stated you were still on the campus that night after you had made the [fol. 783] speech, when you observed an Army convoy of troops coming onto the campus?

A. Yes, sir, I saw a convoy come on the campus.

Q. Had you seen or heard of any troops being on the campus prior to the time you observed them coming on there?

A. No, I hadn't but I had heard of them fifteen miles from Oxford, and they were setting up bases all across Tennessee. In Memphis it was already in the press that it had been discussed for days. It told about troops all in Tennessee, and they had told about—before I went on the campus they had—there was word before I even left Jackson that a Military installation was being set up fifteen miles north of Oxford. Perfectly obvious nobody was moving fifteen miles north of Jackson if they were not coming on the campus. They were already being used in Mississippi at that point.

Q. I wish you would get your copy, if you can find it, of any commitment orders on the use of those troops.

A. That is not necessary. When the troops are used there is an order. Corporals don't go off by themselves, sir. Somebody is directing them to.

Q. Now, did you issue a news report on or about September 27 from your residence in Dallas in which you

[fol. 784] appeared before a TV cameraman and made a statement of similar import to the one that you had made over Party Line the previous evening, and in connection with that TV interview answer a question or two before the TV cameras were shut off?

A. May I have it, sir?

Q. Let me see if I can find it. I don't have it, you didn't furnish it. I have what purports to be one which I will let you see. This is my copy. It is what I have been told is the speech you made. I don't know whether you made it or not.

A. I thought everything went in the deposition. Is there a copy of this?

Q. You didn't furnish that, General.

A. Oh. I recognize it as portions of this statement I made some time, and I think the first part of it has been furnished in the deposition. The others are questions and answers by the reporter, but I don't think I have any particular record of it.

Q. Well, would you say that you did or did not make the answers to those questions asked, the questions asked and the answers given? Or would you need the refreshment of your memory?

A. Well, this has got dots in it and dashes and so forth. This is the way the press does you. They may fill it in [fol. 785] or they haven't filled it in, or you have taken it out of context. "This is the cause of freedom," and then they have got a bunch of dots in here. What does that say? "This is for America."

Q. It is supposed to be a quote from you. I don't know. A pause, I suppose.

A. I can't verify this as my exact statement or wording or a quote from me.

Mr. Gooch: If the Court please—

A. I think that the initial statement that I made covers the point and I am perfectly willing to release that to you.

Mr. Gooch: Well, in order to ask the question in connection with the interview which I have determined from my investigation occurred on September 27, 1962, the voice asked you in front of the TV camera, "General, if the forces go . . ."

Mr. Andress: Judge—just a moment. He has already testified he can't identify this, can't remember it. Such being the case, we don't think it is proper to repeat it.

The Court: Sustained.

Mr. Gooch: If the Court please, at this time we would like to bring in the TV camera and the operator to show [fol. 786] the film for the refreshment of his memory.

The Court: Ladies and Gentlemen, it will take a little time.

The Witness: May I say this, Your Honor?

The Court: Yes, sir.

The Witness: It may save a lot of trouble. It doesn't make much difference.

Mr. Gooch: No, I think we will just go to the trouble.

Mr. Watts: Go ahead, let's do it.

The Court: Will it take a few minutes to set it up?

Mr. Watts: I might suggest we might return to that later, Your Honor, we may draw a ring around this until the recess. We can set it up at the recess.

Mr. Gooch: We would like to do it now.

The Court: I don't want to try to control his method of offering his proof.

Mr. Watts: I don't want to either.

The Witness: May I solve this very simply, Your Honor?

Mr. Watts: No, he wants to show the news release anyway.

The Court: Move into the Jury room, and we will call you when the camera is set up.

[fol. 787] (During the recess, a projector and screen were set up in the courtroom, the jury returned to the courtroom, said film was run and following is a transcript of the sound portion of said film.)

General Walker: We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court.

"The battle-cry of the Republic, Barnett, yes, Castro, no."

Bring your flag, your tent and your skillet. It's now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi. The time is when they decide, if they do, to use troops in the State of Mississippi against the State Sovereignty and the Governor of the State.

The last time in such a situation, I was on the wrong side. That was in Little Rock, Arkansas, in 1957, and '8. This time, out of uniform, I am on the right side. And I will be there.

Unidentified Voice: General, if forces go, will you lead this force?

General Walker: This is a cause for freedom. This is Americans', patriotic Americans' from all over the nation. It is a movement for Freedom. And I will be there. [fol. 788] Rise to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Thousands strong from every state in the union. Rally to the cause of freedom.

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The Court: Turn on the lights, please.

Do you have any more at this time, Mr. Gooch?

Mr. Gooch: Yes, sir, I do.

I would like now to have this marked for identification as Defendant's Exhibit 8.

By Mr. Gooch:

Q. I hand you what's been marked as Defendant's Exhibit 8, which purports to be an address, or a press release, from Mississippi, Saturday, September 29th, at about 5:00 p.m.

It states on here, "From Jackson, from the residence of Dr. Ney Williams."

This was furnished as Defendant's Exhibit 4, to your deposition and I will ask you if this is the release that you gave at the Sun & Sands Motel in Jackson.

A. This is on the 29th?

Q. Yes, sir.

A. Yes, sir.

Q. Now in connection with that news release and the text, were you asked any questions while you were in front of the TV camera?

[fol. 789] A. I don't recall definitely. I have—I may have been, one or two. But I cut it very short because we were sort of—the camera, the press man I thought was taking advantage of me and I walked out in the next hallway to get out from under the cameras and grouped around another group of press people and discussed further, other questions with them.

Mr. Gooch: We offer in evidence at this time Defendant's Exhibit 8.

The Court: It's admitted.

DEFENDANT'S EXHIBIT 8

Mr. Gooch: Statement from General Walker from the Sun & Sands Motel at Jackson, Mississippi, September 29, 1962.

"I am in Mississippi—beside Governor Ross Barnett.

"I call for a national protest against the conspiracy from within.

"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.

"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies. This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a nation."

[fol. 790] Now will you run the tape, please, sir.

The Court: Put the lights out.

(A tape was run and following is a transcript of the sound portion of said tape.)

Unidentified Voice: You are the speaker, sir. Would you like to read your statement?

General Walker: This is Edwin A. Walker. I am in Mississippi, beside Governor Ross Barnett.

I call for a national protest against the conspiracy from within.

Rally to the cause of Freedom, in righteous indignation, violent vocal protest and bitter silence under the flag of Mississippi at the use of Federal troops.

This today is a disgrace to the nation in dire peril—a disgrace beyond the capacity of anyone except its enemies. This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a nation.

Unidentified Voice: Sir, have you been in contact with Governor Barnett?

General Walker: I have been in contact with his office.

Unidentified Voice: Do you hope to see him while you [fol. 791] are here in Jackson?

General Walker: I certainly do. Thank you very much. And I am very happy to have been with you.

Unidentified Voice: Sir, can you tell us what your plans are, specifically?

(No response.)

Will you tell us what your plans are specifically, sir?

(No response.)

(Remainder of voice inaudible.)

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Mr. Watts: Do you have another one to show?

Mr. Cravens: We have another one to show but not right at this minute.

Mr. Gooch: We would like at this time to introduce in evidence the films that have just been shown to the jury.

Mr. Watts: No objection.

Mr. Andress: No objection.

The Court: They are both admitted. Are they both on one reel?

Mr. Cravens: No.

The Court: Separate reels?

All right, we will mark them 9 and 10.

Mr. Gooch: The one from Dallas will be 9 and the one [fol. 792] from Jackson will be 10.

(Thereupon, Defendant's Exhibits 9 and 10, were marked for identification.)

By Mr. Gooch:

Q. Now, General Walker, did you make a third appearance before a press conference, a fourth, rather, after you arrived at Oxford?

I believe you stated that you made one along about 4:45 or 5:00 o'clock, on the afternoon of September 30, 1962?

A. Yes, sir.

Q. Do you have a copy of that script?

A. I believe it's in the deposition, both attorneys have it.

Q. Well, I have one here that was marked Defendant's Exhibit 6, to your deposition and we never were for sure whether or not this is the one you used or one that you called back to Dallas.

I believe you testified that you did use that script at Oxford, I'm not sure.

[fol. 793] A. I believe we testified in the deposition, and as far as I remember this is the script that was used on the 29th, in the afternoon at 5:00 o'clock, as you stated, yes, sir.

Q. At Oxford?

A. At Oxford, and I think it was also called back to Dallas.

Q. Will you please—

Mr. Watts: Is that the 29th? Let's see.

The Witness: That is dated—

Mr. Watts: Couldn't have been in Oxford—

The Witness: No, no, wait a minute. Friday, September 30th.

Mr. Watts: That's right. We have no objection to it. I just wanted to get the date and everything straight.

Mr. Gooch: That is not my writing, that is somebody else's writing.

Mr. Watts: I just wanted to keep it straight.

A. Called back from Oxford. This reminds me, this was called back from Oxford, as marked on here, about 9:00 o'clock in the morning.

Mr. Watts: What date?

The Witness: Friday.

Mr. Watts: What date?

[fol. 794] The Witness: September 30th. Called back to my office in Dallas.

Mr. Gooch: Mark that as Defendant's Exhibit 11.

The Court: Are you offering it?

Mr. Gooch: Yes, sir.

The Court: It is admitted.

(Document marked Defendant's Exhibit 11 by the Court Reporter.)

By Mr. Gooch:

Q. General Walker, I hand you what has been identified as Defendant's Exhibit 11, and do you identify the words used on Defendant's Exhibit 11 as the statement that you made to the press in the courtyard of the Ole Miss Hotel along late in the afternoon of September 30, 1962?

A. Unless you can remind me of something better, well, this is the best of my memory.

Q. I have nothing to remind you with except I understood you to say in your deposition that was what you said.

A. I said in my deposition I think this is it. I know these are my words and this was released to the press.

Q. At the top of the page, "On to Mississippi." "As the forces of the New Frontier assemble to the north, let history be witness to the courage and determination that calls [fol. 795] us to Oxford to support a courageous Governor. His lawful stand for state sovereignty is supported by thousands of people beyond the state borders, now on their way to join you at Oxford."

Now, General, I believe the chronology indicates that your first of these releases in which you spoke of " . . . your flag, your tent and your skillet," was released from Shreveport on September 26, 1962?

A. Yes, sir.

Q. Was that a live broadcast or had you previously sent the word into the station, was it telephonic or just how did you get it over there?

A. I don't remember. I telephoned the statement in. It probably went on the air right at the time I telephoned in.

Q. Did you get any response from that broadcast?

A. I am sure there were telephone calls with regard to that broadcast.

Q. Going a step further, I—to the next night in Dallas, when you uttered a statement of similar import relative to flags, tents and skillets, and using the terminology, "Bring your flag, your tent and your skillet," and calling for ten thousand from each state, did you get any response at your home in Dallas?

A. Yes, I did.

[fol. 796] Q. I believe you testified in your deposition, did you not, that the 'phone calls were backed up six or eight deep and for hours, in response to your pleas?

A. That is a general statement. That is correct.

Q. All right. Did that indicate to you that your plea and statement had been heard for considerable length and breadth of the land?

A. I don't know where these were released, sir.

Q. Checking back with your deposition, we can find the pages, I believe you stated you got calls from California,

Ohio and Florida as a result of these press releases, did you?

A. I had calls from different parts of the country, yes, sir.

Q. Indicating they had heard the broadcast?

A. They had in many areas of the country.

Q. And offering their services, is that correct?

A. Discussing whether they were coming or weren't coming.

Q. General Walker, you furnished us to the deposition a tape which has been identified as Exhibit 5 to the deposition. We asked the Court Reporter, Mr. Frank Nuss, to play the tape over and write out on paper what the tape says. Now, we have that tape and we will submit the transcript to your counsel and to you. If you think that [fol. 797] is accurate we will read that into the record rather than play the tape, but at your pleasure.

[fol. 798] Mr. Watts: Could we identify this as to time and place?

Mr. Gooch: It was his Exhibit 5.

Mr. Watts: Where was it supposed to have come from?

(Sotto voce discussion of counsel.)

Mr. Gooch: We asked him on his deposition if he had any other statements.

Mr. Watts: This purports to be a telephone interview?

Mr. Gooch: It is a tape record. I assume it is an interview on a radio station. He said it was.

Mr. Watts: I think we can probably agree on that. Can I confer with him on that just a minute?

Mr. Gooch: Sure.

Mr. Watts: And save a lot of time here.

(Sotto voce discussion of Plaintiff and Plaintiff's Counsel.)

Mr. Watts: No objections.

Mr. Gooch: I believe, according to this caption on this other copy I have, it says radio interview, WNOE, Friday, September 28, 1962, General Edwin Walker.

The Witness: Sir, I believe that tape came from WNOE. That was what it was. And when it was taken in the [fol. 799] deposition,—this was taken by the reporter?

By Mr. Gooch:

Q. No, General, to be accurate we asked you on the deposition if you had any more and you later sent this one in.

A. Right, and we stated on the deposition this was given at a certain time, and later when I went home and listened to it I told in the report it was given at an earlier time, I believe it was, or vice versa, I don't know which. But, this tape came—the only thing I know about WNOE, which is down in New Orleans—the only thing I know about WNOE, it has got "radio interview, WNOE." The only thing I know about that is that I found this tape with somebody on that station, and they mailed it to me and it was put into the record at the time of the deposition.

Q. All right. And, that is the September 28th interview that you had with Station WNOE, is that correct?

A. Not necessarily, sir. I don't know that. That tape could have been gotten anywhere by any reporter being anywhere, or taking it off a news release. You can tape tonight off your own radio. I don't know how they got it, but it came to me from WNOE.

Mr. Watts: To simplify the thing, we will be prepared to admit this statement was given to him on some radio station on the 28th. Won't that do it?

[fol. 800] Mr. Gooch: That is all I am trying to prove.

Mr. Watts: Save a lot of time.

Mr. Gooch: That will do it.

The Court: What is that number, Mr. Gooch?

Mr. Gooch: That will be Defendant's Exhibit 12.

The Court: Defendant's Exhibit 12, and you are offering it?

Mr. Gooch: Yes, sir.

The Court: It is admitted.

(Transcript of tape marked Defendant's Exhibit 12 and read as follows, by Mr. Gooch:)

"Interviewer: General Walker, do you still intend to follow through with your plans to go to Mississippi after the Government warning today, supposedly that you will be held in contempt?

"General Walker: I plan to go to Mississippi as I had intended if and when Federal troops are used in Mississippi. I do not feel that there is any constitutional law that prevents a citizen moving from state to state or place to place as he sees fit, and there are hundreds of causes moving to Mississippi, or that are reflecting their attitudes in Mississippi, and I am only a small part of this movement, and I intend to be there if and when the decision is made to use Federal troops there.

[fol. 801] "Interviewer: Well, do you personally, sir, believe that that order will be given by Attorney General Robert Kennedy?

"General Walker: I would hope that they certainly do not use Federal troops as it was a catastrophe when they did it before in 1957 and '58 in Little Rock. It was unconstitutional then, as several Governors had pointed out, and also many members of the Bar, and they should read the Constitution more carefully and they would recognize this is unconstitutional. There is no law that requires integration.

"Interviewer: Well, now, sir, what do you think the repercussions would be if these Federal troops are sent to Oxford and, as a matter of fact, the State of Mississippi?

"General Walker: I am not sure. It depends on what their mission is and what they are supposed to do and how they carry out their mission, and what the intents are after they get to Mississippi. I would say it certainly is obvious now that the cause of State rights extends far beyond Mississippi, and practically every state of the Union is recognizing the importance of the sovereignty of the

state, and that is very much involved, greatly involved, in [fol. 802] this issue.

"Interviewer: Sir, what has been the general reaction to your plans of going to Mississippi with groups of citizens? I am sure you have heard from quite a few people throughout the United States.

"General Walker: We are just utterly swamped here with telephone calls and offers of help and assistance and notifications that people are moving to Mississippi and that they want to assist in every way possible; that they are opposed to what the administration is doing in opposing the Governor in Mississippi. I can assure you that the telephones shall never stop ringing. Calls are backed up six and eight deep. People are telling me it's taking four or five hours to even get into a telephone system, and we have seven 'phones in the house. Messages are coming in offering support in groups of ten to twenty to even two thousand.

"Interviewer: Well, sir, do you find these telegrams and well wishes from people throughout the United States are predominantly southern, or are they also coming from the north and the west and from the east?

"General Walker: They are from all parts of the country. Many have come in from Ohio, just a few minutes ago [fol. 803] from St. Paul, quite a few from New York, Florida, of course, Los Angeles and many of the states in between. I have just gotten off the line to Seattle, Washington.

"Interviewer: Do you have plans, sir, for rallies, if and when the Federal troops are entered into Mississippi, of a certain point in the state where all your followers will then meet with you to protest the integration if it does come about?

"General Walker: I intend to join the movement. There are thousands of people, I am sure, already in Mississippi —probably hundreds of thousands there—that are already standing beside their Governor Barnett. The best place to do this would, of course, be at the capitol or at Oxford,

at the University, since that is where the issue is involved, and I am sure that that is where most of the movement will move to, to show the grass roots of movement in this issue.

"Interviewer: One final question, sir. Just what were your thoughts when acting as an officer of the United States Army when you were commanded to enter Little Rock? What were your thoughts in 1957, seeing these same type of citizens in another state, so opposedly or reportedly op- [fol. 804] posing Federal seizure, or Federal acts, against a sovereign state, supposedly?

"General Walker: At that time I knew it was unconstitutional and felt that it was at that time, in using troops, and it should never have been done. My principles have not changed, but now, out of the uniform I'm on the other side, and this time on the right side, and that is in opposition to unconstitutional actions by the Federal Government, and I'm very happy to be free from the requirements of the Military Service in those cases where the Military Service has been unconstitutionally used against the citizens of the United States. It would appear to me with all the problems in the international situation, and with an enemy, and a very critical enemy ninety miles off our coast, it would be as utterly fantastic, as well as impossible, that the administration should now be in a cause and a purpose which is as to the disunity of the United States of America, when the important thing is today that all Americans be unified against the one and only important enemy in the world today, the one who has established that he intends to bury us—and by the President's own statement, this country is in dire peril."

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[fol. 805] By Mr. Gooch:

Q. Now, General, just what was your purpose in going to Mississippi?

A. I thought it was absolutely wrong to use Military forces, troops, American troops in a strictly civilian problem.

Q. All right.

Mr. Watts: Let him finish.

A. And I wanted to see for myself exactly what happened. I wanted to know from first hand information. And I did not trust the press reporting of it in any form, since I had been at Little Rock and seen that exaggerated out of all proportions, and I intended to see for myself.

By Mr. Gooch:

Q. You intended to see for yourself the use of Federal troops?

A. That is exactly right.

Q. And that is all you went for?

A. If and when Federal troops were committed, which I stated were used in Mississippi.

Q. Well, after you got to Oxford and prior to the time of your entry onto the campus on September 30, 1962, no Federal troops had been sent to the campus, had they?

A. They had been—as far as I know, I don't know whether they were on the campus or not.

Q. All right.

[fol. 806] A. They were in Mississippi and they were in Tennessee in large numbers.

Q. All right. Let's back up just a minute, sir. In all of these statements you refer repeatedly to Governor Barnett and his stand, do you not?

A. I have referred—not in all those statements. I have referred to the State of Mississippi and the sovereignty of the State of Mississippi in many of those statements, with regard to the sovereignty of the state and Governor Ross Barnett.

Q. All right. This statement comes to hand first. That is the one you read in Mississippi?

A. Why don't you use that one, Mr. Gooch.

Q. Because this is the one I want to use, General Walker.

[fol. 807] Mr. Gooch: Because this is the one I want to use, General Walker.

The Witness: I'm sorry.

The Court: Just a minute now.

Mr. Watts: That's not—

The Court: Go ahead, Mr. Gooch.

By Mr. Gooch:

Q. This is the one that you used in Oxford, Mississippi, shortly before your advent to the campus: "As the forces of the new frontier assemble to the north."

I presume you were talking about the Kennedy's in that context, were you?

Mr. Watts: If Your Honor please, I object to that. That's argumentative and—

The Court: He can say no or he can say yes.

Mr. Watts: Well, okay.

A. "The new frontier," refers to the Administration, the national policy, the international policy and the administration of government, Federal Government.

Q. Well, I understood that President John F. Kennedy was the one that coined the expressed, "new frontier," and I was just trying to get your views on it.

A. Well, those aren't my views, sir.

Q. All right, sir. "Let history be witness to the courage and determination that calls us to Oxford to support a [fol. 808] courageous Governor."

Now in that interview at least you were talking about Governor Ross Barnett, were you not?

A. In that interview, is as you have read it, sir. May I have the date?

Q. September 30, 1962.

A. That's in Oxford?

Q. In Oxford.

A. Right, sir.

Q. My question again, if you will answer it, does that refer to Governor Ross Barnett?

A. It did.

Q. You knew at that time that Governor Ross Barnett had been enjoined from taking any further action against the entry of Meredith to the University, did you not?

A. I am not a lawyer. I was thoroughly dependent, completely dependent on the legal advice of Governor Ross Barnett and the great lawyers he had there.

He had his Attorney General, he had the ex-president of the Bar Association, Judge Satterfield—

Mr. Gooch: Wait a minute.

Mr. Watts: Let him finish.

The Witness: Was—I was dependent entirely—

The Court: I don't believe it is responsive. Just a minute now. What was the question again, Mr. Gooch?

[fol. 809] Mr. Watts: Let him rephrase it.

Mr. Gooch: Am I prohibited from breaking in when the witness is not responding to my question?

The Court: No, sir, you are not. You are not. Go ahead.

Mr. Watts: I would suggest, if Your Honor, please, it's my understanding, address the Court, but I would object to him breaking into the witness. Now, in other words—

The Court: He had to break into the witness to stop him, Counsel.

Mr. Watts: Well, all right, sir.

The Court: Rephrase your question or re-ask it, Mr. Gooch, please.

Mr. Gooch: Frank, can you tell me what it was?

The Reporter: "You knew at that time Governor Ross Barnett had been enjoined from taking any further action against the entry of Meredith to the University, did you not?"

Mr. Watts: If Your Honor please, I suggest it is responsive, in that he says that he was depending on the Governor's counsel.

The Court: Responsive would be whether he knows or whether he didn't know.

Mr. Watts: Yes, sir. Yes, sir.

[fol. 810] The Court: Did you or didn't you know, General, that's what he wants to know?

The Witness: In general, I knew what the papers were saying, that the Governor had, through the legal procedure at this position in the legal process, he had been enjoined, as you stated.

By Mr. Gooch:

Q. You, also, knew at that time that he was acting in open defiance of that court injunction, did you not?

A. No, I did not. He was acting under legal authority with due process. He had many times said and enjoined (sic) the entire State of Mississippi to join hands and—with him in legal opposition under the Constitution.

This is the position that we are in now. He had asked all the people, including the officials of the State and everybody else, to join hands together with each other and with the Governor in opposing in every possible means the—with all legal authority, under the Constitution, in opposing the administration's, Federal Administration's action against the State then and what might transpire.

Q. The question I originally asked you, General, was as to whether or not you had knowledge at the time you went to Mississippi that Governor Ross Barnett was acting contra to the injunction which had been issued out of the Circuit Court of Appeals for the Fifth Circuit at New Orleans?

[fol. 811] A. Now just to be simple—to get me straight, you have "defiance," you have got, "contra," you have got, "opposition". I am just a layman. I am no lawyer.

As far as I'm concerned, through legal procedures and processes, he is opposing the legal processes from the other side with his own staff, which I depended upon.

Q. Then you made an election, I assume, that you would follow Governor Barnett rather than the edicts of the Federal Courts?

A. I was supporting completely Governor Barnett's position which represented a million people in Mississippi and he, as Governor, was the sovereign state. Barnett was the sovereign—was the State of Mississippi, with a million people, and perfectly capable, law capabilities, as far as I'm concerned.

Q. General Walker, do you believe that one man or a group of men is above the law of the land?

A. Nobody—

Mr. Andress: We don't think that's a proper question now, Judge.

The Court: Overruled.

Mr. Watts: Go ahead and answer it.

The Court: You may answer, sir.

The Witness: Will you repeat the question?

By Mr. Gooch:

Q. Do you believe that one man, a group of men, or a [fol. 812] million men, by their actions, whether in concert or singularly, is above the law of the land?

A. I certainly believe nobody is above the law, no single individual is the law of the land, above the law of the land, and if anybody had been charged as I was, for such, he probably would have been convicted, if they had found sufficient evidence, which I don't believe the Government did.

Q. Well, I don't know what you are talking about here. I asked you about being above the law of the land. Now I don't follow your answer.

A. Your question was whether I believed that anyone—any one individual should be above the law of the land. Mr. Gooch, I certainly do not.

Q. All right. That was the question I asked you. I was just trying to get your answer.

A. And I believe it's been proved by the fact—so you will understand what I am talking about, that it's been very definitely proved. Otherwise, the Government charges against me wouldn't have been dropped.

Q. Well, now General Walker, when we get into that question, I don't know why you are skipping over to that one, the Grand Jury in Oxford, as I read the transcript, did not fail to indict you. They merely didn't pass on the matter, is that correct?

[fol. 813] Mr. Watts: If Your Honor please, I object to that. First, it's not the best evidence. They did fail to indict him. The charges were dismissed by the Federal Government against this man and that is not the best evidence.

And it's certainly argumentative, to argue a hypothetical action of a Mississippi Grand Jury. They are official proceedings and could be available.

The Court: Sustained.

Mr. Gooch: If the Court please, I don't want to belabor the point but when I get these—

Mr. Andress: Judge—

The Court: Wait a minute. Mr. Gooch is talking. One at a time.

Mr. Andress: We ought to argue this outside the presence of the jury.

The Court: Mr. Gooch.

Mr. Gooch: The question was—the answer was completely unresponsive to my—the answer was completely unresponsive to my question but since he brings in a matter like that, I certainly believe that I have the right to interrogate him about the facts of the matter.

Mr. Watts: I have no objection to him being interrogated. The only thing I object to is asking this witness—

[fol. 814] The Court: I understood your objection, Counsel, and I sustained it.

Mr. Watts: Oh, excuse me, sir. I'm just running a little . . . I'm sorry, Judge. I didn't intend to—

The Court: Gentlemen, at this point, let's take a recess. Recess until a quarter of 4:00.

Now the audience remain in your seats until after the jury has left the jury room, please.

(15-minute recess.)

[fol. 815] Q. General Walker, just prior to the afternoon recess we were discussing the question of the constitution and the orders of the Court and the actions of Governor Barnett in connection with constitutional authority. Would that be a fair statement of what we were talking about when the recess was called?

A. In general, in the use of Military troops.

Q. All right. Now, let's go back to your 1957 and 1958, when you were in command of the troops at Little Rock, when you were called upon with your troops, I assume, and correct me if I am wrong, to see that the edicts of the Court there with respect to integration was carried out. Is that a fair statement? Were you called in with your troops at Little Rock to enforce the orders of the Federal Court on the integration of the Little Rock, Arkansas, school?

A. I wasn't called in there, I was already there, and had been there for about a month and I was under orders of Military command, sir.

Q. And you observed those orders?

A. I was given my orders, yes, sir.

Q. Did those orders come from the Pentagon, from President Eisenhower, or where did they come from?

A. They came through the Military chain of command.

Q. You understood that they were the orders from the [fol. 816] commander in chief, General Eisenhower, did you not, or then President Eisenhower.

A. That is—yes, sir.

Q. Did you have any riots in Little Rock?

A. We had quite a protest at Little Rock, continuously, and no—no particular violence.

Q. Did you have any violence at all?

A. Sir?

Q. Did you have any violence at all?

A. One incident, an individual—

Q. All right. Go ahead.

A. One individual took a—jerked a rifle away from a soldier and took it completely away from him and a soldier beside him gave the individual a poke with his gun, and with the butt end of it, and got it back, and this man then had three or four stitches taken in his head, but he had taken the gun completely away from the soldier.

Q. That just about stopped any violence up there when that happened, didn't it?

A. (No answer given.)

Q. Is that the only incident that happened?

A. No, the way—well, the way it was handled helped stop violence.

Q. In connection with troops at Little Rock you told the troops the orders that you had to see that there was integra- [fol. 817] tion at Little Rock, that those orders were going to be enforced, didn't you?

You gave your troops instructions?

A. I followed my Military directions and commands, yes, sir.

Q. And you were going to see to it that those edicts of the Court was carried out under your command?

A. I was only carrying out Military orders.

Q. Did you stand out in front of your troops there and give your orders, or did you send them by written communication, or word of mouth through subordinates?

A. Well, it was an entirely different situation there, sir. Little Rock—Oxford—Oxford is the first time in history that the troops have seized, searched and arrested without Martial Law. Now, we didn't have Martial Law at Little Rock either. But we didn't seize, search and arrest people.

Q. Did it become necessary?

A. No, sir. It was handled different.

Q. In connection with the Little Rock incident of which you have testified about, did you make an address to the student body of the Little Rock High School expressing

your views as to the lawful authority of the United States to—

A. No, sir.

[fol. 818] Q. Did you deliver an address?

A. Yes, sir.

Q. In that address did you discuss the question of the constitutional rights of the people?

A. The way that address was written, it came up in the deposition before—I gave the address that was given at Little Rock, and it discussed, as I remember it, the constitutional rights of the people.

Q. I hand you here a photostat, a photostat of portions of page 14 of the Arkansas Gazette, dated Thursday, September 26, 1957, which is headlined, "Text of General's speech to students." This is an AP story, I believe. Would you look at this and see if that is the address that you delivered to those students, or whether it is not?

A. I believe we can shorten this without reading the whole thing, sir. Is this the exact copy of what was placed in the deposition?

Q. It never was placed in the deposition. As I recall, it was not readable. You stated at that time you couldn't read it.

A. I said I couldn't identify what a newspaper did to an address. I can't take responsibility of accepting this address for the Government. The Government did keep the statement made at Little Rock by me, that you are referring [fol. 819] to as an address. We will even go further. It was made to the students, the students in the Little Rock High School, that had legal advise and legal—

The Court: Pardon me just a minute.

The Witness: That was developed by my chain of command.

The Court: Pardon me. The question was: "Is that the statement that you made?" Is that the speech that you made. That is the question.

A. I have nothing to remind me to say this is the statement I made, Your Honor.

Mr. Watts: Let me see it, Your Honor.

The Witness: And I won't accept a newspaper statement of it.

By Mr. Gooch:

Q. Just a minute.

Mr. Watts: Oh, might I?

Mr. Gooch: I believe the witness is still under cross examination.

Mr. Watts: I thought I might shorten it by just agreeing to it.

Mr. Gooch: I don't care whether he agrees to it or not, Mr. Watts.

Mr. Watts: I am sorry.

By Mr. Gooch:

Q. General, I hand you a certificate from the Pentagon and ask you to take a look at that. Look at the certificate, [fol. 820] and then look under the certificate to see if that is the speech, a certified copy of the speech you made to the students at the Little Rock High School on or about September 25th, 1957?

A. I believe we advised your counsel—the lawyers at the time to please get a copy. Is this the copy you got?

Q. That is the copy I got.

A. An exact copy of what was stated?

Q. If you compare that with the Associated Press—

A. This comes out of the office of the Secretary of Defense?

Q. Yes, sir.

A. Washington, D. C., signed by Shirley B. Meyer, Executive Assistant, offices of Administrative Services; has my counsel got a copy?

Q. Excuse me. Here is the Associated Press dispatch. I will introduce both of them.

Mr. Watts: Have you compared this with the original?

Mr. Gooch: I have and they are the same.

Mr. Watts: We will take counsel's statement that this is an exact statement, the one the witness was reading, and he can read either one of them. As I understand, he has compared them and they are the same. There is no use [fol. 821-2] killing all this time.

Mr. Gooch: Please mark the Arkansas Gazette article of September 26, 1957, I believe it is Defendant's Exhibit 13.

The Court: 13.

Mr. Gooch: 13-A, as I remember, in the deposition, there was something missing on that article, at the last line. May I see it? We couldn't read it when we were taking the deposition.

By Mr. Gooch:

Q. In the deposition we had a very bad photocopy.

A. I see. I can't read portions of this.

Mr. Watts: Is there a question to the witness?

By Mr. Gooch:

Q. Whether or not that was the address that he gave to the Little Rock High School students on September 26, 1957?

[fol. 823] A. As far as I can tell, this is the address that was made.

Mr. Gooch: Please mark that as Defendant's Exhibit 14.

(Defendant's Exhibit No. 14, was marked for identification.)

Mr. Gooch: We now offer it in evidence, if the Court please.

The Court: 14?

Mr. Gooch: Yes, sir.
The Court: It's admitted.

DEFENDANT'S EXHIBIT 14

Mr. Gooch: Pursuant to the provisions of the Department of Defense Directive Number 5015.1, dated July 31, 1952, I hereby certify that the annexed document is a true copy of a microfilmed message on file in the Department of Defense.

In witness whereof, I have hereunto set my hand and caused the seal of the Department of Defense to be affixed this 9th day of June, in the year of 1964, A.D., at Washington, District of Columbia, Shirley E. Meyer, Executive Assistant, Office of Administrative Services.

This is on the stationery of the Department of the Army:

"Staff Communications Division." Caption. Speech by Major General Edwin A. Walker to students of Little Rock [fol. 824] Central High School, 0900 hrs. 25 Sep., '57.

"Young ladies and gentlemen of Central High School. Mr. Blossom, your superintendent of schools, has asked me to come to your school this morning and discuss with you the situation in Little Rock and what it means to you students. I welcome this opportunity to do so.

"As you know, the Fourteenth Amendment to the Constitution of the United States guarantees to all citizens the equal protection of the laws. Since the adoption of this amendment, many states have provided separate schools for their children on the basis of color. The laws establishing such schools have, however, been challenged in the courts, and about three years ago, the Supreme Court of the United States determined that such laws are contrary to the provisions of the Fourteenth Amendment and consequently invalid. This decision by the highest court in the land is, of course, an authoritative interpretation of our Constitution, is binding on all citizens and government officers, both state and Federal, and may not, under our law, be changed except by an amendment to the Constitution.

"Because of the Supreme Court's decision, it became necessary for those states maintaining separate schools to revise their systems to eliminate distinctions on the [fol. 825] basis of color. The nature of these plans was left to the states and local communities, subject to approval by the local Federal District Courts. The Little Rock School District prepared such a plan which was approved by both the District Court and Circuit Court of Appeals. This plan provides for a very gradual abandonment of the separate schools system starting this year.

"Subsequent to the approval of this plan, attempts were made in the courts to prevent the school authorities from putting it into effect.

"I need not go into the details of this litigation, sufficient to say it was unsuccessful, and that the plan as originally approved remains unchanged and in full force and effect.

"During the past few weeks, as you are well aware, the situation in Little Rock has been such as to prevent the entrance of a few students into your high school. Therefore, to see that the laws of the land be faithfully executed, the President has found it necessary to call the National Guard of Arkansas into the Federal Service and has directed that this force and each other armed forces as may be made available be used to enforce the orders of the Court, as an officer of the United States Army, I have [fol. 826] been chosen to command these forces and to execute the President's orders.

"What does all this mean to you students. You have often heard it said, no doubt, that the United States is a nation under law and not under men. This means that we are governed by laws, properly decided upon by duly constituted authority, and not by the decrees of one man or one class of men. Since this is true, it means that we are all subject to all the laws whether we approve of them personally or not and as law-abiding citizens have an obligation in conscience to obey them. There can be no exceptions, if it were otherwise, we would not be a strong nation but a mere unruly mob.

"I believe that you are well-intentioned, law-abiding citizens, who understand the necessity of obeying the laws and are determined to do so. You have nothing to fear from my soldiers, and no one will interfere with your coming, going or your peaceful pursuit of your studies. However, I would be less than honest if I failed to tell you that I intend to use all means necessary to prevent any interference with the execution of your school board's plan. This is what I have been ordered to do, and I intend to carry out my orders. Those who interfere or disrupt the proper administration of the school will be removed by the soldiers on duty and turned over to the local [fol. 827] police for disposition in accordance with the laws of your community.

"One last word about my soldiers. They are here because they have been ordered to be here. They are seasoned, well-trained soldiers, many of them combat veterans. Being soldiers they are as determined as I to carry out their orders. However, as I stated before, the law-abiding people have nothing to fear from them. They have been carefully instructed not to molest any law-abiding citizen in his person or property, and they will obey these orders. Since a peaceful atmosphere must be maintained in the school and its vicinity, it may be necessary for them to issue instructions concerning such things as loitering, assembling in large groups, and otherwise making it difficult for them to perform their duties. I earnestly ask that you cooperate, for your own benefit and ours.

"I wish you all success in your school year and Mr. Matthews, I thank you for the opportunity to talk to the student body."

By Mr. Gooch:

Q. General Walker, just prior to the time you went to Mississippi on September 29, 1962, do you recall having a news conference with a reporter in Dallas, by the name of Phenas E. Mothershed? Do you know Phenas E. Mothershed?

A. No, sir, not that I recollect. I don't know him.

[fol. 828] Q. I will ask you if in a telephone interview this question was asked you: Just a second until I find it.

"Do you recommend that the volunteers go armed?" He's talking about your impending trip to Mississippi.

Do you recall that statement, that question being asked you?

A. By a reporter?

Q. Yes, sir.

A. No, sir, I have no recollection of it.

Q. Would you say it was not asked you?

A. May have been. I don't know whether he identified himself or not.

Q. And your answer to that question, which I am asking you if you made, "The Administration has indicated that it will do whatever is necessary to enforce this unconstitutional action. I have stated that whatever is necessary to oppose that enforcement and stand behind Governor Barnett should be done."

Did you make that statement, General Walker?

A. I can't verify that exact statement. I probably did.

Q. All right. The next question, the reporter asked you whether or not you meant to imply that you advocated physical force. Do you remember a question such as that being asked you?

[fol. 829] A. Yes, many times. I walked off when such questions were asked.

Q. To which you replied, according to this release, "The decision for force will be made in Washington. Evidently it has not been made yet. When and if it is, it's their decision to make. We will move with the punches."

Did you make that answer, General?

A. I may have. Can you identify the reporter? Is that the same reporter?

Q. I'm just asking you if you made the statement?

A. I may have.

Q. All right. Now, General, when did you have a communication by telephone with Louis Leman before you went to Mississippi on the 29th of September, 1962?

A. Yes, I did.

Q. Do you remember the date of that communication?

A. A telephone call?

Q. Yes, sir.

A. It would have been on the 28th, as I remember.

Q. Did you know at the time he made the call to you that he was in Mississippi?

A. No, sir, I didn't.

Q. You had already planned, according to these news releases, to go to Mississippi, had you not?

A. Yes, sir, I had planned to go to Mississippi. I be-
[fol. 830] lieve there were two or three telephone calls have been referred to with respect to Louis Leman.

Q. In one of those phone calls, we'll say on the 28th, were you told by him that there was a growing situation at the Ole Miss campus, an explosive situation?

A. Not that I recall. We discussed the situation, at Mississippi, and he referred to some of the students' attitudes and also, with respect to the State and, also, at Oxford, and some of the attitudes on the campus.

Q. Did he tell you that a majority of the students, according to his opinion, were backing Barnett but the student newspaper was anti-Barnett; do you recall him making that statement?

A. He may have.

Q. Do you recall him telling you that all that they needed was leadership?

A. No, I don't remember that.

Q. All right. Would you say that he didn't tell you that?

A. No, I wouldn't say he didn't.

Q. Now did you tell him in that first conversation that you were coming?

A. As I recall the first conversation, I didn't know whether I was coming or not and later I said I was—I talked to him again and said that I would probably be in
[fol. 831] Oxford the next day—I mean in Jackson the next day.

Q. Now as early as the 26th, you stated you would be there, didn't you?

A. If troops were used.

Q. All right. Now, you went to Mississippi, as I recall your testimony, on the 29th of September, 1962?

A. Yes, sir.

Q. And I believe you have testified that you went by private plane, isn't that correct?

A. Yes, sir.

Q. And I believe that you stated that you had had some previous conversation with Dr. Ney Williams?

A. Yes, sir.

Q. And I presume that Dr. Williams met you at the plane, is that correct?

A. Yes, sir.

Q. Were there any newspaper reporters at the plane?

A. Not that I recall.

Q. You went on to Dr. Ney Williams' house, I assume, after your lunch, as you have testified to?

A. After we had lunch, we went on to Dr. Ney's.

Q. And how did you get ahold of the press? Did you call the press and tell them you were there?

A. Dr. Ney Williams called the press about a call he got into the house about that they were moving Marshals on [fol. 832] the campus, on Saturday afternoon, the 29th.

And there was a call came into his house that Marshals were being moved on the campus and he called, as I remember, he called the press and asked them about it. He had a very close friend in the press.

Q. Well, I'm asking, the question I asked you was, how did the press know you were there?

A. That's the way they would have known.

Q. Did Dr. Williams tell them, the press, that you were there?

A. He probably did.

Q. And then did the press call back and ask for a conference?

A. As I remember, that's the way it worked.

Q. Then you did ask for that press conference or the press asked you, which was it?

A. I don't remember. When you are talking about "the press," if it was a press man and he called and he wanted a conference or asked if he could see me, as I understand our conversation, that would be a request by the press for a conference.

Q. That's right.

A. Right, sir.

Q. And you did hold the conference there at the Sun & Sands Motel, the text of which has already been introduced [fol. 833] in evidence, is that correct?

A. Yes, about 6:00 p.m.

Q. Then you went from the Dr. Ney—you went back to Dr. Ney Williams' house, as I understand your testimony, and from Dr. Williams' house you and Louis Leman then started for Oxford?

A. After the—

Q. I believe you did get a cup of coffee before you started there.

A. Yes, sir.

Q. And you got into Oxford about midnight?

A. Yes, sir.

Q. And you went on the campus that night. What was the purpose of going on the campus at midnight?

A. We just decided to drive through it as we went on up and see it.

Q. It was about 1:00 or 1:30 in the morning?

A. No, sir, I think it was about 12:00.

Q. Between 11:00 and 12:00. Then you went on to the hotel. Now at the hotel, you have testified that you were registered in under an assumed name by Mr. Leman in order to keep the press from getting ahold of you?

A. Yes.

Q. Well, now for the last four or five days prior to that time you had been quite vocal in the press, hadn't you, [fol. 834] General?

A. Yes, sir.

Q. The 26th, the 27th, the 28th, 29th, you had—you had called press conferences for the one on the 26th and the 27th, hadn't you?

A. Well, either they called me or I called them.

Q. Well, now, did the Shreveport station call you to get this party line statement or did you call them?

A. No, I called them.

Q. Then you wanted to be sure that statement got out as close to Mississippi as possible, didn't you?

A. Which statement, sir?

Q. The one from Shreveport. The Shreveport station reaches over into Mississippi, doesn't it, General Walker?

A. Mostly Louisiana and Texas, yes, sir. The answer to your question is yes, sir.

Q. All right, you called to Shreveport to get a release on a Shreveport station?

A. Right, sir.

Q. Then the next day you called a conference in Dallas, Texas, in front of the TV cameras is that right?

A. I don't know who called it. Maybe I did.

Q. Well, you were anxious to get your message out to those who cared to listen, were you not?

A. Very glad to get it out.

[fol. 835] Q. All right. That was your appeal, to bring your, "Your flag, your tent and your skillet," is that right?

A. On Wednesday the 26th of September, yes, sir.

Q. And Thursday, the 27th, you reiterated your flag, tent and skillet, did you not, or did you?

A. I don't think so but I may have.

Q. Well, let's take a look at that. I think we can find out.

Mr. Andress: If the Court please, they are in evidence. We think this is repetition.

The Court: Overruled.

Mr. Andress: We have read them and heard them.

The Court: Overruled.

Mr. Gooch: That's the one we played over the . . . No,

I am not. On the transcript of the movie we played, the first paragraph, I think you will find a reference to, "Bring your flag, your tent and your skillet"?

A. Yes, it leaves off the first part, evidently.

By Mr. Gooch:

Q. I am talking about the flag, tent and skillet part.
A. Yes, it's in there.
Q. All right.
A. Was that—may I ask a question about that, sir?
Q. Yes, sir.
[fol. 836] A. Was that in the—
Q. In the movie just showed?
A. Oh, I see. Right.
Q. This is a transcription of the movie that was shown, General?
A. Right, sir.
Q. Now was that expression, "Bring your flag, your tent and your skillet," was that an original phrase or statement from you or had you borrowed that from somebody else?
A. As far as I'm concerned, it's original. Somebody else may have said it. Practically everything's been said before.
Q. Now did you mean by that that the people were to come on to Mississippi, when you said, "Bring your flag, your tent and your skillet,"—
A. When I—with reference to coming to Mississippi, it refers to bringing your flag, tent and skillet, that you will need somewhere to stay and you will probably have to feed yourself, even the people—
Q. And a flag with which to rally under, is that correct?
A. You don't necessarily have to rally under a flag. You can carry one.
Q. It's a pretty good idea to rally under a flag, though, [fol. 837] isn't it, General?

Mr. Watts: I object to that, if Your Honor please, as argumentative.
The Court: It could be. Sustained.

[fol. 838] A. That is immaterial, whether you have a flag or not, to rally.

Mr. Watts: Well, the objection has been sustained Mr. Witness.

Mr. Gooch: Well, we have got two Courts now that is determining it.

Mr. Watts: He doesn't hear very well, Tiny.

By Mr. Gooch:

Q. Now, take the one from Oxford, General Walker. That was subsequent to your flag, your tent and your skillet coming to Mississippi, wasn't it?

A. Yes, sir, that was afterward, on the 30th.

Q. And in that Oxford statement that you issued, that meant come on to Oxford, didn't it?

A. Yes, sir.

Q. Then, those that had been importuned to bring their flags, their tents and skillets to Mississippi were then informed, to the extent that the news media would reach them, to change their course from Jackson and elsewhere and converge on Oxford? Is that correct, General?

A. Yes, sir, they would probably need their skillets in Oxford, and Jackson too, sir.

Q. But they also—I suppose you meant for them to bring their flags, their tents and their skillets on to Oxford, is that correct?

A. To Mississippi and Oxford, or Jackson or wherever [fol. 839] they came from.

Q. The last one is what I am talking about, and that is the one in which they are directed or invited to come to Oxford, as I read it? I may be in error.

A. Yes, sir, but where the skillet was mentioned, it didn't mention Oxford did it?

Q. Oh?

A. It mentions Mississippi.

Q. I know. I am talking about, though, the appeal you made for them to come to Oxford. I assume that you meant

for them to bring their flags, their tents and their skillets and come on to Oxford, is that correct?

A. Yes, sir. I didn't tell them to take them home and come back.

Q. All right. Now, after you had registered in at the Mansell Motel, I believe you testified that the next morning you went down to see Sheriff Ford?

A. Yes, sir.

Q. And you informed Sheriff Ford where you were and where you could be reached if anyone wanted you, I assume, did you?

A. Yes, sir.

Q. And you informed Sheriff Ford that you would like to be of any assistance to him that you could?

A. That I would be of any assistance to him, I could.

[fol. 840] Q. Well, suffice it to say, without quibbling over words, you offered your services to Sheriff Ford, did you?

A. Yes, sir.

Q. At that time, General Walker, you knew that the Sheriff's Department, including Sheriff Ford, the Highway Department under Col. Birdsong, or the State Highway Police, rather, under Col. Birdsong, were all under the jurisdiction as far as orders were concerned from Gov. Ross Barnett, did you not?

A. Yes, sir, they would have been.

Q. You knew at that time that Gov. Ross Barnett had used the Mississippi State Highway Patrol, together with the Sheriffs, Deputy Sheriffs and Constables from the various counties in Mississippi for the purpose of keeping Meredith from entering the University of Mississippi on his attempt on September 20, 1962, did you not?

A. September 20?

Q. 25th.

A. May I ask the question: Is it the 20th or the 25th? You said 20th.

Q. Two different times. One was the 20th and one on the 25th.

A. I don't recall any on the 20th but—

Q. Well, I asked about the 25th, to be specific.

[fol. 841] A. I don't know in what legal manner he used his forces to stop the entrance of Meredith.

Q. I am not talking about legal matters. Aside from the legality of the situation, do you know whether or not Gov. Barnett used the police forces of the State of Mississippi, consisting of the Highway Patrol, the Sheriffs, the Deputy Sheriffs, to prevent the entrance of Meredith on the campus, from entering the University of Mississippi on or about September 25, 1962?

Did you know that?

A. Yes, he did.

Q. All right. You also knew from having been in the State of Mississippi on September 30, 1962, that Gov. Ross Barnett had not changed his position and had not released or relinquished his opposition to Meredith entering the University of Mississippi, did you not?

A. As far as I know he hadn't.

Q. Then when you went to Sheriff Ford on Sunday, September 30, and offered your services you were also offering your services to Gov. Barnett, were you not?

A. Sheriff Ford is a law enforcement agency, sir, law enforcement, required to keep down violence.

Q. Back to my question—

A. And I went to Sheriff Ford and offered my assistance with the idea that I would assist him in keeping down any [fol. 842] violence.

Q. Did you make it known that that was what you were there for, or did you say, "Anyway I can serve you?"

A. I said I could serve him. I would serve him.

Q. That was what—

A. If he needed me. I gave him the address of my—where I was staying.

Q. Did you say that you would do anything you could to keep down violence?

A. I was—I forget how I stated it, but I told him that I was not there for violence and that I would assist him in any way that I could.

Q. You just implied that you would assist him in keeping down violence, is that right?

A. That's right, that was the implication.

Q. Did you attempt to assist the Rev. Duncan Gray in attempting to keep down violence after you got on the campus, General Walker?

A. I assisted in keeping violence down on the campus.

Rev. Duncan Gray—when you get instructions in mob activities, you don't—and I have had plenty of instructions and study in the activities of mobs and how to suppress them. This is a military requirement. This is in our training program, and you don't assist people—you lose effec- [fol. 843] tiveness if you assist people that the crowd is against, and opposing. And definitely Duncan Gray was in a—he, himself, was in a personal position where he was subject to violence.

Now, the violence, the overall major violence was the violence that might occur, or did to some extent occur in the opposition of one group against another. But not Duncan Gray. He was just immaterial to it.

Q. Back to my question, did you assist or refuse to assist the Rev. Duncan Gray when he sought your help in stopping the violence that you observed on the campus of the University of Mississippi on the night of September 30, 1962?

A. I assisted Duncan Gray by not using him.

Q. All right. He advised you, did he not, that the students would listen to him—listen to you, and implored you to use your influence, did he not?

A. He made those statements, or something similar to them, but he was a frenzied little minister.

Q. And you told the Rev. Duncan Gray that you didn't come there to stop anything? And wouldn't stop it if you could, didn't you?

A. I recall no such statement.

Q. Would you say you didn't make that statement?

A. I wouldn't make—I wouldn't say I didn't to Duncan [fol. 844] Gray. Didn't make any difference what I said to Duncan Gray. He was frenzied and useless.

Q. You told all those around him, including Duncan Gray, that since he was an Episcopalian it made you ashamed to be an Episcopalian. Did you make that statement?

A. I did.

Q. Now, in your statement on the monument—I am drifting a bit ahead, but just to get your viewpoint on it, General,—you stated you assisted Duncan Gray by not helping him—I believe that was the import of your statement?

A. May not have assisted him directly, but it was an assistance to the United States Government.

Q. Were you trying to help the United States Government that night, General Walker?

A. As far as keeping violence out of what was going on, I was.

Q. What kind of a reaction does it have to a mob of people when you tell them somebody sold them out? You think those are soothing terms, General?

A. Yes, sir, that—when they are claiming that the Governor has sold them out. That is one step lower, and that is a soothing term. I am sure Birdwell (sic)—immediately the way the rumor started that was inflaming them that they were being sold out—now, you must get the picture, Mr. [fol. 845] Gooch. It was like this.

I wasn't even going to speak to them for a long time, as I have stated. I didn't expect to speak. Until they begin to rise up in this enthusiastic determination over the statement, and get excited over Barnett selling them out.

Now, the reason for this, which hasn't all become clear, it becomes perfectly obvious that the students saw the Highway Patrol leaving the campus, and they felt that the Highway Patrol were their friends and were on—even though the Highway Patrol were standing physically and pushing them back, but they felt when the Highway Patrol went, fourteen or eighteen cars, whatever it was that I saw drive off the campus, they immediately thought the Governor had sold them out and the Highway Patrol had gone

off and left them, and they were getting all riled up and more—more purposeful, and determined—so that is why the rumor that Barnett—that is the origination of the rumor of why Barnett had sold them out. Because here is the Highway Patrol on the campus was leaving the students, and about this time was when the students began to come toward the monument. It wasn't all because I got there. It wasn't because I was there, but the Highway Patrol were leaving just ten minutes before that. And they came to see why they were leaving. They even talked to [fol. 846] some of the Highway Patrolmen. I didn't hear them. In the cars. As they started off the campus, and the Highway Patrol went right on by the monument. I asked a student, "Who is leaving the campus, who are those people in automobiles?" And one of them said to me, "That is the Highway Patrol," so I walked over to the curb about twenty steps from the monument on the left, coming out on the south side, and I looked right down in the automobiles to verify that the Highway Patrol was leaving. I didn't understand why the Highway Patrol would have been leaving at that time, and it became very obvious to the students when these people left, that Barnett had sold them out. And this was getting them quite excited.

Q. I don't want to interrupt you if you have more to say.

A. Will you re-read his question?

Q. No, that has been—

The Court: We will go on to his next question.

Q. Been about ten minutes ago. I don't even know what I asked you now.

General Walker, I may be repeating a little bit, because I am trying to get back to the continuity, but you did see Sheriff Ford down there on the morning of September 30 and tendered him your services, is that correct?

A. Yes, sir.

[fol. 847] Q. Then, I believe after that incident you stated that some newspaper reporters found out you were

in town. Do you know how they found out you were in town?

A. No, sir, I don't.

Q. Could have been by virtue of the fact you had told them you were going to Oxford the night before, couldn't it, General?

A. It may have been, but it wouldn't be necessary. They would find out where I was.

Q. They sort of have a way of seeking you out if they want to find you, don't they, General?

A. They sure do.

Q. At any rate, you were contacted by some newspaper men, and I believe you said—I may be in error—along about 9:00 o'clock—no, I am in error. You testified you went up to the Courthouse about 9:00 o'clock or to breakfast about 9:00 o'clock.

A. Sunday morning?

Q. Yes. What was throwing me on that, I notice on that statement you made from Oxford you have got a 9:00 o'clock date on it, but apparently that means you called that into Oxford before you had your press conference—I mean called that in to Dallas before you had your press conference; is that correct?

A. As far as I remember that was the reason for that. [fol. 848] It was called back to Dallas, usually at the same time, yes, sir.

Q. All right, General. After you had already talked to Sheriff Ford, had your breakfast and gone to talk to Sheriff Ford, did you return back to the motel?

A. Yes, sir, as I remember we went back to the motel.

Q. And then I believe you went in to lunch, was that about the next sequence of events?

A. Yes, sir.

Q. And I believe you stated at the luncheon table, or in the cafe you ran into some reporters there?

A. Yes, sir.

Q. And that is the time you told them that you would hold a press conference at the Ole Miss Hotel?

A. Yes, sir, they were quite demanding in their requirement for a press conference.

[fol. 849] Q. I believe you further stated that you knew that that was where the reporters were staying?

A. Yes, sir.

Q. How did you know that, General?

A. Conversation in the cafeteria—in the cafe.

Q. So how did you spend your afternoon, General, from the time of your lunch, which I assume was around midday, until your press conference that afternoon?

A. Back at the motel, probably getting a nap and making telephone calls to certain people back to my house to find out about my car that had been taken that night, and to work up a press statement for the press. It takes me usually an hour or hour and a half to work up a statement for the press.

Q. General, you had worked that statement up by 9:00 o'clock, that morning?

A. I may have, yes, sir. That is the usual occurrence. I usually go over them and—

Q. Only about six lines. Take you an hour and a half to work up that conference?

A. Well, this part of it, in seeing that it was right for the situation as it was at that moment, and making telephone calls, and probably getting a nap.

Q. All right, did you listen to the radio to see what was going on in the news?

[fol. 850] A. Probably did. Probably read a paper.

Q. Didn't believe anything you heard or anything you read, did you?

A. The question is what, sir?

Q. We will go on to the next question.

About what time, General, did you have your dinner that night?

A. My lunch or dinner that night?

Q. Well, did I say lunch? I meant dinner. I thought you had lunch around midday, and I was talking about dinner, or supper, as we used to call it down in Ennis County.

A. Dinner—I had—I got into the cafe and—cafe in Oxford about 5 or 10 minutes until 8:00, I would say.

Q. And who were you with?

A. Louis Leman.

Q. Anybody else?

A. Nobody else.

Q. Now I believe you testified that you—someone came in with a radio, and you heard President Kennedy's speech, is that correct?

A. That is right, sir.

Q. Did you hear the proclamation issued by President Kennedy along about that time relative to the Oxford, Mississippi, incident?

A. I heard whatever he said, Mr. Gooch.

[fol. 851] Mr. Gooch: Please mark this as Defendant's Exhibit 15.

(Thereupon, Defendant's Exhibit No. 15, was marked for identification.)

Mr. Gooch: For identification, Plaintiff's Exhibit 15 is Proclamation No. 3497, Obstructions of justice in the State of Mississippi.

Mr. Watts: As a matter of information, was that read over the radio as a part of his speech?

Mr. Gooch: It's my information that it was.

Mr. Watts: I have no objection to it, if it was.

Mr. Cravens: Or referred to. It may not have been read. It may have been referred to.

Mr. Watts: Well, I would object to it unless it came to this witness' attention. I have no objection to you asking if it did come to his attention but I object to it going in evidence unless—

The Court: He hasn't offered it yet, Counsel. Save your objections until the offer.

Mr. Watts: Oh, yes, sir.

Mr. Gooch: If the Court please, I tender to the witness Defendant's Exhibit 15, and ask you to take a look at that

instrument and see if the language or the import of that instrument is such as to have been remembered by you as uttered by President Kennedy on the evening or after-
[fol. 852] noon or evening of September 30, 1962?

A. May I confer with my Counsel?

The Court: Yes, sir, you may.

The Witness: Is this supposed to be the Kennedy speech?

Mr. Watts: No, this is an official proclamation issued by the President.

Mr. Gooch: It was issued over radio and TV.

Mr. Watts: I think we can depend on Mr. Gooch's statement. As a matter of simple information, was this included in the President's speech?

Mr. Gooch: It was alluded to in the President's speech and part of it quoted from.

Mr. Watts: Do you understand, part of it was apparently quoted in the President's speech and we have no objection to the proclamation, as such. What part was quoted, I do not know?

Mr. Gooch: We offer in evidence Defendant's Exhibit 15, being Proclamation No. 3497, obstructions of justice in the State of Mississippi.

Mr. Watts: We have no objection to the Proclamation.

The Court: It's admitted.

DEFENDANT'S EXHIBIT 15

Mr. Gooch: By the President of the United States of America.

[fol. 853] A PROCLAMATION.

WHEREAS the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the

Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and

WHEREAS such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under the laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and

WHEREAS I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained:

NOW, THEREFORE, I, JOHN F. KENNEDY, President of the United States, under and by virtue of the authority vested [fol. 854] in me by the Constitution and laws of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peaceably forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 30th day of September in the year of our Lord nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.

Signed by John F. Kennedy.

We offer that, if we have not. I believe we did already offer it in evidence.

The Court: You did offer it. It's been admitted.

Mr. Gooch: I would like now to mark for identification as Defendant's Exhibit 16, and instrument entitled, "Execu-

tive Order 11053," which was also referred to and quoted from in the Kennedy speech, duly certified by the—whoever puts the red ribbons on.

Mr. Watts: No objection.

(Defendant's Exhibit 16, was marked for identification.)

[fol. 855] Mr. Gooch: We now offer in evidence Executive Order 11053.

The Court: Defendant's Exhibit 16, and it's admitted.

Mr. Gooch: Providing the assistance for the removal of unlawful obstructions of justice in the State of Mississippi.

DEFENDANT'S EXHIBIT 16

EXECUTIVE ORDER

WHEREAS on September 30, 1962, I issued Proclamation No. 3497 reading in part as follows:

"WHEREAS the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and

"WHEREAS such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under those laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and

[fol. 856] "WHEREAS I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assur-

ances that the orders of the courts of the United States will be obeyed and that law and order will be maintained.

"Now, Therefore, I, John F. Kennedy, President of the United States, under and by virtue of the authority vested in me by the Constitution and laws of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peaceably forthwith;" and

Whereas the commands contained in that proclamation have not been obeyed and obstruction of enforcement of those court orders still exists and threatens to continue:

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, including Chapter 15 of Title 10, particularly Sections 332, 333 and 334 thereof, and Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

[fol. 857] Section 1. The Secretary of Defense is authorized and directed to take all appropriate steps to enforce all orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit and to remove all obstructions of justice in the State of Mississippi.

Section 2. In furtherance of the enforcement of the aforementioned orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, the Secretary of Defense is authorized to use such of the armed forces of the United States as he may deem necessary.

Section 3. I hereby authorize the Secretary of Defense to call into the active military service of the United States, as he may deem appropriate to carry out the purposes of this order, any or all of the units of the Army National Guard and of the Air National Guard of the State of Mis-

sissippi to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders. In carrying out the provisions of Section 1, the Secretary of Defense is authorized to use the units, and members thereof, ordered into the active military service of the United States pursuant to this section.

Section 4. The Secretary of Defense is authorized to [fol. 858] delegate to the Secretary of the Army or the Secretary of the Air Force, or both, any of the authority conferred upon him by this order.

THE WHITE HOUSE

September 30, 1962.

By Mr. Gooch:

Q. General Walker, is that the Proclamation that put the Federal forces into the Oxford Mississippi situation?

Mr. Watts: If Your Honor please, I object to that question because it's not within this witness' knowledge. He's asked him the legal effect of that Proclamation.

Mr. Andress: That's an Executive Order.

Mr. Watts: That's an Executive Order. That's a matter for the Court.

The Court: In view of the past experience of the witness, I'll permit him to testify, if he knows.

Mr. Watts: All right, sir. Yes, his understanding of it, I would....

The Witness: Will you read the question?

By Mr. Gooch:

Q. The question is, General, is that the instrument by which the use of Federal forces were being permitted or commanded to be used in connection with the Oxford incident?

A. I have never seen this. I have never seen one before. I do not know.

[fol. 859] Q. Well, I'm sure if you don't know, you don't know. But being a man who was learned in military law and the man who commanded Little Rock, I thought perhaps you would know that an instrument, Executive Order such as that, is required before troops are used in a matter such as the Oxford incident.

If you don't know, that's quite all right. The instrument is self-explanatory.

Do you still say you don't know whether that's the executive order that brought the militia into this matter?

A. I don't. I don't remember seeing one like that at Little Rock.

Q. All right. You have testified previously that troops, Federal troops, had been committed to the Oxford incident prior to September 30, 1962, have you not?

A. Yes, sir, from all the reports I—

Q. Never mind the reports. Do you know of any instrument other than the instrument of which I have handed you that committed Federal troops to be used in the Oxford, Mississippi, incident on September the 30th, 1962?

A. I know of no other instrument.

The Court: Do you have a pretty good stopping place, Mr. Gooch?

[fol. 860] Mr. Gooch: The next series is rather lengthy, Judge.

The Court: All right, then let's recess.

(Thereupon, at 4:50 o'clock, p.m., an adjournment was taken until the following morning at 9:00 o'clock, a.m., Friday, June 12, 1964.)

[fol. 863] Proceedings

EDWIN A. WALKER, having been previously sworn, testified further as follows:

Cross examination (Continued).

By Mr. Gooch:

Q. General Walker, in yesterday's proceedings there was introduced an exhibit which portrayed a news release made by you in Jackson, Mississippi. I refer to Defendant's Exhibit 8, and the first sentence.

"I am in Mississippi beside Governor Ross Barnett." That was a part of that press release, was it not?

A. Yes, it was. Just a part of it.

Q. Now, were you actually or figuratively beside Governor Ross Barnett?

A. Figuratively.

Q. Did you see Governor Barnett after you got to Mississippi on the 29th?

A. No, I didn't.

Q. Did you have any conversation with him?

A. No, sir, I didn't.

Q. You let him know you were there?

A. I didn't personally, no, sir. I had no contact with him.

[fol. 864] Q. Then by that figurative statement that you were standing by him I assume that you meant you were adhering to the principles that Governor Barnett had previously expressed?

A. I was supporting the principles that he had expressed.

Q. All right. You were, of course, aware at that time that he had prevented the entry of Meredith into the Ole Miss University?

A. He had opposed it, yes, sir.

Q. And he had prevented it, had he not, up to that time?

A. He hadn't been entered up to that time.

Q. All right. When did you first learn that Meredith was actually on the campus of the University? Was it

after you got to the campus, or did you ever learn he was there?

A. There was discussion of it all day Sunday afternoon, you might say, and I thought there was a remark made about him being on the campus at the press conference when I got there and they said I was scooped by Marshals having moved on the campus. I think there was a reference to Meredith being on the campus at the same time. But it—I would have definitely known about it when I got to the campus.

[fol. 865] Q. Is that the first time you definitely knew Meredith was on the campus, was when you got to the campus?

A. I considered him on the campus after the press conference, the discussion at the press conference.

Q. Had you been told prior to the press conference he was actually on the campus?

A. No, but this was all being told. You were told several times. Even in Jackson we heard he was coming on the press conference (sic). There was much discussion about it. But nothing that appeared definite to me, Mr. Gooch.

Q. You mentioned a conference at the Courthouse on Sunday afternoon with Sheriff Ford and a number of other Sheriffs?

A. Yes, sir.

Q. You also mentioned there was a Governor's representative there, I believe?

A. Yes, sir.

Q. Did the Governor's representative tell you at that time that Meredith was on the campus?

A. Yes, he did.

Q. Did you take that as authoritative?

A. Yes, sir.

Q. Then, let's get on now back to the dinner at the Mansion House Cafe, which we were getting close to yesterday afternoon.

[fol. 866] I believe you testified that you got into the cafe sometime shortly before 8:00 p. m. and that someone had a radio and you moved up to where you could listen to the speech of President Kennedy; is that correct?

A. Yes, sir.

Q. Did you listen rather carefully to the President's speech?

A. Yes, sir.

Q. Do you recall whether or not the President informed all of the listeners that Meredith was then on the campus?

A. I don't recall that he did, sir.

Q. Do you recall generally what the President—the text of the President's speech?

A. The text of the speech was to the effect that the administration intended to see that Meredith was entered into this University of Ole Miss, and it referred to the use of Military forces, as I remember. I believe we should have the text of the speech.

Mr. Gooch: Well, suppose we just have the President's speech played, for the sake of continuity.

Mr. Watts: If the Court please, I think this is going a little too far. Your Honor knows all the emotional impact connected with the President's speech. It doesn't prove or [fol. 867] disprove anything. I think we can read it.

The Court: It might be relevant.

Mr. Watts: I have no objection to the speech, but I say playing it—

The Court: We will play it, if they want to play it.

Mr. Watts: All right. If Your Honor please, I will object to the movies. This man did not see a movie.

The Court: What did you see?

The Witness: I heard it on the radio.

Mr. Watts: If you turn the movie part off, I have no objection to the sound. I think it would be better to read it, however.

The Court: I will permit the sound of exactly what the General heard.

Mr. Gooch: Well, can you turn off the picture and just have the sound?

The Technician: Yes, sir.

Mr. Gooch: All right. That is all right.

(Whereupon a sound recording purporting to be the speech of President Kennedy was played to the Jury as follows:

* * *

"News Commentator: We take you now to the White [fol. 868] House in Washington, D. C.

"Second Commentator: From the White House in Washington, NBC News brings you John F. Kennedy, President of the United States. As the President speaks to the Nation, Meredith has arrived on the University of Mississippi campus to be enrolled tomorrow. Governor Barnett asked that bloodshed shall be avoided. The President.

"President Kennedy: Good evening, my fellow citizens. The orders of the Court in the case of Meredith versus Fair are beginning to be carried out.

Mr. James Meredith is now in residence on the campus of the University of Mississippi. This has been accomplished thus far without the use of National Guard or other troops, and it is to be hoped that the law enforcement officers of the State of Mississippi and the Federal Marshals will continue to be sufficient in the future.

All students, members of the faculty and public officials in both Mississippi and the Nation will be able, it is hoped, to return to their normal activities with full confidence in the integrity of American law. This is as it should be. For our Nation is founded on the principle that observance of the law is the eternal safeguard of liberty. And defiance of [fol. 869] the law is the surest road to tyranny. The law, which we obey, includes the final rulings of the Court as well as the enactment of our legislative bodies.

Even among law abiding men few laws are universally loved, but they are universally respected, and not resisted. Americans are free, in short, to disagree with the law, but

not to disobey it. We are a government of laws and not of men. No man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law. If this country should ever reach the point where any man or group of men, by force or threat of force, could long deny the commands of our court and our Constitution then no law would stand free from doubt. No Judge would be sure of his writ. And no citizen would be safe from his neighbor. In this case in which the United States Government was not until recently involved, Mr. Meredith brought a private suit in Federal Court against those who were excluding him from the University.

A series of Federal Courts, all the way to the Supreme Court, repeatedly ordered Mr. Meredith's admission to the University. When those orders were defied and those who sought to implement them threatened with arrest and violence the United States Court of Appeals, consisting of [fol. 870] Chief Judge Tuttle of Georgia, Judge Hutchinson of Texas, Judge Reeves of Alabama, Judge Jones of Florida, Judge Brown of Texas, Judge Wisdom of Louisiana, Judge DeWitt of Alabama, and Judge Bell of Georgia, made clear the fact that the enforcement of its order had become an obligation of the United States Government. Even though this Government had not originally been a party to the case, my responsibility as President was therefore inescapable. I accept it. My obligation under the Constitution and the Statutes of the United States was and is to implement the orders of the Court with whatever means are necessary, and with as little force and civil disorder as the circumstances permit.

It was for this reason that I federalized the Mississippi National Guard as the most appropriate instrument should any be needed to preserve law and order when United States Marshals, carried out the order of the Court and prepared to back them up with whatever other civil or military enforcement might have been required.

[fol. 871] "I deeply regret the fact that any action by the Executive Branch was necessary in this case but all other

avenues and alternatives, including persuasion and conciliation had been tried and exhausted.

"Had the police powers of Mississippi been used to support the orders of the Court instead of deliberately and unlawfully blocking them, had the University of Mississippi fulfilled its standard of excellence by quietly admitting this applicant, in conformity with what so many other Southern State Universities have done for so many years, a peaceable and sensible solution would have been possible without any Federal intervention.

"This nation is proud of the many instances in which Governors, educators and everyday citizens from the South have shown to the world the gains that can be made by persuasion and good will in a society ruled by law.

"Specifically, I would like to take this occasion to express the thanks of this nation to those southerners who have contributed to the progress of our Democratic development in the entrance of students, regardless of race to such great institutions as the state-supported Universities of Virginia, North Carolina, Georgia, Florida, Texas, Louisiana, Tennessee, Arkansas and Kentucky.

[fol. 872] "I recognize that the present period of transition and adjustment in our nation's Southland is a hard one for many people. Neither Mississippi nor any other Southern State deserves to be charged with all the accumulated wrongs of the last hundred years of race relations.

"To the extent that there has been failure, the responsibility for that failure must be shared by all, by every state, by every citizen.

"Mississippi and her university moreover are noted for their courage, for their contribution of talent and thought to the affairs of this nation.

"This is the state of Lucius Lamar and many others who have placed the national good ahead of sectional interests. This is the state which had four Medal of Honor winners in the Korean War alone.

"In fact, the Guard Unit federalized this morning early is part of the 155th Infantry, one of the ten oldest regiments in the union and one of the most decorated for sacrifice and bravery in six wars.

"In 1945, a Mississippi sergeant, Jake Lindsley, was honored by an unusual joint session of the Congress.

"I close, therefore, with this appeal to the students of the University, the people who are most concerned:

[fol. 873] "You have a great tradition to uphold, a tradition of honor and courage, won on the field of battle and on the gridiron as well as the university campus.

"You have a new opportunity to show that you are men of patriotism and integrity. For the most effective means of upholding the law is not the state police or the Marshals or the National Guard—it is you. It lies in your courage to accept those laws with which you disagree as well as those with which you agree. The eyes of the nation and all the world are upon you and upon all of us and the honor of your university and state are in the balance.

"I am certain that the great majority of the students will uphold that honor. There is, in short, no reason why the books on this case cannot now be quickly and quietly closed in the manner directed by the Courts.

"Let us preserve both the law and the peace and then after healing those wounds that are within, we can turn to the greater crisis that are without and stand united as one people in our pledge to man freedom.

"Thank you. Goodnight.")

By Mr. Gooch:

Q. Now General Walker, the President's speech has just been played and tabulated here in the record. Does that recall to your mind the things you heard there in the [fol. 874] Mansion House Cafe that night?

A. It recalls to my mind the President's speech, yes, sir. I heard it there that night.

Q. And you did notice in the President's speech that the nation was advised, as were all the listeners, that Meredith was then in residence on the campus?

A. Yes, I did.

Q. You considered that authority, did you not?

A. Yes, sir.

Q. All right. Then prior to the time that you got to the campus on the night of September the 30th, 1962, you knew without question that Meredith was then on the campus and that he had been taken on the campus that day, did you not?

A. Yes, sir, I am not denying that in any way, Mr. Gooch. I would say I knew—I was pretty suspicious of it and suspected from earlier than this speech, as I said after the press conference.

Q. All right. Now I believe you stated that after the President—well, now just at the conclusion of the President's speech, did you make any remark concerning the President's speech?

A. I may have.

Q. I'll ask you if you uttered these words:

"Nauseating, nauseating?"

[fol. 875] A. I may have.

Q. Well, that expresses your feeling I presume then for the President's speech?

A. It expressed my feelings with respect to the situation as it was being presented at that time from the Administration's point of view, Federal Administration's point of view.

Q. All right. Now after the President's speech, you said, after some delay there at the cafe—I believe you said with relationship to some cigarettes or something, or you maybe were stopped—you and Mr. Leman went to the campus.

You have detailed on the map, which I believe is Plaintiff's Exhibit 1—did that get a number applied?

Anyhow, the large map on the wall, on the easel.

The Court: Plaintiff's 11.

By Mr. Gooch:

Q. —Plaintiff's Exhibit 11, that prior to the time you got to the campus itself, that there is a railroad track underneath the University Avenue?

A. Yes.

Q. And the car in which you were in pulled in and parked at someplace east of the railroad track?

A. Yes, sir.

Q. And I believe you stated that you got out?

A. Yes, sir.

[fol. 876] Q. Before the car was parked?

A. Yes, sir.

Q. You started on towards the campus?

A. Yes.

Q. Mr. Leman was left behind?

A. Yes, sir.

Q. Now were there people scattered out along University Avenue, walking in the same direction you were?

A. No, sir, they was scattered out sort of facing the street, watching what was coming and going to the campus.

Q. Were there people between you and the campus as you left the railroad bridge and started towards the campus?

A. Yes, sir, in spotted groups along the route.

Q. About how far did you proceed before you saw or heard of Mr. Leman again?

A. Well, I crossed a big long bridge, which is just part of the road. You can hardly tell the tracks are underneath. And I crossed that. I would say I was about 60 yards.

Q. And then did you make any motion with your arm?

A. Yes, there were people—I had passed people on the, standing there, 30 or so.

And as Leman came out of the park and turned, why, I was up ahead and I wanted him to know where I was and I waved to him to come on up.

[fol. 877] Q. Did you call him by name or did you just wave your arm?

A. No, I didn't. It was too far. I just waved my arm and signaled so he could catch where I was.

Q. There was only one way to get on down to the campus, was that street, wasn't it?

A. Yes, sir, but I wanted him with me.

Q. All right. Now as you got closer to the entrance of the campus, did you observe any people there on University Avenue just at about the entrance of the campus?

A. There was no particular group up there. There were people on both sides of the street in little groups of three's and four's, as you might have come to the campus in a car or a group, and you get to the campus and then there is a group around the monument in an area of 60 feet, say, where the light would show on, that one street light was—that was there.

Q. All right.

A. And it would show the monument. It showed the monument.

Q. Now about the time you got to the edge of the campus but before you actually got on it were you hailed by a group of persons across the street?

A. I wasn't hailed. Some people spoke to me across the street, smiled at me, definitely recognized me.

[fol. 878] Q. What did you say to them?

A. Well, I had talked to three or four on the left side. Now I was right on the sidewalk. I never got off the sidewalk. On the south side of University Avenue, coming to the campus.

And I talked to three or four people on the side, on the left side, and then I turned around and, looked around. I looked at the policeman over in the center of the street to see if he was stopping anybody. He wasn't. And people were going by him on both sides on the—he was in the center of the street, just stopping cars.

And people were going up and down the sidewalks as they wanted. And I—

Q. Did you holler?

A. And I said to 'em, "Come on."

Q. Did you wave to them and say, "Come on?"

A. Across the street to a group that recognized me, about three or four people.

Q. All right. Now when you got on down to the campus, proper, I believe you said there was a street light southeast, I believe it would be, of the monument?

A. Southeast, yes, sir.

Q. And did you stop under that light?

A. Sir?

Q. Did you stop under that light?

[fol. 879] A. Yes, sir.

Q. Were you greeted by any of the students there?

A. Yes, three or four, six or eight, or eight or ten, in groups of three's and four's as they come up.

Q. What was said, General?

Mr. Gooch: Get the General a glass of water, will you, Mr. Sheriff?

The Witness: Thank you, sir.

Just greetings, they would come up and want to shake hands with me and say hello and, of course, every one that did, why, I would let them say what they wanted to and they wanted to greet me and see me.

Some had—well, during the evening, three or four had said they had seen me in my Jackson speech six months before down in Jackson, Mississippi, and so there were several that had other places and some had never saw me before, just heard, didn't recognize me.

And as they would come up and greet me, then I would turn the conversation immediately to find out what had gone on on the campus, what it was all about and what had happened.

And that was sort of the conversation that went on continuously all evening.

By Mr. Gooch:

Q. About how many people came up to you there on [fol. 880] your first entrance to the campus, General?

A. Oh, I would say 15-20 people, probably shook hands with me out of what was standing around, what saw me. And then there were people right beside me that would look up surprised and say—they didn't know who I was.

Q. Did any of that crowd or the 15 that came around with you, whether it was a crowd or not would not be proper, but any of that group that came around you, did they ask you to lead them?

A. Not early, sir, not until—not at that time in particular. There was some students coming back, you see. I wasn't the whole center of attraction at any time there. There were people coming back from throwing rocks and up in the tear gas, boys in T-shirts and sweaty and hot and talking about what was going on up there to their friends back there.

There were people going and coming. That took a lot of the interest and all I had to do was just listen to what they were saying.

So lots of times I was listening to people didn't even know who I was, didn't even know I was there. They didn't know I was listening to their conversations.

Q. The people in the first group that greeted you there, were they all students or of student age, I would say?

A. Well, there were some spectators around, say there was 15 or 20, I would guess, that weren't students, sir. [fol. 881] The students were more down towards the buildings and in their own areas, you might say, and up towards the front in the grove.

We were in the area where the spectators—you are looking a little bit downhill when you go down University Avenue from the monument, so you are not seeing too much on the campus. In fact, you are just seeing a light up in front of you that's lighting up a monument in about 60 feet.

So the only spectator position that will show anything about what's going on on the campus has to be pretty close to that street light.

Then if you stand in the street light, it's not good because you are lighted and the rest of the area is not, so you don't—you move, move out in the light, you see, to get out in the shadows somewhere or where it's a little bit less light so that you see better to the front.

Q. As you approached this small group or while you were talking to that small group, did you see any of the students come by going east with a chemistry professor that had just been beaten up?

A. No, sir.

Q. You didn't—that didn't—so far as you know, nothing like that happened?

A. Oh, it may have come by. I didn't see everything that was happening. There were things going on every- [fol. 882] where. There weren't—everybody there just wasn't paying attention to me.

Q. All right. Now after you had been, talked to this group, of, say, 15 under the light, where did you move to, General?

A. As I indicated yesterday, I believe I moved around on the west side of the monument within about 15 or 20 steps of the monument, first on the south side as I crossed over, talking to people and then crossed over to the west of it about 15 or 20 steps, talked to more people.

Q. When was it that some of the crowd or some of the people indicated, "Here is our leader. We have a leader now. General Walker is here."?

A. Well, in this timing we are using, Mr. Gooch, it would have been, say, now we are 15 minutes ahead after I am on the campus—

Q. Yeah.

A. —I would be in the trees, just from 10 to 20 steps from the monument, and I heard students began, saying, I—"We have a leader."

[fol. 883] Q. Did one of the students say to you, "General, will you lead us up to the steps?"

A. Oh, they asked that many times. "Will you get us organized, will you lead us?" That was the predominate question on the campus.

Q. All right. Now, after these conversations with these entreaters, did you go toward the Lyceum Building, General?

A. Yes, sir, I walked up a little bit further. Not toward the Lyceum Building, toward the flagpole. That is still practically out of sight of the—you cannot see—I couldn't see all of the Lyceum Building. I couldn't see Marshals from the flagpole. So, I moved up a little toward the flagpole; about halfway.

Q. Physically, the flagpole is on a direct line from the monument to the Lyceum Building?

A. Yes, sir, about straight.

Q. Well, I don't want to quibble, but if you were moving toward the flagpole you were moving toward the Lyceum Building, were you not?

A. Yes, sir.

Q. Did anybody go with you?

A. Three or four, probably the Sheriff and Louis Leman stayed pretty close by. I never was aware of exactly where he was, except certain times when he would be talking with [fol. 884] me.

Q. You say only three or four went with you as you walked?

A. Within fifteen or twenty feet of me, yes, sir, maybe five or six. But the others weren't paying any attention to me. Then somebody would come on by me and come up to me. You couldn't see more—you couldn't identify anyone more than about twenty steps at the most.

Q. As you—before you walked westward toward the flagpole, we will call it, that is when the people had greeted you down there by the monument, shouted to you, "Here is our leader, will you lead us to the steps," and then you started toward the flagpole; is that correct?

A. Mr. Gooch, it is like this: The story at Oxford was done at Oxford. And the—there wasn't any leading of anybody up toward the flagpole, or anything else. We were just standing around in the area. I wanted to get a little bit closer, hoping I could see after I got out from under the light, we were discussing what had gone on on the campus, and I just moved up toward the flagpole to see what was going on. There wasn't anybody paying any particular attention to me except people standing maybe ten steps from me, and there wasn't—there wouldn't have been six or eight.

I will say there were three or four people over here, [fol. 885] there were three or four people over there, and there may have been at any one time three or four people by me, and maybe three or four that moved up there with me. Leman, the Sheriff, maybe one or two others. And then maybe three or four joined us there, and discussed something.

The other question was, "General, what about Cuba? Will they use Military forces here—when we are—why are the Military forces coming here, when Cuba is in the situation?" This is one of the typical questions that was going on. Yes, sir.

Q. General?

A. Yes, sir.

Q. Back to the question. As you went toward the flagpole, I believe you stated there were only four or five that went with you, or followed you?

A. In the immediate vicinity that were paying any attention to what I was doing, yes, sir.

Q. All right. Now, you mentioned this Deputy Sheriff. What was the—when was the first contact you had with the Deputy Sheriff relative to your entrance onto the campus proper?

A. I would say it was after that ten or fifteen minutes, which extends to maybe twenty minutes and he is out in this fifteen or twenty steps from the monument where he came up, or I went up to him and spoke to him.

[fol. 886] Q. And then in that conversation is it true or not that you asked him to deputize you?

A. The deputization was mentioned. I had no idea anybody could deputize you under a tree. It was just sort of a facetious statement.

Q. Did he tell you he could not deputize you because he was not from that county and even if it was his county he couldn't deputize you?

A. He mentioned that, yes, sir. He thought it was more serious than I did, I guess.

Q. Then, did that Deputy Sheriff stay with you pretty well throughout the night?

A. I never was aware that he was with me pretty well throughout the night, sir. Somebody stepped off fifteen or twenty steps away from you, he could be with you, or if he was watching you or paying any attention to you. But there were other people that were up by me, three or four or six, talking about something else, so I am not aware of where he is. But in general, I will say, I heard his testimony, it sounded like he probably knew pretty much what I was doing during the evening.

Q. Now, as you got there to the light you said some ten or fifteen people gathered around you from time to time. Could you give us an estimate of how many people you saw down around there—down around the flagpole—not the [fol. 887] flagpole, the monument?

A. Around the Confederate monument?

Q. Yes, sir.

A. Oh, I guess in the area of the shadow of the light you could see about sixty people standing around talking, seventy people, something like that.

Q. You mentioned a figure yesterday from one hundred to one hundred fifty. Where was that group?

A. Well, if you included the people down the street, and start them, but they could hear what is going on. And they, if they were lined up down there, as I came through, they were in groups, sometimes threes and fours, why I

don't know what happened to them, but they were facing the street, sort of. There wasn't anything to see what came and went from the campus, I guess, but that is sort of downhill and—

Q. Then, at the time you got to the campus, first went on the campus, you say there were fifty or sixty people around the monument, and that that, together with the rest of them back further east on University, would total up maybe to a hundred and fifty to two hundred, or a hundred to a hundred and fifty, whatever you said?

A. Well, I couldn't see it, sir. This would be my judgment—my judgment. Now, there were people out in front of the flagpole throwing rocks, and tear gas is coming in, [fol. 888] into the whole area. The whole area is permeated with tear gas. I could smell it when I got to the monument, certainly, or even to the lamp post, and I asked somebody, "What is that?" To reidentify it, and in answer to the question, I guess there definitely must have been—what I could see—couldn't be more than one hundred people from the time—from the lamp post to around the monument.

I probably wouldn't have seen but about one hundred people, except down on the street there were probably another sixty or seventy people, down as far as the bridge. There were twenty or thirty people standing on the bridge.

Now, the reason for this dissertation, nobody knows what area your question is about.

Then if you want to surmise, I would surmise there were six or seven hundred students over this whole area, maybe a thousand. I don't know. They were in dormitories, coming out of dormitories, in and out of the YMCA, from what I heard. I never saw these buildings. And when you want to take in the whole Lyceum, the whole dormitories, the canteen down behind the Lyceum and everybody interested in what is going on, or interested in doing something about it, as far as looking and seeing, in and out, keeping up in [fol. 889] general with it, why, most of them were spectators. I guess there were six or eight hundred or a thousand people all over that area.

I am coming back to your question in this—that around the area of the monument, at the time we have discussed now, and I am talking to the Sheriff, and I am moving up to the flagpole, I saw not more than one hundred to one hundred twenty-five people, around in groups.

Q. What did you see when you got up in the vicinity of the flagpole?

A. Up to the vicinity of the flagpole?

Q. What did you see when you got up there?

A. Well, now, this is later.

Q. No, talking about the same time?

A. Well, half an hour later, say, or twenty minutes—

Mr. Watts: I don't think he heard you.

By Mr. Gooch:

Q. General, you stated that after you were greeted by this ten or fifteen people you went on west toward the flagpole. You did testify, however, that you were going toward the flagpole, not the Lyceum.

Let me ask you this question: You had been on that campus at least twice before you went on there that night, had you not?

A. In an automobile, just through a campus.

Q. You knew where the Lyceum Building was, didn't you, [fol. 890] prior to the time you were on the campus that night?

A. No, sir.

Q. All right. I understood you to testify that after you had been greeted there by, or shook hands with this ten or fifteen people, there under the light, you moved on a little bit west of the flagpole, and that is when they said, "Here is General Walker, we have got a leader, lead us up to the steps"?

Mr. Watts: If the Court please, I object to that statement. It includes factors not in evidence. The witness did

not testify he was ever west of the flagpole. And he—that is unfair cross examination and argumentative.

The Court: Overruled.

By Mr. Gooch:

Q. I believe you stated, that you, with some three or four people went west toward the flagpole?

A. Yes, sir.

Q. Now, my question that I asked a moment ago is what did you see after you had walked west toward the flagpole?

A. Your question was when I was in the vicinity of the flagpole, Mr. Gooch. Nobody knows what "vicinity" means. It could be five hundred yards, or ten feet. This—

Q. Wait a minute, General.

[fol. 891] You had walked westward one step or ten steps, it matters not—

A. I am about—

The Court: Just a minute, please.

A. Yes, sir.

The Court: He hasn't quite finished his question.

The Witness: I am sorry, sir.

By Mr. Gooch:

Q. I am asking you when you first made some movement to the west what did you see? Describe—give us a graphic description of what you saw, General?

A. I believe I have stated what I have seen, with regard to the people. Do you want me to repeat that?

Q. No, I am trying to find out—

A. I will say, then, that I was looking almost toward the Lyceum Building, in general. Looking toward what the people were doing, looking toward noise; anything like that would attract my attention. I was talking and shaking hands with people. I was seeing people coming and going by. I was seeing people coming and going by from east to west, going up in front of the flag, out from the Lyceum

Building. They would hit in general—their direct fire would hit about thirty to fifty steps short of the flagpole, west of the flagpole. They might roll, every now and then, one fired would roll to the flagpole. It could go that far. That [fol. 892] is the ones that were directed in this direction.

Now, then, I was trying to see what I could see of how many students there were, and how many other people there were, and basically what the Lyceum Building looked like, the Marshals and so forth.

I could not see them from where I stood. I couldn't even make out the outline of the Lyceum Building. There was a light up there. I could tell there was a building and a—a reflection. I couldn't even be sure that I could see the movement in front of that building, and couldn't identify Marshals from this position. So, there wasn't too much to see.

I was getting more information in talking to people, and seeing what had happened. I was interested in what happened on the campus.

Q. I believe you said on yesterday the most people you saw at that time was around thirty, that was between you and the Marshals; is that right?

A. I would say directly in the Grove and between the Lyceum Building and between me and the Lyceum Building, the flagpole and Lyceum Building, was about thirty and scattered groups that I could see at that time. Now, there was just enough light to see in certain areas.

Q. What were they doing, those students you saw?

[fol. 893] A. You might say they were up there to harass and antagonize the Marshals, in general protest.

Q. Did you consider it a riot?

A. Not what I am looking at and that we are discussing now. Not that portion of it, no, sir.

Q. Did you see or observe or remember about a newsman's car that had been smashed, and its camera, the car caved in somewhat, over to the south of the Circle?

A. Later I heard about it. I knew about it when it was going on. I asked a student what that racket was. I could

hear it. I don't know what time this is. This might have been ten or ten thirty, or it might have been earlier. But I could hear a racket going on up there, and I asked a student, "What is going on up there?" And he said, "They are breaking up a news car," that I had already discussed with them about, "Well, why are they after the news car?" And, well, the discussion came out that they told me stories about the newsmen asking them to do things so they could take pictures of them doing it. I heard stories like that.

And he said they probably asked them to beat up the car.

But, anyway, I heard them breaking up the car and I moved around, and when this was, say about 10:00 o'clock, I moved up again short of a line through the flagpole, and [fol. 894] listened to see if I could identify what was going on. I never saw it. I couldn't see it. Lights were all out, it was as dark as it could be. Not all the lights. There was one little light, as I remember, at this time up to the right of the walk that heads toward the Lyceum Building; way up toward the Lyceum Building.

Q. Now, General, at the time we are discussing now, and we have gotten up to 10:00 o'clock, which is fine. Up to that time had you seen anybody that approximated your age, or were most of them students?

A. From the time I came on the campus?

Q. Yes, sir.

A. Yes, sir.

[fol. 895] A. Yes, sir, I've seen people that approximated my age, older and younger.

Q. In the group that went up with you towards the flagpole, were some in that group?

A. As I remember, the Sheriff started with me or went with me or talked to me during that time, or was by or left or something.

And Louis Leman is bound to have been close by. And there were—I don't remember anybody in particular at that time.

Q. Did you at any time that night see any students engage in what you considered to be rioting?

A. Well, there is no doubt, sir, that you could say over-all, if you have talked about the situation, there was a riot on the campus but I saw—entirely different what I saw and what happened on the campus. I didn't see everything. I didn't get on the campus until a lot of things had happened.

Q. I suppose it would be impossible for one to see and have heard everything on the campus that went on, General?

A. Certainly would have.

Q. Would you say, based on what you saw and what you heard, that there was a riot situation on that campus that night?

A. Yes, there was a riot situation, over-all, on everything that happened on the campus.

[fol. 896] Q. All right. Now let's go back, if you will, and I apologize for skipping, but we are now back to the time that you and, you say, four or five went towards the flagpole, after you had been greeted there under the light and had talked to those students and after you had been asked to lead them up the steps.

Now as you got up there, you say you observed and you couldn't see the Lyceum Building. I believe you stated that?

A. I didn't say that, sir.

Q. Well, I misunderstood you.

A. I said I couldn't see the outline of the Lyceum Building. I could see there was a building there and I knew there was a building there and I knew it was the Lyceum Building.

We discussed the Lyceum Building through all these conversations. We knew what we were looking at.

Q. All right. Now after you had seen what you have described, did you start back eastward towards the monument?

A. Well, I went back to the monument, right, and to that vicinity, right within 30 or 40 yards of it.

Q. Was it on that trip back that you encountered the Reverend Duncan Gray, the incited, excited little minister?

A. Well, it was either on the way up or on the way back, or in general; it was along in that period.

[fol. 897] Q. He asked you to stop, help him stop the rioting, did he, General?

A. He said, "You can stop it."

Q. What did you say to him?

A. I said, "Why don't you stop it?"

Q. And what did you say then or what did he say?

A. I don't remember the sequence, but the idea was he wanted me to stop the—the—demanded and was frenzied about it and was all upset and excited and—over, I believe —didn't we—wasn't this—shall I repeat everything that's been said on this before?

The Court: Yes, go ahead and answer his question.

A. Well, I—his approach was all excitable and frenzied and just turned my back on him and walked off and I even again, when he approached me, why, I twisted the other way and went to talking to somebody else.

Q. Did you tell him you wouldn't stop it if you could?

A. I don't recall saying that.

Q. Would you deny that you said that, General?

A. I don't recall it.

Q. All right. Now was it then or later that you told him and the crowd that you were ashamed of being an Episcopal?

A. I remember telling him that.

Q. And you repeated that on the monument later?

[fol. 898] A. I didn't remember that I did but I have heard many witnesses say that they heard me say it on the monument. Maybe I did.

Q. It's pretty difficult for a person to remember all at this stage what he did say on a given occasion, isn't it, General?

A. The key areas of what you said and didn't say and whether you charged or not are very easy to remember, Mr. Gooch.

Q. I understand that.

A. Certainly wouldn't forget whether you were leading charges on the campus or not.

Q. I understand that. But I am talking now about the question of what you remember you said and, to be blunt about it, you have heard a lot of witnesses given conflicting testimony up to this point as to what you have said, haven't you?

A. Pretty clear statements, I think, so far.

Q. And the ones that you have heard so far, without enumerating them, do they represent generally what you recollect you having said, the clearness of the statements by the witnesses thus far?

A. Yes, sir.

Q. Do you concur in what the witnesses thus far have said you said on the monument?

[fol. 899] A. Their's is a guessing and their's is a remembery (sic) and their's is a—I'm not substantiating that the actual details of what they said versus what I say, or in general what they have said about the situation that night and about everything that's there is the best of their memory and paints the picture about as I see it.

But we are not—we can't make the same words, Mr. Gooch.

Q. Nobody can make the same words, General. The reason I asked you that question you said that up to now the witnesses who have testified painted a pretty clear picture of what you had said on the monument.

Now all I asked you to do was either affirm or deny that statement.

A. I would rather refer to my own remarks about what I said on the monument. And I'll stand on those. And what supports those, the witnesses are correct. What doesn't support them, that's their opinion.

Q. All right. Now with relation to the time that you first went westward toward the flagpole, did you go westward at any time thereafter and prior to the time that you made the speech on the monument?

A. I never went—no, sir, never went past the flagpole. I was way short of the flagpole.

Q. No, I don't mean that time, General. I am talking [fol. 900] about—and please try to follow me and I believe we can get along a little faster. You have stated that you and a group of four or five did go towards the flagpole?

A. That's right.

Q. There you encountered Duncan Gray and you came back to the flagpole?

A. Yes, sir.

Q. Now my question is, did you go back westward at any time prior to the time you made the speech on the monument?

A. Yes, sir.

Q. All right. Tell me about that.

A. I moved five or ten feet west, steps westward, to talk to somebody else.

Q. All right. Anybody go with you?

A. Nobody that I know of.

Q. All right. After that few steps to the flagpole, did you go westward any more before you made the speech on the monument?

A. Now we are, say, half-way between or a third of the way between the monument and the flagpole?

Q. Yes, sir.

A. All right. In general, I moved five feet, five steps, east, or ten steps, ten steps north.

Q. All right.

[fol. 901] A. Talked to somebody.

Q. All right. Then are we about back down now to where you were at the monument when you—

A. No, I moved 20 steps south, talked to somebody.

Q. All right. What else?

A. Then I am in the vicinity of the monument.

Q. All right. Now when you got back to the monument and shortly before you made your speech, was there any urging you on to lead them at that time?

Was there any urging to lead them at that time?

A. This is turned in—basically, the question before, starting to lead was to start to ask, "Will you talk to us? Will you make speeches."

That was the predominating question about that—I believe I said—"Will you lead and organize us?" That came a little bit later. That was interspersed, too.

But the main question, "Will you talk to us? Will you—will you make a speech?"

Q. All right. Then you did make a speech?

A. If you call it a speech. I got up on the monument and talked to them.

Q. Well, did you make a talk to the students, General, we'll put it all—we'll put it that way?

A. Yes, sir.

Q. Can you outline as best you recollect what the entire [fol. 902] speech, as you made it that night, or talk, was?

A. I told the students that they had a right to protest, they could continue to protest but that this was no place for violence; that the truth and the tragedy of this situation was indicated by a sign on their own airport which said, "Cuba is that way (indicating);" that nobody came to Mississippi—and these were my exact words—nobody came to Mississippi for violence. Violence is not intended.

I said that if there is any violence on the campus, it is on the hands of the Federal Government.

When I said there was no violence intended, there was a rousing moan and boo and, "He's not going to do anything. Let's go."

And I waited until it calmed down and people began off the fringes to leave and there they were talking back and forth, "He's not going to do anything. What's he here for? Let's go on."

And during this, probably before this point, a minister, as we have identified as Duncan Gray, something catches the side of my leg. Again he's grabbing ahold of me and he's sort of clawing his way up to get up on the monument.

I don't remember exactly what he said. I think I said, "The minister would like to speak but I am talking now. And he can speak and say what he wants when I get through."

[fol. 903] And there was a—the reaction was, "Get him off of there. Get ahold of him. Jerk him down."

And some boy walked across in front of me that looked ready to take him apart and the inference was that I sort of quit, watched, looked at it. And I am looking down, I am about 15 inches or 18 inches higher than the other people, and somebody pulling him off.

And I waited and somebody had took him around to the left side and I went on talking.

And I had made the determination only changing my mind after refuting time and time again, that I had nothing to say and all the time finding out what was going on, on the campus.

At this time, before I got on the monument, there was a discussion, and it began to pass the word around the crowd and excitement over the fact and getting mad over the fact that Governor Barnett had sold the students out, he had—that "We are sold out. Let's get going. Let's do something."

And then people had said, "Will you speak?"

There was a drunk there on the campus that was quite drunk, talking about an old frontier and new frontier, an Alamo frontier, and he was just all mixed up, he wasn't making any sense at all.

And I had to walk off from him about five or six times [fol. 904] and he was as drunk as he could be, to be standing, in my opinion.

And I decided, when the situation, as was, as it was at this time, I changed my mind and I said—actually Louis Leman came by me and said, "Those students really want you to talk to them."

And I said, "All right," to the next students, I said, "All right, I'll speak to them."

In the meantime—you want me to go ahead?

Mr. Gooch: General, the question I asked you originally was to give everything you said on the monument. That was the question I had asked you.

The Witness: Right, sir. Well, we will go right on to it.

By Gooch:

Q. All right.

A. Been a long time getting to the monument, sir.

Q. No, you had—well, go ahead.

Mr. Watts: Go ahead.

By Mr. Gooch:

Q. I had asked you to detail what you had said on the monument. Now if you have finished with that—

A. Now we are on the monument. I have stated what I have said, as I recall so far. These were the major, important emphasis, points I was getting across.

Very carefully—this is a very unusual situation. The [fol. 905] reason because, not as Savell stated, that I said that the Governor had betrayed you—that is exactly what I didn't say. And that is exactly why I got on the monument, to stop the rise in the determination to do something over the Governor getting out.

I got on the monument just when they began to say this and now I have just come out of the courthouse about two or three hours before and had heard the story of Sheriff Moore told to the Sheriffs, the Governor's representative, and so I am on the monument and I am speaking to the students and I wanted to make this clear to them, that the Governor had not sold them out, that the Governor's orders had not been followed out and his desires, that a representative of his—not mentioning the man's name—but definitely his representative—I'm not telling you this but I am telling you what I heard at the courthouse this afternoon, and that is that the Chief of the Highway Patrol, Birdwell—and I realized, thinking of Birdwell, that I am misusing

his name, that's not the right name, and I turned down to somebody to my right, which I didn't know at the time but it was Mr. Leman and he said, "Birdsong."

And I said, "Mr. Birdson, according to this representative, escorted and accompanied, you might say, Meredith on the campus that afternoon," and that this was not according to the representative, the Governor's desires, and [fol. 906] this is not the way the rumor I am hearing on the campus now.

Q. In other words, you were telling them at that time that your best information was that Govenor Barnett was still protesting the entrance of Meredith, on the campus, is that correct?

A. I was telling them that Mr. Birdwell had brought the, had escorted or been with the group that had come on the campus with Meredith and that Governor Barnett had not sold them out.

Just before this, the Highway Patrol had left, as I remember. On a group of cars coming off the campus. This was before I got on the monument. Pardon sir?

Q. General, you were telling them that the Governor had not sold them out, that Birdsong had sold them out, and that the Governor was still standing fast in his original position with respect to the entrance of Meredith, were you not?

A. I didn't say that.

Q. Was that the implication, would that be a reasonable implication?

A. I believe that's your statement, Mr. Gooch.

Q. No, I am asking you for yours, General?

A. No, sir, it's not.

Q. Now have you told us all that you remember of your [fol. 907] statements made on the monument?

A. I have told you all I remember, as I did before. Unless something else refreshes my memory.

Q. Well, I believe when your deposition was taken in this case, that with respect to violence, you stated that what you told them, that no violence was intended, do you recall that?

A. No, I don't, sir.

Q. All right. At the time you told them that they had a right to protest, did you tell them that they had a right to keep up the protest?

A. I told them they—they could continue to protest, right.

Q. By continuing the protest, did that mean that they could continue, that you thought it was all right to continue what they had been doing?

A. I didn't say that, sir.

Q. Did you know at the time you told them that they had a right to continue their protest that they had been throwing rocks and bricks and missiles at the Marshals?

A. I knew that they had been throwing rocks at the Marshals, yes, sir.

Q. All right.

A. And that they had been fired on by the Marshals continuously.

[fol. 908] Q. Now let's—at any time that night, did you ever loosen your tie and collar, General?

A. Yes, sir, my back was getting tired. This is over a period of four and five hours, you might say, until, I think when I left about 1:30 or 2:00, and my back was getting tired, say, around 11:00 o'clock, something like that.

And I felt like I was getting a headache and took off my hat and stood under a tree for—over to the left of the monument, for 20 and 30 minutes at a time, took my—loosened my tie.

And when I did it, I was entirely by myself, except maybe Leman may have seen me or somebody, and loosened my shirt collar.

Q. I quote from your deposition, Page 253, with reference to what you said on the monument:

"I stated that any blood shed on the campus would be on the hands of the Federal Government."

A. That's right, sir.

Q. "That the students had a right to protest." Correct?

The Court: I don't think he heard you, Mr. Gooch.

By Mr. Gooch:

Q. Correct?

A. Will you repeat that?

Q. That the students had a right to protest?

A. Yes, sir, but your reference is to—I don't know I [fol. 909] said it in that sequence. The sequence would make a lot of difference.

Mr. Gooch: Get the deposition. I believe that I quoted it exactly as you said it, General.

Look at Page 253, at Line 14.

A. Line 14?

Q. Yes, sir.

[fol. 910] Q. Did I quote you correctly?

A. May I read it?

Q. Yes, sir.

A. I am looking for the question, sir? Have you got the question?

Q. I guess it is the line before the answer.

A. Back to line three?

Mr. Andress: Line one, "By Mr. Cravens".

A. Is this the question?

By Mr. Gooch:

Q. Yes, sir, the last question up there—I am asking you about the speech you made on the monument and what you said. The question just before the answer, "Can you answer the last question?" And your answer, "Yes, sir, be happy to, sir." And then your answer, as I get it—

A. "I am asking you about the speech you made on the monument." And I stated, "That any bloodshed on the campus, that this was—any bloodshed on the campus would be on the hands of the Federal Government; that the students had a right to protest; that no violence was intended and nobody came to Mississippi for violence. That the tragedy of the situation was very obvious with respect

to Cuba and what was going on in Cuba, and it was well reflected by signs on their own airport that said, "Cuba that way."

[fol. 911] And this statement doesn't even cover the Birdsong activity.

Q. I didn't ask you about Birdsong in the question. I asked you if you made the statement that you just read.

A. Yes, sir, but that is not the sequence of the speech.

Q. The sequence of what?

A. That is not necessarily the sequence of the way—I couldn't identify the sequence of what happened.

I am—what I am saying, Mr. Gooch, that in the intent of that speech, and the general tone of it, was to keep the students from any violence; to keep them in the area of a protest only. I intended to keep them in the area of protest, to try to stop any violence that was possible. Any violence on that campus would have been exactly opposite to what—and would have played right into the hands of the use of tremendous Military force. Any violence would have played right into the hands of the use of Military force.

As it was, the thing was looking fantastic and ridiculous. Absolutely ridiculous. It is still ridiculous, with 23,000 troops on the campus. Any fifty or one hundred men could have put any student on any campus in the United States on a week day.

Q. General, the question I originally asked you was to [fol. 912] reaffirm as to whether or not you had made the statement which is attributed to you on page 253 of your deposition. That is all I asked you. No sequence at all. I just asked you if you made that statement in the deposition.

A. I made that statement in the deposition referring to general things that were stated in the speech as I remembered it at that time.

The overall—I will take that—retract that. If it is in the deposition, definitely I said that, sir.

Q. Did you say also in the deposition, I believe at page 255, that Col. Birdsong was in violation—"In fact, he said

that Col. Birdsong was in violation of what the Governor ordered and desired?"

Mr. Watts: Correction, Tiny. "What the Governor wanted and desired."

Mr. Gooch: Maybe I have got the wrong one. Wanted and desired.

A. That, yes, sir.

By Mr. Gooch:

Q. Now, did you tell them, again on the monument, you were ashamed you were an Episcopalian?

A. I may have. May have not.

Q. All right. Now, General, I am going to ask you these questions relative to the remarks that you made on the monument to see whether or not they conform with what [fol. 913] your recollection is of your speech.

Did you say, "Marshals ought not to be here"?

A. I don't recall that.

Q. Would you say you didn't?

A. I don't recall it.

Q. "You have a right to demonstrate against the Marshals being there." Did you say that?

A. I certainly don't recall anything like that.

Q. That, "They had a right to protest against what happened there and that the Marshals being sent in against the University to make sure Meredith got in . . ." Did you say that?

A. Will you repeat that?

Q. "That they had a right to protest against what happened there and the Marshals being sent in against the University to make sure Meredith got in." Did you say that?

A. I said only that they had a right to protest, as I recall.

Q. Did you say, "You may not win, but you will be heard"?

A. I may have said, "You may be heard." I don't recall the other.

Q. You didn't say, "You may not win"?

A. I don't recall,

[fol. 914] Q. Would you say you didn't?

A. I don't recall it.

Q. Did you say something to the effect that they had been sold out by the Kennedys?

A. This is the speech on the monument?

Q. Yes, sir.

A. I don't recall it.

Q. This statement is attributed to you on the monument while you were making your speech. "Protest all you want to. They might run out of gas. Help is on the way. Thousands are coming."

A. No, sir.

Q. You did not make that statement?

A. I don't recall anything like that.

Q. Did you make this statement: "It is wrong for the Marshals to come in and force integration."

A. I don't remember making that statement on the monument.

Q. Did you ever make a statement that it was wrong for integration to be forced?

A. Did I ever?

Q. Yes, sir.

A. That it was wrong for integration to be forced?

Q. Yes, sir.

[fol. 915] A. With reference to Military forces, yes.

Q. I am talking about in the absence of Military forces. Did you ever make the statement it was wrong to have forced integration?

A. Anywhere, on or off the campus? Yes, I have. To force integration.

Q. Regardless of Federal troops or otherwise, is that right?

A. I am talking about Marshals, Federal troops or any way. I have made that general statement. I don't believe it is right.

Q. All right. Did you ever make this statement: "You are fighting a good fight. Keep it up. Help is coming. Don't be discouraged."

A. I recall no such statement.

Q. This statement: "You have every right to protest." Did you make that statement?

A. Yes, sir.

Q. "It is your constitutional right to protest." Did you make that statement?

A. I probably have said, "You have a constitutional right to protest."

Q. And, "I will lead you in your protest." Did you make that statement?

A. I don't recall it.

[fol. 916] Q. Did you make this statement—

A. Are we referring to just on the campus, now, or somewhere else?

Q. Talking about on the campus.

A. I don't recall it.

Q. Did you make—

Mr. Andress: Pardon me, isn't the question "On the monument?" I thought it started out on the monument only.

Mr. Gooch: That is what I am talking about. I am asking him if these statements weren't made on the monument.

The Court: I think he has referred to the word "campus".

Mr. Gooch: Excuse me, I am using campus and monument synonymously, and I apologize for that, but the original question I asked him was what was said on the monument.

The Court: All right.

By Mr. Gooch:

Q. Did you make this statement, "You will be heard all over the world"?

A. I may have made a statement to the effect that, "You will be heard," or something of the sort. Seems to me I remember such a statement, that they would be heard.

Q. General, at the time you made this statement on the [fol. 917] monument you knew there had been casualties?

A. I didn't say I made that statement, Mr. Gooch.

Q. No, at the time you made a statement on the monument?

A. No, sir, I didn't know there had been casualties.

Q. Didn't you testify prior to the time you made the speech a man came up with blood on his stomach, pulled up his shirt or pants leg or something?

A. Oh, casualties, yes, sir, of that type. Yes, sir. My mistake.

Q. That is what I mean.

A. My mistake. I was referring to other type casualties. Yes, sir. I knew there had been some minor injuries, and there had been reports of some major injuries.

Q. You knew that the students were throwing bricks, bottles and missiles at the Marshals prior to the time you made that speech, didn't you?

A. Yes, sir.

Q. Did you ever say on the monument, "All right, I will lead you"?

A. I don't recall any such thing.

Q. Did you ever make the statement, "Stand by your Governor"?

A. No, sir—yes, sir—oh, "Stand by your Governor?"

[fol. 918] Q. Yes, sir.

A. I may have.

Q. I am still talking about the monument now.

A. Yes, sir.

Q. Did you make this statement, "You have a right to protest in any way you see fit, even if it involves violence or bloodshed"?

A. I recall no such statement.

Q. The next one on the monument, the speech on the monument, "I want to congratulate you students on what you are doing here this evening."

A. I recall no such statement. I recall referring to congratulations regarding protest. Not necessarily on the monument though.

Q. You did congratulate them on the protest at some other time?

A. I have mentioned that protests were perfectly all right if they kept it to a protest.

Q. Did you compliment them on the campus that night, on the protest they were making?

A. You are talking about all over the campus?

Q. Yes, sir.

A. Referring to just protest, I had said, "You have a right to protest." And I have used the word "compliment" [fol. 919] on protest, but not anything else; to talking.

Q. Did you make this statement on the monument, "There are thousands who are behind you, or with you, and you will win in the end?"

A. I don't recall it.

Q. Now, deviating a moment from the speech, did you ever—were you ever asked where these tens of thousands were that you had talked about on the news releases?

A. Probably in passing around somebody asked me, "Is anybody coming?" Or, "How many," or what?

Q. Did you make any reply to that?

A. Usually not. I didn't know.

Q. Did you tell them, "They will be here when needed?"

A. No, sir.

Q. Did you give any advice that night, General, on an effective method of putting out or combating tear gas?

A. I remember standing way back during the course of the evening and discussing what was going on with people, and I remember somebody standing by me just quietly, and saying, "What is the Military do to put out tear gas"? And I said, "As far as I can recollect, if water doesn't do it you can use sand."

Q. Anything else said about it?

[fol. 920] A. I believe so. I believe I said something about, "I don't think you have got any sand. No sand is available, or where would you get sand."

Q. What was said then?

A. I guess the student walked on off. I don't know what was said.

I gave no orders or directions to anybody to do anything. He asked me a Military discussion, what usually happened, and how you did it. Well—

Q. General, at any time prior to the time you made the speech on the monument did you see any wheelbarrows or carriers bringing up bricks from the building under construction down on the south side of the campus there, or south side of the Circle?

A. I don't remember seeing them, Mr. Gooch. I know brick were coming up from the thing because the students told me at different times they were getting brick from down there, and I saw the old building. I didn't know whether they were tearing it down or putting it up. Had a lot of weeds and stuff around.

But I don't remember exactly seeing a wheelbarrow, but I know that from time to time I knew there were some bricks coming from down there. I didn't actually see a load of them all night.

Q. You did know they were coming from there?

[fol. 921] A. Yes, sir, the students told me. I asked them and they told me where they were getting them.

Q. And you knew the purpose for which they were being brought up there, didn't you?

A. Well, as I believe the witness said, you can't pull up the pavement, hardly. But it seems to me I saw a fence all torn up, or something, and they were getting pieces of that at one time in the evening. Or they said something about tearing up a fence, or something.

The Court: Let's recess at this point, ladies and gentlemen. We will recess until a quarter until 11:00.

(Short recess was had.)

[fol. 922] Mr. Gooch: General Walker, prior to the time you went to Mississippi on September the 29th, 1962, you

had been told by Mr. Leman that there was an explosive situation on the campus of the University of Mississippi, were you not?

A. He may have used those terms.

By Mr. Gooch:

Q. You also knew at the time you went to Mississippi on the 29th of September that feelings were running high in Mississippi, did you not?

A. Yes, sir.

Q. You also knew that your going to Mississippi would create considerable publicity and create a protest, did you not?

A. I knew it was a protest. I had no idea what publicity it would....

Q. Turn to deposition Page 91. Question on Page 91: "Of course, you knew in September of 1962, that your going to Mississippi would create considerable publicity, did you not?"

A. Considerable publicity, yes. I didn't know how much, sir.

Q. With respect to the Mississippi situation, I believe you stated prior to the time you went to Mississippi the following:

"This is a critical situation. There is nothing lawful [fol. 923] about forced integration. It is not on the book. It would have to be passed by Congress to be lawful."

Did you make that statement, General?

A. At what place and time, sir?

Q. On the 28th, September 28th, 1962.

A. To who?

Q. To a newsman in Dallas?

A. I may have.

Q. Those were your sentiments, were they not?

A. My sentiments were that any—that the over-all integration problem as it's being run today should be legislated by the Congress. Those are my sentiments.

If this is what they intended, it should be legislated by the Congress of the United States, the representatives of the people. That's what I felt at that time and I haven't changed, sir.

Q. You previously testified that after your press releases on the September 26th, 27th, 28th, and 29th, did you not, that you got hundreds of calls from across the country from people who said they were accepting your appeal to come to Mississippi?

A. Yes.

Q. Did you testify in your deposition that when you arrived on the campus there was an explosive condition of excitement, resentment and turmoil?

[fol. 924] A. Yes, I did. I may have said, "explosive," or —did I say, "explosive"? Are you quoting from the deposition?

Q. Yes, sir.

A. Right, sir, I did.

Q. Did you testify in your deposition that you never at any time saw any one throw a brick or other missile towards the Marshals?

A. I believe I did, sir. I didn't see the brick thrown.

I testified in my deposition that I, as I recall the deposition—it's 400 pages long—but as I recall the deposition, and I can restate what I saw on the campus, I never saw anybody throw anything that I could identify.

Now I saw people going through the motions of throwing and I—but I was not close enough to see what they were throwing, except I believe I testified in my deposition I definitely did see a student that could pick up the missiles as they were laying burning on the ground and throw them back—he couldn't throw them back into the Marshals in most cases, I would say never could, because he couldn't get them back that far.

But I saw one student, which was amazing, that had learned how to pick up a burning missile that was spewing tear gas, he would reach in under it someway and throw it back towards the Marshals.

[fol. 925] Q. Did you ever see any Molotov cocktails being made or Coke or soft drink bottles filled with gasoline?

A. No, I never saw any.

Q. Did you determine that they were being made?

A. They told me they were, yes, sir, some students said that they—and I knew that they were.

Q. Did you know how the Marshals were lined up at the Lyceum Building?

A. No, sir, I was never sure. I had been told how they were lined up. One—some said they were in a complete shoulder-to-shoulder of circle and then I heard that one or two, that there were two rows of them, two deep, and I never was sure exactly how they were lined up.

I never could tell exactly or I couldn't get close enough to see or didn't get close enough to see.

One time I was up pretty close to them and that was during the truce and at that time I was mostly interested in the truce and it seemed to me at that time that they weren't too, in any formation, that they were just sort of wondering around in front and sort of spasmodically standing in groups of two's and three's in the front, talking to each other, sort of, and not too well lined up or organized.

Q. Did you ever go west to the flagpole, General?

A. Yes, sir.

[fol. 926] Q. Did you testify that west of the flagpole the tear gas was heavier?

A. Well, it would have to be, Mr. Gooch, because that's where the missiles were landing, up in that area. Unless the Marshals came out, which they did a time—I believe I saw them twice.

Once they came out, I remember, to the flagpole while I was there through a five-hour period and if they fired—when they came out, they could lay down a barrage that would be heavy.

Of course, the gas was heaviest where they were actually landing and the preponderance was being fired from

the Lyceum Building and they were actually landing short of the flagpole, say anywhere from 10 steps to 50 steps short, towards the Lyceum, was where they was landing in general.

So that area was the heaviest concentration. Of course, it was all over by then and it had all—the wind put it down into the dormitory.

Q. General, do you remember a news conference in Dallas about the 27th or 28th of September, of 1962, with a newsman by the name of Murphy Martin?

A. I don't know which one you are referring to but I have knowledge of a news conference in Dallas, which hasn't been referred to here, with the press and some press reports that have been printed that are in the Fort Worth [fol. 927] press that indicated that I said there wasn't—something to the effect, there was no violence.

I think they can find this report. This may be the one you are referring to, Mr. Gooch.

Q. No, I am talking about before you went to Oxford?

A. This was before I went to Oxford? This was a release, I am talking about, on the 28th, and said that I didn't—there was no violence—I hoped there wouldn't be any violence on the campus.

Q. Well, let me see if I can recall to your recollection, and I will ask you if this question was asked you by Mr. Martin:

"If you moved into the State of Mississippi with force, what would you call this movement, General," to which you replied, "This movement is with all patriotic Americans standing up beside Governor Ross Barnett in his cause for freedom."

Do you remember that question being asked you and that answer given?

A. Will you read it again?

Q. "If you moved into the State of Mississippi with force, what would you call this movement, General?"

"This movement is with all patriotic Americans standing beside Governor Ross Barnett in his cause for freedom."

[fol. 928] Do you remember that question and answer?

A. I don't remember it being asked or answered but it sounds like a statement I might have made.

Q. The next question, to the same person, "How would this movement be compared insofar as a name, as to the name, 'Civil War'?"

Do you remember that question being asked you, General?

A. No, sir.

Q. To which you replied, theoretically or according to this reporter, "You are referring quite some time back in history, of course, can repeat itself. The decisions with regard to your question will all have to be made in Washington, D.C., and by the 180 million people of the nation."

Do you recall now that you were asked that question and gave that answer?

A. No, I don't recall it, sir.

Q. Would you say that you didn't make that statement?

A. No, sir, I don't remember this incident or this reporter. He doesn't—I don't recall. Would you mind telling me who he is with?

Q. According to my information, and I think I am right, he is with the Southwest Central New Agency.

A. I have no recollection of it, whether it's telephone or [fol. 929] in the house or outside or what, sir.

Q. All right. Now I believe you stated at the time you left the campus there somewhere between, and I believe you said 1:30 and 2:00 or 1:00 to 1:30, I don't remember now which—

A. Yes, sir.

Q. Do you? Do you remember which it was?

A. No, I don't. I said 1:30 or 2:00 or in the area of 1:30. I don't remember exactly. I just turned and walked off the campus.

Q. That was my recollection. Did you testify that you were followed?

A. I testified that we picked up a car, which I believe they referred to, tailing it, outside of Oxford, after we had made the turn and headed on Highway 6, we were headed towards the Mansell Tourist Court. And we noticed a tail on us.

Q. All right. Then you stopped and talked to the Highway Patrol and some students, I believe you said?

A. Right, sir.

Q. And then I believe you said that you left Leman's car, the one you were riding in there, at that place, and went on in another car, is that correct?

A. Yes, sir.

Q. Was that to try to shake the tail, as you called it?

[fol. 930] A. You might say. It wasn't a question of shaking them. I was going to go back to the Mansell after I got through where I was and the idea was that if they wanted anything, I wanted witnesses with me, Mr. Gooch.

Q. All right.

A. So I called and asked some friends to come down and meet me so if they wanted to stop me and talk to me, I would have a witness.

Q. It wasn't a question of fear on your part, was it?

A. I am not scared of anybody, Mr. Gooch.

Q. That's what I thought. And also in this Leman car was a weapon, was there not?

A. Sir?

Q. In the Leman car in which you were riding there was a weapon?

A. I don't know whether there was or not.

Q. I believe you testified in your deposition that there was a weapon's case in the Leman car?

A. I don't recall that. I remember I testified in the deposition that I saw a weapon's case in the tourist court at the Mansell.

Q. Well, you testified it was in the car. Now I don't want to quibble over it. I just wanted to ask you—

A. I don't remember what time in the car. If you want to read it out of the deposition, it suits me fine.

[fol. 931] Q. All right.

A. I think we can shorten this, because I'm going to say if the weapon was in the car, I didn't know it and I can also say the weapon never went out of the automobile that evening except if it went back in the Mansell apartment, which I don't know.

Q. I didn't say it did, General.

A. Never went on the campus.

Q. I just asked you if there wasn't a weapon in the Leman car?

A. Well, this may clarify the whole thing.

Q. Well, was there?

A. I don't know.

Q. Was there a weapon's case in that car?

A. I think the weapon's case you are referring to in the deposition, Mr. Gooch, is with regard to a weapon's case I saw some time, maybe the next day, I'm not sure how it reads, but that somebody brought into the court, the tourist court where we were staying, two miles out of Oxford, I remember in the deposition I testified that I didn't know what was in the weapon's case. I didn't know what sort of gun it is, if you will recall.

It's there in the deposition.

Q. That's right. I'm just trying to see if it was in the car or not.

[fol. 932] A. I couldn't even guarantee there was a gun in it. It was one of these break-down cases that held, I remember that much in the deposition, held a weapon. It was a weapon's case.

And I never saw the weapon that was in that case. And it was one of the break-down kinds that you have to take the gun in half, if it's in there.

Q. All right. Now, General, in your pleading—I assume you have read your pleading in this case?

A. You don't want to read the deposition, sir?

Q. Yes, I do.

A. Well, let's go ahead. I don't see any point in it.

Q. Well, I don't either but we will find it now since you have asked me. I'll find it in just a minute.

The Witness: May I speak to my counsel, sir?

Mr. Gooch: Yes, sir.

The Witness: Why don't you help him, Clyde, find it?

Mr. Watts: I don't know where it is myself.

The Witness: There are 400 pages. It will help for two to look.

Mr. Watts: I will start from the back if he starts from the front.

Mr. Gooch: Page 292, sir.

By Mr. Gooch:

Q. Page 291 (reading). Did you see anything in the automobile that looked like weapons?—

[fol. 933] Mr. Watts: Might I request that you go back to Page 290, where it starts, when you asked him, did he bring any weapons to Oxford, right on the bottom of Page 290.

By Mr. Gooch:

Q. Well, I will ask you, did you take any weapons to Oxford, General?

A. No, I didn't.

Mr. Gooch: All right, does that clear that up, Clyde?

Mr. Watts: Well, that brings it all in context, Tiny, if you just start on Line 19, Page 290. That's where you started asking him about Leman bringing a weapon.

By Mr. Gooch:

Q. (Reading) Did Leman have any weapons in his automobile? And you answered, "I don't know."

Then we go on over to Page 291, "Did you inquire whether he had or not?"

And you answered, "I don't recall requiring, inquiring.

"Did you see anything that looked like weapons?"

You said, "What is your question?"

Then, "Did you see anything in the automobile that looked like weapons?"

Answer, "I recall a weapon's case which I saw coming out of one of the cars, and I don't know which one it was, which one of which cars.

[fol. 934] "Your automobile, or the one Leman was driving?"

Your answer, "Either mine or Leman's."

Is that question correct?

A. That's correct. I believe you will find in there that my car didn't come until the next—or I didn't see it until—

The Court: Just a minute, please, General. Don't volunteer anything until he asks a question.

You see, your counsel on redirect may bring out other things which he thinks are important. So we can move along a lot faster if you will just answer the question, please.

The Witness: Yes, Your Honor.

By Mr. Gooch:

Q. General, did you testify in your deposition that you never saw any rioting?

Mr. Watts: Page?

Mr. Gooch: 383.

A. I may have, Mr. Gooch, to the extent that at that time, and it always has been, everybody's trying to build this thing up and I say during the period I was there and what I saw wasn't everything that was went on, on the campus, and I didn't get on the campus until about a quarter to 9:00 or 9:00 o'clock, and what I saw, if just what I saw had been seen by the press, I don't believe they could have said that, they could build it up the way they did.

[fol. 935] And I don't—I believe they overplayed it and over-built it, even what they did see—or with reference to your statement, I probably stated I didn't see any overall rioting on the campus.

Q. I will refer you to Page 389, the question in Line 12:

"Let me ask you this further question: Since your trip to Mississippi, has there been any increased demand on your time for speeches and public appearances before organizations over the South or anywhere in Texas?"

Answer, "The demand is continuous. I keep no records on that."

A. Yes, sir.

Q. Did you make that statement?

A. Yes, sir.

Q. Is it true?

A. It's—there is always a demand for speeches. There is always a request, in the house, for a speech somewhere, maybe three, five, ten.

[fol. 936] Q. General, have you ever made a statement to a representative of the UPI, United Press, as follows:

"Former Major General Edwin A. Walker said today the integration riot at the University of Mississippi last year in which two persons were killed were 'like a comedy, most amusing'."

A. No, sir, that is the most false report I have ever heard, and that report was made when I was on a speaking engagement. That report stems from Jackson, (sic) Florida, and it was a press conference and the intent of it was to spread it across the country so it would ruin our crowds as we were speaking. We had set up speeches from Florida to California, hitting a speech every night, clear across the nation, and we have a copy in our file, I believe—I am glad you identified it because I have the press release from Jackson that made that statement and if you will look at it it has got dits and dots and quotation marks and if you

will look it is the most distorted, lying statement I have ever read.

I made so—no such inference. I had talked to the press for fifteen or twenty minutes, questioning me about Mississippi, and I made a statement during a conversation that went on for some time.

This is typical of the press, and I am so glad you brought it out, Mr. Gooch, because I think it is very, very interest- [fol. 937] ing. And went clear across the country as far as they could spread it, that I laughed at the comedy of the Mississippi situation.

The Mississippi situation was an out and out tragedy, stemming right out of Washington, D. C.

And during that conversation, to answer your question further, during that press conference in which there were about fifteen people present in one of the hotels in Jackson, Florida, (sic) the UP and the AP man was sitting side by side. One of their tricks. We noted it, and we knew it before they left the conference, and they wanted to question me on Mississippi, which I was perfectly willing to tell them, as I have said all over the country, continuously, I led no charges, I never got involved in any charges in Mississippi.

And, of course, I told them that that night, that I didn't lead any charges, and they wanted to know about Mississippi, like thousands of people are dying to know what happened on Oxford that night, or on the campus that night and in Mississippi and in Oxford and the surrounding area.

And I told them that once during a five hour period, or twice, or maybe three times I had to laugh at something the students originated, or something they did.

You have got your own press releases that say this thing [fol. 938] started in zest, with these students, and that they were laughing, and certainly they were using their songs and there were things that they did that were—even one of them that had the wound, he was laughing himself. He was laughing at what was going on.

Overall, the thing was a tragedy. Of course it was.

And then they distorted, and you read this to the Jury, sir, you read what happened, the dots, dashes, quotation marks, and there is a copy in my briefcase.

And that is where that story originated, and the intent of that story and of the press was to destroy the audiences which was set up, and they knew the schedule.

That I was laughing at the tragedy in Mississippi, it is the foulest reporting that I can ever think of. I am not mad at anybody, but it is just foul reporting. It is false, it is untruthful, it is deceitful, and it's destructive.

Q. General Walker, this is not the AP, this is the United Press.

A. The two sat side by side at that press conference and when they could get a little comedy, or reference to comedy, about something the students did, they both jumped up and quit the meeting. Just like that. We saw them go out.

[fol. 939] Q. I don't believe the AP carried anything like this at all.

A. It is typical reporting. It doesn't make any difference, sir.

Q. The next one attributed to you, "I wouldn't call it a riot, just student hijinks."

Did you make that statement?

A. To who and where?

Q. The UPI at Savannah, Georgia.

A. Probably with plenty of other statements. That is out of context and out of concept.

Q. I will ask you if you made this speech in—this statement in Savannah, Georgia: "Asked if he found the two deaths at Ole Miss a comedy, Walker snapped 'one of them was a foreign newsman. What was he doing there?'"

Did you make that statement?

A. Yes, sir, and I went further, Mr. Gooch, and made the statement, "This is a foreigner that should be protected, that the administration has all of the responsibility, within the hands of the judiciary, to find out why they haven't found out anybody that—and they should. This is a key

responsibility, and I am convinced that it is very important, that the true story of Mississippi, which he had on tape and had just come from Auburn, Georgia, with in his [fol. 940] possession, why didn't somebody— why—do they want him to go back to Europe with the true story of Mississippi? I can assure you there is much objection to getting the true story of Mississippi in Europe, of what happened on the Oxford campus.

Why doesn't somebody find out that whole statement you read is out of context because I explained that the whole judiciary has the capability to—it is their responsibility to find out. Now, I can't say that they can.

But this is a reporter—a reporter killed.

Q. Do you know Mr. Kuettner of the UPI?

A. Do I know him?

Q. Yes, sir.

A. Where from?

Q. Atlanta.

A. Kuettner?

Q. Kuettner.

A. Kuettner, yes, we have Alfred Kuettner, K-u-e-t-t-n-e-r (spelling).

Q. Yes, sir.

A. Yes, sir, we met him over there and we took the—there has been a deposition taken over there in that office, of several people.

Q. I quote from a report of his, this is March 8, 1963, "Former Major General Edwin A. Walker yesterday [fol. 941] charged that newsmen helped engineer the violence which erupted at the University of Mississippi the night Negro James Meredith entered the school."

Did you make that charge to Mr. Kuettner?

A. As far as stories are concerned? You mean during this deposition?

Q. Yes, sir.

A. Is this in the deposition?

Q. No, no, it is not in the deposition.

A. Is this a news release?

Q. Yes, sir, UPI news release by Mr. Kuettner.

A. What date?

Q. March 8th, 1963.

A. May I ask my counsel if that date corresponds with anytime I—

Mr. Watts: I don't think he understands the question. Tell him when and where.

Mr. Andress: Re-read the question, Mr. Gooch.

By Mr. Gooch:

Q. According to my information, you made this in a form of a news release in Atlanta on March 8, 1963. I don't know whether you were there or not. I am asking you.

A. March 8, 1963, in Atlanta? March 8th? February 27th, '63?

We left Miami February 27th, Jackson about that thing [fol. 942] we have been referring to, and, right, we were in Atlanta. It would have been about March 8th, because we landed in California. That is the trip. It is already identified, I guess. I was in Atlanta on or about that time.

Q. Further, "But the Army veteran who commanded Federal troops during the Little Rock integration crisis in 1957 denied students were guilty of rioting."

Did you make that statement to Mr. Kuettner?

A. I may have, from what I saw, but that is not necessarily in context, because I made many other statements, and I would like to mention that that statement previously you asked me if I made, doesn't include everything I said.

Will you read the previous one?

Q. That is all there is to this one.

A. No, the one you read just before the last one.

Q. "Asked if he found the two deaths at Ole Miss a comedy, Walker snapped 'one of them was a foreign newsman. What was he doing there?'"

A. I believe we discussed that one. The next one?

It is out of context, the one you just read.

Q. "The students had a lot of laughs, plenty of fun on the campus, Walker told the news conference. I wouldn't [fol. 943] call it a riot, just student high spirits."

A. I said that, and that is out of context. That doesn't include the whole statement.

Q. Back to the Kuettner one on March 8, 1964, in Atlanta.

Mr. Andress: '63.

By Mr. Gooch:

Q. '63, excuse me. "Walker said they were just playful," talking about the students on the campus.

A. I said that. That is out of context. It is referring to certain specific incidents, like this other thing where they—where I laughed at something. It was referring to a particular incident on the campus.

Q. All right. Now, General, I don't know whether you have had a chance to read the pleadings that your counsel has filed in this case, or have you?

A. Yes, I have.

Q. Referring to page 8, you stated that the Associated Press showed malice in failing to report that on November 21st, 1962, that the AP placed emphasis on a Government witness who testified, and failed to report that the Court-appointed psychiatrist, Dr. Robert L. Stubblefield, had reported that Plaintiff was currently functioning under a superior level of intelligence.

Now, have you since determined that the Associated [fol. 944] Press did carry that story and made a report as to what Dr. Stubblefield said about you?

A. I haven't determined there was a wide national coverage of that statement like there was that put me in Springfield, on the front pages of all the papers in the country.

Q. Have you determined that the AP story wherein you, in Dr. Stubblefield's report, was given—was carried in the Fort Worth Star Telegram in Fort Worth, Texas?

A. I would have to refresh my memory, whether I am or am not. I believe it can be done.

Q. Sure can. You are alleging here that they didn't put out the report, and I am saying to you that the very thing you complain of was published in a news release that was carried in the Fort Worth Star Telegram on the evening of November 22, 1962.

And I hand you the reports from the files of the Star Telegram. I believe you have a copy of this, Mr. Watts, if I am not mistaken.

Mr. Watts: Let's see it. I don't have it with me.

Mr. Gooch: This is the one you saw down there.

Mr. Watts: The article I saw on the 22nd?

Mr. Gooch: Right.

Mr. Watts: No, you said the 21st.

[fol. 945] Mr. Gooch: No, I said the 22nd. I read it right off of it. If I said the 21st, I meant the 22nd.

Mr. Watts: The 22nd; the following day.

By Mr. Gooch:

Q. I refer you to the report that's from the Associated Press that was carried in the Star Telegram under date, evening, November 22, 1962. Will you read with me, "Stubblefield's report said Walker is 'functioning currently at a superior level of intelligence.'"

A. This is at Oxford, Mississippi. It's an Oxford, Mississippi, release as of November 22nd by AP; is that correct?

Q. Yes, sir, and published in the Star Telegram.

Mr. Watts: If Your Honor please, for the sake of the record, I would like to inquire which wire that came on, whether it came on the A or B wire, or the local wire?

Mr. Gooch: I don't know. It just says AP and we had a stipulation.

Mr. Watts: I would object to this, then, as hearsay. Because this is the repetition of what was in the Fort Worth press.

Mr. Gooch: It is not the Fort Worth Press.

Mr. Watts: Fort Worth Star Telegram.

The Court: Overruled.

[fol. 946] Mr. Watts: I see.

Mr. Andress: I would like to make a further objection there. This is a story that came out in the evening paper and unless it is shown that the original story omitting the pictures was in the evening paper, the morning paper, that would make a lot of difference, because, as I understand, the circulation of the evening paper is considerably less than the morning paper and don't go out as far, unless it is corrected it wouldn't catch up. We think it ought to be shown, the identity of this story and the edition it appeared in, that it is the same as the original story.

The Court: That objection is overruled.

Mr. Watts: Might I approach the Bench?

The Court: Yes, sir.

(Conference at the Bench.)

By Mr. Gooch:

Q. In connection with the pleadings, if the Court please, when the objection was made, the pleadings state we were guilty of malice because we didn't report it. This is the paper that published the other report, and it is the same paper.

Mr. Watts: I don't believe I heard that?

Mr. Gooch: Yes, you did. We offer in evidence as Defendant's exhibit 17 the clipping from the Fort Worth [fol. 947] Press—

The Court: Star Telegram.

Mr. Gooch: Fort Worth Star Telegram of November 22, 1962, showing the—among other things, the quoted portion of the substance of the question.

These are the original records of the Star Telegram, and I would like to substitute a photostatic copy, if I may.

The Court: Yes, sir, you may.

Mr. Gooch, the witness has finished reading the article.

Mr. Gooch: I beg your pardon?

The Court: I say the witness has finished with the article.

Mr. Gooch: Oh, excuse me just one second. Another one here I wanted to find.

General Walker, you have alleged on page 8 of your petition, on the ground—on evidence showing malice, "In reporting the incident involved in Plaintiff's arrest and commitment the Defendant deliberately refrained from fairly and impartially reporting the true facts that he had been transferred from the State of Mississippi where he had been committed by a judicial order, and in the State of Mississippi without a Court order."

[fol. 948] This will be Defendant's Exhibit 18.

(Defendant's Exhibits 17 and 18 marked by the Court Reporter.)

By Mr. Gooch:

Q. I hand you what has been marked as Defendant's Exhibit 18, which is an Associated Press story out of Springfield, Missouri, dated October 2, 1962, Associated Press, and published in the Star Telegram on October 3, 1962, in the morning edition, relative to the portion read from your pleadings.

I believe you will find this statement here.

A. It may take a long time, sir.

Mr. Gooch: Well, we can find it. Down on the second portion of it, "Watts—" this is Clyde Watts. Is that your lawyer, Clyde Watts?

The Witness: Yes, sir.

By Mr. Gooch:

Q. "Watts said he learned that Walker was transferred from Oxford to the Springfield Medical Center on tele-

graphed orders from James V. Bennett, director of Bureau of Prisons."

Did you see that?

A. Right, sir. The date of this is October 3rd, and it is a Springfield, Missouri release, right?

Q. By the Associated Press.

A. AP, right.

Q. All right.

[fol. 949] Mr. Gooch: We offer that in evidence as having been published by—

The Witness: Can we identify whether it was the evening or morning edition, and whether—

The Court: He already has.

The Witness: That is morning. And what page this is on?

Mr. Gooch: I don't know what page it is on.

The Witness: I think that is very important.

The Court: Pardon me just a minute, General. Orderly procedure requires that Mr. Gooch ask you questions and you answer them. Then if your counsel wants to bring out something else on redirect, then he will ask it.

The Witness: Yes, sir.

By Mr. Gooch:

Q. Further up in this same article, read along with me, General. This is on Defendant's Exhibit 18.

EXCERPT FROM DEFENDANT'S EXHIBIT 18

"Watts, reading from a full page statement, told reporters he had talked to Judge Clayton at Oxford by telephone and was informed the order committing Walker for psychiatric examination was issued on the basis of testimony by Dr. Charles E. Smith, a Bureau of Prisons psychiatrist. Watts quoted Judge Clayton as saying Dr. Smith had not seen Walker."

[fol. 950] Did I read that correctly?

A. Yes, sir.

Mr. Gooch: We offer Exhibit 18 in evidence, if the Court please.

The Court: It is admitted.

A. That is a continuation from page 1?

By Mr. Gooch:

Q. Yes, sir. I believe that does establish that that was on page 1.

A. Not the portion you were reading, sir.

Q. I said it was a continuation from page 1.

A. The portion you were reading was not on page 1?

Q. No, it was a continuation.

The Court: Let's don't get into an argument.

[fol. 951] Q. You also complain that the Associated Press failed to report a motion—it's in Paragraph III of your—on Page 8 of your Petition, that Defendant failed to further report the true facts, that on October 16, 1962, Plaintiff filed in the United States District Court at Oxford, Mississippi, a motion to strike the entire proceedings by which Plaintiff was committed to the Federal Mental Hospital, upon the ground that such commitment, in violation of the right to make bail and without counsel, notice of hearing, violated the constitutional rights of Plaintiff.

That is correct from the Pleading, is it not, General Walker?

A. Is that what you are reading from, sir?

Q. Yes, sir.

Mr. Watts: Yes, it is.

A. Yes, sir, that's correct.

Mr. Gooch: I will ask the court reporter to mark this as Exhibit 19.

(Defendant's Exhibit 19, was marked for identification.)

Mr. Gooch: And I hand you Defendant's Exhibit 19. I believe you have a copy of that, don't you, Clyde?

Mr. Watts: I know what it is. Yes, and may I have one?

Mr. Gooch: No, that's mine but—

[fol. 952] Mr. Watts: Well, I know what it is.

By Mr. Gooch:

Q. Exhibit 19 was a news release from Oxford, Mississippi, dated October 16, 1962, and published in the morning edition of the Fort Worth Star Telegram, reading as follows, and read with me, General.

DEFENDANT'S EXHIBIT 19

"Attorneys for Former Maj. Gen. Edwin A. Walker asked a federal court Tuesday to reverse its order that he undergo a psychiatric examination.

"U. S. District Judge Claude Clayton had directed that Walker, facing four federal charges including insurrection for his role in desegregation riots here September 30, be examined to see if he is mentally competent to stand trial.

"In a motion filed here Tuesday, Walker's attorneys charged that the court's order 'violates the constitution rights' of Walker in four ways.

"1. 'The right to make bail and be released thereon.

"2. 'The right to be represented by counsel at every stage of the proceedings against him.

"3. 'The right to notice of proceedings against him, which is a necessary element of due process of law.

"4. 'The right to be present in person at the hearing wherein defendant's mental sanity and mental competency is questioned.'"

A. Yes, sir.

Mr. Gooch: We offer in evidence Exhibit 19, and ask [fol. 953] permission to substitute a photostatic copy.

The Court: Defendant's 19 is admitted and you are granted leave to substitute a photostat for the original.

Mr. Gooch: Will you give us just about five minutes? That's all at this time, Your Honor.

Redirect examination.

By Mr. Watts:

Q. General Walker, there have been read to you a large number of court orders, proclamations, injunctions and things of that kind.

Did those legal instruments come to your attention at the time they were issued by the respective courts?

A. No, they didn't.

Q. Mr. Gooch asked you, as I remember the question, as to whether you did not stand beside Governor Barnett in defying court orders.

And I will ask you to tell the jury if you at any time made any defiance of court orders or advocating any defiance of orders of the court, of courts of the United States, and to whom you looked for handling of the legal problem?

A. I did not. I looked to the Governor and the State of Mississippi, which he is and represents, and his Attorney [fol. 954] General and surrounded by the best lawyers in the country, to include the President of the Bar Association, ex-president of the National Bar Association, Satterfield.

I was, depended on their carrying the procedure, legally, and constitutionally, under the requirements of Mississippi.

Q. Now, Mr. Gooch also asked you about your motivation and determination to speak out in protest against certain things at the time you resigned your commission as a Major General in the United States Army.

Would you tell the Court and jury, please, sir, at that time what was the exact condition that you were objecting to.

Mr. Gooch: If the Court please, I object to that as irrelevant and immaterial to any issue in this case until it has something to do with this case.

Mr. Watts: Mr. Gooch went into it. I hadn't intended to go into it.

The Court: I overrule him.

Mr. Gooch: Note our exception.

By Mr. Watts:

Q. Go ahead, General, do you understand the question now?

A. Yes, sir.

Q. Well, tell the jury now very briefly—don't—try not to go afield, and stay right on target here, of what Mr. [fol. 955] Gooch asked you.

A. I was, had to do in Little Rock what I felt was entirely wrong, under the military requirements, in following the directives and orders from the Administration. My orders came through military channels.

I thought it was wrong at the time. I even called home to Center Point and had my mother on the line and asked her if—

Mr. Watts: Don't—

Mr. Gooch: We object to that as hearsay.

Mr. Watts: Don't go into conversations with your mother. Go ahead.

By Mr. Watts:

Q. Did you then try to resign at Little Rock?

A. I definitely turned in my resignation before, resignation from the military service, which I have never seen in print, incidentally—

Q. Well, now don't get into the print. You did turn it in?

A. I turned in my resignation before I left Little Rock, Arkansas.

Q. All right, sir. Now in Germany, you were asked about your Pro-Blue Program—

Mr. Gooch: No, I didn't—

Mr. Watts: He testified from the witness stand that was [fol. 956] his—

Mr. Gooch: No, that was your question.

Mr. Watts: Oh, all right, sir. Perhaps I asked you.

By Mr. Watts:

Q. Anyhow, I remember the Pro-Blue Program coming up. Did the Army, did the Department of Army's reaction to your Pro-Blue Program have anything to do with your final resignation of your commission as a United States—

A. Yes, it did. The Army position, it itself, the military side, in my opinion, was terrifically, and still is, handicapped in accepting a Pro-Blue Program.

My program was accepted by the higher commander, one star more than I was, within two or three weeks after it was written, completely and—

Q. With whom then in the Department of Army did you have your conflict, with the soldiers or civilians?

A. My conflict was not with the military, basically. It was not that I saw these other people but I knew where the problem was and who was giving all the instructions with regard to me in the military service.

Q. Were they soldiers or civilians?

A. Civilians in the Defense Department.

Mr. Gooch: If the Court please, we say that's hearsay. [fol. 957] The Court: It would be. That would be a conclusion, I think, unless he knows.

Mr. Watts: He talked to the one—let me ask this:

By Mr. Watts:

Q. Did you receive a call from one Arthur Sylvester?

A. Yes, I did, in Augsburg, Germany.

Q. Well, what was Arthur Sylvester's position in the Department of Defense?

A. He was head of public—

Mr. Gooch: If the Court please—
The Court: Just a minute.
Mr. Watts: Hold it.
Mr. Gooch: Suppose he was. Anything that Mr. Sylvester might say would be hearsay, so far as we are concerned.
Mr. Watts: I'm not asking him what Sylvester said.
The Court: All right. Overruled.
Mr. Gooch: Note our exception.

By Mr. Watts:

Q. Now then in simple language, what was your disagreement with the civilians in the Pentagon that caused you to go to the extent of resigning your commission as a Major General of the United States Army, very simply, tell the Court and jury what it was.

A. I instituted a Pro-Blue Program which taught the [fol. 958] soldiers and the officers patriotism and their knowledge about citizenship and their responsibilities to citizenship, their understanding of discipline and their understanding of morality and morale and their relationship with church and their necessity to accept the Lord and the necessity to know their enemies, which they have to understand his psychology, to know this sort of situation when you are facing an enemy only about 150 miles, with 13—eleven thousand troops, and about ten thousand people in their families sitting around Augsburg and Munich where the Division, U S Division was that I commanded, was stationed.

And my program was to keep and to extend the knowledge of the enemy, which was definitely what we referred to as the Communist enemy, from the East Zone, and my program was to give them a complete understanding so at any time war should break out, what we are there for, either there or anywhere else they might be sent, under those conditions we had plans in our Headquarters to leave

immediately for 17 different countries through Central and the Middle East and Africa, in that general area, and the soldiers had to be prepared, knowledgeable about what sort of an enemy that we have got and what they would be confronting—the Division was alerted even at one time for a portion of the Division had to stand on the airplane to go to Katanga.

Q. Now did these civilian personnel restrict your pro-
[fol. 959] gram to so train your troops?

Mr. Gooch: Object to that as being a conclusion.
The Witness: They restricted this program—
Mr. Watts: Just one moment for an objection.
The Court: Overruled.
Mr. Gooch: Exception.

By Mr. Watts:

Q. Go ahead and tell the jury what happened.

A. They restricted this program continuously. They restricted us when I was District, head of Arkansas at Little Rock, they have—they continuously restricted it.

Now I am not in their position. If they want this sort of program, that's the program they can have.

But I don't intend to command American troops, and this is why I resigned, I don't intend to command American troops without the proper instruction when they go to Vietnam or anywhere else, that they are not knowledgeable about the Communists and the way they operate under cover and cold war and prisoner of war cages in Korea, and the soldiers, this is not fair to the soldiers, in my mind, across this nation.

And if they want this sort of program, they can have it. And I made up my mind I was—I got orders from the Military Service in October, I have written orders in my file that directed me to a higher training job in the Pacific.
[fol. 960] The military has—basically out of this, they recognized my training ability and capability, you might say, and the Division's capability and they gave me orders

to go to the top training operations and supervision job of the entire Army in the Pacific. That was in October.

Q. Would that have trained the personnel that ultimately ended up in Vietnam and Southeast Asia?

A. That, it exactly did. It supervises, it runs the plans and programs, it operates and supervises what's going on in Laos and at that time—

Q. Now General—

A. —Vietnam and the entire South Pacific.

Q. Did you make a comment about the so-called, and to shorten this, "No-win policy"?

A. Yes, I have continuously made such a comment.

Q. And were you apprehensive about the future of your country under that policy as it existed?

A. I certainly am, with soldiers—I have been on three continents, looking back at the United States and then to look back and see soldiers would mention to me, "I'm from Florida," and those people are just 90 miles from Florida.

Q. I noticed a comment in the morning press that you had testified that you had approved people going armed to Mississippi. Did you hear any such question?

[fol. 961] A. I should never have made that answer. I didn't hear the question properly. I recommended that nobody, or didn't make any—told nobody to go armed to Mississippi.

I made no order to tell anybody or told nobody to go armed to Mississippi.

Q. Now then when you mounted that Confederate statue to make your talk to these students, what was your estimate and evaluation of the existent situation?

A. The existent situation was very, very tragic. It was serious. It was a critical situation.

I didn't know definitely, as has been referred to, whether anybody was killed or not.

When I got on the campus, the reports that the girl was hit by a tear gas and she was dead, a tear gas missile, that would have been around 8:00 o'clock or half hour or hour, half hour or so, before I got there.

That highway patrolmen had been killed, and these were the two that were being referred to at the time.

The tragedy was very obvious about the situation.

Q. That's enough of that. When you got to the point and saw the highway patrolmen leaving and saw the reaction of the crowd, what was your procedure then in speaking to the crowd in view of what came up following the highway patrolmen's leaving and why?

A. Since the highway patrol were leaving and they were [fol. 962] very upset and getting more excited over the Barnett's departure, as I have explained, the newspapers around, it became obvious, I decided to talk to them and my idea was just to make myself enough acceptable, which you have to do in mob activities—I have had continuous training in the method, you might say, off and on through the services, of how to quell mobs and how to quell riots and you have got to know exactly what position they are in and what their state of excitement, what degree they are in, what sort of things they are doing.

Of course, it was a most unusual situation to find, and difficult one, very difficult because we are taught never to use—not only don't do it but you do not use tear gas, you never fire a salvo of tear gas—this is in mob operations—you never fire a salvo of tear gas at, a flat projectory at people. It's not to be used this way at all.

You are told not to do it. And if they were going to use tear gas, if they had decided they had come to the necessity of using tear gas here, they are only antagonizing the students and hitting people with tear gas fired directly.

If they were going to use tear gas, you want to get a tear gas into a crowd, you would rather if you could just get it there without a missile. That's your objective of tear gas. You drop it over on a downwind side and let them smell it first.

[fol. 963] You certainly would have set off, before you even started, you would have set off just a sample round off near somebody. It is not a missile.

It is antagonistic and to continuously fire it is very antagonistic.

Q. From your training and experience, what is the reasonably expected result of firing a massive volume, salvo of tear gas with a flat projectory at point-blank range?

A. Just as what happened here, it made a fantastically tragic situation, it was brought out.

Now there is another angle of that that becomes perfectly obvious, which I can understand very clearly, all law is gone in the area. I thought, of course, the Sheriffs would do what they could, and I feel that they did, to stop violence where they could stop it, but the law is all behind a range of—a ring of Marshals that nobody can get to—as you evaluate the situation and what I was told. And you found that it's all in the Lyceum Building. If a student wants to discuss what's going on with somebody or get some advice or nobody comes out to talk to him—

Now in Little Rock I just appeared out in the crowd. Whenever I went to the high school, two or three times in the morning, say, or two or three times in the afternoon, why, I got stopped in the jeep or sedan and appeared in the crowd and talked to some of the people in the streets [fol. 964] and talked around. You couldn't find here—I couldn't find—saw nobody.

And the students seemed to indicate there was nobody they could talk to.

Q. Now then the question has been asked you on cross examination if you didn't make statements that that whole riot was just a joke?

I direct your attention to the Plaintiff's Exhibit 7.

Mr. Watts: Give this one the last number, 7-B, which I think we are in agreement is an Associated Press release.

(Plaintiff's Exhibit No. 7-B, was marked for identification.)

Mr. Cravens: Let's see what it is.

Mr. Watts: And direct your attention to this language in Exhibit 7: "The rioting started shortly after sundown—

The Court: Pardon me just a minute, Mr. Watts. Now you have never actually offered that.

Mr. Watts: Yes, sir, I at this time offer in evidence the Plaintiff's Exhibit 7-B.

The Court: It's admitted.

Mr. Watts: And I would like to, and I hope I don't forget it, offer in evidence chronologically all of these news [fol. 965] releases which I'll—

The Court: Let's wait until we reach each one.

Mr. Watts: Yes, sir.

PLAINTIFF'S EXHIBIT 7-B

Reading to the jury, this AP news release, Exhibit 7-B:

"The rioting started shortly after sundown when about 2,500—jeering and joking—gathered at the Administration Building where the Marshals held their tight guard.

"In the early stages, much of the shouting at the Marshals sounded more like just than maliciousness.

"From time to time, even the grim-faced Marshals would break into a slight grin.

"But as the evening wore on the talk got rougher and the students started rampaging. They tore away a photographer's camera and smashed it. They smashed the windows in a car, sending a man and woman fleeing.

"Then they moved against one of the army trucks standing by with the Marshals. They got the cap off the auxiliary gasoline tank and threw a flaming piece of newspaper at the fumes, trying to set fire to the truck."

By Mr. Watts:

Q. Now then did your understanding coincide with that AP news release as to the joking attitude of the students at the start of the riot?

[fol. 966] A. That was my understanding, yes, sir.

Q. Now what was the full comment you gave to this news reporter in Savannah, I believe, perhaps Jacksonville, Florida, that was reported, as Mr. Gooch read to you?

Give the jury the benefit of the full statement you made to the news, to the press.

A. We were discussing the situation on the campus, sort of as in answer to their questions and I was giving them an idea of what was happening there for news and I referred to, during the conversation, I said something about zest and that something, that some student did something that was funny and I laughed at a remark, or something he said, referring to the stories I had heard about the campus, and the zest with which this thing started and their funny remarks back and forth to the Marshals and then their school song and their cheers, and so forth, and the excited manner which one student would come out and tell about what he saw and—

Q. And was that the full text—

A. And from time to time there was joking about what they were doing.

Q. And was that the full text of the statement that caused the news release that you were shown by Mr. Gooch that said, "Walker considered the riot a joke," was that the full text of the statement you told?

[fol. 967] A. This certainly is not the full text of the statement. This is out of context.

[fol. 968] Q. Did you ever at any time tell anyone that you considered that Mississippi riot a joke?

A. No, sir, I said many times I considered it very serious and tragic.

Q. Was it your understanding that the riot did start off in a joking manner?

A. It certainly did.

Q. Except for that massive delivery of tear gas, how do you think it would have ended up?

A. Well—

Mr. Gooch: I object to that.

Mr. Watts: Yes, sir. Yes, sir. I think that is probably—

Mr. Gooch: I object.

The Court: All right.

By Mr. Watts:

Q. Now, it was pointed out to you yesterday that proclamation for the use of Military forces was entered by the President on September 30, 1962. From your subsequent knowledge are you familiar with the type of units and the nature and extent of the Military forces that was committed in Mississippi?

A. Yes, sir, I am, with regard to terms and units to a certain extent, and also that this is an order for a Military operation.

Q. To shorten this, did you understand there were ap- [fol. 969] proximately 26,000 troops committed to Mississippi?

A. Between twenty-three and twenty-six thousand troops, correct.

Q. And were you in on the timing and the logistical preparation necessary for the commitment of 1,000 troops to Little Rock?

A. Yes, I was.

Q. How long did that take?

A. Well, I did some planning on my own in the Little Rock headquarters because I expected that something might happen, and I was hoping continuously they would use Marshals. And certainly it was three or four days before the Central High School incident occurred that I was in where planning was going on, in the Chief of Staff of the Army's office in Washington, D. C.

Q. How long would it be, in your opinion, the required time to make the necessary logistical planning for the staging areas, the transportation, the alerting of troops, to move that 23,000 troops from their respective bases into the area of Oxford, Mississippi?

A. From the time they got there, going backward, those troops would have had to have been alerted and logistic preparations, staging areas, and so forth, at least a week to two weeks before, somewhere in that area. Somebody was planning on this operation, in the Military, to have

[fol. 970] been accomplished, when the troops went into Oxford.

Q. You have stated that you oppose the use of the Military in Mississippi.

A. I certainly do.

Q. Why, then, would you then have told the students to avoid violence in your speech from the monument?

A. Because any violence at that time would have played right into the hands of the Military and such orders coming from the Defense Department to use masses of troops, which were never called for in Mississippi for what was happening. This was a great show of force, intended to be. It was intended—

Mr. Gooch: We object to that.

By Mr. Watts:

Q. Just a minute, you can't testify what it was intended to be.

Mr. Gooch: Move the answer be stricken.

The Court: Sustained.

Mr. Watts: Yes, sir, that's right.

A. Any violence—

By Mr. Watts:

Q. Just a minute now.

A. Any violence—

Q. Just a minute. Did you have any other motive behind that, aside from that, in telling these people at the monument to avoid violence, and violence was not the answer? Yes or no?

[fol. 971] A. Yes, I did.

Q. All right. Tell us about it.

A. If there was no violence there, or nothing that was worse than this fantastic force which was building up in the area, why it made it look ridiculous. It was already looking ridiculous, absolutely ridiculous, and foolish, to

put one man on a campus. You could do it with any fifty men on a school day when the students were all in school. It was absolutely getting ridiculous. Well, anything that affected it—

Q. What was your concept of the operation that brought that man on there about 5:00 o'clock or 4:00 o'clock on Sunday afternoon as these students were returning from a football game in Jackson, Mississippi, under the circumstances as you found them to be? And hold up, don't answer until they object.

Mr. Gooch: I object to that as wholly irrelevant, calls for an opinion and conclusion.

The Court: It is far too broad. He wasn't there at the time.

Mr. Watts: All right. All right, shall I ask him some more questions?

The Court: No, it is close to noon. Ladies and Gentlemen, we will recess until 2:00 o'clock. Keep your seats in the audience until after the Jury leaves the Courtroom.

[fol. 972] (Whereupon, the Court was recessed at this point until 2:00 o'clock of the same day.)

[fol. 973] Afternoon Session

2:00 P. M.

By Mr. Watts:

Q. General Walker, when you left Jackson, Mississippi, on Saturday the 29th, did you know Mr. Meredith would be brought on the University campus the following night?

A. No, I didn't. I certainly didn't.

Q. When did you first learn it?

A. I think I learned it at the press conference. If not then, at the President's speech, or the entering of the campus. And I believe it was in the President's speech. I certainly did not expect him to be brought on the campus on Sunday. It is—I knew that the students were all away and that Sunday bible—deep bible state, seemed like the

most inopportune time to slip somebody on the campus, while the students were off the campus.

Q. Now, would you take your pointer, please, and for the benefit of the Jury point out as nearly as you can on the chart an area that represents the outer limits of any part you reached that evening, and by "that evening" I mean the evening of September 30, 1962.

A. The area I was in and never of is around this area (indicating) and in the direction of the flagpole, and here to the flagpole, and one time I went right to about this [fol. 974] far here, during the truce, and never further, except for that one time—further than here (indicating), and I was in this area right here.

I never got past this point to the left, and I never—I came right this way and I was to this curb here, and right here, and across here, and I spent, oh, probably an hour and a half during the whole evening at different times under a fir tree, by a fir tree, or on the west side of it, right here (indicating) and close the circle right here.

I was never out of that area.

Q. You may take your seat. During that evening, did you ever get out of a walk?

A. I never did, no, sir.

Q. During that evening, did you ever participate in any of the activities of the crowd toward the Marshals with respect to either throwing things at them, or encouraging such actions to be done?

A. I did not.

Mr. Watts: That is all.

Mr. Gooch: Nothing further.

Mr. Watts: Oh, yes, one other thing.

By Mr. Watts:

Q. As I recollect your testimony, you saw that manifesto committing troops on the 30th of September, 1962, or did not? Did you or did you not?

[fol. 975] A. I did not.

Q. When did you first have knowledge that troops were being planned for the area, planned by the Government to be committed in this area?

A. Certainly it was by the 28th, because there were press releases on it, and from my previous experience I had knowledge of it.

Mr. Gooch: If the Court please, the press reports would be the best evidence.

By Mr. Watts:

Q. Would you have such a press report?

A. Yes, sir, I have a press report here. I believe it is the front page of the Star Telegram. May not be the front page; the picture page. Friday, September 28th.

Q. Would you deliver that to counsel, please, sir?

A. Yes.

Mr. Andress: We would like this marked as an Exhibit.

The Court: Let counsel look at it.

Mr. Gooch: Go ahead.

Mr. Andress: Will you mark it with the next exhibit number?

(Said document marked Plaintiff's Exhibit 12 by the Reporter.)

Mr. Andress: We offer in evidence Plaintiff's Exhibit [fol. 976] 12, a portion of the front page of the Fort Worth Star Telegram for Friday, September 28, 1962.

The Court: It is admitted.

Mr. Gooch: No objection.

By Mr. Watts:

Q. Prior to the time you went to Mississippi, did you have any other notice or reason to believe troops were about to be committed in Mississippi?

A. I had reason to believe that they could have been or was going to be committed, based on my experience

and different indications of what was being done, and what was in the press.

Q. Without saying any hearsay, was—what anybody told you, could you outline what the source of that information was, or was it from something someone told you?

A. I remember a telephone call from the Tennessee area.

Q. You can't tell about calls from the Tennessee area.

Mr. Watts: I believe that is all.

Recross examination.

By Mr. Gooch:

Q. General Walker, as a Military man you know that troops can be called only on the order of the President of the United States, do you not?

A. Yes, sir.

[fol. 977] Mr. Gooch: That is all.

Mr. Watts: Thank you, sir.

The Court: Step down.

Mr. Andress: We call Dr. Beard.

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[fol. 991] Mr. Andress: Now, Your Honor, we would like at this time to ask the Court to permit this witness to testify upon the basis that after the morning recess, according [fol. 992] to my notes, of the testimony, it was almost entirely concerned with the stories in the Star Telegram and the mitigating matters in connection with whether or not there was any malice involved.

The Court: I have already ruled, Mr. Andress.

Mr. Andress: Yes.

The Court: Bring the jury in, please, sir.

Mr. Watts: Call Ed Jackson, please.

If the Court please, I forgot to ask, may that previous witness be excused?

The Court: Yes.

(Jury returns to the courtroom.)

EDWIN LEON JACKSON, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. State your name, please.
A. Edwin Leon Jackson.
Q. Was that Edwin?
A. Yes, sir.
Q. Where do you live?
A. Houston, Texas.
Q. How old are you?
A. I will be 21 in August.
[fol. 993] Q. Who are your parents?
A. Richard L. and Lorene Roach Jackson.
Q. How long have you lived in Houston?
A. Oh, on and off, nearly 18 years.
Q. You are then a resident of Texas?
A. Yes, sir.
Q. What is your father's business?
A. He puts in air conditioning, installs air conditioning.
Q. Where do you go to school or to college?
A. The University of Mississippi.
Q. How long have you been there?
A. I have attended two years. I attended one year at Abilene Christian.
Q. When did you first enroll in Ole Miss?
A. September, 1962.
Q. What school were you in?
A. Liberal arts.
Q. Were you on campus on the night of September the 30th, 1962?
A. Yes, sir.
Q. What dormitory did you live in then?
A. Long Street A.

Q. Had you been in school over the weekend or did you go anywhere?

[fol. 994] A. Ole Miss played Kentucky in Jackson, Mississippi, over the weekend and I am in the band. We went to that and we got back about 1:00 o'clock Sunday morning, in the morning, that night.

Q. Where did you go? To your dormitory?

A. Yes, sir, I slept all day.

Q. And about what time did you get up?

A. Around 2:00 in the afternoon.

Q. Were you anywhere on the campus when the Marshals first appeared?

A. Yes, sir, in my dorm.

Q. Did you go out into the area of the circle where the Marshals were?

A. Yes, I arrived there—as soon as the first truck of Marshals came, the word spread out like, just like electricity, I guess, all through the campus, you know, and I was there—I ran down to see what was happening and I was there about the time the second or third truckload came in of Marshals.

Q. Would you tell the jury now in your own words, what occurred and what you saw from the time this first group of Marshals came in up until after tear gas was fired.

A. Yes, sir. Well, around 4:00 o'clock that afternoon, the Marshals started arriving—at least it seems like 4:00 o'clock, as I remember.

[fol. 995] And like I say, word spread when the first truckload came in because we weren't expecting anything on Sunday; I mean there was a tense atmosphere, I would imagine, from all that had been happening but when they came in, I ran down there and a crowd started gathering and in an hour or so, there were several hundred students, two or three hundred students, I imagine, maybe even more, came down to see the Marshals come in.

And some of the students would put Confederate flags on their car and drive through the crowd and everybody was

yelling, I mean—and they were cheering (jeering) calling the Marshals names and they passed out little bitty stickers saying, "Ross was right," people were wearing on their lapels.

And some of them were telling the Marshals they ought to go to Cuba and other places (laughter) and, well, there was more—

At first, I mean, it was kind of a premonition of what was to come by what they were wearing because, I mean, we weren't expecting anything and there they were, with helmets and billy clubs and pistols and tear gas cannisters on their chests, so we didn't know what was coming off but we were still yelling at them and calling them names and just yelling, just, I don't know, it was—

Q. Were any highway patrolmen around there?

[fol. 996] A. Yes, sir.

Q. Tell the jury what those patrolmen were doing.

A. Well, the patrolmen, highway patrolmen, as they came, and they were in the street in front of the Lyceum in the middle, facing the students, between the students there and the Marshals on the Lyceum Building, circling the Lyceum.

The State Police were in the center of the road facing the students.

Q. Did you have any rough idea how many Marshals there were there?

A. Oh, it seemed like around 400, at least, because the Lyceum was completely surrounded with them; I mean it seemed like they kept, more trucks and more trucks and everything, truck and trucks of Marshals, you know, army trucks, those convoy trucks.

And there must have been at least 400 to have circled the Lyceum, standing up just arm to arm.

Q. Now were the highway patrolmen around the Marshals at first or did they move in later or between the Marshals and the students?

A. Well, at first, the highway—I mean around 5:00 o'clock, it seemed like—

Q. I couldn't hear. Say it again, please.

A. Around 5:00 o'clock, I believe, the State Police started [fol. 997] coming in about, more and more of them. I mean there had been State Police around the University in and on the campus all that September.

But they started really arriving and they formed a—they just stationed themselves in the middle of the street, facing the students, their backs to the Marshals, in the middle of the street.

Q. Now do you see a pointer there in front of you, a little wooden pointer?

A. Yes, sir.

Q. Would you take that and step down there to the chart, and the top of it is north, University Boulevard goes by your chin there and proceeds westward.

Do you see that circle there?

A. Yes, sir.

Q. What's on the east end of the circle?

A. The east end—which way is north?

Q. Right there. Put your pointer up and I'll tell you where to move. Put your pointer up. Now move your pointer to your right, to your right—not up.

A. Oh, excuse me.

Q. What's that dot right there?

A. Right here?

Q. Yes, sir.

A. That's the Confederate memorial monument put up by [fol. 998] the—

Q. Do you remember the exact position of that monument with reference to the Lyceum and the other installations?

A. Yes, sir, this is a tree-clustered circle, I mean it's a real pretty place, with park benches all over it. The Lyceum is at one end and at the very opposite end, facing University Avenue, is the Confederate monument.

Q. Now put your pointer where the Marshals were with respect to the Lyceum.

A. The Marshals at first they came right here and as more truck loads came they just slowly circled the Lyceum completely.

Q. And where then were the highway patrolmen?

A. The highway patrolmen were stationed like this (indicating).

There was a whole lot of students right around here and right around here, I mean, like I say, "A whole lot," several hundred and the State Police stationed right there, right in the very middle.

Q. Where were you?

A. At what time?

Q. Before the tear gas was fired?

A. I was right there on the curb.

Q. Were you east or west of the curb of the circle?

A. Sir?

[fol. 999] Q. Were you east or west of the curb of the circle? East is on your right, remember.

A. Well, the curb is right there. I was standing—there is a cement curb and then grass there. I was standing right on the grass right by the curb.

Q. Now from that time on—take your seat again—tell the jury further what happened.

A. Well, like I said, it was a tense atmosphere, I mean naturally you expected, if you have—I mean it couldn't be anything else with how they were dressed; I mean it was just sort of, looked like something—I don't know why they were dressed that way cause half of us didn't know what they were doing dressed that way but they were there.

The Court: He asked you what happened.

By Mr. Watts:

Q. Go ahead and tell what you saw, son.

A. Well, there were some cigarette butts thrown, I mean as the night progressed, I mean, 5:00 and 6:00 on like that.

Q. All right.

A. There was people started flipping cigarette butts at the Marshals, I guess—I don't know what—they were just flicking them at them.

[fol. 1000] And they put a Confederate flag on the back of one of the Army trucks. Somebody just went up there and stuck it on. And I saw one bottle thrown.

Q. Uh-huh.

A. I am not going to say there weren't more, but I mean I was up in the front and I saw one bottle thrown, and suddenly, I don't know what or why, but tear gas just started coming at us, you know.

Q. Did you see the position of the Marshals as they fired that gas?

A. They were right across the street from us.

Q. Was it fired in a single round, or was it fired in a salvo by all the Marshals you could see?

A. Well, I don't know how many Marshals fired, but it was fired more or less in a volley. And on the girls, I mean, you see there were a lot of girls out there. This was not just boys, there were girl students out there, students and boys and everybody, and some of the girls started screaming, and everybody just started turning around and just running.

Q. At the time the tear gas was fired, were the Marshals between the—strike that. Were the Highway Patrolmen between the students and the Marshals?

A. Yes, sir.

Q. What was the closest that a student was to a Marshal [fol. 1001] at the time of the firing of the gas?

A. The width of the street.

Q. Had you at any time, or had at any time any students come in physical contact with the Marshals?

A. I hadn't, and none that I know of.

Q. Would you have seen it along there? Were you in a position where you must necessarily have seen it had it happened, in that area?

A. I should have seen it.

Q. What happened after the tear gas?

A. Well, everybody ran back in the direction of the Confederate monument, back at the other end of the Grove.

Q. About how many people could you estimate, as best you could, were in the circle at that time?

A. Three hundred, or something like that.

Q. All right. Go ahead.

A. Of course, there were some people over on the side too. The Lyceum Building has four sides. There were about one hundred on the side, on the north side, across the street too. And the people just started running back toward the monument, because the smell was horrible. Well, I mean it is exactly what it means, just tear gas because you just started crying. It is very penetrating. Of course, I had never been tear gassed before, but all the girls were crying. And they started running toward their dormitories, and the [fol. 1002] boys went back to the other end. And what followed from then on, I guess, was a case of reaction. I don't know what you would call it. I mean, the reaction to the tear gas and the reaction to what had happened. But I just—students were resentful at least. I mean the ones that were—they really started yelling then, I mean calling the Marshals names.

Q. Did they start throwing things then?

A. Well, they went back to the other end, at the monument, and there were some rocks in the streets and bottles there on the campus, and a bunch of the students started picking up anything they could find then and to start running back up there and throwing them at the Marshals, and from then on is what you might call a riot. It was a riot.

Q. Was it an organized activity? That is, was there any leadership?

A. No, sir.

Q. Did you see anybody out there in front that was issuing orders or commands or was there anybody there?

A. No, sir. No, sir. I will say this. The first couple of charges, the very first, you know, it was sort of like a gallant, I guess, entry, when they would march across, you know, in lines, you know.

Q. Yes.

[fol. 1003] A. I mean there were several charges like that, I mean some people had Confederate flags and they were in the middle of the crowd. They were not out in front, exactly, but after the tear gas—the Marshals started firing back with tear gas so as the night progressed, very quickly they just—it came into a disorganized attempt just to get a rock or any missile that you could find that you could throw, and run up and throw it, and then dodge for a tree or anything you could hide behind, because those tear gas cannisters are approximately that long (indicating) and that big around and weigh several pounds and they are fired with such a force that they will shoot far—I mean, over the length of a football field. So they arched them over the monument from the Lyceum, because we watched them going over and landing in the University Avenue intersection out there.

Q. Outside of that first couple of movements immediately after the tear gas was fired, was there any further reaction at one time of the entire crowd, or was it sporadic, as you testified?

A. It more and more, it just became, people would run back and if you could find a brick or a rock, they went fast—they would sort of make their own missiles.

Q. In these just two moves that you testified about, did they have any leadership? Was anybody out in front of [fol. 1004] them?

A. No, sir. Just people would yell and they would say, "Come on, let's go get those Marshals."

Q. Did people then go on toward the Marshals and throw things?

A. They would run up there, and when they started opening up with that tear gas—I mean, all of them started firing, all of the Marshals.

Q. What happened, then, to the Highway Patrol?

A. The Highway Patrol, for several hours there, an hour or so, or an hour and a half and two hours, I don't know what happened to them. Because I mean I do know they

were running back too, because their—we had asked them, "Don't you all have gas masks?" They had gas masks. And they said—we asked them why weren't they working. They were out crying too. And they said the smoke, I mean this tear gas penetrates this gas mask. It is not effective against this tear gas they are using.

So, the State Police, I mean they sort of tried to get out of the way too.

Q. Did you ever, that evening, see General Walker?

A. Yes, sir.

Q. Will you tell the Jury in your own words where and when you saw him and what he was doing?

A. Yes, sir. Well, I had run back to the monument, back [fol. 1005] in that direction, and I heard some people say, "Here comes General Walker."

Q. All right. Now, excuse me, son, right there a minute. As of that time, how long had it been since one of these—that you were talking about—general movements of the crowd occurred?

A. Oh, they had disappeared a long time ago. This was now just—this was in the nature of the riot, now.

Q. Could you estimate in time as to minutes or parts of an hour, half hours, quarter hour, whatever it was?

A. What time he arrived?

Q. Yes, how long after these general movements of the crowd you testified to about ago—a while ago, had it been before General Walker arrived?

A. Well, these movements I was telling you about at first didn't last long. I guess because experience is the best teacher. But some of these people had had their hands burned, and one boy got hit in the back. I mean, he was terribly hurt, but, I mean like I say you are not going to keep doing that with those things coming at you.

Q. From the time of the last of those general movements until the time Walker arrived would you say an hour, half an hour, quarter hour?

[fol. 1006] A. I would say over an hour.

Q. Go ahead, then. You said you heard someone say, "Here comes General Walker."

A. Well, I was right—I was right beside the monument, or right in about no more than five or ten feet from the monument, and I looked out and—

Q. Take the pointer and just explain it to the Jury.

A. Here is the monument. I was standing right about like that (indicating) and I looked out and I saw General Walker right across in this position. This is south. I saw him right here, and then people would say, "Here comes General Walker, here comes Walker."

Q. All right.

A. That was the first I saw him, so I ran over, and I said, "General Walker, I am from Texas. Would you lead us?"

I mean, it is hard to explain to you all now how I felt.

Q. Well, as best you can, tell them how you felt.

A. I was very resentful. I mean, you can't explain how you felt. I mean, it was just something spontaneous. You just wanted to get back at the Marshals, because of how they had fired at you, because several girls got hurt. One girl got hurt from firing that tear gas cannister. It hit [fol. 1007] her in the back.

Anyway—anyway, we were very resentful and we wanted to get back at the Marshals, like I said, and if we had been organized—

Mr. Gooch: If the Court please—

By Mr. Watts:

Q. Just go ahead and tell us what you said to General Walker and what happened.

A. I said, "General Walker, would you lead us?"

Q. All right. What did he say?

A. He wouldn't answer us.

Q. From this point, just try as best you can to relive that instant, just visualize it in your mind and tell the Jury just what you saw and what happened.

A. Well, as I remember it, there were several men out in this—with him. I don't know what it was. They were there with him, and as I ran over he was about by the monument when I started asking him this.

Q. Uh-huh.

A. And there was this sort of fat—he was a Sheriff, had a star. I guess he was with him. I remember him quite vividly because he was a prominent figure.

I mean, he was noticeable, and we kept asking him, "General Walker, what can we do?" And the people kept coming up and saying, "General Walker, what can we do? We can't get to them. Would you lead us, sir?" [fol. 1008] And he never would answer, he just kept looking at the Marshals, and walking. And they walked up a ways and—

Q. About how far would you say he walked from the monument?

A. From the monument?

Q. Yes, just point to roughly the furtherest westward point he walked.

A. This is hard to remember.

Q. Well, do you know where the flagpole is?

A. Yes, sir, it seems to me we walked somewhere in that vicinity, right there (indicating).

Q. Are you pointing to the flagpole?

A. Yes, sir, it was here, this side, or this side. I am not sure which (indicating). I don't remember. And we walked over there, and he stood there and looked. And he stood there and looked several minutes, just at the Marshals. He stood there.

Q. Take your seat again. As you walked in that direction, what gait did General Walker walk?

A. It was very slow because it took us—I was right there with him. I kept asking him, I was persistent would he lead us. And it took us about five minutes to get up there. It was about—

Q. Now, tell the Jury about the crowd in the vicinity, [fol. 1009] how many there were, if you can. I am sure

you didn't count them, but tell us what they were doing, what they looked like.

A. The crowd of who?

Q. The crowd in the vicinity of General Walker. Now, you were walking with—were you walking along with him?

A. Yes, sir.

Q. Can you remember whether—I don't guess that would be a fair question, whether you were on his right or left, or do you know?

A. I was on his left.

Q. Incidentally, did anybody have a hold of his arm?

A. No, sir.

Q. Go ahead.

A. From where?

Q. From the time you started walking on to the westward there.

A. Well, about this time I was standing there and looking and the Highw.y Patrolmen started pulling out. I mean they got in their cars.

Q. Well, wait just a minute. Let's go back a little and cover in detail about on the way up there.

I have asked you a question about the crowd. Would there be any way to estimate how many boys trailed along [fol. 1010] as you went toward the flagpole there?

A. Well, several of the boys would run over and ask him would he lead us and when he wouldn't answer they would just run back, if you know. I mean, they didn't know what to do. They would just run—just run—they might have a brick, you know, and he wouldn't say anything, and they would just run on up and try to throw it. But, I would say approximately anywhere from ten to twenty-five people in the immediate company that stayed with him, and didn't run away from him.

Q. You say ten to twenty-five stayed with him and didn't run away?

A. Didn't run away.

Q. Were there other then that would move around in the vicinity?

A. Well, what I am saying, there were ten to twenty-five that were not participating in the riot at that moment.

Q. What were they doing?

A. They were trying to get him—they were asking him—I mean—

Q. Did Walker participate in the riot in any way?

A. Sir?

Q. I say, did Walker participate in the riot in any way?

[fol. 1011] A. Do you call his later speech participating?

Q. No, I am talking about on the trip up there.

A. No, sir.

Q. All right, go ahead. I am talking about solely from the time you were walking on from the monument up toward the flagpole. What else did he do besides walk along and talk to you students?

A. Well, occasionally this Sheriff would say something to him, but I mean, you know, he never would make any—

Q. Did any of the students around him, within as far as we will say that wall over there, throw a missile when they were that close to him?

A. No, sir, you couldn't throw that far. There were trees in the way anyway. You would have to throw it up high to get it to go that far. The trees were in the way.

Q. Now, you say you walked on to the flagpole and then turned toward the southward, or your left?

A. Yes, sir.

Q. At that time or any time approximating that did you see a minister? He has been identified as Rev. Duncan Gray?

A. I don't remember.

Q. Were you then with him—were you right with Walker all the time?

[fol. 1012] A. Yes, sir.

Q. And you have no recollection of Rev. Duncan Gray?

A. I have no recollection of it.

Q. Then go ahead and tell us what happened after you cut to the left, or south. You started to say something about the Highway Patrol?

A. Okay. The Highway Patrolmen, they had their cars in that vicinity and they all got in them and pulled out down the south side of the circle. They were driving out—coming out, leaving, and some of the students started running over to them and saying, "Why are you leaving us?" You know, and they would tell them to come—I heard one boy—well, that is incidental though. Anyway, they were leaving, though, the Highway Patrol were, and the students didn't know what was coming off, and anyway Walker was walking, was still walking back toward the monument. Some of the people said, "Tell us something, give us a speech, General Walker; say something. What can we do?" And about that time General Walker, he went back to the monument, and the crowd gathered around him, and he gave a speech.

Q. Did you gather around him?

A. I was above him on the monument.

Q. You mean you climbed up the monument?

A. Yes, sir.

[fol. 1013] Q. Which side of him were you on?

A. Well, facing down University Avenue, I was standing in front of the monument. I was hanging on above him, up above him.

Q. Was anybody up above you?

A. No, sir.

Q. As best you recollect, tell the Jury what General Walker said to these boys?

A. Well, they kept saying, "Will you lead us? Give us a speech."

So, General Walker says—oh, I can't remember all his speech.

Q. You don't have to, I understand.

A. I just remember parts.

Q. Just tell the best you can.

A. Okay. He says, "You all have a right to protest." I remember that part.

And he said something about—well, I don't remember that well enough to even know what it was. Something

about blood being on the Government's hands, or something like that.

Q. All right.

A. And—oh, the people said—the Highway Patrol had just left, it seems like, or it hadn't been too long, and some of the people said, "Did Ross sell us out? Did Ross sell [fol. 1014] us out?"

And General Walker said, "You have been sold out, but not by your Governor Ross Barnett. It was by Col. Birdsong."

He is the Director of the Highway Patrol, I think, in Mississippi.

Q. Uh-huh.

A. And then this minister, he tried to get General Walker—I don't remember if he tried to get General Walker to disband the crowd, or tried to tell the students to leave themselves and quit rioting, but anyway, he and General Walker said something—some things between them, but I don't remember all they said between them, but anyway, finally General Walker said—I remember this very plainly, he turned around and said, "You know I am ashamed now I am an Episcopalian," or something to that effect.

And the crowd, oh, this time, most of them, you know—I mean, these were not all rioters by no means because there were always people down at the other end of the monument, people who were not participating at all, or doing anything, just standing there and watching as observers, and they came over. And there were some women in the crowd. I remember that very distinctly. And the people would occasionally say, "Would you lead us?" And he never would answer them.

[fol. 1015] And when he—most of the people, I mean the people who were involved, I mean who were involved in the riot, they just started leaving, though, when he wouldn't say anything. They would say, "What can we do? And he wouldn't ever say anything, and they would say, "Will you lead us?" And he wouldn't ever answer, and they

started going back and the crowd just sort of disbanded.

I don't know—don't remember how, exactly. I think the people just sort of left, because they were—they were—at least the people involved in the riot saw what—it was pretty futile what they were doing. They needed some kind of a plan and they had none, because everybody was sort of on their own, and when he wouldn't lead them, they just started going back. Going back—a lot of them went over to Hume Hall where they were building this new Science Building and got some bricks and broke them up, and others just ran on back up there and started throwing again.

Q. Were you still above General Walker when he finished his talk?

A. Yes, sir, I was above him when the crowd disbanded.

Q. What did he do then?

A. He stood there and was talking to these people for several minutes there, and then, I mean, I would say—[fol. 1016] I mean, it is hard to say. Maybe three hundred people were around the monument at that time, and I had to wait until they moved so I could jump down, and I was there about a couple of minutes, I would say from two to five minutes, somewhere along there.

[fol. 1017] Q. Now what was the effect on you individually of General Walker's speech?

A. Now again, you all won't understand this, but I was disappointed because I thought, I thought really and truly that we might find a leader because everybody knew General Walker and I thought we might have a leader and he didn't, he wouldn't lead me—he wouldn't lead any of us.

Q. All right, go ahead and tell what happened after the speech.

A. Well, the riot just—well, at first—

Q. Did you stay with General Walker after the speech?

A. Not for more than a couple of minutes, like I said,—

Q. What did he do in that two minutes?

A. Well, he was there talking and when I finally could get down, I ran back up—excuse me (taking pointer).

We had some cement benches on the campus there and they were trying to break them and it was right in this vicinity right here, I ran back up to here, it was right—

Q. Were you in a position there to where if General Walker had participated in a movement towards the Marshals of a thousand people, you could have or would have seen it?

A. Well, first, there weren't a thousand people rioting, not really. There may have been a thousand people observing from here (indicating), all back in here. But there was [fol. 1018] not a thousand people rioting.

Q. If he would have moved towards the Marshals, in front of or in the very center of the group of as many as a hundred, would you have seen that, do you think?

A. Yes, sir.

Q. Did you see anything of that kind after you moved up to that point?

A. No, sir.

Q. What kind—describe the activities of the crowd after you left Walker and moved up in that area.

A. Well, like I say, I went back up a ways, breaking some bricks, and there was—people, they would—there is only so many trees on that campus within throwing range of the Lyceum, I mean, you know, where you could throw without hitting the branches hanging down and reaching and usually that was pretty limited, the number of people who would go up there, because if you couldn't hide behind a tree, you were sunk, sort of.

Q. What sunk you?

A. Well, if you would have—well, those things they fired, those tear gas cannisters, they were fired with tremendous velocity and, I mean, if it hit you, boy, it could really hurt horribly bad.

Mr. Watts: I believe that's all.

Cross examination.

[fol. 1019] By Mr. Gooch:

Q. Just a question or two, please, sir.

Mr. Jackson, I believe you stated the first time you saw General Walker, he was coming on to the campus, in a westward direction?

A. Let's see, westward is towards the Lyceum?

Q. Yes, sir.

A. Yes, sir.

Q. And at that time you and a group of them rushed up to him and asked him to lead 'em, lead them, lead you?

A. Well, there were people running up to him. I was—I yelled, "Would you lead us?"

Q. About how many ran up to him at the time you first saw him there as he came on the campus, or the first time you saw him, rather?

A. Yelling, "Would you lead us?"

Q. Yes, sir.

A. Oh, when I first saw him, the word was just spreading that, "Here comes General Walker." I would imagine five or ten people turned around and said, "What can we do," or "Would you lead us?"

Q. All right. Did any others gather after the word got out?

A. Gather where?

Q. Gather around General Walker?

[fol. 1020] A. Well, there were some people who went over, I imagine some went over just to see him, I mean, see who it was because you had heard about General Walker.

Q. Please tell us what you saw.

A. Yes, sir. Like I said a while ago, there were from 10 to 15 people around him and these were—

Q. All right. Was General Walker still walking west when these 10 or 15 people were around him?

A. They didn't get around him until he got up past the monument, I mean it takes a little bit of time to find out

that this is General Walker and when they found out, I would say that from the point he passed the monument until he walked up to his farthest point, the people around, 10 to 15, I would say, students.

I said a while ago there was probably from 10 to 25 people in all. There were some, several men with him.

But these students, they ran over, were asking him, "Would you lead us, General Walker?"

Q. I am trying to get you to tell me how many people were with General Walker, say, when he got to the flagpole?

A. No more than 25.

Q. All right. What were the students doing at the time he got up to the flagpole with what you say is 20 or 25?

A. The students out front who had rocks and a tree to [fol. 1021] hide behind were throwing the rocks. Students who were just spectators and the people that were spectators were back there in the grove, were standing and watching and others were running back for more rocks.

Q. Now immediately after the speech down on the monument, isn't it a fact that there was a considerable number of people that went from that area back towards the Marshals? And threw things at them?

A. Depending on what you mean by "considerable".

Q. Well, 10, 20, 30, 40, 50, any number you want to pick out.

A. There were people who went back up.

Q. You don't know whether General Walker was with that group or not, is that what you are saying, or was he?

A. Just a second. I'm trying to think what you mean—I mean trying to—General Walker—what I am saying is, the crowd that went up to—the crowd that went up to riot again from his speech left before he did.

Q. That's what I—

A. But he stayed there for at least five minutes, I know, because it was two minutes before I could get down and I was—I saw him there talking to—with these people for another couple of minutes before I ran back up there and started breaking up some cement things.

Q. Did you ever see General Walker again that night?

[fol. 1022] A. No, sir.

Q. All right. Now you have testified that the best recollection that you have of what you heard him say on the campus was what?

A. Do you want me to repeat what I said in this speech?

Q. That's right.

A. He told us, "You have a right to protest."

Q. All right. Now the speech was made after he had gone up there to the flagpole with this group that you have described, wherein at least you could see that they were still throwing at the Marshals, is that correct?

Mr. Watts: If Your Honor please, I object to that as an improper question.

The Court: Overruled, Counsel.

Mr. Watts: All right, sir.

The Witness: Would you repeat your question, sir?

Mr. Gooch: Would you read that back to him, Mr. Nuss?

(Last question read.)

By Mr. Gooch:

Q. Shall I rephrase the question or do you understand it?

A. Yes, please.

Q. You have testified, as I understand it, that when you first saw him, he was walking westward, that he continued [fol. 1023] to walk westward with the group that you fix as somewhere around 20 or 25, am I right up to there?

A. From 10 to 25, yes, sir.

Q. That he walked on to the vicinity of the flagpole or a little bit past, you indicated when you had the ruler up there, is that correct?

A. Yes, sir, to the best of my recollection.

Q. And you testified at that time you could observe or at least you could observe people out in front between the flagpole and the Lyceum Building throwing at the Marshals?

A. Yes, sir.

Q. Now my question is, that when he got back to the monument, it was after he had been up there in the group that you were with, that he made the statement that, "You have every right to protest," is that correct?

A. He said, "You have a right to protest."

Q. Did he say anything else that you remember besides Birdsong and about the Episcopal minister?

A. Well, he said—I don't remember exactly—about blood being on the hands of the Federal Government or something like that but I don't remember—I mean it was just a phrase I mean, something, seems like it's in my mind, you know, I heard him say but I mean, you know, I can't give you the complete statement.

[fol: 1024] Q. Now you were up on the monument almost leaning over him, I assume, is that correct?

A. I was in several feet because the monument is built sort of like that (indicating), and it's got a place up there, a little ledge or thing you can hang on that I was—not a ledge, but a little place you can put your feet and I was hanging on that.

He was not on the monument. He was down on the, sort of, little—the ground sort of rises above the monument. He was down on the ground.

Q. Could you see him?

A. Yes, sir.

Q. Could you hear him?

A. Yes.

Q. And you have done your best to detail what you heard him say there at the speech on the monument, is that right?

A. Yes, sir.

Mr. Gooch: Thank you, sir. That's all.

Mr. Watts: Thank you.

The Court: I am going to excuse this witness then.

Mr. Gooch: Wait a minute. Just a moment would you, please, sir?

By Mr. Gooch:

Q. How many people would you estimate was around the monument when he climbed up to make his speech?

[fol. 1025] A. Well, he didn't climb up but when he was there—

Q. All right.

A. —it seems to the best of my memory, 300.

Q. All right. Now when he began to talk, when he said you had a right to protest, did he elaborate on that?

As a matter of fact, didn't he say this, that you had a right to protest what had happened there and the Marshals being sent in against the University to make sure that Meredith got in?

A. Well, there is a distinction between "protest" and "rioter".

Q. Well, I am asking you if that isn't what General Walker said, that you said he said when your deposition was taken in Mississippi?

A. Would you repeat it, please.

Q. I have Page 45, of the witness' deposition taken at Oxford, Mississippi.

Question—or the answer, about the middle of Page 45. Would you refresh your recollection there, please, sir?

A. (reading) I remember: . . . he said that we had a right to protest against what had happened there in—and the Marshals being sent in against the University to make sure that—

[fol. 1026] Q. Do you remember testifying to that over in Mississippi?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. All right. Did he say that you had a right to protest?

A. Yes, sir.

Q. Did he say something like this: "You may not win but you will be heard"? Did you hear a statement to that effect?

A. It seems like I did. I mean I can't tell you that I did because I mean it just seems like I do remember it.

Q. Did you hear him say, "This is a dangerous situation."?

A. Yes, sir.

Q. Then you said that he mentioned something about General Birdsong?

A. Yes.

Q. Did he say anything about having sold out to Kennedy (indicating)?

A. Like I said, "or something like that." I don't remember if it was—who he said who he sold out to but he sold out.

[fol. 1027] Mr. Gooch: In order that the record might show, your deposition was taken on March the 12th or 13th down in Mississippi by Mr. Watts, was it not, in which I cross-examined you?

The Witness: This is true.

By Mr. Gooch:

Q. Now you know—don't know what happened to General Walker after his speech was over, do you, after he got down from the base of the monument?

A. No, sir.

Q. I believe you stated earlier that the condition worsened insofar as the taunting of the Marshals and the throwing of at least one bottle along about dusk?

A. Yes, sir.

Mr. Gooch: I believe that's all. Thank you, sir.

Mr. Watts: Thank you.

Would you send Danny Hunter in, please?

The Court: You are excused. Send Mr. Hunter in.

DANNY LEE HUNTER, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Would you state your name, please.
A. Danny Lee Hunter.
Q. Where do you live?
[fol. 1028] A. My home is in Morton, Mississippi.
Q. How long have you lived there?
A. Twenty-three years.
Q. Who are your parents?
A. Mr. and Mrs. Woodrow Hunter.
Q. Move that mike a little closer there to you if you want to, make it a little easier.
A. All right, sir.
Q. Were you a student at Ole Miss in the fall of '42—I mean '62. I'm sorry.
A. Yes, sir, I was.
Q. How long—what school were you in?
A. I was a first-year law student.
Q. What school are you in now? What class?
A. Third year, law student.
Q. Were you on campus that night?
A. Yes, sir, I was.
Q. Were you—where did you live on the campus?
A. Howry Dormitory.
Q. Had you been on campus over the weekend?
A. No, sir, I had not. I had gone home.
Q. About what time did you get back?
A. At approximately 7:30 we arrived on the campus that Sunday afternoon.
Q. Who was with you?
[fol. 1029] A. I was with my roommate who was also from Morton and probably some more boys from Morton usually rode with us when we went home.

Q. Where did you go when you got back to the campus?

A. We drove onto the campus and went around the circle, by the Lyceum Building, and by the student union building, to Howry Dormitory, which is right there across from the old cafeteria, parked the car and loaded our luggage.

And went back out to the Lyceum Building because it was, the Lyceum Building, when we arrived, was surrounded by United States Marshals and it was a large group of students out in front of the Lyceum Building and the Mississippi Highway Patrol was there between the students in front of the students, between the students and the Marshals, and we were, of course, curious to find out exactly what was going on.

We had heard that the Marshals had come on the campus over the radio as we were coming from home to school, and when we arrived, we saw that the reports were correct.

And we parked the car and was curious to find out just what was going on, so we went down to the Lyceum Building.

Q. What did you see when you went out there?

A. Well, as I said, the Lyceum Building was surrounded [fol. 1030] by Marshals. A large number of students were accumulated. And others were coming in practically all the time.

The students were, seemed to be rather anxious, excited and angry and there was an army truck parked in front of the Lyceum Building, maybe too, a jeep, an Army jeep.

And for about, well, the next 30 minutes, or so, we were just there in front of the Lyceum Building, generally to the northeast.

Q. Did you know where the circle was?

A. Yes, I am very familiar with the circle.

Q. Did you get down in the circle?

A. Yes. Not very far. Usually right around the curb there in front of the circle.

Q. All right, go ahead.

A. At approximately 8:00 o'clock, or possibly shortly after 8:00 o'clock, I remember I was standing on the curb

observing the best I could just what was happening and Chief Marshal McShane came out of the Lyceum Building onto the front steps there and hollered, "Let 'em have it, gas."

[fol. 1031] Q. Now, did the Marshals let them have it?

A. Yes, sir, just at that time some of the Marshals started firing tear gas into a crowd that had accumulated in the Circle and the street.

Q. Now, did they fire that gas with a flat trajectory or lobbin?

A. It was flat.

Q. What happened?

A. Well, practically everybody—well, everybody, including myself, turned and ran just as fast as they could back down through the Circle, and I went over to the Y Building and out behind the Y in an area which is known as the Grove where the—

Q. Were there any other personnel between the United States Marshals and the students at the time this gas was fired?

A. Yes, sir, the Highway Patrol was still there all the time.

Q. What were they doing to the students?

A. Just trying to keep them quiet, see that they didn't get up around the Marshals, and talking to them and holding them back across the street the best they could.

Q. Sometime immediately before the gas was fired, what was the distance between the closest student you saw to a Marshal and the Marshals themselves?

[fol. 1032] A. Probably about eight or ten feet.

Q. All right, go ahead.

A. As I said, they fired the tear gas. I turned around and ran back to the Y Building.

Q. Did you go in the Y Building?

A. No, sir, I ran out behind the Y Building to the Grove, and I stayed there a while and I could hear tear gas still being fired, and I ran back around in front of the Y to see the best I could what was going on, and there was a group

of students, mostly students, probably, and a few other people, were grabbing things, bottles and rocks and running up and throwing back at the Marshals that were firing the tear gas.

Q. Now, could you tell the Jury, please, sir, how that activity looked to you as to the movement of personnel involved in it, where they would come from, where they would go, what they would do?

A. Are you asking about the students?

Q. Yes, the activities of the students.

A. Yes. It was—it was just a lot of confusion and people running around all over the place. Didn't know what to do. Most everybody was scared to death. And practically everybody was glassy eyed from the tear gas because it made you cry. Kind of made tears run out your eyes. [fol. 1033] And most of the girls, and most of the boys also, stayed back out of the way, as far back as they ran, further. But, or some of them went back up. A pretty good crowd of them came back around and accumulated around the Y, and would grab things and run up into the Circle and throw them at the Marshals and the Marshals would retaliate with more tear gas. Consequently, the air became filled with tear gas and you could see people out in the Grove, scattered out all through there, practically all over the campus. You could just look around.

Q. Now, would you know about what time this was?

A. Oh, when they first fired the tear gas I said I ran back behind the Y and I stayed back there a few minutes and come back around in front of the Y and this was probably around 8:30, something like this.

Q. All right, go ahead.

A. And for about fifteen or twenty or thirty minutes, possibly longer, this is where I was, in front of the Y Building. Between the Y and the Lyceum Building.

Q. Did you at any time hear anything about General Walker?

A. Yes, sir, I was in the street in front of the Y Building. I heard several people say, "General Walker is here." I said, "Where?"

"Down the street in front of the statue, Confederate [fol. 1034] statue," and at the head of University Avenue which runs into the Circle, and I turned and went down there and I saw General Walker with a few students around him. And I ran up to him and introduced myself. It was—there was already several people accumulated around him. I had to edge my way through the crowd. I got up to him, I shook hands with him, I said, "Is this General Walker," and he said, "Yes, sir." And I said, "Well, I am Danny Hunter. I am glad to meet you," or "Sure am glad to meet you," or "How are you?" Or something to that effect.

And the word was getting around that General Walker had arrived on the campus. And as people would hear it they would run down there to him. Everybody was wanting to meet—get up to him and introduce themselves, shake his hands. Some of them was asking him, "General, organize us and lead us against the Marshals. They fired on us. What can we do?"

And he didn't say anything to them while I was there. But I was edged out, back on down in a southeasterly direction into a street there where the Circle runs back into the Y as it comes back around.

And, as I say, the crowd just kept getting bigger and bigger as the students kept coming down.

And I stayed in the street there, tried to look, watch and see what General Walker was doing as he milled [fol. 1035] around, meeting people, looking around, seeing what was going on.

And as I recall, seems like that he stepped out into behind the statue into what is called the Circle. That is where there isn't any building.

Q. Oh, yes, at any time in this time area did you see a big heavy set Marshal?

A. No, sir, I don't recall it.

Q. I mean a Deputy Sheriff. Now, excuse me. Deputy Sheriff?

A. No, sir, I don't recall that either.

Q. Don't recall him either. All right. Go ahead.

A. And I just stayed there in the street trying to see what was happening down here, observing to see what General Walker was doing. And he was just looking around there, meeting people. Some of them were still asking him to lead us, to organize us. And he went into the Circle, looked around out there. Walked around a little bit.

Q. About how far into the Circle did he go?

A. Oh, probably about—oh, forty or fifty feet in that direction.

Q. How long did he stay there?

A. In a westerly direction. Sir?

Q. How long did he stay there?

[fol. 1036] A. Probably about fifteen or twenty minutes. I remember I was still down there in the street.

Q. You didn't follow him then into the circle?

A. No, sir, I was still in the street. I was just looking. Just looking around in his direction, watching to see what was going on.

Q. Could you tell the Jury, please, sir, about the size of the crowd you saw out in the Circle with respect to Walker?

A. With respect to Walker, any crowd that was with him would probably be just about six or eight immediately around him?

Q. Then what about the rest of them?

A. But there were others scattered out. There wasn't too many of them out there at the time, I don't think. Most of the people still were down in the street.

Q All right.

A. And I recall that a lot of them came down there around where I was, because there was some Highway Patrol cars leaving the campus, coming around the Circle into the avenue, and a lot of the people were asking the Highway Patrol why were they leaving, asking if they were coming back, who ordered them, where they were going, begging them not to go, really, I think, and this

was when—this was while I was still down there in the street.

[fol. 1037] Q. You were still—now, which direction from the monument were you at this time?

A. Generally in a southeasterly direction.

Q. Now, where was Hume Hall from where you were?

A. Hume Hall was behind me.

Q. Now, to shorten this a little, were people running back to Hume Hall and picking up brick and things?

A. Brick and anything they could find. Hume Hall was in the process of being built.

Q. Go ahead and tell us what happened after the Highway Patrol cars—first, where did they come from? Which direction?

A. They came from up on—from up in the Circle.

Q. Could you take your pointer and step over there to the chart and find the Circle and show us roughly where the cars came from?

A. I can show you where I saw them.

Q. That is what I mean. Get the pointer and walk over to the chart, which is Exhibit 11. Start out from the monument. Put the pointer on the monument.

A. This is the monument right here (indicating), and I was right in here. Hume Hall is right back in here somewhere, and I saw the Highway Patrol coming out in here, this way (indicating).

[fol. 1038] Q. All right. Take your seat again. Tell us what happened after the Highway Patrol left?

A. Didn't much happen after the Highway Patrol left, different from what was already going on. A few minutes later General Walker came back. The crowd was getting bigger down there. People were still asking him to lead us, make a speech, tell us what to do, and he walked up to the Confederate statue and made a short speech.

Q. Did you hear all or any part of it?

A. Yes, sir, I think I heard most of it.

Q. Tell the Jury what you heard?

A. He said that these troops shouldn't be here, that they should be in Cuba. He said that, "Your Governor has not sold you out." He says, "Somebody name Birdsong has sold you out." And then he told us that he had walked from downtown Oxford and that while he was downtown on the square where the Courthouse is that some gentlemen had told him that somebody named Birdsong—he had heard somebody say that Birdsong had sold them out, and that all he knew about the truth of this statement was that he had heard this gentleman downtown at the Courthouse say it. That the Governor had not, "sold you out", and that somebody name Birdsong had.

Then, cautioned the group to avoid violence. He told [fol. 1039] them they had a right to protest as long as they wanted to, but to try to avoid violence at all times. And I think that was about all that he said.

Q. What effect or reaction did the speech have on you?

A. Oh, not much effect. I didn't think too much about it. Actually, I didn't think it was what the students wanted to hear. I know when he said, "Let me caution you to avoid violence," he got an unfavorable reaction from the crowd there.

Q. What do you mean, unfavorable reaction from the crowd?

A. I heard some people say, "What the hell is he doing here?" And, "If he is not doing anything—this guy is just here to look around. Let's go. We are not going to get any help from him."

Some people booed or hissed or something like this.

I was still kind of on the outskirts of the crowd and about that time he just come back into the crowd, kind of over where I was and started talking to some people, some boys there who probably were still asking him to help them out.

And I was a little closer to him then that—than I had been when he made the speech, and it was still down in [fol. 1040] the—down in the head of the avenue there. I heard him say, "Well, let's walk up here and see what is

going on." Or something to this effect. Might not have been those exact words.

Q. Was this after the speech?

A. Yes, sir, a few minutes after the speech.

Q. What did he do immediately after he quit talking?

A. He just stood around there talking to some people that was trying to get up to him.

Q. All right. Go ahead.

A. And I said all the time I was watching to see—just to see, actually, what he was going to do. And I heard him say, "Well, let's walk up here and see what is going on."

And he started walking in that direction, over kind of to the south a little bit, first, and then on up toward the flagpole. And the people immediately around him, or some people was right around him all the time. A lot of the others down there following along, and including myself, I followed along.

Q. How close were you to him as he walked along toward the west?

A. Well, when we first started down around the bottom of the Circle, probably around eight or ten feet, and then as we got on up he got a little further ahead of me, and I [fol. 1041] probably followed twenty or twenty-five feet behind him.

Q. What was his gait as he walked away from the monument?

A. Sort of a stroll, real slow. Not real slow, but just kind of stepping around, crossing.

Q. I wish you would try to visualize that situation, as he left the monument, try to relive it and tell the Jury just exactly how it looked to you.

A. As he left the monument, he stepped out toward the people in the street. They were still talking. Some of them were, some of them turned around to go the other way.

I just stood there watching them, over the crowd as best I could.

I couldn't hear what he was saying to them because he wasn't saying it out loud like he was when he was making his speech.

He maybe—he kind of just walked through the crowd there, talking to these people. He would occasionally stop and talk to somebody who would seem to be pressing him.

And this is when I heard him say, "Let's walk up here and see what is going on." And I said, "Well, he is going up there." I mean I thought—I said, "Well, he is going [fol. 1042] up there," to myself, but he didn't just proceed on up there as I first thought, but—

Q. How far did he go?

A. He stood around talking to some people.

Q. Did he go all the way at a single move, or did he stop from time to time?

A. As he walked through the Circle up toward the flagpole?

Q. Right.

A. He would occasionally stop and talk to somebody when they would come up to him, but never for too long, I don't think.

Q. What was going on further up toward the westward where the Marshals were, at that time?

A. Up around the Lyceum Building there were still people up there throwing rocks and bricks and running back.

Q. Could you describe to the Jury how this operation was as to the type, size crowd, the activity and what they were doing?

A. They were small groups scattered out, probably more in the northeast than in the—on the west side, I mean on the south side. And probably less on the south side than on the north side, because it seemed to be thicker over there, because more people ran back in that direction.

[fol. 1043] The Court: Let's recess at this time.

Mr. Watts: All right.

The Court: Ladies and Gentlemen, we will recess until a quarter until 4:00.

(Short recess had.)

[fol. 1044] Q. Then Mr. Hunter, after General Walker's speech on the monument, you said, as I remember, he started towards the westward?

A. Yes, sir, shortly after the speech.

Q. And were you some little distance behind me?

A. Yes, sir, that's correct.

Q. Were there other people around you behind him?

A. Yes, sir, that's correct.

Q. Were you—were there people in front of him, out in front?

A. Yes, that's right.

Q. All right. Where else? Were there any other people anywhere else?

A. There were people all over the place.

Q. What were they doing, the ones, we'll say, way off to the northeast quadrant of the intersection, of the circle?

A. To the northeast.

Q. In the northeast quadrant of the circle, what were those people doing? That's over towards the Fine Arts Building.

A. Do you mean in the lower part of the circle?

Q. No, way up high towards the northwest.

A. Could I go over here?

Q. Yes, go over and get your pointer so we can get [fol. 1045] straight. Do you find the flagpole?

A. That would be the northeast quadrant (indicating).

Q. What were those people in there doing?

A. Well, practically everybody over here was just standing around.

Q. All right. Then what were the people—

A. Scattered out all—

Q. —over in the northwest quadrant doing?

A. Northwest?

Q. Yes, sir.

A. Most of the people over here were participating in the throwing of rocks.

Q. All right. What was the size of the groups that were engaging in that activity?

A. In this section?

Q. Right.

A. Well, I think most of it was just individuals.

Q. All right. Then what was happening down in the southwest quadrant?

A. About the same as up here, as far as I know (indicating).

Q. Tell us what was happening in the southeast area and point out where you were as you went forward?

A. Well, I was right in here (from here to here indicating).

[fol. 1046] Q. All right.

A. I walked in this direction. Most of it was just—just walking around.

Q. Was that towards the flagpole?

A. Proceeding towards the flagpole.

Q. Did General Walker ever get out of your sight as he went in that direction?

A. No, sir. Every time I looked for him I could find him easily.

Q. How far towards the flagpole or in the area of the flagpole did he go?

A. I think he went right up to the flagpole.

Q. All right, what did he do?

A. All the times I saw him, he was just standing around there.

Q. Did he ever participate in any way in the activities of the crowd, so far as throwing things at the Marshals were concerned?

A. No, sir, not—nobody around me in this part of the circle was throwing anything at all. We were just standing around there.

I personally was watching to see what General Walker was doing.

Q. All right.

A. And you see, it's trees all around in here, especially [fol. 1047] around the flagpole (indicating), and you couldn't throw one if you wanted to—at least I couldn't.

Q. Okay. Go ahead.

A. Especially through the trees. I don't know exactly where I was when the tear gas that I ran from was fired but it was right in here around the sidewalk. It might have been on the sidewalk.

The tear gas was fired, they could throw it and it would roll along the ground or they could shoot it up above the trees and let it fall. The tear gas was fired.

I turned and ran back down in here, right in here (indicating).

Q. Did you see General Walker any more?

A. Yes, I stopped, looked back to see if I could see where he was, and he was still up around the center of the circle.

Q. He didn't leave then when you did?

A. No, sir.

Q. Okay. What did you do after that?

A. Well, most of the people that were in here turned and ran back in this direction and accumulated down in here (indicating).

I was right out in here in the bottom part of the circle.

I saw General Walker still standing up in here some- [fol. 1048] where (indicating) and people were just still coming back as the tear gas was fired.

I went on down into the street after I saw him up there. He stood around up there for a few minutes.

I went back into the street and the next time I saw him was right in here (indicating), he came walking down through here, and I recall two boys came up to him with another boy; they were helping him along, one of them had him—they had him just like this (indicating).

Q. Had who now?

A. Some boy had been shot in the leg. They had ripped his pants up the side and they came up to General Walker and said, "General, look what they had done to this boy."

And he said, "Well, let's see," said, "He needs to go to the hospital," or "put him in a car," he said, "Put him in a car and take him to the hospital," or something like this.

And I think they went on down here and it was a car there and I think that the boys put him in a car and left. That's the last time I recall seeing them.

And General Walker, who was watching these boys, walked on down this way. That's the last time I saw him.

I thought he was leaving and going back downtown.

And I went back up to the "Y", around the "Y", and I saw a boy standing right out here in front of the "Y", right [fol. 1049] on the corner of the "Y", with a notebook and a pencil.

And he was, he would write—I saw him write a note down and I went up to him and I said, I told him he's better get out of there, that he'd better get rid of his pen now because these people didn't like reporters.

And he said, "I'm on their side." I said, "Where are you from?"

And he said, "Texas," and I told him—

Mr. Gooch: If the Court please, we are getting far afield.

The Court: Yes.

Mr. Watts: All right.

The Witness: I'm sorry. So I went back to the dormitory.

Mr. Watts: I believe that's all. Thank you.

Cross examination.

By Mr. Gooch:

Q. Mr. Hunter, have a seat. I believe you have testified that you saw General Walker not too great a time before he made this speech on the monument, is that correct?

A. Yes, sir, that's correct.

Q. And when you saw him he was in the vicinity of the monument?

A. Yes, sir, he was right there in the street in front of the [fol. 1050] monument.

Q. Did you see him go west towards the flagpole with any group prior to the time he made the speech?

A. He went out into the circle but the only people with him was just a few people, mostly students.

Q. And they were walking west towards the flagpole?

A. Yes, sir.

Q. All right. Now, after that you saw him back around the monument shortly before he made the speech, is that correct?

A. Yes, sir.

Q. I believe you have stated that when the word got out that General Walker was there, or was going to make a speech—I may be in error on my words—that the crowd began to congregate around the monument, is that correct?

A. Yes, sir.

Q. How many people would you estimate congregated around the monument at the time General Walker was making his talk? I know it's—

A. Over 100, probably around 200 people.

Q. Probably around 200. And did they listen pretty well at the time he made his talk?

A. Yes, sir, most of them did, I think.

Q. Now I believe you have stated, or I'm asking you this question: Isn't it a fact that after General Walker finished [fol. 1051] his speech, that he said something to the effect, "Come on, let's go," or "Let's go up and see," and started towards the Lyceum Building?

A. Yes, sir, right after making his speech, he stepped down and people were still shaking hands with him and talking to him and he talked to a few of them and came over in the direction where I was and he says, "Let's walk up here and see what's going on," or something like that.

Q. And when he did, he started walking which way?

A. He walked out into the circle—well, he walked up the street a little piece, I believe, and then into the circle up towards the flagpole.

Q. And when he did that, what happened to this crowd that had been listening to him when he made the speech on the monument?

A. Well, some of them had already scattered out and the ones that had remained down there went out into the circle and went on up in that direction (indicating).

Q. You mean they followed him up in that direction?

A. Well, I was following him for—I can say that I was following him because I was, I wanted to see what he was doing.

Q. Mr. Hunter, do you remember when your deposition was taken down in Oxford?

A. Yes, sir.

[fol. 1052] Q. In March. By Mr. Watts. On Page 14:

"All right, continue with the narrative statement of what occurred after he finished his speech and got down off the monument."

And your answer, "After making the speech, I said to him—no, after making the speech, I said, he said, 'Let's walk up here and see what's going on,' or something to that effect. And so he turned and walked toward the Lyceum."

Did you make that answer?

A. Yes, sir, that's right.

Q. Was it true?

A. Yes, sir, that's right.

Q. Next question, "Did you see a big heavy-set Sheriff or someone that looked like a Sheriff with him?"

And you answered, "No, sir, I didn't notice."

Is that correct?

A. Yes, sir, that's right.

Q. "Mr. Watts: Continue then and tell us what you saw Walker do."

Answer, "He did walk toward the Lyceum and practically everyone that was in the crowd there at the bottom of the circle around the monument walked toward the Lyceum, also, and I was among that group."

Was that a correct answer that you gave in Oxford?

A. Yes, sir, that's correct.

[fol. 1053] Q. Does that refresh your recollection of what you saw there that night?

A. I don't know.

Q. Sir?

A. I don't know whether it does or not.

Q. Well, was that a true statement when you made it in Oxford on March the 13th, 1964?

A. Yes, sir.

Q. Now that, I believe you have testified that Walker, with this some 200 people behind him, got up near the flagpole, that a burst of tear gas was fired, is that correct?

A. Yes, that's right.

Q. And at that time you came back?

A. Yes, sir, most of the way.

Q. A lot of the crowd came back?

A. Yes, that's right.

Q. You looked back and General Walker was still standing there and hesitated some time before he came back, is that correct?

A. Yes, sir, it was a few minutes before he came back.

Q. Now the testimony that I have read to you, is that testimony true that you gave over in Oxford, Mississippi, on March 13, 1964?

A. Yes.

Q. Would you say that General Walker went westward [fol. 1054] any past the flagpole?

A. He could have, two or three steps.

Q. Did you say he did go past the flagpole in your testimony? At Oxford?

A. I don't recall.

Q. Well, would you say now one way or the other?

A. I say that he might have, two or three steps—

Q. All right.

A. —he might—I say the sidewalk there runs through the circle, right through the flagpole—

Q. That's right.

A. —two or three steps, give or take either direction.

Q. Now at the time you were in the vicinity of the flagpole, which might have been at it or some few steps past, you could see the group between the flagpole and the

Lyceum still throwing rocks, bricks and missiles at the Marshals, could you not?

A. I don't recall but I'm sure you could.

Q. Well, you just said that people up in that area, when you got up there, were throwing at the Marshals; that's what you just testified to?

A. Yes, sir, that's generally what was going on.

Mr. Gooch: All right. That's all.

Mr. Watts: That's all. Thank you.

The Court: I will excuse you, Mr. Hunter.

[fol. 1055] Mr. Watts: If Your Honor please, at this time we shall offer in evidence the deposition and testimony of Relman Morin that was taken here in Fort Worth on March the 7th, 1964.

RELMAN MORIN testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. All right, your name, please, sir.

A. Relman, R-e-l-m-a-n, Morin.

Q. Your profession?

A. Newspaper correspondent.

Q. For what period of time, Mr. Morin?

A. Well, since I was 18.

Q. Where were you born and raised?

A. I was born in Freeport, Illinois, but I was brought up in California, in Los Angeles.

Q. What place?

A. Los Angeles.

Q. Where did you go to school?

A. I went to Los Angeles High School and Pomona College and then did some post-graduate work in two universities in China.

Mr. Watts: Over to Page 16, next to the last question.

[fol. 1056] Q. Well, Mr. Morin, you have watched the balance of power shift militarily and psychologically from the hands of the free world almost into the hands of the enemy?

The Court: Just a minute.

Mr. Gooch: If the Court please, that's wholly irrelevant.

The Court: We are not going to permit that.

Mr. Watts: Let's see, maybe I was—Page 18, then.

Q. How long have you been employed by the Associated Press?

A. Thirty years this year—1934.

Q. Now as I understand, they are a cooperative news-gathering and disseminating agency?

A. That's correct.

Mr. Watts: Over to Page 20, Line 6.

Q. As a very expert newsman, you recollect that the news can be, or you recognize that the news can be slanted?

A. Of course it can.

Q. And it can be weighed?

A. Of course.

Q. And even the timing of news releases can affect the public acceptance and influence of that news?

A. That's right.

Q. Do any of the high-level AP personnel ever have con-[fol. 1057] ferences to discuss developments in the news and reactions?

A. Yes. We have two types: Every morning at 11:00 o'clock the Department Heads get together and that's primarily for coordination. In a big organization it simply —it happens that the left hand doesn't know what the right hand is doing.

And so before the day is very hard along, they get together and the general desk and the world desk and the sports desk and the out-going desks and the financial desk, and so on, all those, they get together because that news sometimes overlaps.

In other words, there is, as you can realize easily, a point where sports news and financial news overlap.

So they get together and that's primarily for the purposes of coordination so that everybody knows what everybody else is doing.

Then once a week the general manager has us all upstairs to the Board Room and there we talk not so much on an operational level as about what we are doing and what we ought to be doing and where something has gone wrong, to trace it down and find out why and where it's gone wrong.

Once a week the full-dress conference and every day the 11:00 o'clock more or less operational conference.

Q. So out of that, then, undoubtedly must come some [fol. 1058] organized concept of various important issues, so far as this group is concerned, doesn't it?

A. I am not sure that I know what you mean by that.

Q. Well, at the end of a conference, wouldn't you have some idea in mind of how, say, your boss is thinking?

A. Yes, and more important, he would have some idea in mind about how—what we are thinking.

Q. And if some of you people get a little too far in a direction that he doesn't fully concur with, why, you realize you are getting away from his trend of thought, don't you?

A. Yes, but his trend of thought is not inflexible, by any means. In other words, if you are discussing a particular thing, let's say a particular story that is being covered or something that you are planning for, he may take a point of view on it and you may well say, "Look, it just isn't like that and here are the reasons why not." Well now he can't know those things, let's say, that someone in the field knows about it. So in that case, he's not going to insist on any particular point of view and neither are we.

Q. And you individuals of the somewhat lower echelon influence him as well as him influencing you?

A. That's right.

Mr. Watts: Over to Page 23, Line 21.

[fol. 1059] Q. Mr. Morin, were you participating in the AP conferences when General Walker first became a national figure coincidentally with his relief of command in Germany?

A. Well, let's see, what was the date of that?

Q. That was the—in the spring of 1961?

A. Where was I then? Yes, the answer is yes. I was trying to remember, because in the spring of 1962, I went abroad to cover the Eichmann trial but that was '62. It was not the spring of 1961.

Q. As I remember, you, also, covered the Little Rock incident, didn't you?

A. Yes, I did.

Q. And General Walker was the commander of the Corps Area Headquarters in Little Rock at that time?

A. And a very good one, too.

Q. Well, thank you. And as such, he had been assigned the immediate command of the troops sent in by the government?

A. Yes, sir.

Q. And from your observation of the situation, there was absolutely no violence?

A. Well, there was violence, of course.

Q. Well, there was no violence that involved the Federal troops, was there?

A. Yes.

[fol. 1060] Q. There was?

A. Well, I don't know what you mean by "violence". There was the one instance where the man tried to take a rifle away from the paratrooper and he reversed it and caught him over the forehead like that (indicating) but that's the only case I seem to recall, if that's violence.

Q. By the term "violence," I mean—

A. You mean by a mass?

Q. No rioting or anything approximating the Oxford situation?

A. Oh, no.

Q. And that was so coordinated and controlled that the Government's mission was accomplished without any rioting whatsoever?

A. Yes, that's right.

Mr. Watts: Now over to Page 38, Line 11.

[fol. 1061] A. Oh, no.

Q. And that was so coordinated and controlled that the Government's mission was accomplished without any rioting whatsoever?

A. Yes, that's right.

Mr. Watts: Now, on page 38, line 11.

• • •

"Q. . . . Now then getting down to the Walker case, as such, what was the first you heard or first directive or order you had concerning the Oxford incident?

A. About 11:00 o'clock on the Sunday morning when Meredith was to be installed there, I had a call from one of the editors, one of the Sunday editors, and he said, "Stand by or to," not to Oxford—but I'll explain this in a moment, but, "to New Orleans."

And later in the afternoon, I think it would be around 3:00 or 4:00, the then executive editor of the AP called me and said, "I want you to go to New Orleans." Now the reason for that was that Oxford is a small town, no possible facilities there for setting up all the paraphernalia in terms of printers, I mean teleprinters, the wire photo setup and all the rest of it, so everything was going from Oxford to New Orleans. That was the way we were relaying it out of there.

And I said at that time, "Well, I would prefer to go to [fol. 1062] Oxford rather than to do a desk job in New Orleans." And he said, "All right, I think I am inclined to agree with you."

So the next thing was then to try and get a flight and by this time Sunday—I'm going beyond your question but—

Q. That's all right.

A. So I began phoning airlines and finally—I think the flight was out of New York at something like 11:20 at night, for Memphis, and that's the one I took.

Q. That was the night of September the 30th?

A. Well, if that's the date. It was the Sunday night that Meredith was installed in Oxford and—

Q. And you left New York at 11:20?

A. That's my memory of it. I could check the flight.

Mr. Walker: A. M.?

A. No, no, 11:20 P. M. I didn't get the definite word to go or, rather, where to go, Oxford or New Orleans, until about 3:00 or 4:00 o'clock in the afternoon.

By Mr. Watts:

Q. And, roughly, what time did you arrive in Memphis?

A. I would say 4:30 or 5:00.

Q. What did you do then?

A. Well, I had phoned down there and told them to have a rented car reserved for me because I felt sure that there [fol. 1063] would be a lot of correspondents coming and there might not be any cars.

Q. Were you alone?

A. No, I met Warren Rogers, who was at that time of the Herald Tribune, on the airplane and he found that he couldn't rent a car and so he rode to Oxford with me.

Q. Did you and Mr. Rogers discuss Walker at all at any time en route to Oxford?

A. I don't think we knew he was there.

Q. You had not—

A. I'm pretty sure we did not.

Q. You had not seen the national publicity where Walker called on, over the radio, for people, "To bring their flags, tents and skillets," and come to support Governor Barnett?

A. Oh, I had heard that one, yes.

Q. Sir.

A. I had heard that one. But in connection with what was going on in Oxford, I don't believe that I knew at the time that General Walker was there.

Q. I understand. And you and Mr. Rogers had no conversation at all on the way to Oxford concerning Walker?

A. No—well, I am 99 and 9/10 percent sure that we didn't. I know I went to sleep on the airplane. And when I filled out the forms for the rent-a-car in Memphis, the [fol. 1064] woman behind the desk said, "They have already killed three people down there tonight," as she put it. It was early morning, of course.

So we were naturally more concentrated on that. But apart from that, my memory of it is that I didn't know General Walker was there.

Q. Who drove?

A. I did.

Q. What time did you get to Oxford?

A. I'm going to be a little vague about this but not purposely: I would think that it was about 7:00 o'clock. It might have been a little earlier.

Mr. Walker: A.M.?

A. A. M., Monday morning?

By Mr. Watts:

Q. All right. I wish you would take it from there, to save my interrupting you and save some time, and give us a narrative statement of everything you did from there on, with whom you talked, who you saw.

A. Yes, sir.

Q. What you did.

A. Well, the first thing was coming down the road—it isn't a highway after you turn off the main turnpike—you came to that section of the University campus where there are exits there and we saw, I believe it was, state troopers but I'm not too clear about that. I think it was state [fol. 1065] troopers who were stationed in front of that

entrance. And we stopped and got out and questioned them there a little while.

They had very little to tell us because I believe they had been there all night. They weren't able to tell us very much or they didn't want to, I don't know which.

So we then went to the Ole Miss Motel where our people were and I believe Rogers and some of the Herald Tribune people were there and, in fact, the entire motel, as I recall, was at that time occupied by newspapermen.

Q. Now, you mentioned "our people." Whom did you see that you recognized as some of your people?

A. Ed LeBreton, primarily. He's an experienced man from Washington whom I knew best, in short. I don't recall that I knew any of the others except by name before that.

Van Savell was there. The man from Memphis who got shot, I think, was there. I was interested and curious about his wounds, and so on. He got shot in the back, you know, buckshot.

Q. Was that Bill Crider (phonetic)?

A. Crider, that's the name I was trying to recall. So the first thing I said, "I would like to go to the campus. Is that possible?" And they said, I think, it was.

[fol. 1066] So we piled into the car, LeBreton was driving, since I wasn't familiar with the town and what-not. I was in the front seat. Savell was in the back and there was a fourth but I don't remember who it was. It might have been a photographer.

We drove to the campus and parked up there outside and walked up through that area where the action had taken place the night before, noticed the debris and the smell of the tear gas, at the monument, empty tear gas cartridges and all that other detail.

Meanwhile, in the car coming up there, I asked these fellows details, details, details as rapidly as I could get them as to what happened on the night before.

Q. Now, let's get identified a little further. That was LeBreton and Savell and—

Q. The fourth person I just don't know. He might even have been a photographer. My memory of it is that the car was filled but I can't tell you who the fourth person was.

• • •

Mr. Watts: At this point I want to hold the remainder of Mr. Morin's deposition and read excerpts from the deposition of Van H. Savell.

Mr. Gooch: If the Court please, I presume he can make that request, but I would rather go on with one.

[fol. 1067] The Court: Yes, sir, he has a right to stop and you may offer whatever you want on cross there.

Mr. Gooch: No.

Mr. Watts: Now, turn to page 2 of the deposition of Van H. Savell.

Mr. Andress: All right.

• • •

DEPOSITION OF VAN HENRY SAVELL

Q. Your name, please?

A. Van Henry Savell.

Q. Where were you born?

A. Greenwood, Mississippi.

Q. Have you been a resident of Mississippi all of your life?

A. No, sir, I have not.

Q. Where else and when?

A. Springfield, Missouri, Louisville, Kentucky, Orlando, Florida, and New Orleans, Louisiana, Birmingham, Alabama, and Kansas City.

Q. What schools did you attend?

A. I went to school, grammer school in Vardaman, Calhoun City, Merigold, Mississippi, and I went to high school in Luka, Mississippi, and college at Mississippi College, in Clinton, Mississippi.

• • •

[fol. 1068] Mr. Watts: Now, page 3, line 8.

• • •

Q. And your age?
A. Twenty-two.
Q. Are you married?
A. Yes.
Q. And your wife's name?
A. Shirley Anne Sally Savell.
Q. This is your only marriage?
A. This is.
Q. When and where were you married?
A. June 21, 1963, in Greenville, Mississippi.

• • •

Mr. Watts: Line 18.

• • •

Q. Where did you have your college training?
A. Mississippi College, Clinton, Mississippi.
Q. What was the nature of that course?
A. It was for one year only.
Q. You are not then a graduate?
A. No, sir, I am not.
Q. What was the course of your studies?
A. I took basic course, that all freshmen take, on English and history and zoology and physical education, and that was it.
[fol. 1069] Q. Have you had any formal education in journalism?
A. No, I have not.
Q. What background then do you have, just on-the-job training?
A. On-the-job training.
Q. What is the nature and extent of that?
A. I wrote sports articles for a national weekly newspaper in Luke when I was in high school, and I was hired by the Clarion Ledger in Jackson, Mississippi, about Thanksgiving of 1960 I believe, and I worked continuously for that paper until Easter, 1961. At that time I was employed by the Associated Press in New Orleans until about the middle of October, 1961, at which time I resigned be-

cause I was only hired as a part-time placement, in the first place, and then I was hired by the Montgomery Advertiser in Montgomery, Alabama, and I worked for them until January 21, 1962, at which time I was again hired by the Associated Press, in Jackson, Mississippi, and I have been with the Associated Press ever since.

• • • • • • • •

Q. Have you ever had any experience of any kind in general reporting, prior to the time you went to work for the AP?

A. Some, yes.

Q. What was the nature and extent of it?

[fol. 1070] A. Some was with Clarion Ledger, but primarily in the sports department.

Q. Did you form an acquaintance while you were working with that paper with somebody connected with the AP?

A. Yes.

Q. With whom?

A. All three members of the Associated Press: Ben McCarthy, James Sigus, spelled S-i-g-u-s, and Doug Starr.

Q. Did you become acquainted with any of the other personnel of Associated Press who were outside of Jackson at that time?

A. Not to my knowledge, I don't think so, not until two weeks after I was hired by AP.

Q. Who hired you?

A. I was hired or interviewed by Mr. Davis, chief of the bureau in New Orleans, and he recommended by hiring, and as normally, it was approved by New York.

Q. Was he the only individual out of the New Orleans office with whom you had any contact before you went to work for them?

A. No, I had visited one of the other fellows the day I was interviewed by him.

Q. Who was he?

[fol. 1071] A. His name is Robert Rowand, an AP newsman in New York.

• • •

Mr. Watts: That must undoubtedly be a misprint, or a mistake; it was New Orleans.

Mr. Andress: It says New York here.

Mr. Watts: It was corrected to New Orleans.

• • •

Q. What was his official status?

A. Newsman like I was. Strictly a visit, nothing about business.

Q. What was your office set-up in Jackson, as you observed it between the Clarion Ledger and the AP office?

A. We were in the same building, second floor. During the day hours, our office was actually in the Jackson Daily newsroom, which is connected with the Clarion Ledger, and during the night hours, our office was connected with the newsroom of the Clarion Ledger.

• • •

Mr. Watts: Skip the rest of that. Just go to line 24.

• • •

Q. You went to New Orleans when?

A. I went to New Orleans about, I believe it was April 2nd.

[fol. 1072] No, not April 2nd, but it was around Easter time, if I am not mistaken, or right after Easter, and I believe this was in April.

Q. What year?

A. 1961.

Q. Did you receive any course of training for the increase in efficiency of your duties while you were in New Orleans?

A. The normal inside office training, yes. I was under observation of others, and I was kept under 'wraps' for a certain amount of time, until I felt I could take anything by myself without any help.

• • •

Mr. Watts: Now, to page 8.

• • •

Q. So we will all be instructed about the same thing, from your experience and contacts, you have been very familiar with the Walker case, have you not?

A. Well, fairly familiar, yes.

Q. Do you remember the 1st of October, or the 2nd and 3rd of October, 1962, after General Walker was ordered or committed to the prison hospital in Missouri?

A. I remember something like that happened, yes.

Q. From the vast headlines coming across the press of the nation, that came to your attention, that Walker had [fol. 1073] been arrested for insurrection, sedition and insulting public officers?

A. No, I didn't.

Q. You didn't read anything like that?

A. I didn't have time to read the papers.

Q. You say you were not familiar with it?

A. No, I didn't read the papers.

Q. Did you ever hear it on the radio or television or anything of that kind?

A. No.

Q. You were familiar with your reporting, were you not?

A. Yes.

Q. And set out considerable emphasis on the fact that Walker had led a charge and had been arrested, didn't you?

A. That is what I reported, yes, sir.

Q. That's right. Were you in the area on the 21st of November, 1962?

A. On the 21st of November—

Q. When they had a hearing in Oxford, with respect to Walker's mental capacity?

A. Yes, I was.

Q. Did you attend that hearing?

A. No, I did not.

[fol. 1074] Q. Did you have any contact with any of the news releases after that hearing by Associated Press?

A. To my knowledge, I didn't read any of them, no, sir.

* * *

Mr. Watts: Now, then, skip over to page 111, line 10.

• • •

Q. Could you fix the time the tear gas was fired?
A. Of my own personal knowledge, no.
Q. From subsequently acquiring information?
A. About 7:50.
Q. About 7:50. All right. What occurred then?
A. I ran back to the phone and made my report, said that tear gas had been fired, and left immediately, and that's all I said.
Q. This is report number 5?
A. I guess.

• • •

Mr. Watts: Now, then, turn over to page 139, line 15.

• • •

Q. Go ahead.
A. Then I heard a comment behind me to the general effect, and I don't remember the exact wording, "Here is [fol. 1075] General Walker, here comes General Walker," and I turned and I saw striding fifteen yards behind me, General Walker.
Q. Describe that.
A. He was walking in very long strides.
Q. In what direction?
A. In a westerly direction, up toward the Confederate statue.
Q. Where was he at that time when you first saw him?
A. About fifteen yards east of the intersection, right there where the Circle meets University Avenue.
Q. On which side of the road?
A. More or less in the middle.
Q. Now at this point, let's put an X with a 2 after it,—

• • •

Mr. Watts: May we agree, Mr. Gooch, or Mr. Cravens, that I will go up and point out on the big board where it is?
Mr. Cravens: Yes, sir.

Mr. Watts: I will point out to the Jury that at this point the witness, Van H. Savell, put an X at this point right here (indicating).

Mr. Andress: What is that point?

Mr. Watts: That X is the point where he first saw [fol. 1076] Walker.

Mr. Andress: Where is it located, please?

Mr. Watts: Located slightly westward of the monument.

* * *

Q. Now, at this point, let's put an X with a 2 after it, where you are. We will put this on Exhibit 7-A, put where Walker was with a W, with a ring around it.

All right. Was anyone with Walker?

A. I didn't recognize anyone with him. There were students and people beside him, mostly young people.

Q. How many?

A. About twenty-five or twenty, in the general area here, back like this (indicating).

Q. Did they appear to be walking with him, or standing, or moving at a definite pace?

A. They appeared to be walking with him. They were hollering "Here is General Walker," and so forth.

Q. Now, how was he dressed?

A. He had on a black suit, black shoes and a white tie, white shirt, I mean a black tie, and a white or light beige Texas hat.

Q. What did you see him do?

A. Walk up to this area, and just sort of stood around looking.

[fol. 1077] I was just to the north of—

Q. Roughly, then, you were due east of the monument?

A. Due east, yes, I was.

Q. I'm going to move this line here, which represents the south side of the University Avenue, for the reason that the monument, as I remember it, is just about in the center.

A. You will have to move me over a little bit then.

Q. All right.

A. I was standing right next to the curb, street, right over the curb, and I was standing right next to this curb.

• • •

Mr. Watts: Drop down to line 17.

• • •

Q. We will call this X-2, to distinguish it from the other position you occupied. Walker then was roughly in the center of the street approaching the monument?

A. Yes, sir.

Q. The monument is roughly square, isn't it, or rectangular?

A. The base is square.

Q. I have drawn here a square which represents the monument, and you say Walker passed to your right as you [fol. 1078] faced west?

A. He more or less stopped on my right, and I moved toward him.

Q. How far from you was he?

A. When he stopped, he was, oh, eight or ten or fifteen feet, ten or fifteen feet from me.

Q. Did you say anything to him?

A. No, sir, I did not.

Q. Did he say anything to you?

A. No, sir, he did not.

Q. Did you hear him say anything to anyone?

A. At that time, no, sir.

Q. What occurred then?

A. He stood there looking around and I moved closer, I was probably within five or six feet of him, and this same person with the Confederate flag and multi-colored shirt, mostly red, said "General, will you lead us to the steps," and Mr. Walker made no comment, he sort of scratched his head (indicating), or rubbed his head a little, like this (indicating), and moved his—his head went back a little, and he lowered his head, in my opinion he looked like somebody who might be thinking, and he was like that for several

seconds, about forty or fifty seconds, just didn't say anything, was very quiet, in fact the students got restless behind and began to chant "Come on, let's go. There is [fol. 1079] General Walker, he is our moral support, let's go." And Mr. Walker raised his head and looked this fellow squarely in the face, and nodded his head. Up to this time Walker had said nothing. I hadn't heard him say a word.

Q. Go ahead.

A. About this time they appeared to—well, Mr. Walker took a couple of steps forward, and this boy was over to his left, and some of the group, sort of moved up behind, there was quite a large group behind, and they took several steps.

Q. At this time was there any personnel west of the monument?

A. West of the monument, I didn't see anyone. There might have been one or twenty, but I didn't see them.

Q. Had all the crowd then moved back into the street east of the monument?

A. Yes, that's my—.

Q. Any people at all north of the Circle or northwest of the Circle?

A. In that direction, I couldn't tell.

Q. How far could you see in that direction?

A. I couldn't see very far. There were no lights.

Q. How far could you see toward the Lyceum?

A. I could see the Lyceum Building.

[fol. 1080] Q. Could you still see people in front of the Lyceum Building?

A. Outlines of people, yes.

• • •

Mr. Watts: This is line 3, page 144.

• • •

Q. You moved then about half the width of the street to the north then?

A. Yes. I was about the center, where General Walker was.

Q. Where was Walker from you?

A. Oh, four to six feet from me, just to the north of me.

Q. All right. Were there any people between him and the monument at that time?

A. This one fellow who made the comment to him.

Q. Were Walker then and this fellow alone out there, ahead of the main crowd?

A. Repeat that.

Q. Were Walker and this one fellow now alone and to the west of this main crowd?

A. No.

Q. Describe the location then.

A. The fellow was out alone, up ahead of the crowd, but the crowd had closed around Walker on all sides, except the [fol. 1081] one where this fellow was, and this fellow was standing about three or four feet away.

Q. From Walker?

A. West of Walker, he was.

Q. Go ahead.

A. And as I said, they took several steps forward, and then a portly, neatly dressed fellow of about forty-five walked up.

Q. Did he say anything?

A. He walked up to Mr. Walker and introduced himself.

Q. Could you remember what he said?

A. I didn't understand his name, no, sir.

Q. Did they shake hands?

A. Yes, they did.

Q. All right.

A. And this fellow, I noticed had on a deputy sheriff's badge. They talked for a moment, and then this boy sort of made a motion, and several people got around, and there was quite a hubbub in there, but I couldn't tell what was going on. I was still four or six feet away, and everybody talking at once there. This was only for several minutes.

[fol. 1082] Q. The portly gentleman with the sheriff's badge seemed to be involved in the charging?

A. In the charge, well, I hadn't seen him before.

Q. You had not seen him prior. Go ahead.

A. As I said, they were talking quite low, and then everyone was talking at the same time, and I just sort of kept an eye on him, and I didn't hear Walker say anything. I just keep watching his mouth, and I didn't see him say anything, and then they sort of opened up.

Q. Did he have his hat still on the back of his head, or did he put it back?

A. He did actually push it back, to the back of his head, but then sort of moved it when—

Mr. Cravens: Just a minute. "He did not. . . ."

Mr. Watts: "Did he have his hat still on the back of his head or did he put it back?"

Mr. Cravens: "He did not. . . ." Should be a "not" in there, he did not.

Mr. Watts: Go ahead then. Put a "not" in there.

A. He did not actually push it back, to the back of his head, but then sort of moved it when—

Q. In other words, he rubbed his brow?

A. Yes. He didn't put it on like a cowboy would.

Q. All right.

A. The group backed up or away from the front of Mr. [fol. 1083] Walker, and this boy took his right hand and grabbed hold of the general's left arm, and another person on the other side did the same thing.

Q. Was that the deputy sheriff or someone else?

A. I'm not certain whether it was or was not. I really don't know.

Q. All right.

A. But anyway, they started walking.

Q. Which direction?

A. At that time they were walking due west and they walked around the monument.

Q. Which direction?

A. To the north of the monument, and then they walked straight toward the Lyceum Building for 10 or 15 yards.

Q. Was that on the sidewalk or on the grass?

A. They were on the grass.

Q. North or south of the walk?

A. North of the walk.

Q. At what rate of speed were they walking?

A. Normal pace.

Q. Did Walker have any rocks or weapons or any missiles?

A. No, sir.

Q. Then what happened?

A. After Walker went ten or fifteen yards, they sort of veered to the right.

[fol. 1084] Q. That would be to the north?

A. Yes, sir. They were walking to more of a northwesterly direction.

Q. All right. Where were you at this time?

A. I was just to the right of Walker.

Q. Following them?

A. Almost abreast of him.

Q. From the time you saw Walker come up to this point, had you seen anyone else you knew?

A. No.

Q. Any other newsman?

A. No.

Q. Had you up to that time seen the UPI newsman Kettner anywhere?

A. No.

Q. Continue.

A. We walked for about ten or fifteen yards, and as I say, they were—then veered to the right and walked in a circular manner, more or less bordering on the Circle.

Q. How close to the curb of the Circle?

A. About 25 yards from the circle—

Mr. Gooch: Feet.

Mr. Watts: Feet?

Mr. Cravens: That's been changed from "yards," to "feet".

[fol. 1085] Mr. Andress: Mine isn't. Go ahead.

Mr. Watts: That should be about 25 feet.

A. About 25 feet from the circle but walked around until they were almost even with the flagpole.

Q. All right.

A. And then sort of veered back toward the center of the circle.

Q. Did they walk straight or—

A. They came, just went toward the sidewalk.

Q. Due south?

A. No, not due south, just more or less going southwest or south-southwest.

But they went toward the sidewalk, didn't reach it, and then turned directly toward the marshals, and at this time Walker and the two fellows that had hold of his arms were between the sidewalk or almost even with the sidewalk and street.

Q. And by that you mean the east-west sidewalk from the flagpole to the monument? Well, I will draw a line from the flagpole to the monument, which will represent the sidewalk. Now, where were they at this point?

A. Right in here.

Q. Would you put a W and circle it? All right. And we will put a 2 to the side of it.

Mr. Watts: And may we agree that the W with the 2 [fol. 1086] around it that the witness put is along in this area here (indicating)?

Mr. Gooch: In that area.

Mr. Watts: In the northwest quadrant?

Mr. Andress: And about the center of it.

Q. Would you say that was a third of the distance from the flagpole to the Lyceum Building?

A. No.

Q. Would you say the distance would be a fourth?

A. I doubt if it was that far. They were still about forty or fifty yards away from the Lyceum Building.

Q. Then what happened?

A. They walked in this direction, like this (indicating). They walked toward the Lyceum building in a westerly direction.

Q. Now did this young man who took hold of Walker's arm take a position just east of the monument, or not releasing his arm until he reached the position of W-2?

A. He didn't release his arm.

Q. What about the man on the left, was he holding onto Walker's arm, too?

A. Yes.

Q. And the three of them went along there, as you have described?

A. Yes.

[fol. 1087] Q. Were they in step?

A. I didn't notice if they were in step.

Q. Was anything said by anybody?

A. Mr. Walker walked straight ahead, with his head straight. I didn't see him look to either side, I didn't hear him say a word. As far as I know, he had not said anything.

Q. He said nothing that you heard?

A. Nothing.

Q. Go ahead.

A. They walked about 10 or 15 yards in this direction, in a westerly direction.

Q. At that time had there been any tear gas fired?

A. No.

Q. From the time you saw Walker start from the monument area to this point?

A. I didn't see any.

Q. You saw them walk 10 or 15 yards toward the Lyceum?

A. Yes.

Q. And then what happened?

A. Then when they were about 70 or 75 yards from the Lyceum Building, then this tremendous group that was behind them—

Q. Was this group bigger than the group the whole day?

A. Bigger group, that I saw.

[fol. 1088] Q. All right.

A. They threw all of their rocks, small bricks or broken bricks and glass and stakes, and so forth.

Q. Where was Walker and these two other men at the time these bricks and things were thrown?

A. At the very front of the group.

Q. How far was it from them to the nearest man to their rear or east?

A. Behind them, about two or three or four feet.

Q. Walker and the two men were out in front of the distance you mentioned?

A. By that distance, yes.

Q. Then what happened?

A. They threw all of their things, as I said, and turned, and the tear gas hit in the middle or else in behind us, and it was quite heavy.

Q. Before or after the rocks were thrown?

A. After the rocks were thrown.

Q. All right.

A. And I watched as both these fellows let loose of Mr. Walker and turned. Mr. Walker turned and sort of ducked down, like this (indicating), and took off running, and so did the other two fellows, and so did I, and so did everybody else.

Q. Which way was Walker running?

[fol. 1089] A. Directly to the east.

Q. That would be how far north of the sidewalk connecting the monument and flagpole?

A. About 125 yards.

Q. About 125 yards?

A. About a hundred and twenty-five yards from the monument to where he turned when he started running.

Q. No, I believe you misunderstood my question. You say he ran directly east. Now, how far was the line that he was following as he ran north of the sidewalk between the monument and the flagpole?

A. I didn't have time to estimate it, because I was running, too.

Q. Would you say half the distance to the street and circle, or a third?

A. I don't know.

Q. Would you say five yards or ten yards?

A. I couldn't say. I didn't see the sidewalk.

Q. Where were you with respect to Walker?

A. When he turned to run, I turned with him. I had a towel with me so the tear gas was not as bad for me.

Q. Did he out-run you or you out-run him?

A. He ran several steps and I ran, and I didn't see him again for about 10 or 15 seconds.

Q. When he started to run, what direction was he from [fol. 1090] you, east or west?

A. He was to the east, or west of me. No, he wasn't either.

Q. Where was he?

A. He was to the south of me.

Q. You were directly on his right then?

A. Directly on his right, yes.

Q. Were you on ahead of the crowd, then?

A. I was at the time he turned, yes.

Q. Did you ever see Walker throw a rock?

A. No, sir.

Q. You still didn't see any other newsmen involved in this incident, that you knew?

A. No.

Q. Did you see anyone you knew during this or during the last few minutes that you described?

A. No.

Q. Did Walker leave you as he started to run, or did you keep up with him?

A. I didn't see him after he ran three or four steps, until I was back down at the monument.

Q. What happened then?

A. I heard him make some remark about "Well, we'll get together and charge again," some comment or something

about students, and "We will charge again, the group will [fol. 1091] charge again." I don't remember what the exact words were.

Q. Now this was down at the monument?

A. He was still running, or he wasn't running at this time, more or less walking fast or trotting, but out of breath, appeared to be, and I was out of breath, and he didn't make any comment to anyone in particular, just made the comment.

Q. Was anyone with him at all other than these two individuals concerned?

A. They were not with him. They let loose of his arm.

Q. You mentioned some individual who introduced you to Walker at the motel. Did you see him from the time Walker arrived until after the incident you described here?

A. I haven't seen him since the time at the motel.

Q. Would you say that he was not with Walker as Walker came on the campus?

A. No, I wouldn't say that.

Q. Now where is this last location you are talking about, when Walker said, "We will charge again"?

A. We were in the general area of the monument, more or less to the northwest, about in here (indicating).

Mr. Watts: May we agree that that is a point apparently about, oh, I would say ten yards northwest of the monument?

Mr. Gooch: Yes.

[fol. 1092] Mr. Andress: I think it is northwest, yes.

Q. Put a 3 in there.

A. All right.

Q. Then what did you do?

A. As soon as he made the comment, I turned and ran to a phone.

Q. What direction did you follow?

A. A different one from any I had taken before. I ran directly north or a little to the northwest of the monument, and I ran between the YMCA and what I think is the Fine

Arts Building, and I ran near the girls' dormitories, into the valley back there.

Q. North of the Fine Arts Building?

A. Yes, ran by Meek Hall, which is down the valley, and the tear gas was quite heavy down there, but I made it back up to the dormitory, which I pointed out earlier.

Q. And you made that, and did you make a telephone report there?

A. Yes, I did.

Q. Now this then would have been the fourth charge you witnessed?

A. Yes, sir.

Q. To whom did you make that report?

A. I really don't know.

Q. What was the time of that report?

[fol. 1093] A. Somewhere around 9:00 o'clock, I wouldn't know.

Q. What was the time you saw Walker arrive on the campus?

A. I would estimate it about 8:45.

Q. What period of time would you say it was between the time of 8:45 when he arrived and the time that he reached the furthest westward penetration toward the Marshals?

A. Well, at that time my idea was not to estimate time, but rather to keep my eye on him and see what was going on. I didn't pay any attention to the time whatsoever. It couldn't have been more than 15 minutes.

Q. Have you since talked to anybody anywhere at any time who purports to have seen the same thing you did?

A. No, sir, I have not.

Q. Have you made an effort to do so?

A. No.

Q. Have you been instructed by anyone connected with the Associated Press to endeavor to find some other person who also saw the same thing you reported?

A. No, sir.

Q. What was the text of the report you made on this occasion to the New Orleans office?

A. I said that General Walker had appeared on the campus, and I described, as I have to you, the chronological order in which he arrived, and the things that occurred, [fol. 1094] and then I described the fact that a wave of people, numbering in my estimation about 1,000, had made a charge or assault, I don't know what word I used, but they approached the Lyceum Building and got to within an estimated 75 yards, and that General Walker was in the forefront of this group, with these two other persons holding his arms, but Walker was a half step behind—

Mr. Gooch: Ahead.

Mr. Watts: That's been changed from "behind," to "ahead".

Mr. Andress: A little difference.

A. But Walker was a half step ahead and that rocks and bricks and stakes and glass bottles had been hurled toward the marshals, that we were repulsed by a barrage of tear gas, that General Walker had turned and run back toward the monument, and that then I turned and that he had made that comment about the fact that the students or the group would regroup and charge again.

Q. That is not exactly what you told us a moment ago.

A. I don't remember, because I never wrote that comment down. I was running, I didn't have time, with a big news story right there, to write any comment down, and I never gave a fact quote on that remark at any time. I said that he had said that the students or the people would regroup, and I don't at this moment remember the exact [fol. 1095] words that he used. I know he used the word "students".

Q. He said the students would regroup and charge again, is that your language now, that you think he used?

A. I don't know, but he said the students would regroup, and he used his own self in the same phrase. He gave me the impression that he said that he and the group would

regroup and charge again, or the students would regroup and charge again, and used himself in the same type of sentence.

Q. What distance did you cover from the monument to the Perkins room to make that report?

A. More than an eighth of a mile, probably less than a quarter of a mile.

Q. What floor was Perkins's room on?

A. The second floor.

Q. You went up a flight of stairs?

A. Yes.

Q. Were you out of breath when you got there?

A. Yes, sir.

Q. Was the line open?

A. Yes, sir.

Q. Was someone waiting at the other end?

A. Yes, sir.

Q. Do you know who that was?

A. No, sir, I do not.

[fol. 1096] Q. Did you ask them—

A. I knew at the time who it was, I could tell by the voice, but I don't remember.

Q. Could you fix that time?

A. Sometime around 9:00 o'clock, to the best of my knowledge, depending. I estimate there was probably a 15 minute lapse between the time I saw Walker and the time I got on the phone, so it was about 9:00 o'clock.

Q. Did you hear any part of the President's speech?

A. No.

Q. Do you know he had made a speech?

A. I knew he had planned to.

Q. When did you first learn that he had made one?

A. The next afternoon I was told he had made a speech.

Q. All right. You made that report. Now what did you do then?

A. I made the report and went back to the area.

Q. How long did it take you to make that report?

A. About three or four minutes, something in that area, I don't know.

Q. Now by my figures here, from following your testimony, that is the eighth phone call you made, that the fifth call you made from Perkins's room. What did you see when you came back to the area?

A. As I got to the area, I saw Mr. Walker standing on a [fol. 1097] ledge of the Confederate statue.

Q. What was he doing?

A. He was talking.

Q. Had you at any time prior to this seen a young preacher, Mr. Duncan Gray?

A. Many times I had seen him, yes.

Q. Had you seen him that evening on the campus?

A. No.

Q. Did you see him at all that evening on the campus?

A. No, sir.

Q. Then when you returned, Walker was on the base of the Confederate statue?

A. Yes.

Q. Was he alone?

A. There were students around.

Q. Was there anyone else up on the statue with him?

A. No, sir.

Q. Could you hear anything he was saying?

A. Yes.

Q. What did he say?

A. As I saw him, I heard the word "Cuba," I heard him say "Cuba," and I continued running to the area, and he sort of lapsed for a moment, or a few seconds, didn't say anything.

Q. Wait a minute. From what direction were you approaching?

[fol. 1098] A. I was approaching from the northwest, or northeast, more northwest.

Mr. Gooch: That's been changed to "north".

Mr. Watts: —"more north"?

Mr. Gooch: "I was approaching from the northwest, or northeast, more north."

Mr. Watts: As a matter of information, who made these changes?

Mr. Gooch: Savell.

Mr. Cravens: The witness.

Mr. Gooch: Wasn't me because I wasn't there.

Q. What was the size of the group of people around him at that time?

A. Several hundred.

Q. How did it compare with the group that participated in the alleged charge that you have described, which was the fourth charge?

A. The people in the area of Walker were smaller, but there were more than that, a thousand people within a hundred fifty or two hundred yards of him.

Q. As you came back, where were you from this north curb of the oval, as you came eastward?

A. As I came eastward from the north curb, I was running on the grass, six or seven or ten yards from the curb.

Q. Where did you enter the oval?

[fol. 1099] A. At the street, where the YMCA is, the building here, that's the Fine Arts Building.

Q. Had you again come from behind the Fine Arts Building?

A. That's correct, sir.

Q. And you entered somewhere roughly near the place that we have marked X-1?

A. Yes.

Q. As you approached on the scene, you heard Walker say something about Cuba?

A. I heard the word "Cuba".

Q. Did he have his hat on at that time?

A. I guess he did, yes, sir.

Q. What next did you hear him say?

A. I heard him say something about somebody, he made the comment about somebody had betrayed Mississippi.

Q. Somebody had betrayed—

A. Yes.

Q. Do you remember who he said?

A. He didn't say who, he said, "Somebody has betrayed you!"

Q. In other words, he used the words "Somebody has betrayed you"?

A. Yes.

Q. Go ahead.

[fol. 1100] A. And immediately there were comments, "Who, who?" And he didn't at first make a comment, just "Governor Barnett".

Q. What comment?

A. He just said "Governor Barnett", but it was his voice, I was within ten feet of him at this time.

Q. Which direction were you from the statue?

A. To the northeast, in the road just off the curb.

Q. Where was he from the statue?

A. On the north side of the statue.

Q. Facing to the north?

A. No, facing to the east.

Q. But he was standing at the north side of the statue?

A. Yes.

Q. The statue then was on this right?

A. Yes, more or less.

Q. Go ahead.

A. And he stood there, he made this comment, almost inaudible, it was inaudible to most people, about Governor Barnett.

Q. What period of time—

A. He made this comment about Governor Barnett, in a low voice, and I heard it, and then he stopped and leaned over and talked to a fellow, I don't know who the fellow was, and there was a period of time when he was talking to this fellow, and leaning on this fellow's shoulder, and [fol. 1101] then he reared back up and said "Birdsong, Birdsong has betrayed you."

Q. Is that all?

A. No, that is not all. Then he made a comment about "We can win," or "You can win." If you don't think you can

win, go home, leave the university. But we can win." Then he made a comment about "Keep protesting. You may not win, but you will be heard." And he said "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now." When he made that comment, I immediately turned and left and ran for the phone.

Excerpts From Morin Deposition

Mr. Watts: All right. Now, if you will, return to the Morin deposition, Page 43, Line 15.

Q. Now let's get identified a little further. That was LeBreton Savell and—

A. The fourth person I just don't know. He might even have been a photographer. My memory of it is that the car was filled but I can't tell you who the fourth person was.

Q. All right, sir.

A. So during that ride there, they would tell me something and I would ask a question, and so on, and then when we got up to the campus, I don't think we drove on. I think we stayed, parked outside the gates and walked on up there, all the way to the Lyceum Building, the monument.

[fol. 1102] I tried to ascertain, for example, how far forward the students had gone that night in relation to the Marshals and, of course, in the dark I don't think that they were able to tell me with any exactness but we paced it off as well as we could and that was about the size of it.

Then we drove back from there. That took, I would think, a half to three quarters of an hour and we drove back from there to a lunch counter sort of on the outskirts of town.

We came to it before we actually got into town and we stopped there for breakfast.

Then I dictated that story that Little Rock was a skirmish, I believe it begins, and then we went out into the town again, into the streets, up to the square, saw—

Q. I wish you would outline to us everything that Savell told you from the time you first arrived until the time you are speaking of now, after you left the campus?

A. Well, I don't know that I can do that.

Q. Only with regard to Walker; I mean I would emphasize with regard to Walker.

A. Well, the first thing that I asked about was those two people who were killed, the circumstances of their deaths. That was the thing that—in fact, I remember saying, "Well, I have been told that there were three," and they said, "No, there were only two," or "there were two," or something [fol. 1103] like that.

And then to find out how many, if they knew, persons had been injured either with gunfire or flying objects. And that was the first part of it.

The next part was when we got to the scene and had to find out—oh, I, also, asked them if they could estimate, realizing it was dark and there was a good deal of confusion, how many students or other persons were involved.

And, of course, they weren't able to be very specific about that.

And I asked, as usual, "Were there many outsiders, out-of-towners here, adults," and so, "that you were able to recognize?"

And they said they saw a few and I believe that the first time that General Walker's name came into the conversation was at the monument when one of them—and I don't remember whether it was LeBreton or Savell—said, "General Walker stationed himself here last night and then the students," he said, "recognized him," and I think he said that, or Savell, rather said, "a cheer went up," or maybe it was LeBreton, I'm not sure, "a cheer went up," or something, that "the students rallied around him," or something like that, and that, "He then led them towards the Marshals."

I believe that was the substance of the conversation.

[fol. 1104] But the first thing I was concerned with, as I say, was the deaths and injuries because I thought, judging from what that woman had told me in Memphis, it was a good deal more severe—well, it was bad enough but....

[fol. 1105] Q. Now, then, Mr. Morin, under date of October 1, 1962, and under your by-line, there was an article written about Walker, is that right?

A. Yes, sir—well, not about Walker.

Q. Sir?

A. It was not only about General Walker.

Q. Well, the article included comments about Walker?

A. Yes.

Q. And I notice the Dallas paper there has headlined it as emphasizing Walker.

A. Yes, but that's the Dallas Times Herald.

Q. Yes.

A. That's not the substance of the story.

Q. I understand. You are not responsible for the headline that the local paper puts on it?

A. No.

Q. But the article does contain comments on Walker?

A. That's right. It doesn't—I wouldn't use the word "comments". It contains what our people down there, including the photographers, who were all over the place, told me was his part in the action; in other words, that's a report of what General Walker did. But "commenting" is the wrong word.

[fol. 1106] Q. Well, do you mean that photographers told you that Walker had led a charge?

A. I don't say the photographers told me this. I don't—in other words, you have got a lot of people talking there.

Q. Yes.

A. But out of the concensus of what they said was that the General had been there the night before and that he had played a role in the events of the night.

Q. Now reading down to the third paragraph, there are two paragraphs here, or three that we are interested in primarily, "Walker whipped up the students and others on the campus of the University of Mississippi Sunday night when it became known there Meredith, Negro, was on the campus."

A. Uh-huh.

Q. That was your concept of the general information that you had received from your AP personnel?

A. That's right, they told me, I mean the statements that they attributed to General Walker and his actions.

Q. Yes. So are we in agreement then that the entire source of facts upon which this article was based came from your conversations with the AP newsmen that you encountered after you arrived at Oxford?

A. No, they were not the only source. There were other [fol. 1107] newspapermen there from other newspapers who had been on the campus the night before.

Q. Did any other newspapermen other than Savell or someone else connected with the AP tell you that Walker had led a charge?

A. I don't know that they actually used that term but they described the action.

• • •

Mr. Watts: Skipping to the question on line 22, page 49.

• • •

Q. Yes. "However, at the time he was the crisp and professional soldier who gave no signs of his feeling. He set up his command post at the corner of Central School. The contrast is most marked by the size of the operations here. In Little Rock, it was largely quiet. If you were three or four blocks from the school. In Oxford, there is little quiet anywhere. On the contrary, there is a brooding sense of disaster. Several days ago, Walker said he planned to lead 'tens of thousands' of volunteers to aid the cause of Governor Barnett but his only troops Sunday night were a band of students and other persons whom he led in a charge on the position of the Federal marshals."

Now, you have in your article there and news release to the world made the statement that "Walker led a charge [fol. 1108] on the position of Federal marshals." Now, I wish you would tell us, to the best of your capability of memory, all sources of information that you had that

Walker had led a charge on the position of the Federal marshals.

A. Well, I have tried to—as I say, these were reporters, they were photographers, they were men from other individual newspapers and what-not to whom I talked that morning.

Q. All, of course, was hearsay from other people and you personally hadn't observed it?

A. No, of course I didn't get there until long after the events were over.

Q. Could you give us a distinct recollection of any single individual that told you that Walker had actually led a charge?

A. No, no.

Q. You do have a recollection you went out to the campus in the automobile with LeBreton, Savell and one other individual, that someone pointed to the monument—

A. Well, we walked to the monument.

Q. Oh, you got out and walked?

A. As I told you, we parked outside the gates and we walked over that area.

Q. Now reconstructing and reliving that incident, to the very ultimate of your present capability of memory, I wish [fol. 1109] you would park your car and get out and go back over it and tell us just exactly what happened and what you saw and who said what to whom.

A. All right. First of all, I asked where the two people were killed. Nobody seemed to know that. And it later developed that the French correspondent—at least I believe—whether he was killed there or not but the French correspondent's body was found some distance from there. But in any case, we weren't able to establish that.

The next thing was to go and look at the debris, burned out cars and things of that nature around the side. And they showed me, my memory of it is, there was a bulldozer or some sort of—a piece of equipment, in any case, that had had been used but I believe had jammed or the motor quit or stopped against a tree, or something of that nature, so

they showed me where that had come from, toward the lines of marshals.

I can't tell you exactly when we went to the monument. As I say, we were simply walking around the whole area, from the steps there of the Lyceum, on out to the gate, this having been the scene of the action the night before and that's about the best I can tell you about it.

• • •

[fol. 1110] Mr. Watts: Now, on page 54, line 7.

• • •

Q. And from your talking with these people—and as I understand, the only one you can specifically remember telling you about the charge is Savell?

A. That's the only one I can specifically remember.

• • •

The Court: Ladies and Gentlemen, we will recess until 9:00 o'clock Monday morning. The Courthouse is closed tomorrow. They will not keep it open just for one Court, and the air conditioner on on the whole building just for one room.

Please bear in mind my instructions not to discuss this case with anyone, or permit it to be discussed in your presence. Have a pleasant week-end.

(Thereupon, at 5:00 o'clock, p. m., an adjournment was taken until Monday morning, at 9:00 o'clock, June 15, 1964.)

[fol. 1113] Proceedings

9:00 o'clock a. m.

Mr. Watts: If Your Honor please, at this time I would like to read to the Jury the Plaintiff's Exhibit 13, which is an Associated Press release, and in lieu of digging it out of this stack of official wire service releases, I am going to read the same release from the Evening Star which was offered by the Defendant as the Defendant's Exhibit 2.

The Court: All right. But, you are offering Plaintiff's 13 out of the original group?

Mr. Watts: Yes, sir.

This, Ladies and Gentlemen of the Jury, is an Associated Press release by the witness Relman Morin, whose deposition we have read, and I know it's kind of hard to keep up with these depositions, but we read his deposition the last thing last Friday.

I will read to the Jury this news release by the Associated Press.

PLAINTIFF'S EXHIBIT 13

"By Relman Morin, Associated Press Staff Writer.

"Oxford, Mississippi, October 1:—

"Little Rock was a skirmish. Oxford is a war.

"The riots just five years ago in the capital of Arkansas were ugly and dangerous. In Oxford, the ugliness and [fol. 1114] danger, is magnified to a gigantic scale.

"And one of the ironies of the situation here today is that former Maj. Gen. Edwin A. Walker, who commanded the Federal troops that took over Little Rock, is on the opposite side of the fence here.

"Mr. Walker whipped up the students and others on the campus of the University of Mississippi last night, when it became known that James H. Meredith, was on the campus.

"After the Little Rock riots, Mr. Walker said that he found his duty there distasteful.

"However, at the time, he was the crisp and professional soldier who gave no sign of his feelings. He set up his command post at the corner of Central High School—the object of the riots.

"Contrasts in Size

"The contrast is most marked by the size of the operations here. In Little Rock, it was largely quiet three or four blocks from the school. In Oxford today, there is

little quiet anywhere. On the contrary, there is a brooding sense of disaster.

"Several days ago Mr. Walker said he planned to lead 'tens of thousands' of volunteers to aid the cause of Gov. Ross Barnett.

"But his only troops last night were a band of students [fol. 1115] and other persons whom he led in a charge on the position of the Federal marshals.

"They got within 100 feet but the tear gas fumes repelled them.

"Gives Advice

"Later, Mr. Walker was giving demonstrators advice on how to counteract the acrid tear gas fumes.

"Mr. Walker, appeared on the Oxford town square during the disturbance here today.

"Mr. Walker marched ahead of a file of soldiers as though he were their inspecting officer.

"Finally, an Army officer asked him to move. He refused. The officer ordered several soldiers carrying rifles with bayonets alongside him.

"The soldiers held their bayonets within inches of the former general, but did not touch him. The officer said something to Mr. Walker and he walked off through the crowd."

Mr. Watts: Now, if Your Honor please, we will offer part of the deposition of Mr. Alan Gould, the Executive Editor and, unfortunately, we do not seem to have the other deposition. I will, I believe, just go ahead and put on a witness rather than doing that.

Mr. Charles May.

Mr. Gooch: Wait, if the Court please. Before he puts [fol. 1116] on this next witness, he was reading from the Van Savell and the Morin deposition. I believe I have a right—

Mr. Andress: He's got a right to cross-examine.

The Court: Yes.

Mr. Watts: Did you want to offer some of that cross examination?

Mr. Gooch: Yes.

The Court: Hold up, Mr. May. You will have to wait back outside, Mr. May.

Mr. Andress: Do you want to read it, Tiny, or do you want me to. . . .

Mr. Gooch: I'll read it.

At the close of the day on Friday, Mr. Watts was reading from the deposition of Van Savell and Relman Morin, which was a deposition taken by Mr. Watts in this case and I would like to read excerpts from that deposition.

I refer you to page 7, line 5.

* * *

Q. Did you receive any course of training for the increase in efficiency of your duties while you were in New Orleans?

A. The normal inside office training, yes. I was under observation of others and I was kept under 'wraps' for a [fol. 1117] certain amount of time, until I felt I could take anything by myself without any help.

Q. Under whom were you mainly working?

A. Ken L. Davis. He was the Chief of the Bureau, of the superior, yes.

Q. How many employees were in that office?

A. I don't know exactly.

Q. Just roughly?

A. About seven or eight or nine newsmen.

Q. Did Kenneth Davis then give you any type of instruction that would better qualify you for performing your duties?

A. My copy was checked, edited, and I was attentioned as to the editing that was done, to show the things I could correct.

Q. Did they give you any Associated Press training manuals or directives, any written material at all?

A. Certainly, I was given copies of how the Associated Press was organized, and so forth, and copies of so-called

fringe benefits that were available to me, hospitalization, pensions, insurance, and so forth, and that's about it.

Q. Mr. Savell, were you given any directives from the Associated Press as to editorial policy and as to procedure of their news-gathering personnel?

A. I was told that we report only facts. There is no [fol. 1118] editoralizing in the AP. I was explained to as to how the AP works, and I was told the reporter's opinion is nothing, I must forget the reporter's opinion.

Q. Were you given any briefing as to slanting of the news?

A. I was told there was no such thing, strict facts and nothing else.

Mr. Gooch: Page 22.

Mr. Watts: Just a moment, Tiny. If Your Honor please, I intend to offer this other stuff he left out. Would it be more convenient if I just asked Mr. Gooch the questions and let him give the answer?

The Court: I believe it would be better to let Mr. Gooch offer what he wants to offer.

Mr. Watts: Whatever he wants to do. I thought it would just save a little time.

Mr. Gooch: Page 22, line 25.

* * *

By Mr. Watts:

Q. When did you go to Oxford?

A. I believe it was in September, September 15th, on a Sunday in 1962.

Q. What caused you to go there?

A. I was assigned to go to Oxford because of the possibility that James Meredith would appear on the campus to register.

[fol. 1119] Q. Was the assignment oral or written?

A. Oral.

Q. By whom?

A. I think it was officially given to me by Mr. Sigus, but I know it was coming sometime beforehand.

Q. How did you know?

A. Mr. Davis had told me that I would be the newsman to go up there.

Q. When and where did that conversation occur?

A. I don't remember, in Jackson, on one of his visits to Jackson.

Q. Relate to us what he said, and what you said.

A. I don't remember.

Q. You have no recollection at all?

A. No, sir. It was just one of these conversations where —you drink coffee and talk about different things, and he just said, "By the way, you are going to Oxford," and that's it.

Q. What was your personal attitude toward the integration problem that existed in Mississippi?

A. My only attitude was that I had to report what was going on.

• • •

Mr. Gooch: Please turn to page 44, line 10, for continuity.

• • •

[fol. 1120] Q. Tell us what happened on the 15th? Anything else significant on the 15th?

A. Not to my knowledge, no, sir.

Q. What day of the week was it?

A. I feel certain it was on a Sunday. Well, it was a Sunday that I went, but it may not have been the 15th but the 14th or 16th.

Q. Anything significant the remainder of that week?

A. On Thursday, I believe, James Meredith made his first attempt to enroll at the University, if I am not mistaken. I believe it was a Thursday.

Q. Did you cover that?

A. Yes, sir, I did.

[fol. 1121] Q. Was that attempt unsuccessful?

A. Yes, it was.

Q. Did you report it to your employers?

A. Yes, I did.

Q. And the substance of that report?

A. The substance of the report was that James Meredith arrived at the University with Federal Marshals, including James McShane, and a Federal attorney by the name of—well, I can't think of it right now. I know him but—one of the civil rights attorneys in the Justice Department. They went to a building called the Alumni House or Alumni Extension Center, and I don't remember at this moment whether Governor Ross Barnett arrived before or after, but either he was there or he arrived shortly thereafter. None of the newsmen were allowed inside the building, no newsman was allowed within, well, a certain distance. The Highway Patrol had the streets blocked off so the people had to stand across the street from the building.

There was a large group of students there and I reported this. There were some jeers and cat-calls, and I reported this. Shortly thereafter, 15 or 20 minutes, Meredith came out with some people, the Marshal and Attorney, and they all got in a car and they drove off. When they drove all the student group, which was quite large, ran in the direction that they drove as they left from, or the direction [fol. 1122] from which they came, because they ran, and I ran in that direction, too, and keeping an eye on things. They got away okay, and I reported this. When I returned Governor Barnett was coming out, and Claude Powell was with me, and the Governor started to get in his car, and before he did, he reached out with his fingers, like that (indicating) and said the Winston Churchill style of the, and Claude Powell took a pretty good picture of that, and I reported this. After that everything was pretty quiet that day, and I think the rest of the week. Mainly, or for the most part, the whole business was to sit around and wait.

Q. To whom did you report?

A. I reported to New Orleans.

Q. By phone?

A. Yes.

Q. Did you make any written reports at all?
A. No, I didn't.

• • •

Mr. Gooch: Page 47, Line 13.

Q. What of any significance happened the following week?

A. I believe on a Thursday—let's see—well the next week we were—we were preparing for Meredith to come again to the University on Tuesday.

Q. How were you preparing for it?

[fol. 1123] A. Setting up the positions where we would be, because we didn't expect him to go to the same place again.

Q. And who is "we"?

A. The other newsmen and myself. We heard rumors that the Marshals would be there in much greater number, and we figured that they would try to go straight to the Administration Building, so we prepared on several fronts, and also the airport, to keep an eye on the plane he might have come in on, and the whole thing switched to Jackson.

On Wednesday it did occur in Oxford. Meredith came and was blocked this time by the Lt. Governor, and this occurred right at the edge of the university property, some 200 or 300 yards east of the Alumni Building, down the University Drive, University Avenue.

• • •

Mr. Gooch: Page 53, Line 7.

Q. Now did anything else significant or news worthy occur between the previous incident that you have outlined, on September 30th?

A. Well, yes, one news item on Saturday afternoon late, we received a report that Federal Marshals or troops, one or the other, were moving in. It proved to be false.

• • •

Mr. Gooch: That is through Line 12, on Page 53.
Page 56, Line 24.

[fol. 1124] Q. When was it you first knew that General Walker was coming?

A. I didn't know he was coming until he was there.

Q. Until he actually arrived in Oxford?

A. Until I saw him, I didn't know for a fact that he was coming.

Q. When did you first see him?

A. In the courtyard of the Ole Miss Hotel.

Q. When?

A. About 4:00 o'clock, or 5:00 o'clock Sunday afternoon, September 30th.

Q. What was he doing there?

A. He was preparing to have a press conference, sir.

Q. Did you see this press conference?

A. From a distance, yes.

Q. Had you ever seen General Walker before?

A. Yes.

Q. Where?

A. Jackson, Mississippi.

Q. When?

A. I believe it was in the winter or early spring of 1962, when he was there for a speech. I don't remember the exact time, or don't remember when it was, but it might have been after January 1, 1962, because I wasn't in Jackson before that time.

[fol. 1125] Q. Did you see him at that time?

A. Yes, I did.

Q. Where?

A. At the Municipal Auditorium, where he spoke.

Q. Did you hear his speech?

A. No, I did not.

* * *

Mr. Gooch: That is through Line 25, on Page 57. Now Page 59, Line 6.

Q. Did you at any time prior to the 15th of September know Walker's background?

A. All I knew was that he had been the general leader of the troops in Little Rock, and I knew that he had re-

signed from the Army, or—I don't know how it went—but I knew he was not in the Army any longer, and I knew he was in Texas, or thought he was in Texas, and I knew that he was making some speeches across the country.

Q. Did you have any concept at all the reason for his resignation?

A. No, I don't know whether I knew about him or not. I really don't know what they were, but I heard, but I haven't read anything.

Q. Did you talk with Barsch about Walker, after he had appeared, that he was coming to Oxford?

A. Barsch—well, no, not to my knowledge. In fact, no, [fol. 1126] no, I didn't.

Q. Had Barsch known Walker?

A. I don't know.

• • •

Mr. Gooch: That is through Line 24, Page 59.

Page 65, Line 9.

Q. When was Meredith brought onto the campus?

A. To fix the time, I don't know.

Q. When was it you first heard that he was coming on the campus?

A. I heard he was on the campus some time between 7:30 and 8:00 o'clock, I think, I wouldn't know exactly, but after dusk.

Q. And this news conference of Walker's was taking place around 5:00 o'clock?

A. Yes.

Q. How long did it last?

A. I don't know. I didn't stay around to the end.

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Mr. Gooch: That is through Line 20 on Page 65.

Page 75, Line 4.

Q. Tell us everything that happened from the time you left the motel until you actually got on the campus.

A. I left the motel and drove down University Avenue and toward the east entrance of the campus. Upon reaching,

[fol. 1127] well, actually I entered the campus property, but when I came to the bridge which crosses over the railroad tracks the Highway Patrol was there, and five or six persons stopped us, told us that newsmen, nor anyone else, were allowed on the campus. But he told us that possibly we could have an order shortly letting the newsmen on.

So Ed Lebreton whispered to me, "I'll stay here and you can go ahead and see if you can get on anyway you can."

So—

Q. You mean by deception or otherwise?

A. Any way. So I turned my car around and drove back to about the next street going toward town, drove about two blocks or three blocks, down back around the railroad tracks bordering the campus.

Q. Which direction did you go, north or south?

A. Well, I was going east as I was going to the campus, and I turned around and drove—well, west, rather—and when I came to the entrance I turned around and drove east for about two or three hundred yards, took the first street to the left going north, and then drove for about two or three blocks and then turned west, drove two or three blocks until I came to the railroad tracks, and when I parked my car and got out and stepped onto the railroad tracks, and a patrolman saw me from the railroad trestle [fol. 1128] that I had just left, or he saw someone, and he made some shout, and I paid no attention but went across. I went through the underbrush and I was on the campus.

Q. Alone?

A. Alone.

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Mr. Gooch: Page 87. Mr. Watts, there has been a deletion there, I think. That was part of your question—

(Sotto voce conference of counsel.)

Mr. Gooch: Page 87, at Line 20.

Q. All right, you had arrived on the north side of the campus, saw the Highway Patrolman, and tell us what occurred then.

A. I walked further on the campus, I met a convoy of U. S. Marshals and army trucks, and I followed them to the Lyceum Building or Administration Building on the campus.

Q. Were you alone or with someone?

A. I was by myself.

Q. All right.

A. The Marshals got out of the truck and proceeded to ring the Lyceum Building. They had their backs to the building, and I counted and there was a hundred and forty-eight. They were dressed as we talked about earlier. They were facing a few small groups of persons standing across [fol. 1129] the street from the building.

Q. In what area?

A. In the area of the Fine Arts Building.

Q. Did the Marshals form a ring facing outward from the Lyceum Building?

A. Yes, sir.

Q. Did you walk completely around the building?

A. Completely around, no, sir.

Q. When did you count them?

A. Shortly after I arrived.

Q. Was Meredith with the Marshals?

A. I didn't see him.

Q. When did you first see Meredith?

A. At 8:30 on Monday morning, October 1st.

Q. What time was it these Marshals arrived?

A. Shortly after 5:00 o'clock, to my best memory.

Q. How long after you had left the Walker press conference was this?

A. They were on the campus when I got there. It must have taken me 15 minutes, maybe, to get there from the Ole Miss Motel onto the campus, University Motel.

[fol. 1130] Q. Were you there when they de-trucked?

A. Yes.

Q. When did you 'phone your first report to the AP?

A. As soon as I got to the telephone.

Mr. Gooch: That's through line 8, page 89. Page 92, line 23:

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Q. What next occurred that was significant.

A. The next thing that I can remember was that the crowd began getting a little larger and there were some snide remarks of some sort, anyway some remarks to the Marshals, and the Marshal were taunted about their tear gas guns that they were carrying and after quite a few remarks I went to the telephone and I called this in, along with the fact that the Marshals appeared to pay no attention to it.

Q. At first, were the students remarks of a somewhat humorous vein?

A. Some were, yes.

Q. Go ahead. Did you so report that at that time to the AP?

A. I did.

Q. Now, this is the second call you made?

A. Yes, second call, yes.

[fol. 1131] Q. Continue.

A. After that I just stood around, mainly being seen in the vicinity, I mean so that the AP newsmen would know I was there, and keeping an eye on things, and the crowd got larger and larger.

Q. And somewhere wandering around the area of the Lyceum Building?

A. North and northeast and eastern side, yes. I kept check on the other side, but nothing there but Marshals, and nobody was gathered. I stood around in the area and the crowd got larger and there were lighted cigarettes tossed into two or three Army convoy trucks parked immediately to the east or in front of the Lyceum Building and there were also some small rocks tossed toward the Marshals.

Q. Tossed or thrown?

A. Tossed, thrown.

Q. Sir?

A. Tossed or thrown.

Q. Could you see the individuals who were engaged in those activities?

A. Yes.

Q. Did they appear to be students or otherwise?

A. Yes, students.

Q. Where were they getting the rocks?

A. Off the road that had them, a few little small pieces [fol. 1132] of gravel on the side of the road.

Q. Did you see any Marshals hit?

A. I saw a few bounce off their helmets, yes.

Q. Was it dark yet?

A. No, it wasn't.

Mr. Gooch: That's through line 19, on page 94. No, it's continued. I'm sorry.

Q. Continue.

A. I went to the telephone and I reported this. I returned.

Q. Now, this is the third 'phone call?

A. Yes, I guess.

Q. All right.

A. And I come back and the crowd was getting bigger and it was getting dark at the same time and a helicopter flew over. I knew it was taking pictures. Somebody inside was taking pictures and there were some sort of pep rally remarks about the helicopter from the students but the rocks and the lighted cigarettes continued to be thrown toward the Marshals. After it got dark, why, the crowd got quite large on those two sides.

Q. About what time did it get dark?

A. I really don't know. I think it was probably between 6:45 and 7:15.

Q. Were the lights turned on then?

[fol. 1133] A. Yes, sir.

Q. What lights were there with respect to the Lyceum Building and Circle?

A. There were two lights. Well, strike that. There was a sidewalk going down through the Circle. As the sidewalk

starts, at the Lyceum, in front of the Lyceum Building, there is a light on each side.

Q. Now, in this Circle, there is a flagpole about the center?

A. That is correct.

Q. I put an "O" where the flagpole would be. Is that approximately correct?

A. Oh, as close as could be, yes.

Q. Down at the very east end of this point of this circle I will put a dot, as representing the Confederate statue. Is that roughly in the same position?

A. Yes, sir.

Q. All right. Meanwhile, now, up north is the Lyceum Building?

A. Yes.

Q. How far could you see after it became dark?

A. About a hundred yards.

Q. Continue.

A. I watched as the crowd got larger and the Mississippi Highway Patrol had appeared in the meantime.

[fol. 1134] Q. *By that time had you heard* how the football game came out?

A. The football game was on Saturday.

Q. And you know how it came out?

A. Yes.

Q. Had you heard any students discuss it any?

A. No.

Q. Was the student body by that time pretty well back in school after the football game?

A. I don't know.

Q. Where are most of the dormitories from the Lyceum Building?

A. To the north are the women's dormitories, in an area here directly north from the Circle, and the men's dormitories on Rebel Drive and Dormitory Road.

Q. That's generally on the west side of the Circle?

A. Yes.

Q. All right. Continue. Then what did you see after the crowd began to get large?

A. Well, the highway patrol came during the time that I was at the 'phone. When I came back, I went back to the 'phone again.

Q. Did they come in automobiles or what, or on foot?

A. I don't know. I just saw them standing in front of [fol. 1135] the Lyceum Building and somewhat to the northern side. By front, I mean east.

Q. Did they form anything approximating a line?

A. Yes, sir, a line.

Q. Where was this line with respect to the Marshals' line?

A. It was more or less across the street, pretty close to the curb, opposite from where the Marshals were.

Q. Did it conform in circling to the Marshals' line or was it different?

A. Pretty much so.

Q. About what interval between them?

A. About four or five feet, I don't know.

Q. Did you hear any conversation between the Marshals and the Highway Patrol?

A. Yes, sir.

Q. Tell us what it was?

A. The Chief Marshal, James McShane, told the Highway Patrol, he called the captain, called him over, and he said, "Captain, come here." And the Patrolman came over and they talked a little bit and as the Patrolman walked away from him, after they talked, McShane hollered to have the students move back off the curb and off the grass.

Later he called the same man over again and asked for the same thing out loud. The man didn't go all the way to [fol. 1136] it and I believe there was a third time. He just talked generally to the Highway Patrol and told them to move the crowd back.

Q. What did the Highway Patrol do?

A. They attempted to move them back.

Q. And by this time, could you then estimate the crowd?

A. Larger than a thousand, I think.

Q. Were they all in one group or in separate isolated groups?

A. Actually, a solid group strung over a large area.

Q. Where were they concentrated with respect to the Lyceum Building?

A. Northeast, north and east, and eastern side.

Q. What occurred next?

A. The TV cameraman drove up and parked in the road just to the northeast of the Lyceum Building and started to get out of his car with his camera.

Q. This is on the so-called Circle?

A. Yes, it is on part of the Circle, right next to the Lyceum Building.

Q. All right.

A. And he got out, and the students converged on him, and there was a lot of talking, they got closer, and they were sort of shoving him around and then his TV camera [fol. 1137] was knocked to the ground and his wife was in the car, and the guy was able to get back in his car with the help of the Highway Patrolman. With the help of the Highway Patrolman, this fellow was able to get back in his car, but the students grabbed hold of the car and rocked it back and forth, rocks were thrown and the windshield was busted and another window busted and some dents were put in the car and finally he was able to drive away.

Mr. Gooch: That's line 12, page 99.

* * *

Mr. Gooch: Please turn to page 103, line 3.

Mr. Watts: Mr. Gooch, would you mind, saving me having to do it, go a couple of questions before and identify where this 'phone was? If you will, go to line 22, page 102. Save me having to go back and pick it up.

* * *

Q. I thought you said you kept this 'phone open all the time?

A. I kept this 'phone open all the time but they could switch it to any extension they wanted to.

Q. In New Orleans?

A. Yes.

Q. How long did the 'phone stay open in Perkin's room?

[fol. 1138] A. I think about 3:00 o'clock or 4:00 o'clock in the morning.

Mr. Gooch: Is that what you are talking about?

Mr. Watts: Right, yes.

Q. What did you find when you went back from using the 'phone?

A. A crowd was there and it was getting quite large and hurling insults at the Marshals and throwing rocks and throwing cigarettes and the Marshals, through the Highway Patrol, ordered them to move back and at this time they didn't and they were standing in the middle of the road rather than getting back on the grass like the Marshals ordered them to, and the Chief Marshal, James McShane, ordered gas masks on, and the students were ordered to move back. They didn't.

Q. Did you at that time see any students you knew in the crowd?

A. Yes, sir.

Q. Name some names or all you know?

A. The only one I can remember is Joe K. Moore.

Q. Where was he?

A. He was standing there.

Q. Was he saying anything or doing anything?

A. He was working.

Q. Doing what kind of work?

[fol. 1139] A. Stringer for the Clarion Ledger in Jackson, Mississippi.

Q. Was he participating at all in the activities?

A. I didn't see him participate.

Q. Did you see any other students you knew?

A. I saw those I knew by face, and I can't remember right now, that I really know.

Q. Would you say, then, that as of now you don't know any student that was in that group, except John K. Moore, or Joe K. Moore?

A. To the best of my remembrance, I can't think of anyone else.

Q. Can you fix this time?

A. Between 7:30 and 7:50.

Q. All right, sir. Anything else of significance occur?

A. They were ordered to move back again, and they didn't.

Q. How long was this after the gas masks were put on by the Marshals?

A. A minute.

Q. Who was issuing the orders?

A. McShane.

Q. Could you hear his orders?

A. Yes, sir.

[fol. 1140] Q. Were they in a loud voice, to all the Marshals?

A. They were so that the Marshals could hear it in front and they were to relay the orders around.

Q. You say they were to relay?

A. And they did relay the orders.

Q. But you don't know whether this was by order or pre-arrangement?

A. No, I do not.

Q. What was the order that McShane issued when they put on the gas masks?

A. He just said, "Gas masks."

Q. Then about a minute later the students were ordered to move back again, or the crowd was?

A. Yes, sir.

Q. Could you at that time spot what you thought were individuals other than students?

A. Yes, sir.

Q. Anyone you knew?

A. Newsmen and professors.

[fol. 1141] Q. What professor?

A. Well, I don't remember any of the professors, in fact, I don't know but one by name, but I didn't see him.

Q. What about the newsmen?

A. I saw this fellow from Memphis, UPI newsman.

Q. Did you see his walkie-talkie?

A. I didn't see it at that time.

Q. All right, go ahead.

A. When the students didn't move within 30 seconds or so, the guns were up and they fired.

Q. What was the order given to fire?

A. I didn't hear an order.

Q. How many weapons were fired?

A. I don't know.

Q. Did all the Marshals completely surrounding the Lyceum fire their weapons?

A. I don't know.

Q. What weapons did you see fired?

A. The ones on the east part of the northeast.

Q. For about what distance, assuming—

A. From, say, the southeast corner here, to a little place past the northeast corner.

Q. There was a barrage of tear gas fired by Marshals starting from the southeast corner of the Lyceum, clear around to, circling due north of the Lyceum?

[fol. 1142] A. I don't know whether due north, but as far as I could see, yes.

Q. Where were you at that time?

A. At that time I was standing just facing the Lyceum Building, standing just left of the center of the building.

Q. Were you behind or in front of the Marshals?

A. I was in front of the Marshals.

Q. Were they facing towards the flagpole?

A. Yes, they were.

Q. Where were the Highway Patrolmen with respect to—

A. The Highway Patrolmen were in a line, one directly in front of me was two feet in front of me.

Q. How far were you from the Marshals?

A. About eight feet.

Q. So there was about 10 feet then between the patrol and the Marshals?

A. No, sir, about six feet.

Q. About six feet. Did you hear the Patrol say anything before or immediately before the tear gas was fired?

A. They were telling the students to move back.

Q. Did you see anyone make any overt act, throw anything or make anything approximating a move toward the Marshals just before the tear gas was fired?

A. Overt act, yes. Rocks were thrown, large ones.

Q. From what area?

[fol. 1143] A. From the general area of all the students.

Q. Did it seem to be an organized effort by command, or was it spontaneous, or sporadic?

A. Spontaneous and sporadic. It was not organized, to my knowledge, it was not organized.

Q. How longer after the first rock was thrown, that you know about, was that before the tear gas was fired?

A. About five or six minutes, I think.

Q. What was the closest student to the Marshals at the time the tear gas was fired?

A. I don't know.

Q. What was your observation, your best estimate?

A. That I know of, those in the front line were as close as I was.

Q. Were there students then between the Highway Patrol and the Marshals?

A. No.

Q. Well, you were between the Highway Patrol and the Marshals?

A. No, a highway patrolman was between me and the Marshals.

Q. Then I misunderstood you a moment ago.

You then were to the east of the Marshals, were you, or Highway Patrol?

A. Yes.

[fol. 1144] Q. Were you among the students?

A. I was standing on the front line.

Q. How near were the closest to your left and right?

A. On my right, half a foot. On my left, I don't remember.

Q. How far back in depth did the crowd go?

A. About 10 or 15 feet, in my area.

Q. Did you see at that time any students that you recognized?

A. No.

Q. Or anyone else, other than just the newsman you recognized?

A. At that time I didn't see a newsman I recognized.

Q. Where did the tear gas pellets land?

A. Behind me and behind the front line, unless they hit someone.

Q. Were the weapons fired upward in an arc, or hip level?

A. Hip level.

Q. That you say?

A. Hip level.

Q. Were the barrels of the weapons parallel to the ground, roughly, when they were fired?

A. Yes, sir.

Q. About what range from the muzzle of the weapon did [fol. 1145] the pellets land?

A. I didn't notice.

• • •

Mr. Gooch: That is through Line 4, on Page 109.

Page 119, Line 17.

Q. Go ahead.

A. And I went on into the area, and there was quite a group of people there. They sort of—once in a while a group of five or six or maybe 10, or sometimes as many as 20 people, would start running to the Lyceum Building with small parts or particles of bricks or rocks or sticks or glass in their hands, and they would get as far as they could without the tear gas affecting them, and throw this toward the Marshals.

Q. Where were these students starting from?

A. In the general area of the Confederate statue.

Most of them were a little—they were actually between the Confederate statue and the Lyceum Building, more or less half-way in between that and the flagpole.

Q. What would you estimate that distance?

A. From the Lyceum Building?

Q. No, from the Confederate statue to the Lyceum Building?

A. Roughly 200 yards.

Q. All right. And how far would the students run be- [fol. 1146] fore they would throw?

A. I would say a hundred yards.

Q. Would they throw from the east or west of the flagpole?

A. East or west, both.

Q. Where were they getting their missiles?

A. Their glass, I don't know. Their sticks and their broken brickbats were coming from the construction of a Science Building, I believe, that was directly east of where the Confederate statue is.

Q. On which side of the road?

A. South side of the road.

Q. Would that then be southeast of the Confederate statue?

A. More south than east. Actually it was straight down the road, right down the road, due east.

Q. Continue with your narration.

A. The group apparently got a leader. I don't know, but somehow or another, they gathered, and after many small assaults, they got a larger crowd, several hundred, probably as many as 500 in the group, and they made an assault towards the Marshals.

Q. What do you call an assault?

A. They were walking and running, some not really fast, towards the Lyceum Building, as far as they could go, and [fol. 1147] they would come to within throwing distance of the Marshals, and in respect to the tear gas, not going any further, where it was too thick, and they would throw

this, and then the Marshals would race across the street and that would make them back up.

Q. What do you mean race?

A. The Marshals were on the sidewalk there in front of the Lyceum Building, and then they would run across the street, on the other side of the street, firing their tear gas quite high, and it was falling behind the students, and since the wind was blowing northwest, it was blowing right back in their faces. As far as the students, actually it was falling on the other side of them, and blowing back in the faces, towards the Marshals, so they had to leave and run back to their area.

Q. Were the Marshals wearing a gas mask?

A. Yes.

Q. You say it was rolling toward the north?

A. Northeast. (sic)

Q. And the students were approaching toward the west?

A. The students were going towards the west and the wind was blowing this way (indicating).

Q. By "this way," you mean directly northwest?

A. Yes. And the students would run to a certain area, within throwing distance, probably around 75 paces—yards [fol. 1148] from the group, and the Marshals, after being—when the stuff began hitting them, would run across the street, maybe 25 or 30 feet, maybe more, and shoot their gas again, and it would fall behind the students, and the wind brought it back across them as it blew northwesterly, and this group which was still mostly students at this time, fled backward.

Q. You say apparently they had a leader.

Were you able to identify the leader?

A. Yes, there was one person who appeared to be a spokesman, kind of tried to rally the group together.

Q. Can you describe him as best you can.

A. He was carrying a Confederate flag in his hand and he had on a shirt that was mostly red, but it was multi-colored. Blue jeans, and he had a jacket on his arm at one time.

Q. What age?

A. A student age, about 19 or 21. I don't remember.

Q. And his size?

A. About 150 to 170 pounds, about five, nine or ten.

Q. Blond or brunette?

A. I don't remember.

Q. How far could you see at that time?

A. I could see the Marshals from the Confederate statue, but I couldn't recognize anyone.

Q. Did you see them close enough to tell their general [fol. 1149] size and outline?

A. General outline, yes, but size, no.

Q. At this time were there any highway patrolmen in the area?

A. I saw none.

Q. When did the highway patrolmen leave?

A. I don't know, don't know when they left, but they were not back there when I got back from the first phone call, after the tear gas was fired.

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Mr. Gooch: That is through Line 15 on Page 123. Now Page 127.

Q. By my figure, that is the seventh phone call you made, and the fourth one from the Perkins' boy's room. Now are those telephone calls timed when they come into the AP receiving area or Bureau?

A. No.

Q. Are you sure of that?

A. Positive.

• • •

Mr. Gooch: Page 128, Line 22.

Q. Did you return then to the area?

A. Yes, sir.

Q. What area?

A. The grove area, right near the Confederate statue.

[fol. 1150] Q. Which side of the statue?

A. A little to the southwest or southeast.

Q. Did you see anyone you knew?
A. Slappy.
Q. That is twice you had seen him?
A. Yes.
Q. Any other AP personnel?
A. No.

• • •

Mr. Gooch: That is through Line 7 on Page 129.
Take up at Line 20, Page 129.

Q. Go ahead.
A. When I got to the area again, there were groups of people coming in from the railroad bridge, or what I call the east gate.
Q. Had the guard been taken off of that?
A. I don't know. I didn't go there.
Q. Go ahead.
A. And I kept noticing the crowd was getting larger and larger, and it appeared that lot of students were moving out of the area, because I moved on across, and I kept noticing there were large groups over to the north of the circle, on what used to be the old Library Area, I think it is now maybe the Fine Arts Building, and near the YMCA. And there were large groups of students standing, [fol. 1151] and I went over and recognized quite a few students whom I knew, and they were there, and I came back, and I kept noticing the crowd was getting larger, and less and less students in the crowd.
Q. Continue.
A. At this time there was another charge and—
Q. Wait a minute. You went or left the flagpole area and went over to near the YMCA area?
A. Yes, YMCA, and this other building, which is I think the Fine Arts Building.
Q. Did you see anything unusual there?
A. No, nothing, just this large group of students, standing on the steps on both buildings, and I just watched.
Q. By this time had you heard or seen any shooting?
A. No.

Q. Did you hear any shots at all that night?

A. Yes. I saw no shooting but I heard it.

Q. All right.

A. As I turned to leave that area and go back towards the grove a wave of people went towards the Marshals again. It was as large as the first group.

Q. Was the same individual leading them?

A. I didn't see.

Q. What was the conformation of that?

A. I don't understand.

[fol. 1152] Q. Was it a solid front, or was it in broken groups?

A. In solid front.

Q. What were the north and south boundaries of it?

A. Oh, the north boundary of it was pretty close to the street on the north, and south boundary was about halfway between the street and the flagpole.

Q. Now this is the second wave or charge you had seen?

A. Yes.

Q. Where were you when you saw it start?

A. I was a little northeast of the flagpole walk, I was halfway between the Confederate statue and this building that I had been in front of.

Q. Now there are trees in the circle, called the Grove, or is the Grover somewhere else?

A. What we call the grove is not really the grove, no.

Q. What did you call the grove when you referred to it?

A. The circle. This circle actually is where this occurred.

Q. As I remember, some of the news reports referred to it as the grove?

A. Yes.

Q. Any of your reports refer to it as the grove?

A. I don't remember.

Q. Continue. You were in the grove and northwest of [fol. 1153] the Confederate monument when you saw the second charge?

A. No, I was not in the grove, but in the street, walking between this building and the Confederate statue.

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Mr. Gooch: That is through Line 9, on Page 132. Go to 133, beginning at Line 22.

Q. All right, sir. What did you do then?

A. I ran into the area where the charge was.

Q. Past the flagpole?

A. Yes, past the flagpole, and I just watched what went on.

Q. What did go on?

A. There were rocks and brickbats and so forth thrown at the Marshals, and tear gas, as before, used to repulse the group, and we all left the area and went down to the general area of the monument.

Q. And by "we all", you mean the people that participated in the charge?

A. Yes.

Q. At this time there were people north of the circle?

A. North of the circle?

Q. Yes.

A. Other than a few scattered people who were in this group they were mostly students, in my opinion.

[fol. 1154] Q. Was there any activity against the Marshals emanating from that direction?

A. No, I didn't see any.

Q. All right, sir. How near to the Marshals did you get on this so-called charge?

A. About the same distance as the first, close to seventy-five yards.

Q. Did you see the Lyceum Building hit with rocks on that occasion?

A. I didn't notice.

Q. What did you notice?

A. I noticed that rocks, and so forth, did hit the Marshals again and bounced around and I knew they did behind, but whether they actually hit the building, I don't know.

Q. What else; anything else?

A. Tear gas reached us and we turned and ran to the monument.

Q. Did the tear gas reach you before or after the rocks were thrown?

A. After.

Mr. Gooch: That's through line 6, on page 135.

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Mr. Gooch: Please turn to 136, line 7.

Q. Go ahead.

[fol. 1155] A. As soon as the group got to the other end, they almost immediately turned around and made a third charge or assault, or went toward the Lyceum Building again. By this time they had rocks and bricks and so forth, already down there, at the monument.

Q. Did you hear any command or order between the second and third charge?

A. Nothing, other than scattered comments of, 'Let's go,' and quite a few curse words.

Q. All right. Did you participate in the third charge?

A. Of the group, yes.

Q. What happened then?

A. The same as the two times before, the group went toward the Lyceum Building and we didn't get as far that time, because the Marshals ran out across the street in an apparent attempt to meet us or something, but we only got just a short distance past the flagpole because the tear gas was too heavy.

Q. Did you hear anything from the Marshals?

A. No.

Q. Then what?

A. Rocks and stuff were thrown. I couldn't see too well through the tear gas.

Q. Was the smoke getting pretty heavy at that time?

[fol. 1156] A. At the time of the charge it was, because it was fired before we could get very far.

Q. Was there a restriction of visibility?

A. At that time, yes.

Q. Prior to the time the tear gas was fired, could you see the Lyceum Building plainly from the monument?

A. Yes, I could see it.
Q. Could you see individuals walking in front of it?
A. I could see the outline of the Marshals.
Q. Go ahead.
A. I turned back and raced back to the monument.
Q. What happened then?
A. Everything got quiet for a while.
Q. For how long?
A. For about five minutes, maybe.

Mr. Gooch: That's through line 21, page 137.
Mr. Watts: Would you read the next two, and save me reading it?
Mr. Gooch: Be glad to.

Q. What would you say was the timing at the end of the third charge?
A. Between 8:30 and 8:45.

Mr. Watts: That's all I care about.
Mr. Gooch: Then, that would run down through line 24 [Tol. 1157] on page 137.

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Mr. Gooch: Page 139, line 15.

Q. Go ahead.
A. Then I heard a comment behind me to the general effect, and I don't remember the exact wording, "Here is General Walker, here comes General Walker," and I turned and I saw striding fifteen yards behind me, General Walker.
Q. Decribe that.
A. He was walking in very long strides.
Q. In what direction?
A. In a westerly direction, up towards the Confederate statue.
Q. Where was he at that time when you first saw him?
A. About fifteen yards east of the intersection, right there where the Circle meets University Avenue.
Q. On which side of the road?
A. More or less in the middle.

Mr. Gooch: Then, going over—this next was read, about putting the marks on the chart. I'll omit that.

• • •

Mr. Gooch: Going over to page 142, line 1.

Q. How far from you was he?

[fol. 1158] A. When he stopped, he was, oh, eight or ten or fifteen feet, ten or fifteen feet from me.

Q. Did you say anything to him?

A. No, sir, I did not.

Q. Did he say anything to you?

A. No, sir, he did not.

Q. Did you hear him say anything to anyone?

A. At that time, no, sir.

Q. What occurred then?

A. He stood there looking around and I moved closer, I was probably within five or six feet of him, and this same person with the Confederate flag and multi-colored shirt, mostly red, said, "General, will you lead us to the steps?" And Mr. Walker made no comment, he sort of scratched his head (indicating), or rubbed his head a little like this (indicating), and moved his—his head went back a little, and he lowered his head, in my opinion he looked like somebody who might be thinking, and he was like that for several seconds, about forty or fifty seconds, just didn't say anything, was very quiet, in fact, the students got restless behind and began to chant, "Come on, let's go. There is General Walker, he is our moral support, let's go."

And Mr. Walker raised his head and looked this fellow squarely in the eye and nodded his head. Up to this time [fol. 1159] Walker had said nothing. I hadn't heard him say a word.

Q. Go ahead.

A. About this time they appeared to—well, Mr. Walker took a couple of steps forward and this boy who was over to his left, and some of the group, sort of moved up behind, there was quite a large group behind and they took several steps.

Q. At this time was there any personnel west of the monument?

A. West of the monument, I didn't see anyone. There might have been one or twenty, but I didn't see them.

Q. Had all the crowd then moved back into the street east of the monument?

A. Yes, that's my—

Q. Any people at all north of the Circle or northwest of the Circle?

A. In that direction, I couldn't tell.

Q. How far could you see in that direction?

A. I couldn't see very far. There were no lights.

Q. How far could you see towards the Lyceum?

A. I could see the Lyceum Building.

Q. Could you still see people in front of the Lyceum Building?

A. Outlines of people, yes.

[fol. 1160] Q. That is point where you moved, X-2?

A. I moved, now, about where my old X was.

Q. X-1, you mean?

A. No, the obliterated X.

Q. You moved then about half the width of the street to the north then?

A. Yes. I was about the center, where General Walker was.

Q. Where was Walker from you?

A. Oh, four to six feet from me, just to the north of me.

Q. All right. Were there any people between him and the monument at that time?

A. This one fellow who made the comment to him.

Q. Were Walker then and this fellow alone out there, ahead of the main crowd?

A. Repeat that.

Q. Were Walker and this one fellow now alone and to the west of this main crowd?

A. No.

Q. Describe the location then.

A. The fellow was out alone, up ahead of the crowd, but the crowd had closed around Walker on all sides, except the

one where this fellow was, and this fellow was standing about three or four feet away.

[fol. 1161] Q. From Walker?

A. West of Walker, he was.

Q. Go ahead.

A. And as I said, they took several steps forward, and then a portly, neatly dressed fellow of about forty-five walked up.

Q. Did he say anything?

A. He walked up to Mr. Walker and introduced himself.

Q. Could you remember what he said?

A. I didn't understand his name, no, sir.

Q. Did they shake hands?

A. Yes, they did.

Q. All right.

A. And this fellow, I noticed had on a deputy sheriff's badge. They talked for a moment, and then this boy sort of made a motion, and several people got around, and there was quite a hubbub in there, but I couldn't tell what was going on. I was still four or six feet away, and everybody talking at once there. This was only for several minutes.

Q. The portly gentleman with the sheriff's badge seemed to be involved in the charging?

A. In the charge, well, I hadn't seen him before.

Q. You had not seen him prior. Go ahead.

A. As I said, they were talking quite low, and then every-

[fol. 1162] one was talking at the same time, and I just sort of kept an eye on him, and I didn't hear Walker say anything. I just kept watching his mouth, and I didn't see him say anything, and then they sort of opened up.

Q. Did he have his hat still on the back of his head, or did he put it back?

A. He did not actually push it back, to the back of his head, but then sort of moved it when—

Q. In other words, he rubbed his brow?

A. Yes. He didn't put it on like a cowboy would.

Q. All right.

A. And the group backed up or away from the front of Mr. Walker, and this boy took his right hand and grabbed hold of the general's left arm, and another person on the other side did the same thing.

Q. Was that the deputy sheriff, or someone else?

A. I am not certain whether it was or was not, I really don't know.

Q. All right.

A. But anyway, they started walking.

Q. Which direction?

A. At that time they were walking due west, and they walked around the monument.

Q. Which direction?

A. To the north of the monument, and then they walked [fol. 1163] straight toward the Lyceum Building for ten or fifteen yards.

Q. Was that on the sidewalk or on the grass?

A. They were on the grass.

Q. North or south of the walk?

A. North of the walk.

Q. At what rate of speed were they walking?

A. Normal pace.

Q. Did Walker have any rocks or weapons or any missiles?

A. No, sir.

Q. Then what happened?

A. After Walker went ten or fifteen yards, they sort of veered to the right.

Q. That would be to the north?

A. Yes, sir. They were walking in more of a northwesterly direction.

Q. All right. Where were you at this time?

A. I was just to the right of Walker.

Q. Following then?

A. Almost abreast of him.

Q. From the time you saw Walker come up to this point, had you seen anyone else you knew?

A. No.

Q. Any other newsman?

[fol. 1164] A. No.

Q. Had you up to that time seen the UPI newsman, Kettner anywhere?

A. No.

Q. Continue.

A. We walked for about ten or fifteen yards, and as I say, they then veered to the right and walked in a circular manner, more or less bordering on the Circle.

Q. How close to the curb of the Circle?

A. About twenty-five feet from the Circle, but walked around until they were almost even with the flagpole.

Q. All right.

A. And then sort of veered back toward the center of the Circle.

Q. Did they walk straight or—

A. They came, just went toward the sidewalk.

Q. Due south?

A. No, not due south, just more or less going southwest or south-southwest.

But they went toward the sidewalk, didn't reach it, and then turned directly toward the Marshals, and at this time Walker and the two fellows that had hold of his arms were between the sidewalk or almost even with the sidewalk and street.

Q. And by that you mean the east-west sidewalk from [fol. 1165] the flagpole to the monument? Well, I will draw a line from the flagpole to the monument, which will represent the sidewalk. Now, where were they at this point?

A. Right in here.

Q. Would you put a W and circle it? All right. And we will put a 2 on the side of it.

A. (Marking.)

Q. Would you say that was a third of the distance from the flagpole to the Lyceum Building?

A. No.

Q. Would you say the distance would be a fourth?

A. I doubt if it was that far. They were still about forty or fifty yards away from the Lyceum Building.

Q. What then happened?

A. They walked in this direction, like this (indicating).

They walked toward the Lyceum Building in a westerly direction.

Q. Now did this young man who took hold of Walker's arm take a position just east of the monument, or not releasing his arm until he reached the position of W-2?

A. He didn't release his arm.

Q. What about the man on the left, was he holding onto Walker's arm, too?

A. Yes.

[fol. 1166] Q. And the three of them went along there, as you have described?

A. Yes.

Q. Were they in step?

A. I didn't notice if they were in step.

Q. Was anything said by anybody?

A. Mr. Walker walked straight ahead, with his head straight. I didn't see him look to either side. I didn't hear him say a word. As far as I know, he had not said anything.

Q. He said nothing that you heard?

A. Nothing.

Q. Go ahead.

A. They walked about ten or fifteen yards in this direction (indicating).

About ten or fifteen yards in a westerly direction.

Q. At that time had there been any tear gas fired?

A. No.

Q. From the time you saw Walker start from the monument area to this point?

A. I didn't see any.

Q. You saw them walk ten or fifteen yards toward the Lyceum?

A. Yes.

[fol. 1167] Q. And then what happened?

A. Then when they were about seventy or seventy-five yards from the Lyceum Building, then this tremendous group that was behind them—

Q. Was this group bigger than the group the whole day?

A. Bigger group, that I saw.

Q. All right.

A. They threw all of their rocks, small bricks or broken bricks and glass and stakes, and so forth.

Q. Where was Walker and these two other men at the time these bricks and things were thrown?

A. At the very front of the group.

Q. How far was it from them to the nearest man to their rear or east?

A. Behind them, about two or three or four feet.

Q. Walker and the two men were out in front by the distance you mentioned?

A. By that distance, yes.

Q. Then what happened?

A. They threw all of their things, as I said, and turned, and the tear gas hit in the middle or else in behind us, and it was quite heavy.

Q. Before or after the rocks were thrown?

A. After the rocks were thrown.

[fol. 1168] Q. All right.

A. And I watched as both these fellows let loose of Mr. Walker and turned. Mr. Walker turned and sort of ducked down, like this (indicating), and took off running, and so did the other two fellows, and so did I, and so did everybody else.

• • •

Mr. Gooch: Please turn to page 153, line 22.

Q. What happened then?

A. I heard him make some remark about, "Well, we'll get together and charge again," some comment or something about students, and, "We will charge again, the group will charge again." I don't remember what the exact words were.

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Mr. Gooch: Now, I will turn to 155, line 4.

Q. Then what did you do?

A. As soon as he made the comment, I turned and ran to a 'phone.

* * *

Mr. Gooch: Please turn to page 160, line 1.

Q. Then when you returned, Walker was on the base of the Confederate statue.

A. Yes.

Q. Was he alone?

A. There were students around.

[fol. 1169] Mr. Watts: Excuse me, Mr. Gooch, at this point, may we just stipulate, for continuity, that all of this previous testimony occurred before Walker's speech on the monument? I think it would simplify matters.

Mr. Gooch: Yes, yes.

Mr. Watts: Save me reading a great mess.

Mr. Gooch: Yes.

Mr. Watts: This is the testimony of Van Savell, the AP newsman.

Mr. Gooch: Who wrote the article complained of.

Mr. Watts: And up to now, everything that has happened was before the speech on the monument?

Mr. Gooch: That's correct.

Mr. Watts: That will save me reading a lot.

Mr. Gooch: All I am doing is reading the whole thing in continuity.

Mr. Watts: Yes, that's all right, but some has been omitted. Saves me going back and reading it.

Mr. Gooch: Well, I—yes.

Q. Then when you returned—

Mr. Watts: Mr. Gooch, if you wouldn't mind, it will save a lot of time if you will read one question and answer on page 159, line 11 through line 18.

[fol. 1170] Q. Now, by my figures here, from following your testimony, that is the eighth phone call you made, and

the fifth call you made from Perkins' room. What did you see when you came back to the area?

A. As I got to the area, I saw Mr. Walker standing on a ledge of the Confederate statue.

Q. What was he doing?

A. He was talking.

Q. Had you at any time prior to this seen a young preacher, Mr. Duncan Gray?

A. Many times I have seen him, yes.

Q. Had you seen him that evening on the campus?

A. No.

Mr. Gooch: Beginning at line 1, page 160. Do you want to stop here or go on?

The Court: No, we can go ahead and stop. Let's recess until a quarter of eleven.

(20-minute recess.)

[fol. 1171] Mr. Gooch: Page 160, Line 1, is where we got to.

Q. Then when you returned Walker was on the base of the Confederate statue?

A. Yes.

Q. Was he alone?

A. There were students around.

Q. Was there anyone else up on the statue with him?

A. No, sir.

Q. Could you hear anything he was saying?

A. Yes.

Q. What did you say?

A. As I saw him, I heard the word "Cuba," I heard him say "Cuba," and I continued running to the area, and he sort of lapsed for a moment, or a few seconds, didn't say anything.

Q. Wait a minute. From what direction were you approaching?

A. I was approaching from the northwest, or northeast, more northwest.

Q. What was the size of the group of people around him at that time?

A. Several hundred.

Q. How did it compare with the group that participated in the alleged charge that you have described, which was the fourth charge?

[fol. 1172] A. The people in the area of Walker were smaller, but there were more than that; a thousand people within a hundred fifty or two hundred yards of him.

• • •

Mr. Gooch: Picking up—do you want me to read the rest of that? It is descriptive only.

Mr. Watts: No.

Mr. Gooch: Line 13, Page 161.

Q. As you approached on the scene, you heard Walker say something about Cuba?

A. I heard the word "Cuba".

Q. Did he have his hat on at that time?

A. I guess he did, yes, sir.

Q. What next did you hear him say?

A. I heard him say something about somebody, he made the comment about somebody had betrayed Mississippi.

Q. Somebody had betrayed—

A. Yes.

Q. Do you remember who he said?

A. Didn't say who, he said, "Somebody has betrayed you."

Q. In other words he used the words, "Somebody has betrayed you"?

A. Yes.

Q. Go ahead.

A. And immediately there were comments, "Who, who?" [fol. 1173] And he didn't at first make a comment, just "Governor Barnett."

Q. What comment?

A. He just said, "Governor Barnett," but it was his voice. I was within 10 feet of him at this time.

Q. Which direction were you from the statue?
A. To the northeast, in the road just off the curb.
Q. Where was he from the statue?
A. He was on the north side of the statue.
Q. Facing toward the north?
A. No, facing to the east.
Q. But he was standing at the north side of the statue?
A. Yes.
Q. The statue then was on his right?
A. Yes, more or less.
Q. Go ahead.
A. And he stood there, he made this comment, almost inaudible, it was inaudible to most people, about Governor Barnett.
Q. What period of time—
A. He made this comment about Governor Barnett, in a low voice, and I heard it, and then he stopped and leaned over and talked to a fellow, I don't know who the fellow was, and there was a period of time when he was talking to this fellow, and leaning on this fellow's shoulder, and then [fol. 1174] he reared back up and said, "Birdsong, Birdsong has betrayed you."
Q. Is that all?
A. No, that is not all. Then he made a comment about, "We can win," or "You can win." "If you don't think you can win go home, leave the campus, but we can win."
Then he made a comment about "keep protesting. You may not win but you will be heard," and he said, "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."
When he made that comment I immediately turned and left and ran for the phone.
Q. Now is the outline you have given us in chronological sequence?
A. I am not certain of that, no, sir. Well, there were many other things he said.
Q. Tell us everything.

A. That's all I remember, this is all that I—just at the present time that is all that I—well, he said other things, which were practically the same thing, meant the same thing, but were said in different words.

Q. How long did you hear him speak?

A. Four minutes or five minutes at the most.

Q. Did you on that occasion see anyone that you knew?

A. No one but Walker.

[fol. 1175] Q. Have you heard since or talked to anyone who heard substantially the same things you heard?

A. No, sir.

Q. Then as I understand, you raced back to the telephone?

A. Yes.

Q. And reported Walker's speech?

A. Yes.

* * *

Mr. Gooch: That is through Line 8, on Page—Line 10 on Page 164.

Page 166, Line 6.

Q. You made notes on Walker's speech?

A. Yes, sir.

Q. What did you do with those notes?

A. Those notes, the last time I saw them, were at the hotel on yellow legal paper, that's what I typed the story on.

Q. Do you know where they are at this time?

A. No, sir.

Q. Could you give us as near verbatim as possible what your notes were about?

A. The notes said that "Somebody has betrayed you." And the students asked, "Who, who, who?"

And Mr. Walker said almost inaudibly, "Governor Bar-[fol. 1176] nett," and then he leaned down and talked, as I said before, and he got back up and said, "Birdsong, Birdsong has betrayed you."

Q. Did you have that in your notes?

A. I did not put that in my notes, because I could remember it. I had Governor Barnett down, and I did write

a B down there, I know that, and later used it, and then, that he said, "If you don't think you can win—" or something like that, "If you don't think you can win go home, leave the University, but we can win." Then he made some other comments, as I remember it, and then there were remarks almost along the same line, pepping the students up, and then he made the comment about "You may not be able to win, but you will have been heard."

And he said that, "This is a dangerous thing." Then he said, "If you are not prepared for possible death, go home now."

He paused and immediately started talking about the Kennedys, and I left and went to the phone.

Q. Then he was not through with his speech when you left?

A. No, he wasn't.

• • •

Mr. Gooch: Turn now to Page 168, Line 2.

Q. The Marshals were still firing at the time Walker [fol. 1177] was speaking?

A. Yes, sporadically.

Q. Were there any charges, or rocks being thrown at that time, any rock throwing going on at that time?

A. I didn't notice any that impressed me enough to stick in my memory. There were no large charges that I saw again that night.

Q. Did you hear Walker at any time mention the word, "Violence"?

A. I believe that when he was talking he made a comment about violence.

Q. What was the comment?

A. I can't remember exactly, but something about that—I don't think it was the word "violence". I think the words were something like, "This is violence,—"

The comment is familiar to me, but I didn't take it down as a note, that I remember, didn't use it, anyway.

Q. Did you hear him say anything like, "avoiding violence"?

A. Not at this time, that I remember, no.

Q. Did you at any time hear anything about avoiding violence?

A. Later when talking to students, when I was talking to students, yes.

Q. You mean later that night?

[fol. 1178] A. Yes.

• • •

Mr. Gooch: That is through Line 25, on Page 168. Page 170, Line 22.

Q. What was the attitude of the crowd as he spoke?

A. Their attitude was, I think there were several cheers for him, and in addition they appeared to be restless, they kept saying, "Come on, let's go, let's go."

But there were quite a few cheers when he said, "If you are not prepared for possible death, go home now."

Q. And that brought cheers?

A. That brought cheers, yes.

• • •

Mr. Gooch: Then on Page 171, Line 12.

Q. I wish you would relate to me in chronological detail everything else you heard or saw Walker say or do.

A. I kept an eye on Walker from a distance. I went back and I was talking to Sterling Slappy again, I met him, and we talked a little bit and he said, "Have you seen Walker?"

And I said, "Yes, I have," and he said, "Well, I haven't. Where is he?"

And I said, "He is over there," and pointed to the group and he was still there, and then Sterling left me and went towards the group. I don't know whether he actually went [fol. 1179] to the group or not. Then I went on, and by that time they had brought up a fire engine, up into the grove area of the campus, and so I kept an eye on them as they were charging the Marshals with the fire engine, and also using that to try and put out the tear gas bombs.

Q. Was Walker participating in that in any way?

A. He didn't seem to. He was still down in the area where he was talking to this group, and I kept watching this group, and finally one of the boys in the group—I felt like they were students, they were young, very young—one of them had on an "Ole Miss" jacket and they made a charge, fire engine, and they were busy themselves at this time, and they went right on up to the sidewalk and across the street, and they were right next to the Marshals, the Marshals had to jump out of the way, and at the same time a couple more were hanging out and swinging with their stakes, and then turned around.

Q. You mean the students or the Marshals?

A. The students had stakes in their hands, and were swinging at the Marshals, and went to turn up, went back around, and they were going about 25 yards in front of the Lyceum Building, and started to turn around to, began to back-up, but the Marshals had charged on them, and the Marshals captured the fire engine and the five people involved, and that quieted the fire engine for that time. [fol. 1180] In between the time I saw Walker there and the next time I saw him, they brought out a bulldozer. They tried to get it started to go by itself, and go after the Marshals.

Q. Did Walker have any participation in that?

A. No, sir. They had the fire engine, I mean the Marshals finally captured the bulldozer. About that time I saw a huge fire ball flash in explosion, just a fire over the side there in the street, and I heard somebody comment about Molotov cocktails, and I ran into the area where I was told they were making them.

* * *

Mr. Gooch: Skipping down to Line 17, on the same page.

Q. All right.

A. And I went over there and there was a big gasoline can there and bottles they had.

Q. Who was "they"?

A. People, ten or twelve or fifteen of them.

Q. How many?

A. There were quite a few, quite a group of students standing at the Fine Arts Building, many of them I knew, and I went over and I asked them something, asked how long they had been there, and they told me, and I think I was there five minutes and I came back, and they were making or had tried two more, and both of them just flared [fol. 1181] into fire, didn't reach the Marshals and didn't explode, and it made them quite mad, and about that time, why, somebody hollered "We will get Mr. Walker to tell us how to make them." And I paid no attention to that. In a matter of a minute or so, here was Mr. Walker, walking this way.

Q. Where they were making the Molotov cocktails?

A. Yes. And he listened, one of the students asked "Will you help us make some Molotov cocktails, or show us how? Ours are not working." And he made no comment but nodded his head, and didn't do anything. Then finally one student said, "Well, we are having trouble with these damn tear gas bombs. How can we put these things out? Water doesn't help?" And he suggested using sand.

Q. This was still in the area north of the oval, where they were making the cocktails?

A. Right in that area.

Q. And he suggested the use of sand?

A. He suggested the use of sand, but he said, "Where can you find it?"

Q. Who is "he," Walker or the boy?

A. Mr. Walker said, "Where you—can you find it", or "Where can they find it," and one of the students said, "Oh, we can find it," and that's all the comment of Mr. Walker, and he turned around with a couple of students and walked back into the general area of the monument. I [fol. 1182] walked back, and I saw him down there talking to some people, and I saw no reason to stick around, and I went to a telephone.

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Mr. Gooch: That is through Line 7.

Mr. Watts: Would you mind reading just the next two questions and answers?

Mr. Gooch: Not at all.

"Question: Same phone?
"Answer: Same."

Mr. Watts: May we agree, in order to save reading a lot of this deposition, that that phone is in Lebuve, in this building?

Mr. Gooch: It is in Lebuve Hall.

Mr. Watts: Well, this says Lebuve Hall.

Mr. Gooch: Yes, sir.

Mr. Watts: May we also agree that this scale here is applicable to this map.

Mr. Gooch: Yes, sir, so far as I know. How many more do you want me to read?

Mr. Watts: Just the next two.

• • •

Q. Now this would be, by my record of your telephone calls, Number 10. What did you report at that time?

A. The fact that they were throwing Molotov cocktails [fol. 1183] and I said three of them had been unsuccessful and there had been no explosion, and I said they had asked General Walker how to make them and that he had made no comment, and then nodded his head as if to say, "No,"—

• • •

Mr. Watts: That is as far as I am interested in. The rest of it is repetition.

Q. You say he nodded his head no or yes?

A. Like that (indicating). Shaking it sideways as if to say no.

• • •

Mr. Gooch: And that is through Line 18, on Page 175. I believe that is all we have to offer at this time from the Savell deposition.

Mr. Watts: Would you mind reading two questions, or I will read the questions and you read the answers?

Mr. Gooch: Sure. What page?

Mr. Watts: Page 176, Line 4.

Q. Still up to this time had you seen anyone connected with the AP?

A. No.

Q. Any other newsmen except the one individual with U.S. News?

A. Not to my knowledge, no, I hadn't.

Q. You had seen no one connected with the UPI?

[fol. 1184] A. No, no, not with the UPI . . . I went back to the area, the route I was taking the first time.

Q. That would be around to the south?

A. Yes. This time I got back there and I couldn't find Mr. Walker.

Q. Wait. First you went back to the phone and reported in this incident about Walker?

A. Yes.

Q. Telling them about the sand?

A. Yes.

Q. Then when you went back there, you went this way, and did you take the north or south route?

A. No.

Q. When you went to the phone?

A. I started to take the north route, but when I got there I found tear gas, so I couldn't stand it.

Q. Where?

A. There is a valley between the Fine Arts and the Math Building. I had used it before, but the gas, tear gas was so thick in that area that I couldn't stand it even with a wet towel around my face, so I turned around and went back this way, went back to the south, to the phone, made my report and went back to the area of the monument by way of the southern route.

• • •

[fol. 1185] Mr. Watts: May we agree the southern route would be roughly starting at Lebuve Hall, and roughly in this direction (indicating).

Mr. Gooch: Whatever the map shows.

Mr. Watts: All right, that is all.

[fol. 1186] Mr. Watts: Mr. Gooch, I have one other short one on page 8 I would like to read if you don't mind reading the answer. Page 8, line 14.

Mr. Gooch: Be glad to.

Mr. Watts: On the previous line, to tie it into continuity.

I had asked the question: "Were you given any briefing as to the slanting of the news?"

The answers was: "I was told there was no such thing, strict facts and nothing else.

Question: "What did you understand to be slanting of the news?"

Answer: "Slanting of the news, possibly reporting the facts, but at the same time reporting it for only one side."

Question: "Over-emphasis on one side?"

Answer: "Certainly."

Mr. Watts: That's all. Any more deposition, Tiny?

Mr. Gooch: Not this witness.

Mr. Watts: Are you going to offer any more depositions now or shall I offer a witness?

Mr. Gooch: No, you can go ahead.

Mr. Watts: Mr. Dornblaser.

[fol. 1187] JOSEPH DORNBLASER, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. Your name, please, sir?

A. Joseph Dornblaser.

Q. Have you been in the Court room at any time since this trial has been going on?

A. I have not.

Q. All right, sir. What is your—briefly—your background?

A. I entered the Army in 1917 and retired with the grade of Colonel in 1948.

Q. Were you in a combat branch or support branch?

A. Mostly support branch.

Q. Did you have occasion to become acquainted with General Walker?

A. Yes, sir.

Q. First when?

A. About 1930.

Q. Did you have a specialty in your Military duties?

A. I was used largely for the purchase of horses and [fol. 1188] mules for the calvary and the artillery.

Q. To shorten it and lead you a little, was that what was known as the "remount service"?

A. Remount service, yes, sir.

Q. Did you buy horses and mules all over the ranch country of Texas?

A. Yes, sir.

Q. While you were out there on these assignments, did you ever read any newspapers?

A. Yes, sir.

Q. What newspaper did you find to be the primary news organ in that area?

A. Well, it was definitely the Star Telegram. That would seem to be the Bible of all the ranch people.

Q. And what was your connection with Walker in those —in the 30's?

A. Well, we were both interested in horses and they had a ranch at Center Point and that was one of my favorite stops, so I could stay all night there.

Q. And did he stay active in connection with the horse. . . . ?

A. Yes, he did. He was. . . .

Q. Did you have any contact with him after World War II?

A. Yes, sir, I was—while I was commanding officer of [fol. 1189] the Southwestern Remount Station at San Angelo, Texas, he came up and many times to visit me and also to take part in the horse shows there and, in addition, I was stationed for about a year at Fort Sill with General Walker.

Q. Prior to October 1, 1962, what was General Walker's reputation as a capable and competent Army officer?

Don't answer this until I finish the question.

Mr. Gooch: To which we object.

By Mr. Watts:

Q. Capable and competent Army officer as you knew it generally.

Mr. Gooch: I object.

The Court: I would have to sustain that.

By Mr. Watts:

Q. All right. Now, then, did you have—where did you live in September and October of 1962?

A. Forth Worth, Texas.

Q. Were you retired?

A. I was retired.

Q. Did you read the Forth Worth Star Telegram?

A. Yes, sir.

Q. Did you have occasion to read these articles that we have outlined that said Walker led a charge of students on the Ole Miss campus on the night of September 30th, 1962?

[fol. 1190] A. I did.

Q. What impression did that have on you concerning General Walker after you read those articles?

Just a minute.

The Court: Just a minute, please. Ladies and Gentlemen, will you step into the Jury room for a moment, please?

• • •

[fol. 1197] (Jury returns to the Court room.)

By Mr. Watts:

Q. What was your rank when you retired?

A. Colonel.

Q. Now, then, Colonel, did you know—answer this yes or no—the reputation of General Walker in the Fort Worth community and in the ranching area to the south and southwest served by the Fort Worth Star Telegram prior to September 30, 1962?

A. Yes, sir.

Q. What was his reputation as a peaceable, law-abiding citizen prior to that publicity that I have outlined? By the Fort Worth Star Telegram, as taken from the Associated Press publication? Was that reputation good or bad?

A. It was good.

Q. All right, sir. Now, then, you were familiar, as I understand, with these articles in the Fort Worth Star Telegram as published from the Associated Press sources [fol. 1198] that said he was leading a charge against U. S. Marshals, were you familiar with those articles?

A. Yes, sir.

Q. And after those articles were circulated in this same area, was his reputation good or bad?

A. Bad.

Mr. Watts: That's all.

Mr. Gooch: No questions.

The Court: You may step down, sir. I will release this witness.

CHARLES MAY, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Watts:

Q. You haven't been in the Court room during the course of this trial, have you?

A. No, sir.

Q. State your name, please?

A. Charles Joseph May, III.

Q. Where do you live?

A. Pascagoula, Mississippi.

Q. What is your age?

A. I am twenty-three years old.

[fol. 1199] Q. Are you a student at Mississippi University?

A. Yes, sir.

Q. Since when?

A. Since 1958.

Q. What school?

A. I am now in the School of Law.

Q. What class?

A. I am in the senior class.

Q. What class were you in in September of 1962?

A. I was in my second semester.

Q. Sir?

A. I was in my second semester. I had gone to one summer session.

Q. Of Law School?

A. Yes, sir.

Q. Were you on the campus that night?

A. Yes, sir.

Q. Do you know where the so-called Circle is?

A. Yes, sir.

Q. Did you arrive in the Circle area before or after the Marshals fired tear gas?

A. I was there before.

Q. Would you outline to the Court and Jury, please, sir, exactly what happened immediately before this tear gas was fired?

[fol. 1200] A. Well, immediately before the tear gas was fired, there were the Marshals, around three or four hundred of them, had surrounded the Lyceum Building and were standing on the steps.

In front of the Lyceum, there were several huge troop trucks in which the Marshals had come. The students were gathered in front of these trucks.

The trucks were between the Marshals and the students. Between the students and the trucks were the Mississippi Highway Patrol, trying to keep the students away from the trucks and the Marshals away from the students, I guess.

Q. Now, immediately before the firing of gas, what was the distance of the closest student to the closest Marshal, as you saw it?

A. I would say about twenty or thirty feet, at the most, because they had these trucks and they, also, had the Highway Patrol in between the trucks and the students.

Q. All right, sir. What was going on?

A. Well, the students were jeering and they had rebel flags, waving the flags and cheering. And I think some cigarettes—some cigarette butts were flicked over toward the Marshals, out in the street toward the trucks.

And groups of students were standing around talking to the Highway Patrol, asking them what their orders were. [fol. 1201] And the Highway Patrol were trying, were pushing the students back.

At one time the students had moved up toward the trucks and the Highway Patrol then pushed students all the way back across the road into the Circle.

And around that time I was over near the Fine Arts Building.

Q. Is that to the northeast of the Lyceum?

A. Yes, sir.

Q. All right.

A. I was standing, I would say, mid-way between the Fine Arts Building in the road and the Lyceum. And all of a sudden, I heard these explosions and I thought they were cherry bombs or firecrackers or something.

And then I saw one Highway Patrolman fell and this gas started coming up in the crowd.

And so several of us pulled the Highway Patrolman over across the street and we didn't know whether he had been shot. And then we ran—I ran into a girl's dormitory, which is about two blocks, it's behind the Fine Arts Building. I don't know the name of it. But we ran into the lobby there because I had that gas in my eyes.

Q. Which direction?

A. It was behind the Fine Arts Building. I don't know the name of the dormitory there.

[fol. 1202] Q. Noting the scale on this map, and this distance here as 500 feet, are you aware of the approximate distance from the monument around north of the Fine Arts Building over to LaBuve Hall?

A. LaBuve?

Q. Yes.

A. No, sir, I don't know.

Q. Well, is this LaBuve Hall way over here northwest of the Fine Arts—of the Lyceum?

A. Yes, sir, yes.

Q. Over in here. All right. Now, I wish you would take this pointer and from there on to the best of the capability of your memory, explain to this Court and Jury exactly what you saw, where it was and what happened.

A. Well, when the tear gas was fired, I was standing, I would say, in this area (indicating), and after we drug the Highway Patrolman—he was shot in the back with a tear gas shell or something of that sort—and we ran around the, let me see, around—around this side of the Fine Arts Building and into Ward Dormitory here.

And at that time there had already been a crowd in there watching the President's speech on television.

And so I tried,—I got some water to wash out my eyes. And then I came back out of Ward Dormitory and came over here to this street (indicating); I would say I was [fol. 1203] right in here, between the "Y" Building and the Fine Arts Center, with a view of the Circle.

Here I met Dr. James Silver, who was standing there. He was a professor at the University of Mississippi in history.

And I stood there and we talked and watched all of the commotion out here in the Circle, stood there, I guess, from about 8:15 until 9:00 o'clock, somewhere around in that area.

Q. Now, in that period of time, was there any large mass of students—well, we will skip that—say, from a period of about ten or fifteen minutes after the riot first started, with the firing of tear gas, from that time on until you met Silver, was there any large movement of a great mass of people across that Circle area?

A. Yes, sir, right after the tear gas had been fired, there was not. There was a movement away from it, of course. Nobody knew what was going on.

And so I would say in about five minutes, by the time I came out of Ward Dormitory and down here, you could see little groups of people run across toward the Lyceum and some of the Marshals, at first they lined up like this (indicating), and would march across the Circle here like this and then crowds of students would come from this way or behind them or this way and sometimes the Mar- [fol. 1204] shals even ran down here and into the Grove and I know, because we were standing there, Dr. Silver and I, and students would run by, "Here come the Marshals," and we would both have to run to get away because . . .

[fol. 1205] Q. Now from the time this first movement until you left Dr. Silver, was there a movement of the students, or was it a sporadic activity by little groups?

A. It was just sporadic activity. I would say we had activity from over here around the Chemistry Building,

and from behind it, where the—here at Carrier Hall, from behind any of these buildings. You would have small groups of people.

Q. If within that period of time there had been a charge started en masse down here east of the Confederate monument with three leaders in front of it, and a line of a thousand people, and had moved within about 25 feet of this north curb, and had then moved down toward the Marshals and gotten almost to them, and at which time the tear gas—the missiles were discharged and thrown at the Marshals, the tear gas was fired, and all that group of people raced back to the monument, would you have been in a position where you would or would not have seen such an activity? Yes or no?

A. Yes, I would have seen it.

Q. Did such an activity occur at any time from the time this riot first broke until you were up there talking to Dr. Silver? Yes or no?

A. With 1,000 people?

Q. Yes.

[fol. 1206] A. No, sir.

Q. All right, have you outlined to us as best you can what did happen before you went up there and talked to Dr. Silver?

A. Yes, sir.

Q. All right, tell us then from that time on in details, relive in your memory, and tell this jury exactly what you saw.

A. Well, at about, I would say 9:00 o'clock, I saw there was a crowd of people over here toward the monument. And so I came around through the grove, behind the "Y" Building, and behind the Geology Building, into the street, and then I came up and I stood, I would say, right around here (indicating on map).

There was a pile of construction material—no, it was right about here. They had piles of brick and lumber stacked here.

Q. Was there a street immediately to the north of you?

A. Yes, sir, this—well, it was this junction right here (indicating).

Q. Did any vehicles come out of that street about that time?

A. Yes, sir, after I had been there two or three minutes I noticed that all the highway patrolmen were leaving, [fol. 1207] and some of them came up in here, and others came around through here, and through here (indicating on chart), and all the students started yelling, "Why are you all leaving?"

And they said—

Mr. Gooch: I object to that.

Mr. Watts: You can't say—

The Court: Sustained.

Q. Take your seat.

A. Sir?

Q. You may take your seat. Don't tell what the highway patrolman said, but what were the comments when the highway patrol left?

A. The students were all yelling, "Why are you going; why are you leaving us?" And I can't tell you what they said?

Q. You can tell what the students said but not what the highway patrol said.

A. Well, they were all yelling that, "Why are you all leaving, why don't you all stay?"

Q. Go ahead.

A. And about this time all the highway patrolmen were moving out, and I guess there were—I don't know, 40 or 50 cars, may be more, and, anyway, they all pulled out and all the students were out there waving at them, and asking them to please stay, and then I heard someone say, "Well, [fol. 1208] here comes General Walker." Somebody in the crowd. It started as murmuring, you could hear a little murmur through the crowd, so I stood there on this pile of lumber and General Walker was in the—when I first saw him he was just in the general vicinity—can I show you?

Q. Sure.

A. I was in this general vicinity here (indicating on chart), and he walked around here. I stood on this pile of lumber right here and I believe there was a light, a vapor light there, and General Walker walked around back and forth, and people would come up to him and shake his hand, and—in groups of two or three—and stand around there, and he stood around there in the crowd, and people would go up to him, and I think he gave some autographs or something, and anyway, he just stood there talking to people, and walking around, and he just walked back and forth in front there of the statue.

He might have gone up behind it. I didn't notice, but anyway for a while he just did that, for a while, and after a while went—when all the highway patrolmen had left they kept hollering, "General Walker, will you give us a speech; speech, speech."

You could hear it, all the yelling out in the crowd, so finally General Walker moved over toward the monument, and he stood around talking to the people at the monument a [fol. 1209] couple of minutes, and I think some—two boys boosted him up on the monument.

Q. Where did you go from there?

A. I moved up as close as I could to the monument.

Q. About how closer were you?

A. I was, I would say, in the middle—in the middle, halfway towards the front.

Q. Could you estimate in distances in the room here something that is an equivalent distance?

A. I would say I was as far as from here to the last juror over here, the lady in the corner (indicating).

Q. And did you hear what General Walker said from the monument?

A. Yes.

Q. Prior to that speech had you heard any comment by the students about Governor Barnett?

A. Yes, they kept asking the highway patrolmen, "Why are you all leaving, has Ross sold us out?"

Everybody calls him "Ross", in Mississippi.

Q. All right, go ahead.

A. And the highway patrol wouldn't say anything. They said, "We don't know, we haven't—all we have is orders to leave."

Q. Now then did you hear General Walker's speech?

A. Yes, sir.

[fol: 1210] Q. Tell the jury as nearly as you can remember what was said.

A. Well, the students asked General Walker the same thing they had asked the Highway Patrol, they kept yelling, "Has Ross sold us out, has Ross sold us out?"

And General Walker stood up there on the statue and he said, "I can assure you. . . ." He said, "Your Governor has not let you down. I just returned from a meeting downtown in Oxford and I can assure you it is not your Governor."

And at this time we had some—there were people applauding and everything, and then he said, "What are these troops doing here? Cuba is that way."

And he pointed toward the south.

And he said, "This isn't the way to Cuba."

He said, "Under the Constitution you have a right to protest but if there is any blood shed, let it be on the hands of the Federal Government."

He said, "We must stop this, we must stop this riot."

And the people booed and jeered, and a lot of people left then.

And I heard people say, "He is no good; he ought to be out here leading."

And I would say about one-quarter of the people left [fol. 1211] when he said that.

And people kept yelling, "Who sold us out if it wasn't Ross?"

And he said, "I can't tell you now. I cannot divulge that. I have learned at a meeting downtown in the courthouse . . ." I believe he said that, "But I can't divulge it now."

And they kept yelling, "Who was it; who was it?"

And the people were booing and jeering and everything, and General Walker leaned over and talked to a couple of men standing there and he stood up and he said, "It was Col. Birdsong."

At this time a lot of people didn't know who Col. Birdsong was, and they would yell, "Who is he," you know, and he said, "He is your Highway Director."

And about this time the Episcopal priest there, Duncan Gray, Reverend Duncan Gray walked over. He came from the "Y" Building, from the vicinity of the "Y" Building, and moved over towards the statue.

And he walked up towards the statue and I couldn't hear what he said to General Walker, but I saw a fellow who, I later found out was a Sheriff, grab him, grab Duncan Gray, and two students, and pulled him back through the crowd. Because the crowd was surging in on him, and General Walker said, "This man makes me ashamed I am an [fol. 1212] Episcopalian."

And after that time they took Reverend Gray back into the "Y" Building, the Sheriff and these other two men.

And I stood there for a while and that was about all I can remember about the speech.

Q. Were you there when General Walker got down off the monument?

A. Yes.

Q. What did he do, where did he go?

A. Well, he stood around in front of the monument for about—well, I couldn't estimate the time, really. Probably upward to 15 minutes, and I wanted to go—that was the first time that I had ever seen him and I wanted to go shake his hand.

And so I—

Q. He stood in the vicinity of the monument for 15 minutes?

A. Yes, sir, I would say 10 or 15 minutes.

Q. All right, go ahead.

A. And, well, I walked over toward him. There was a group of people around him talking to him and shaking his

hand and everything, and I would say I don't know how many, but it wasn't but, maybe, 15 or 20 in his general area.

Q. Did you go over and shake hands with him?

A. Yes, sir, I got up—

[fol. 1213] Q. Did you talk to him?

A. Yes, sir, and people were asking him questions. Can I tell you some of the questions?

Q. Well, I don't believe you'd better say what they told him. You can say anything you heard General Walker say.

A. I asked him, I said, "General Walker, do you think if you were in charge here you could stop the riot?"

And he said, "Hell, if I had been in charge here we wouldn't have had a riot."

And then other people were asking him things like that, and—let's see.

Well, anyway, he was moving around at this time, sort of moseying back and forth in front of the statue there, the Confederate statue, so after I had talked to him a few minutes I went back and stood on that pile of lumber back there, you know, where I could see pretty good, and he wandered around the statue there and most of the people had gone home—well, I don't know where they went, but most of the people had left the area, and had either gone back behind the Chemistry Building there, or behind the Fine Arts Center back there, or over towards that.

Because they were burning some cars over there and—

Q. And what did you do then?

A. I stood there about, I would say, five or six more minutes on top of that brick, and nothing was happening, [fol. 1214] so I went downtown—I went out on University Avenue and caught a ride downtown with a Sheriff.

Q. Did you see General Walker anymore?

A. I didn't see him any more that night.

Mr. Watts: That's all.

Cross examination.

By Mr. Gooch:

Q. Mr. Mays, directing your attention to the period of time after the tear gas was fired, I believe you stated generally, and correct me if I am wrong, that there was quite a bit of surging towards the Marshals by groups of some size after the gas was fired, is that correct?

A. Yes, sir. Not immediately after.

Q. Well, at any time after?

A. Yes, sir, after—well, that goes into the next day.

Q. And that was happening prior to the time that General Walker got to the campus?

A. Yes.

Q. Was it happening during and at the time General Walker got there?

A. No, sir, I would say that was the quietest time during the riot.

Q. All right. Now, where was the—what would the students throw at the Marshals?

[fol. 1215] A. In the vicinity of the Science Building they had stacks of bricks, and I believe they threw bricks, mostly. I didn't ever go up in the circle myself.

Q. I take it you didn't participate in any of the rioting?

A. No, sir.

Q. How would these groups form? Would it just be spontaneous, and go forward and some of them throw their rocks, bricks and so on?

A. Yes, sir, I would say in groups of maybe five or ten.

Q. Well, now where would they detach themselves from? Would you say that the people were scattered completely out, or was there any grouping? You mentioned a crowd a time or two in your statement.

A. Yes, sir.

Q. Would they detach themselves from the crowd?

A. Yes, sir.

Q. To run up and throw the brick?

A. Yes, sir. Right after the riot I would say you had your biggest crowd. Up until about, maybe about four or five minutes right after they shot the tear gas. You had your biggest crowd, but the Marshals kept firing this tear gas and it kept building up and so most people left. Or the larger majority of the people had left after about 45 minutes, it [fol. 1216] was so gassy around there.

Q. Well, I understood you to say that there was a crowd?

A. Yes, sir.

Q. Around the monument at the time General Walker came on the campus?

A. Yes, sir, but it wasn't as big as the crowd that had been there when they fired the tear gas.

Q. Well, most everything is relative, isn't it, Mr. Mays?

A. Yes, sir.

Q. Had that crowd that had come down around the monument, had some of them detached theirselves from the crowd prior to the time he got there and gone up and thrown something at the Marshals?

A. I couldn't say whether they did or not.

Q. The source of supply of the brick, at least, was about where you were standing?

A. Yes, sir.

Q. I guess you were able to observe quite a few of those brick and stone was being hauled from your vantage point over to the students doing the tossing, is that correct?

A. No, by the time I had gotten there, you see, that was one of the quietest times during the riot. I wouldn't have [fol. 1217] ever come around there if—if they would have been charging.

Q. That wasn't the question I asked you.

A. Yes, sir.

Q. Were you as close to the source of supply of the bricks and stones and sticks from the new construction—

A. Yes, sir, I would say so.

Q. Did you see any students coming in and around that construction where you were standing and picking up sticks,

stones and whatever they could get to be used as missiles toward the Marshals?

A. Yes, sir.

Q. Was that almost continuous throughout the night?

A. No, sir. Not the time—it was not continuous the time I was there.

Q. You say it was continuous?

A. You—no, sir, it was not.

Q. When did it stop?

A. Well, when I first got there there were a few people milling around in the streets. By the time General Walker had started talking on the statue there was no rioting at all then. There was no charges.

In fact, the Marshals were still firing tear gas, and they fired some of these rockets that would reach all the way from the Lyceum back toward us.

[fol. 1218] Q. By the way, you say, "Those charges". Now, what do you describe as a charge?

A. A group of maybe—well, I don't know, in talking about this, talking about the riot. I would say maybe eight or ten people running toward the Lyceum throwing brick.

Q. That would be your definition of a charge? You have used that several times.

A. Yes, sir.

Q. All right. Now you say when you first saw General Walker coming on the campus he was greeted by "Here is Walker." Did you hear them say anything about, "Here is our leader"?

A. No, sir.

Q. Had you heard any previous word prior to this night that General Walker might be coming ten thousand strong?

A. I think I might have read it in the newspaper.

Q. Did you hear the expression, "Bring your flag, your tent and your skillet?"

A. I couldn't swear to it. I might have, yes, sir.

Q. But you had heard that General Walker was re-

ported to be on his way to Mississippi with 10,000 strong. Did you hear that?

A. Yes, sir.

Q. All right, did anybody ask him where his volunteers were when he came on the campus?

[fol. 1219] A. I didn't hear it.

Q. You didn't hear it?

A. No, sir.

Q. But did you hear a number of them say, "Here is General Walker."?

A. Yes.

Q. Anything said about "Here is the moral support we need, here is our leader"?

A. No, sir, I didn't hear that.

Q. Now prior to the time that this gas was fired up around the Lyceum Building, did you see anything being tossed at the Marshals by the students, or thrown?

A. Yes, sir, they were flipping some cigarettes, and that is all I saw myself.

Q. Any pebbles, stones or rock or anything of that sort?

A. Yes, sir, could have been. I did not see it. I have read about that in the newspaper.

Q. Well, now when General Walker first came on the campus and you say some of them, at least, "Here is Walker," and shook his hand, then what did General Walker do?

Mr. Watts: If the Court please, I object to that as not within the evidence. This man said he didn't see Walker come on the campus. That when he came back and found him, he was down at the monument; after he was down at [fol. 1220] the building. That is a misstatement.

The Court: After you saw General Walker.

Q. Let me—I misunderstood you.

Mr. Watts: Yeah, I think you misunderstood.

Q. Do you know when General Walker first came on the campus?

A. No, sir.

Q. I misunderstood you. I thought you said you saw him as he came towards the monument. But you don't attempt to say now as to what time General Walker came on the campus?

A. No, sir.

Q. Well, I beg your pardon, I misunderstood your testimony completely. Then you don't know what General Walker could have been doing on the campus prior to the time you saw him, do you?

A. No, sir.

Q. You don't know whether he had walked up with a group toward the flagpole or not, prior to that time, do you?

A. No, sir.

Q. I believe you said if there had been as many as 1,000 you would have seen it, is that right?

A. Yes, sir.

Q. All right, we will go back then, and I do apologize [fol. 1221] to you because I thought you said you saw him come on the campus. It now develops he had been there for some time, or according to you some time?

A. Well, I never said some time.

Q. Well, you don't know how long he had been on there?

A. No, sir.

Q. At any rate when you observed General Walker the first time you saw him, was when they were urging him to make the speech?

A. Yes, sir. When I first saw General Walker the last of the Highway Patrolmen were leaving.

Q. All right.

A. And they kept asking why, they kept asking the Highway Patrol, "Why are you leaving?". And then they were finding General Walker and saying, "Why are they leaving, General"?.

Q. Incidentally at the time the Highway patrolmen left that caused quite a group of people to run over to the highway patrolmen, watching them leave?

A. I don't know, sir.

[fol. 1222] Q. Well, you spoke of a number of people yelling to them—

A. Yes.

Q. —as to why they were leaving?

A. Yes, sir.

Q. And I assume that the people had gone over to watch them leave, or had they?

A. Yes, sir. See, well, a lot of people had lined—there were a line of cars all down University Avenue down to the bridge.

Q. Yes, sir.

A. And just—not many of them were students. But there were just a lot of—I saw, talked to a cab driver and two or three sheriffs out there.

Q. All right. At any rate, when General Walker—when they yelled, "Speech, speech, speech,"—and I think I quote you exactly on that?

A. Yes, sir.

Q. Did he agree to make a speech, or did he just start up to the monument?

A. Well, he didn't agree at first to make a speech. They kept—

Q. I guess he finally consented—did he say so or just impliedly walk over there?

A. Well, from—they—it took a while, I believe. I don't [fol. 1223] remember him going right up there immediately.

Q. I think I quote you when you said that two people boosted him up on the monument?

A. Yes, sir.

Q. Do you know who those two people were?

A. No, sir.

Q. How did they boost him up there?

A. Just sort of took him by the arms and helped him up.

Q. And you don't know who those people were?

A. No, sir. There might have been two or three, I'm sorry about that.

Q. All right. And you heard him say something about, "What are the troops doing here?"

A. Yes, sir.

Q. Were there any troops on the campus there at that time?

A. Yes, sir, I believe so.

Q. Do you know what time the troops came in?

A. Well, there were some Negro troops driving those trucks that brought the Marshals.

Q. I'm talking about the Marshals around the Lyceum, had you seen the troops come in with bayonets at that time?

A. No, sir.

[fol. 1224] Q. What—did that occur later? You don't know when they came in, do you?

A. Yes, sir.

Q. When?

A. I think. They came in around 12:00 midnight.

Q. You were a long way from the campus at that time, as I understand your testimony?

A. When?

When the troops finally came in?

Q. Yes, sir.

A. No, sir, I was over by the—I think I had gone back and talked to Dr. Silver again after that. See, I went—

Q. I understood you to say that shortly after Walker, within twenty minutes after Walker's speech, you left and went back to town?

A. Yes, sir.

Q. Did you come back?

A. Yes, sir. I was trying to call home.

Q. Oh. Then the first you heard of any troops being on the campus was around 12:00 midnight?

A. Yes, sir.

Q. All right. Then all your conversation with General Walker occurred before that time, did they not?

A. Yes, sir.

[fol. 1225] Q. All right. Then all your conversation with General Walker occurred before that time, did they not?

A. Yes, sir.

Q. And the speech on the monument was about what time? Would you estimate that?

A. No, sir, I couldn't. Maybe 9:30 or 10:00, right in there somewhere.

Q. 9:30 or 10:00?

A. Yes, sir.

Q. And you don't know, of course, what time General Walker got on the campus that night, do you?

A. No, sir.

Q. All right. Now, I believe you stated that you heard him say something about Cuba?

A. Yes, sir.

Q. What was that?

A. He said, "What are these troops doing here? Cuba is this way (indicating)," or, "That's the way to Cuba," one. It was something like that.

Q. He said, "What are those troops doing here?"

A. Yes, sir.

Q. Did you see any troops at that time?

A. No, sir.

Q. All right. And I believe you said that you have a right to protest?

[fol. 1226] A. Yes, sir—he said, "I remember he said, "Under the Constitution, you have a right to protest."

Q. All right. Now, what sort of protest had been occurring prior to that time?

A. Well, just the riot, I guess.

Q. Throwing rocks?

A. Yes, sir.

Q. Sticks and bottles?

A. Yes, sir.

Q. And stones at the Marshals, hadn't they?

A. Yes, sir.

Q. All right.

A. You didn't finish the statement there, though, sir. That wasn't the whole statement he made. That wasn't the whole sentence. You have taken part of it there.

Q. I thought you said, "You have a right to protest under the Constitution"?

A. Yes, sir, but, he said, "But, if there is any bloodshed, let it be on the hands of the Federal Government."

Q. "But if there is any bloodshed—

A. Yes, sir.

Q. —let it be on the hands of the Federal Government"?

A. Yes, sir.

[fol. 1227] Q. Well, I was going to get down to that next but I'm glad you brought that in.

A. Yes, sir.

Q. Because the rioting had occurred and everybody knew about that at that time, didn't they?

A. Yes, sir.

Q. And he was saying, "You have a right to protest but if there is going to be any bloodshed, let it be on the hands of the Federal Government"?

A. Yes.

Q. Is that what he said?

A. Yes, sir, he said, "There must be an end to this rioting."

Q. Yes, sir. Did he say, "Violence is not the answer?"

A. I don't remember that, I'm sorry.

Q. Did he say, "Nobody intended violence?"

A. He might have. I don't remember all—that's all I remember of—

Q. Did he say, "Neither Governor Barnett and myself have told you use violence;" did he make those, did he make that statement?

A. I couldn't swear to it, sir.

Q. Well, what did he say about a peaceful protest?

A. All I remember is, he said that, "Under the Constitu-

[fol. 1228] tion, you have a right to protest. But if there is any bloodshed, let it be on the hands of the Federal Government."

And he said, "There must be an end to this violence," or, "We must stop this violence." Or, "We must stop this riot," or it was something to that effect.

Q. Well, now, which did he say, "The rioting" or "The violence"?

A. I couldn't swear to it, sir.

Q. All right. Then he was asked if—or at some time, at least, he was asked if Ross had sold them out?

A. Yeah, the crowd asked him.

Q. Now, you knew at that time, did you not, that Governor Ross Barnett was still protesting the entrance of Meredith into the University, didn't you?

A. No, sir, I didn't know. I had heard Governor Barnett's speech on the radio about, I think it was, 7:30, and he made the statement, "Our heads are bowed, but let's try to be honorable," or something like that, and I didn't know what that meant.

Q. I see. What—but, at any rate, he told the students there that Governor Barnett had not sold them out?

A. Yes, sir.

Q. You knew that prior to that speech, which you say [fol. 1229] you heard, that Governor Barnett was still standing on his original position of keeping Meredith off of that campus, didn't you?

A. Yes, sir, before that speech.

Q. All right, sir. Then I believe you said that when they kept asking him who it was that sold them out, that he said he wasn't at liberty to disclose it, is that what you said?

A. Yes, sir.

Q. Just how did he put that? Did he say, "I am not at liberty—

A. He said, "I cannot divulge that at this time." He said, "I have just returned from a meeting at the Courthouse and I cannot divulge that at this time."

Q. Did that mean by you (sic) that he was holding something back on an implied promise or something?

A. Yes, sir.

Q. But he finally, at the insistence of the crowd, said it was Col. Birdsong?

A. Yes, sir.

Q. And I assume that he meant that the Governor, Barnett, was standing steadfast but that Birdsong was the one that sold them out; is that correct?

A. Yes, sir, I would . . .

Q. After General Walker came down off the monument, [fol. 1230] what did you say he did?

A. Well, he walked around and I would call it moseying, I don't know how to, any other word to explain it.

Q. That's a good word.

A. But he walked back and forth and groups of people would come over and shake his hand and talk to him, and that's when I went up and shook his hand and talked to him.

Q. Did he at any time after he came off the monument go toward the flagpole?

A. Yes, sir, I—yes, sir.

Q. How far did he go toward the flagpole?

A. I couldn't—I couldn't really say, sir.

Q. Was there any group around him or beside him as he went toward that flagpole?

A. It was not a group in itself. There were—he would just walk around, just . . . and walk—

Q. And everywhere he went—

Mr. Watts: Let him finish, please, sir.

The Court: Have you finished your answer, Mr. May?

The Witness: No, sir.

Mr. Gooch: Go ahead.

A. He was just, he would walk around and whenever he [fol. 1231] would walk, there would be four or five people come up and shake his hands, "Glad to meet you, General Walker," and then they would talk a minute and then they would leave. And wherever he went, it was that way—even days after the riot, all over the campus.

Q. Well, I am talking now, directing your attention—

A. Yes, sir.

Q. To after the speech on the monument?

A. Yes.

Q. Wherever General Walker went, there was a crowd around him, wasn't there?

A. Yes, sir.

Q. And do you say that he did not walk up towards the monument?

A. Yes, sir, he did walk up, up toward the monument.

Q. Do you know how far he walked up toward the monument—I mean the flagpole, excuse me. Did he walk toward the flagpole?

A. Yes, he walked on the other side of the monument, towards the Lyceum.

Q. Do you know how far or what distance he walked from the monument to the flagpole?

A. No, sir, I wouldn't—if I can explain, see, I was standing there on that group of bricks and lumber there and he [fol. 1232] would just sort of walk up toward this way and then he would maybe move around and just walk around in circles, I would say, and he walked up there a little bit and then he would walk, and then maybe he would walk up there again. And after about ten minutes I thought nothing was going to happen and so I left.

Q. Was any tear gas fired any time you were in the presence of General Walker?

A. Yes, sir.

Q. When was that?

A. Before, during and after the speech.

Mr. Gooch: That's all, thank you, sir.

Mr. Watts: If Your Honor please, this lad has a summer job at the University of Mississippi and may he be excused? He has to get back.

The Court: Spell the name for the reporter, the city in which you live.

The Witness: Pascagoula, P-a-s-c-a-g-o-u-l-a (spelling).

The Court: Is your name May or Mays?

The Witness: M-a-y.

The Court: No "s" on it?

The Witness: No, sir.

The Court: All right. Ladies and Gentlemen, we will recess until 2:00 o'clock.

[fol. 1233] (Whereupon, the Court was recessed at this point until 2:00 o'clock of the same day.)

[fol. 1234] Afternoon Session

(2:00 o'clock, p.m.)

Mr. Watts: If Your Honor please, we will read now part of the testimony of Alan Gould, who is Executive Editor of the Associated Press. The deposition was taken in Fort Worth on March 25, 1964.

Mr. Gooch: Taken by you.

Mr. Watts: Taken by me. I propounded the questions, yes, sir, starting on Page 4.

ALAN GOULD, testified by deposition as follows:

Direct examination.

Q. Will you state your name, please?

A. Alan Gould.

Q. Your residence?

A. Residence, Greenwich, Connecticut. You want the street address?

Q. Your profession?

A. I am retired now, and I am a Consultant with the Associated Press.

Q. For what period of time did you work for or with the Associated Press?

A. Since March, 1922 until—

Q. What was your background?

A. Until I retired at the end of January, 1963.

[fol. 1235] • • •

Mr. Watts: Now turn to Page 6, the question at Line 6.

Q. What was your position?

A. My position was Executive Editor.

Q. And they left the post vacant when you retired?

A. Yes, for the time being. The responsibilities have been taken over by the General Manager of the Associated Press.

Q. What is his name?

A. Wes Gallinger.

Q. As far as you know has that position, as such, ever been filled?

A. No, sir.

Q. Describe for us, please, sir, your duties as Executive Editor.

A. I was in general charge of administering the news service of the Associated Press, including its various branches throughout the world.

Q. Now we have taken Mr. Relman Morin's deposition, and I understood from him that at each day at approximately 11:00 o'clock they had a meeting of the various heads of Departments in the Associated Press Headquarters in New York to consider various items in connection with your responsibilities. Is that an accurate statement of what occurred?

[fol. 1236] A. I am not familiar with what is occurring now.

Q. No, I mean what occurred when you were there? Did you have some type of executive meeting or Department Head Meeting every day to accomplish any particular purpose?

A. We would have meetings among the Department Heads to consider the current news situation daily. These meetings, as far as I was concerned, did not occur at any particular time, but were related to our activities, the news development, whatever planning and organizing we needed to do to cover that day's news. This is a continuing process.

* * *

Mr. Watts: Now Page 8, Line 2.

Q. As of the first part of October, 1962, who were those individuals, and what were their assignments?

A. Generally, the men who would get together included the General News Editor.

Q. Who was he?

A. The Foreign News Editor.

Q. Who was he at that time?

A. Sam Blackman.

• • •

Mr. Watts: Line 14.

Q. Foreign News Editor?

A. Foreign News Editor.

Q. Name?

[fol. 1237] A. Ben Bassett.

Q. Who else?

A. The General News Photo Editor, Al Resch, R-e-s-c-h, and such others as from time to time might have any particular reason for being included in these conferences, too.

Q. Who controlled or supervised that meeting?

A. I would from time to time, and Mr. Blackman, the General News Editor might.

Q. How long had you been Executive News Editor prior to the first of October, 1962?

A. I had the responsibility from December, 1941, about 10 days after Pearl Harbor, until I retired.

Q. I wish you would describe for us briefly, but in some adequate detail the organization and setup of the Associated Press.

A. You mean the news organization for which I was responsible?

Q. First, the corporate structure and the ownership, the operation, high level management.

A. There is no ownership of the Associated Press.

Q. I understand. It is a membership corporation?

A. It is a membership group. The members of the Associated Press elect a Board of Directors. The Board of Directors, in turn, selects the General Management.

[fol. 1238] • • •

Mr. Watts: Now over to Page 10, Line 11.

Q. I wish you would describe to us the events that actually took place in this meeting; as a typical example of what occurred, that led you to send personnel into the Oxford, Mississippi, area in connection with the Meredith enrollment. Just give us a thumbnail of what occurred and who said what to whom. You can just pick a date of your own choice.

A. Well, actually, to clear up the matter of these meetings, you have asked a number of questions, and I am inclined to think that it might be useful to particularize more with regard to the question you have asked about these meetings, Executive Staff Meetings.

Q. All right.

A. The daily meetings, which were not any fixed time, but depended upon events, and which were attended by people directly concerned with the particular developments in the AP, were held as and when required for operational purposes during the day.

In addition to that, and perhaps this may bear on what you were asking about earlier, there would be weekly meetings of all executives in charge of the various departments and branches of the AP, which was designed chiefly to communicate departmental activities, and to exchange [fol. 1239] ideas and to discuss planning in the broader sense as it involved the general news operation of the AP.

I mention these distinctions chiefly so there will be no confusion about what time the get-together you are asking about, when we discussed these meetings.

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Mr. Watts: Page 14, Line 2.

Q. Go ahead and tell us then briefly, on the weekly meeting—I think you have covered the daily meeting fairly well, give us an example—start with the weekly meeting just prior to the Oxford incident, and just tell us or give us a blow by blow account of what occurred. Who said what to whom in the weekly meeting?

A. I couldn't attempt now to recollect a blow by blow description of the weekly meeting, Mr. Watts, but in general, each department would report what it was doing, what it thought was of general interest. Ideas might be advanced for particular stories or features.

Q. Give us an example of that. What do you mean?

A. Well, the development of the news situation. A particular example might be in a political year, which this is. We would know in general what the chief figures in the political campaign intended to do. We might discuss the assignments and the arrangements that would be needed in order to produce the news coverage for a given segment [fol. 1240] of the campaign. It might deal with various aspects of covering missile firing, particularly, of course, the orbiting of astronauts from Cape Canaveral.

Many of these great stories are immensely complex. They cross departmental lines. They involve arrangements and planning in a number of areas, as well as departments, so that the purpose there would be to discuss the various possibilities for both coverage, and for the assignment of staff people, and other aspects of the story of that kind.

Q. Now what personnel would attend these weekly meetings, and this time we are talking about immediately before or immediately after?

A. All available departmental chiefs of the AP.

Q. All right, in addition to Blackman—excuse me.

A. Some specialist would be there from time to time, such as Mr. Morin, who was a special correspondent of the AP, as you know, and covers a variety of news assignments.

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Mr. Watts: Over to Page 22.

[fol. 1241] Q. Now, that news is the composite result of individuals who observe the news?

A. That's right.

Q. Did the Associated Press, in organizing and arranging its coverage of the Oxford incident, select the indi-

viduals, the particular individuals, who would go to Oxford and make the report?

A. At various echelons, we did, yes.

Q. Who selected them?

A. Well, you have the staff in New Orleans and Mississippi to begin with. Then reinforcements are sent in as developments warrant by request of the Chief of Bureau in charge of our field forces, in consultation with other Chiefs of Bureau, who may have or may not have men available, in consultation with the New York control center, the general desk, so that in the aggregate of our operations, we select men who are available, who are qualified to go in and handle various aspects of a story of multiple angles.

Q. Who did you send from New York to Oxford?

A. From New York, my recollection is we sent Sam Blackman.

Q. Who is "we"?

A. I did.

Q. All right, sir.

A. The General News Editor.

[fol. 1242] Q. In other words, it was your sole responsibility as to who would go?

A. No, it was my ultimate responsibility but I did not select or decide a lot of assignments. It was not my function to do so.

Q. Who did?

A. It was the function primarily of the Chief of Bureau. Then when you go beyond that, it can come to New York and the general desk can cooperate in providing the manpower or whatever additionally was needed.

In the particular case you asked about, who did we send from New York, the answer is that I directed Sam Blackman and Pat Morin to go.

Q. To Oxford?

A. Morin to Oxford and Blackman to New Orleans.

Mr. Watts: Now, if you will, turn to the deposition of Alfred Kuettner. We are about through.

Do you want to ask any questions from the deposition, Mr. Gooch?

Mr. Gooch: Not at this moment.

ALFRED KUETTNER, testified by deposition as follows:

By Mr. Watts:

Q. State your name, please, sir.

[fol. 1243] A. My name is Al Kuettner.

Mr. Watts: If Your Honor please, this deposition of Al Kuettner, we have stipulated, to save having to read a lot of preliminaries here, that Mr. Kuettner was a news reporter for the United Press International; that he was present on the Ole Mississippi campus that night and saw the things that he testified to and reported to his news service, the United Press International.

Mr. Gooch: The deposition was taken by Mr. Watts. It's Mr. Watts' witness.

Mr. Watts: Yes, the deposition was taken by—as you were. I wasn't there. I took one and then they re-took it.

Present at the taking of this deposition was Mr. John A. Dunnaway of New Orleans, or, as you were, Atlanta. And Mr. Carlisle Cravens, the gentleman sitting here, and Mr. Fred D. Smith, the gentleman that usually sits there. I don't know what happened to him.

Mr. Gooch: The deposition was taken on behalf of the Plaintiff, is what I am trying to arrive at.

Mr. Watts: That's right, taken on behalf of the Plaintiff, but not by me.

The Court: Do you stipulate to the facts which Mr.

[fol. 1244] Watts said the two of you had agreed upon?

Mr. Gooch: Yes, that's all right.

Mr. Watts: Starting on page 16, at line 14, or 12. He will need to know where to start reading.

I will start over. My question is at line 12. Your answer is line 14.

Q. Now, what time did you get on the campus Sunday afternoon or evening?

A. Well, it was after dark.

Q. Did you see General Walker when he came on the campus?

A. Yes, sir.

Q. Where were you, Mr. Kuettner?

A. On University Avenue.

Q. Doing what?

A. Going to the telephone.

Mr. Watts: I would like to point on the chart at this point where this location is. On University Avenue is this Avenue right here (indicating).

Q. In other words, you were headed east?

A. Yes, sir.

Q. How far from the monument were you headed back towards where your telephone was?

A. Oh, I would say more than a couple hundred feet.

[fol. 1245] Q. Where did you see General Walker?

A. He was on the sidewalk on University Avenue.

Q. Which one, north or the south?

A. Well, as I recall, there was only one sidewalk on University Avenue right there.

Q. Which side of the street is it on?

A. He was on the left side of the street going toward the west, in a westerly direction.

Q. In other words, he would be on the south side of University Avenue, assuming it runs east and west?

A. Yes.

Q. Is that the same side of the building you were using?

A. Yes, sir.

Q. And you were headed back toward your building and he was meeting you, you were meeting each other?

A. Yes, sir.

Q. Do you recall what time it was?

A. No, I don't recall.

Q. Approximately.

A. Oh, I would say it was probably after 9:00.

Mr. Watts: Over now to page 18.

Q. Did you speak to General Walker?

A. I said, "Good evening."

Q. And was the street lighted?

[fol. 1246] A. It was lighted enough to see him.

Q. Sir?

A. It was lighted enough to see him.

Q. You had enough light to identify and recognize one another?

A. Yes.

Q. Anybody you knew?

A. Yes.

Q. Now, you didn't stop and have any conversation with him?

A. No, sir.

Mr. Watts: Then skip over to the top of page 19.

Q. But you didn't talk to him?

A. No, sir.

Q. And you didn't talk to him as he came on the campus that night about 9:00 o'clock or a little after?

A. No, sir.

Q. Where was the building located where the 'phone was you were using?

A. It was the Journalism Building.

Q. How far was that from the monument?

A. Oh, I would say about, maybe 500 feet or so.

Mr. Watts: (Indicating on map.)

Q. Where were you going at the time you met General [fol. 1247] Walker?

A. To the Journalism Building.

Q. To report what?

A. The increasing activity on the campus.

Q. And did you go ahead then and make your report?

A. Yes, sir.

Q. Did you report General Walker was on the campus?

A. Yes, sir.

Q. Did you immediately get a 'phone call through?

A. To the best of my knowledge.

Q. And when you finished it, you did what?

A. Went back to the campus.

Q. And when you got back to the campus, did you see General Walker?

A. I saw General Walker again, yes.

Q. Where was he?

A. Standing on the monument.

Q. On which side?

A. On the east side.

Q. Facing the direction you were coming from?

A. Yes, sir.

Q. And how close to General Walker did you get?

A. Oh, within, I guess, one hundred feet or so, one hundred, one hundred fifty feet.

[fol. 1248] Q. You never got any closer to him than that?

A. To the best of my knowledge, that was about it.

Q. Did you hear him say anything?

A. Yes.

Q. What did he say?

A. Well, again, not directly quoting him at this point, but he said something to the effect that, "You have every right to demonstrate, but this is not the way to Cuba." That, in general, is what I heard him say.

Q. Did you hear the crowd jeer him?

A. Yes, at one or two points.

Q. You reported, I believe, that the crowd gave him a massive jeer?

A. Yes.

Q. Now, describe what that information was the result of? Well, state whether there was jeering?

A. I heard some jeering.

Q. And can you state the occasion of it?

A. By something that he said, and I don't recall specifically at this point in response to what particular remark it was that the jeering came.

Q. Look at this copy of Plaintiff's Exhibit 3-G that was identified at the taking of the deposition on January 17th of this year.

Mr. Watts: Do we have that available? Do you have it, [fol. 1249] Carlisle?

Mr. Gooch: I don't have it.

Mr. Watts: I guess it's not here.

Q. Look at this message, UPI A144 N AJ and see if that refreshes your memory?

A. Yes, I will abide by this because this was given to our people here as a chronology of the events that were happening.

Q. Now, state for the record, the basis of the report that you made that he was jeered.

A. When he made some reference to a desire that peace be restored, he was jeered.

Q. Will you state for the record whether or not as you reported in this statement that this is true, that during a lull in the rioting General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to cease their violence?

A. Yes.

Q. That is true?

A. That is true.

Q. And was the massive jeer that is reported something that took place chronologically after that occurrence?

A. As I recall, it was.

Q. How much, and I don't mean percentage-wise, did [fol. 1250] you hear General Walker say while he was in that position of speaking to his audience?

A. Only what is reported in the dispatch that you have just shown me.

Q. Now, there were other dispatches, were any merely repetitious?

A. In general, we may have expanded some on what I said.

Mr. Watts: I believe that's all.

Mr. Gooch: I didn't have a chance to check this. I have to be a little slow in reading.

Page 23.

Q. Let me ask you the question, what did you report that you heard him say?

A. At one point I reported him saying, "I want to compliment you all on the protest you make here tonight. You have a right to protest under the Constitution."

Q. Now, is that what you heard him say?

A. That is correct.

Q. Did you ever see General Walker, or did you see him on the monument with anyone else?

A. I don't recall whether anyone else was on the monument or not. There was quite a crowd of people around the monument. I don't know exactly the physical characteristics of this monument, but I think it has got a base [fol. 1251] and then a recess up above that and then the shaft goes on up, and there could have been somebody on there with him.

Q. You recall no occurrence that involved anyone else being on the monument with him?

A. I would not be able to say positively that there was or wasn't.

Q. And now did you continue on into the campus or did you go back to your telephone after you heard that portion of his remarks?

A. As I recall, I went back to the 'phone.

Q. And you reported them while they were fresh in your memory?

A. Yes, sir.

Q. And this is a report that you have just read?

A. Yes, sir, you see, if I could just—could I explain something there?

Q. Yes, sir.

A. At the height of something like this, you don't have time to stop and write down things in notebooks. You

have to commit them to memory and get back to your telephone and report that and to a large extent forget it because you just simply don't have time to commit a lot of things to writing at that point.

Q. Now, when you got through with that telephone call, [fol. 1252] did you then go immediately back to the Circle or Oval?

A. Yes, sir.

Q. Did you see General Walker?

A. I say immediately, I don't know. I don't recall whether that 'phone call took five minutes, fifteen minutes, twenty minutes, whether we had difficulty getting the call through, whether there were other things that I had to do before I got back, I just don't recall.

Q. My question was, when you did conclude it, did you go immediately back to the Oval?

A. Yes, sir.

Q. And did you see General Walker any more?

A. No, sir.

Q. Did you ever see him that night at all?

A. I saw him when I left the campus.

Q. And that was about what time?

A. Well, it was late. Most of the real trouble had stopped by then.

Mr. Gooch: Line 20.

Q. When did the soldiers come in?

A. Well, it was, as I recall, pretty close to midnight, sir.

Q. When did the Marshals come?

A. They came in that afternoon.

[fol. 1253] Mr. Gooch: 13 on page 26.

Q. And now between the time you saw General Walker on the monument and the time you saw him leave, first, let me ask you where was he when you saw him leaving?

A. On University Avenue.

Q. He had already passed out beyond the Circle and east of the monument?

A. Yes, sir.

Q. Had he reached the building where your telephoning was being done?

A. No, sir, it was between the monument and the Journalism Building.

Q. Was he on the sidewalk or in the street?

A. On the sidewalk.

Q. When he came in, who was with him, if anyone?

A. When he came onto the campus?

Q. Yes.

A. There were two men with him.

Q. Was there anybody in uniform?

A. No, sir.

Q. Did you see anybody with a badge that was with him?

A. No, sir.

Q. You did not see a badge, is that what you mean?

[fol. 1254] A. That is correct.

Q. Now, when he left, were those same two men with him?

A. There were two people with him when he left.

Q. Did they appear to be the same individuals?

A. Recalling this far back, I would say yes, but I am not positive.

Q. Now, between the time you saw him on the monument telling the students as you have indicated in this report and you reported that to your company and the time you saw him leaving, what did you do; where were you? Were you in and out of the crowd on the Oval?

A. Yes, sir. I say in and out of the crowd, this is true to this extent, that I mingled with this crowd around the perimeter, around the south perimeter of the Oval. Now, I didn't go straight up through the Grove to the Lyceum.

Q. What is in the middle of the Grove Street up?

A. Trees, flagpole.

Q. With reference to the center of the Oval, where is the flagpole located?

A. It is about in the middle.

Q. Is there a paved walkway from the monument by the flagpole to the Lyceum?

A. I believe so.

[fol. 1255] Q. Are there any cross pavements?

A. I think so.

Mr. Gooch: At line 24.

Q. And you could see what went on within the Oval and in front of the Lyceum Building as it faced east?

A. Mr. Dunaway, I could see what I could see. I don't mean to be ambiguous.

Q. I understand.

A. But this is a pretty big area. There was a tremendous crowd of people and I could see a good deal of what was going on. I could not see everything that was going on.

Mr. Watts: Would you read the next question, to save me coming back?

Q. You did not see General Walker lead a charge?

A. I did not.

Mr. Watts: Correction, Mr. Gooch, "You did not see Mr. Walker lead 'any' charge?"

Mr. Gooch: That's what I said.

Mr. Watts: No, you said, "A". Makes a lot of difference.

Mr. Gooch: Excuse me, "You did not see General Walker lead any charge?"

Answer: "I did not."

Q. Did you see or hear anything that would indicate [fol. 1256] to you that he was leading a charge?

A. I did not personally, no, sir.

Q. Now, as you walked and worked the south side of that Oval, was there a building under construction south of the monument on the south side there at the end of the Oval, a new building?

A. Yes, sir.

Q. And just west of that building there is a building there with some either fir trees or evergreens of some sort, two or three trees? You did not, as you worked the south side of the monument, at any time see General Walker standing over there in the neighborhood of those trees for a long period of time?

A. No, sir.

Q. You missed that?

A. I missed it.

Mr. Gooch: On page 30, line 10.

Q. What was the first contact that you observed between the students and the Marshals?

A. Jeers, some rock throwing, throwing of pebbles, that type of activity.

Q. Were you present when the first tear gas was thrown?

A. Yes, sir.

Q. Where were you at that time?

[fol. 1257] A. In the vicinity of the Lyceum.

Q. Well, on the south side of the perimeter?

A. Yes, sir.

Q. How far from the entrance of the Lyceum?

A. About one hundred feet.

Q. Were you in the crowd or in the street?

A. The crowd was in the street. It was all over the place. I don't remember whether I was standing on the street or not.

Q. How soon after the tear gas was thrown did you make a report by telephone to Atlanta?

A. Just as quick as I could get to a telephone.

Q. Did you run or walk?

A. Ran.

Q. Then, when you reported that, what did you do?

A. Went back.

Q. How near the other position were you at this time when you went back?

A. I don't recall at this point. There was a good deal of tear gas. They laid down a blanket of tear gas to dis-

perse the crowd that was near the Marshals and I don't recall now how close I was able to get, but in the vicinity, well up in the Grove.

[fol. 1258] Q. Were you able to identify anybody that was leading any charge?

A. No, sir.

Q. Or was there a charge? Was there any organized charge?

A. No, sir, not at that point.

Q. Did you ever see an organized charge?

A. Yes, sir, but I don't recall. I couldn't tell you who was leading. I say an organized charge, do you mean this, that you could see a column of people rushing in one direction together? This happened numerous times.

Q. Did you see any weapons on any of the persons that were engaged in the charge, firearms, is what I mean by weapons?

A. No, sir.

Q. What were they using?

A. Molotov cocktails—now I did not know—I am referring to those weapons as weapons that I saw in the hands of people going into the campus, into the crowd.

Q. Were they students?

A. I couldn't tell, sir, whether they were students or not. They were young people. Some of them had student-type, you know, sweaters and so forth. I saw numerous weapons in the hands of the people, stakes, Molotov cocktails, large rocks, broken brick, broken concrete, broken bottles, that [fol. 1259] type of thing.

Q. But you saw no firearms?

A. Not at that time, not that night. I did not see any firearms.

Q. Were the Marshals armed with firearms?

A. The Marshals were armed with firearms.

Q. Yes, sir.

A. Yes, sir, as far as I know they were.

Q. And did you see any pistols in holders on the Marshals?

A. Yes, sir.

Q. Did they have any other type of gun?

A. Tear gas.

Q. Just pistols and tear gas guns?

A. So far as I know those are the only ones that I saw.

• • •

Mr. Gooch: Down to Line 15, on Page 33.

Q. In any of these surges that you talked about did you ever see a flag?

A. Yes, sir.

Q. What sort of a flag?

A. A Confederate flag.

Q. Was it in the crowd or was it leading?

A. I saw several times a Confederate flag toward the [fol. 1260] front of some of these surges.

Q. Could you see who was carrying the flag?

A. No, sir.

• • •

Mr. Gooch: On Page 34, Line 10.

Q. Did you ever see any of these groups in there, surging people, having physical contact with the Marshals? Did they ever cross the street?

A. I didn't see this, no.

Q. Did you have any reports that that had occurred?

A. Yes.

Q. What time of day? Early in the evening or late, or when?

A. Well, it was after the riot had started.

Q. Well, that started while Kennedy was talking, didn't it?

A. Well, Kennedy was talking what? About 8:00 o'clock? It was a good deal later than that.

Q. Was this before General Walker appeared on the campus?

A. I just don't recall whether it was before or after.

• • •

Mr. Gooch: On Page 35, Line 11.

Q. And where was the motion at that time? From out of the oval, or the edge of the street next to the Lyceum?

[fol. 1261] A. Could I just explain this thing?

Q. Yes.

A. The Marshals were standing in an arc around the front of the Lyceum, on the Lyceum side of the street. The demonstrators were standing both in the grove, along the street and some in the street, and this thing was quite spontaneous. There was jeering, there was taunts.

The Marshals were standing their ground, not doing anything, and there was this increase in taunts, then rocks, and later on, I don't recall at what point, this car was wrecked and that is the way the thing started.

But there was an increasing activity and motion.

Q. When the tear gas was fired the State Patrol was there, wasn't it?

A. Yes, sir.

Q. And after the tear gas was when the Patrol left?

A. Yes, sir.

• • •

Mr. Gooch: That concludes at Line 4, Page 36.

Cross examination.

By Mr. Cravens: (Line 22, Page 36)

Q. Mr. Kuettner, when were you first acquainted with General Walker as a public figure? I mean more than personally, but when you had knowledge that there was such a man?

[fol. 1262] A. When he was still in the service.

Q. Was that at Little Rock, or prior to Little Rock?

A. At Little Rock.

Q. Were you at Little Rock covering that story for UPI?

A. Yes, sir.

Q. Did you observe his activities at Little Rock?

A. No, sir. My assignment at Little Rock was writing the story and I did not—I was not ever at Central High School during that time.

Q. But you did know that there was a person called and known as General Walker?

A. Yes, sir.

Q. And at that time he was a public figure and news worthy throughout the State and elsewhere?

A. Yes, sir.

Q. Now you also, or I will ask you whether or not if that image, that public image has continued to this time, to a newsman?

A. Yes, sir.

* * *

Mr. Gooch: Skipping down now—that ends at Line 19.

* * *

Q. Now I believe you mentioned the fact that you were [fol. 1263] in Oxford some few days before September 30th. Did you happen to be in Jackson, Mississippi when Meredith attempted to register in the office of the Trustees in Jackson?

A. No, sir.

Q. You were not present at that?

A. No, sir.

Q. You actually saw, as I understand your testimony, what you called a confrontation of the Lt. Governor of Meredith on the campus of Ole Miss?

A. Yes, sir.

Q. Tell us in your own words just what you saw and the approximate time and date, as you recall, concerning that confrontation.

A. Well, it was several days prior to September 30th, after Meredith had been ordered registered in the University. And the incident that I witnessed was on the date, and I don't remember what date it was, when they had the consultation at the—what corresponds to the center for continuing education there at Ole Miss.

Q. You mentioned "they". Who do you refer to when you say "they"?

A. Did I testify about this before?

Q. You did not.

A. I would have to refresh my memory from the file on this. As I recall now it was the Lt. Governor and the school [fol. 1264] officials.

Q. Were you present when that meeting took place?

A. Yes.

Q. Did you hear what was said?

A. No, sir, it took place inside the building.

Q. Did you see Meredith actually, on campus to attempt to register on that occasion?

A. I don't recall exactly the circumstances. As I recall now he was brought in in a car, and taken in at that time.

Q. Now the Lt. Governor you referred to was Paul D. Johnson, now Governor of Mississippi?

A. Correct.

• • •

Mr. Gooch: Line 16.

Q. What I am really asking you about is the actual confrontation when the Lt. Governor, Paul B. Johnson, actually impeded and obstructed physically the entrance of Meredith to the University. Did you see that?

A. I don't believe that I was the one who covered that. I think Leon Daniel was the man that covered that. This is the best of my recollection now.

Q. At what time did you also know that it was common knowledge from the newspapers, the UPI dispatches and other sources of news, that Federal Courts, both the Dis- [fol. 1265] trict Court in Mississippi and the Fifth Circuit Court in New Orleans, had existing then, injunctions and court orders requiring the registration of Meredith at the University of Mississippi?

A. Yes, sir.

Q. And that was the occasion of the one confrontation that you referred to, in either the Continuing Education

Building or the entrance to the campus when he was physically refused admittance?

A. Correct. There was a lot of back and forth there. As I recall they tried to get him on two or three times.

Q. And he was physically obstructed, as far as his entry to register was concerned?

A. Yes, sir.

Q. And I believe you stated that you knew of the existence of the Court Orders and Injunctions requiring that he be registered at the University of Mississippi?

A. Yes, sir.

Q. And therefore the activities of the school and state officials, as you understand it, were in defiance of the court order, is that correct or not?

A. That is correct.

Q. And that was the situation that was in existence there at Oxford on that Sunday, or Saturday night, September 29-September 30, or September 30th when you arrived at Oxford?

[fol. 1266] A. Yes, sir.

Q. Now you referred in your direct testimony that things were building up very fast when you were talking about what was happening there some time in the morning and in the afternoon of Sunday.

What did you mean when you said, "Things were building up very fast," as to what those things were?

A. There was a great deal of talk in the town about that they are not going to let him come on the campus. There was the interview with the Sheriff. I based my supposition about the building of tension a great deal on what Sheriff Ford told me, and there were a number of—well, there were a lot of people in town. Well, it was just a thing you can pretty much feel; tension building up.

Q. In other words you base it on what Sheriff Ford told you and just through observing the ordinary townspeople?

A. Correct.

Q. And the other people that were crowding into the town?

A. Correct. There were out-of-state cars, there were out-of-county cars, that type of thing.

• • • •

Mr. Watts: Excuse me, I am going to just object to this next, just to shorten it. It is obviously hearsay.

[fol. 1267] Mr. Gooch: Cross examination.

Mr. Watts: In other words, this is not part of the res gestae. This is several days before.

The Court: What line are you on?

Mr. Watts: Line 23, Page 41.

The Court: I will permit it, if it was out there.

• • •

Q. There was talk of obstruction of the Court Orders at that time?

A. Correct.

Q. To prevent Meredith by any means from registering at the University of Mississippi, is that an accurate statement?

A. I would say, yes.

Q. And that is what you are referring to, was that feeling, or that sense of tension and animosity and element of revolt being built up against the Federal Court Order that was then in existence, is that correct?

A. Correct, and I also based it on what had happened previously; that there had been this confrontation, there had been tension, there had been physical evidence that they were not going to let this fellow on the campus, and this is the reason we put our telephone where we did.

• • •

Mr. Gooch: Down to the question on Page 18—I mean [fol. 1268] Line 19, Page 42.

Q. What I would like to ask you was, what, in substance, was it that Sheriff Ford told you there in the interview on that Sunday morning?

• • •

Mr. Watts: Your Honor, I object to this. It is hours and hours, a day before this event took place.

Mr. Gooch: Sunday morning.

The Court: What is the line and page?

Mr. Watts: Line 18, through 20. In other words, this is what the Sheriff told this reporter the morning of the riot. At least 10 or 12 hours before the thing happened.

The Court: Sustained.

Mr. Gooch: May I be heard?

The Court: Do you want to make a Bill on it?

Mr. Gooch: I want to say this, General Walker testified what the Sheriff's conversation was.

Mr. Watts: Oh, no, I don't believe he has. The Court sustained your objection.

Mr. Gooch: He did testify on cross examination what the Sheriff told him?

The Court: I am not going to permit that.

Mr. Andress: Cross examination? That was invited, Judge.

[fol. 1269] Mr. Gooch: Shall I go on down?

Mr. Watts: This is all the—what the Sheriff told him. It would save a lot of time if you would skip over to Page 45. It is all hearsay down through Line 19, on Page 45, it looks to me like.

The Court: I am going to permit him to read Line 25, Page 43, through Line 13, Page 44; or Line 14.

Mr. Watts: Is that on 44 or 43?

Mr. Gooch: Well—

The Court: Bottom of Page 43.

Mr. Watts: Oh, I see. Yes, sir. At line—

The Court: Line 25.

Mr. Watts: 25. Yes, sir, I think that is all right.

The Court: Through Line 14 on 44.

Mr. Watts: Yes, sir, I think that is right, because that is his own observation.

Mr. Gooch: Line 14?

The Court: Yes, sir.

Mr. Gooch: I see. Beginning with Line 14, Page 43.

* * *

Q. Had you yourself seen or heard of some of these news dispatches or statements that General Walker had made while over in Texas about coming to Mississippi ten thou-
[fol. 1270] sand strong and bring your flags—

A. I heard these reports. They were being relayed to me second-handed from our people here.

Q. And that was in your mind when you realized that this tension was building up, as well as these other things that you saw there on the campus and in town at that time?

A. Yes, sir.

Q. Included in his statements, I believe, was this, "To come and bring your flag, your tent, your skillet and stand shoulder to shoulder with Governor Barnett." Did you know he made that statement?

A. I remember something to that effect.

• • •

Mr. Gooch: Now it goes ahead and talks about Ford. I guess we will leave that out?

The Court: Yes, sir.

Mr. Gooch: Now Line 20, Page 44.

Q. I believe you have described the initial or the first part of the action of the group just before the tear gas was fired. I believe you said there was a tremendous crowd of people there in front of the Lyceum and in the circle or the oval as we call it?

A. Yes.

Q. And that crowd of people, did it increase or decrease during the course of the night?

[fol. 1271] A. I am sure some people left, but it was a good crowd of people there. I have a suspicion that it was somewhat decreased from what it was earlier in the evening. Because when the violence really got started, the tenderhearted I am sure left.

Q. Now, what actually started out there to be a demonstration of what you say was a throwing of rocks, and I believe you said some lighted cigarettes—

A. There was some lighted cigarettes thrown because a canvas top on one of the vehicles was set fire to.

Q. That was just before the Marshals fired the tear gas, is that correct?

A. Yes.

• • •

Mr. Gooch: I am trying to read this so I won't get in trouble with you.

Mr. Watts: I think that part is all right. I am kind of reading ahead of you. I will scream when—

Mr. Gooch: Okay.

Q. Did you see actually the immediate movement, action, on the part of the crowd that brought on the firing of the tear gas; was it the throwing of any particular missile?

A. I would say it was, to me it was sort of the brink of the explosion from a demonstration into something uncontrollable. In other words, there was the sound of the [fol. 1272] crowd—the sound of the crowd changed from a jeer to a, well, I would call it a snarl. There were more rocks thrown and there was a sort of a surge forward.

Q. Towards the Marshals?

A. In the direction of the Marshals.

Q. And did it appear that the state police were going to be able to control the situation or did they try?

A. I did not see them try.

Q. And at that point, when that surge occurred and the tenor of the noise turned from maybe jeers and other things, to a snarl, was when the tear gas was fired?

A. Correct.

Q. And that had the effect, I will ask you, did that have the effect of moving the crowd back from the Marshals?

A. Temporarily.

Q. Now, when you first saw General Walker, I believe you said it was about nine o'clock, was he walking toward the Lyceum when you saw him?

A. Yes, sir.

Q. And I believe you said two men were with him?

A. Yes, sir.

Q. How were they walking, single file?

A. One on each side of him.

Q. Walking three abreast?

A. Yes.

[fol. 1273] Q. Was there any other group there with him, with General Walker at that time?

A. Not just with him, there were people, you know, walking along.

Q. Behind him?

A. Some behind, some in front.

Q. All moving toward the Lyceum?

A. Yes.

Q. Did these two men, were they holding his arms or anything of that kind when you saw them?

A. As I recall, they were.

Q. They were?

A. Yes.

Q. Then, I believe in your prior testimony you said that you were running in the opposite direction from which he was going?

A. Correct.

Q. In order to make a telephone call?

A. Yes, sir.

Q. After you lost your telephone connection there on the post, then you had to make these runs at periodic intervals to make your reports, is that correct?

A. No, sir, after we established some kind of a headquarters in the Journalism Building, I quit using the telephone pole position because the Journalism Building was [fol. 1274] considerably closer to the scene of action. I did use the telephone pole phone earlier in the evening and then I went back to it later that night and it was at that point that I discovered that the wires had been pulled out.

Q. Was there some antagonism toward the photographers and the press on the campus that night of September 30?

A. Yes, sir.

Q. Was there considerable?

A. Yes, sir.

Q. To what extent did that sometimes show itself?

A. Well, one of the things that happened near the Lyceum was that a television cameraman's car was wrecked.

Q. Did you see that?

A. See the actual wrecking of the car?

Q. Yes.

A. No, sir.

Q. Did you see any antagonism—

A. I was on the opposite side of the crowd from, in other words, the crowd obscured my vision then.

Q. Did I understand your testimony that there was evident antagonism of the, by the crowd towards newspaper photographers and news reporters that night?

A. Yes, sir.

Q. You felt that and knew that as far as you were concerned?

[fol. 1275] A. Yes, sir.

Q. You felt that and knew that as far as you were concerned?

A. Well, I will tell you, the first thing we did was to take off our coats, take off our ties, and pull our shirttails out and try to be as near like one of the demonstrators as we could.

Q. Make yourself as less conspicuous as you could?

A. As inconspicuous as we could.

Q. Now, at the time you saw General Walker coming on the campus at about nine o'clock, had there already been violence that had erupted?

A. Yes, sir, and I don't recall at what stage it was at that time.

Q. Now, I believe in your prior testimony you said that the temper of the crowd, the action of the crowd, its anger and its resentment increased during the night just before it finally subsided, is that correct?

A. Yes, sir.

Q. That was before and after General Walker's speech, the part of it you heard at the monument?

A. Correct.

Q. Were these people that had these weapons that you call it, the wooden staves, the broken bottles, parts of bricks and other missiles, were they making any evident effort to [fol. 1276] hide them or were they just holding them in their own hands?

A. They had them in their open hands.

Q. Anyone on that campus could see that they were armed with dangerous weapons, that is by throwing within fifty or seventy feet of the Marshals?

A. Yes, sir.

Q. You mentioned that you saw no weapons, and by that I understand you to say guns. You mention you saw no guns in the hands of the demonstrators?

A. I did not see any.

Q. At any time during the night, did you hear any guns fired?

A. Yes, sir.

Q. From what direction was it apparently coming?

A. From the east side of the grove.

Q. Away from, in other words, it was not coming from the Marshals, it was coming from someplace other than where the Marshals were, is that correct?

A. Yes, sir.

Q. Could you tell whether that was a .22 fire or shotgun fire or what?

A. It was rifle fire.

[fol. 1277] Q. Sounded like rifle fire?

A. Yes, sir.

Q. And about what time of the night did that occur, if you recall?

A. Oh, as I recall, it was around about eleven o'clock.

Q. Now, the next time after you saw General Walker coming on the campus, I believe you said that he was making a speech at the monument?

A. Yes, sir.

Q. Do you know how many speeches General Walker may have made at the monument that night?

A. No, sir.

Q. I believe you said when you got there he was already speaking?

A. Yes, sir.

Q. And as soon as you saw that it was General Walker, you immediately left to report that he was there?

A. As soon as I got the gist of his conversation that I have in my report.

Q. Now, in your prior testimony I think you said you listened to him from two to three minutes?

A. I would say about that long.

Q. Did you see the Reverend Duncan Gray attempt to talk to General Walker at the monument?

[fol. 1278] A. I have tried to refresh my memory about that and I just can't say that my memory is clear that I actually saw Gray.

Q. Did you hear General Walker say that he, Duncan Gray, made him ashamed to be an Episcopalian?

A. If that is in our news report, I would say yes. I will just have to rely on that from this distance in time.

Q. At any rate, that night on September 30, 1962, from the time you got there until the time you left—incidentally, when did you leave the campus?

A. The next morning.

Q. You stayed over there all night?

A. Yes, sir.

Q. That thing developed from what at first was a demonstration to a full scale riot?

A. Yes, sir.

Q. And that is your language?

A. Yes, sir.

Q. And that is your best way to explain it?

A. Yes, sir, it was a riot.

Q. And it was a dangerous situation?

A. Yes, sir.

Q. For anyone to have been in that circle or in that immediate area, with the rifle fire and the temper of the crowd [fol. 1279] such as it was?

A. Very much so.

Q. I believe in one of your statements you said disorder broke out all over the place?

A. Yes, sir.

Q. And after the riot broke out, it went fast?

A. Yes, sir.

Q. Now, describe as best you can again these, the charges that you said were, had the appearance of a generalized movement toward the marshals. Was it a large group with small factions breaking off and going up further or was it moving in solid front or how did it operate?

A. Well, I would say that the clearest way I could explain it would be that somebody, and I don't know who, would get up a fairly small segment of the whole crowd and charge toward the area from whence the tear gas was coming and at one point, from whence the fire hose water was coming at another point, and there were these groups, one of them would go this way and another one would go from another direction.

Q. All at approximately the same time?

A. Right. No, this went on for a period of time. Then the marshals would fire more gas and the whole crowd would come swarming down and then presently another group would go up.

[fol. 1280] Q. You said swarming down, you mean making a movement toward the marshals, is that what you mean?

A. No, I mean when the marshals would fire their gas, it would disperse the whole crowd temporarily.

Q. They would fall back?

A. Fall back. And then a group would—the only thing I could recall, it would be reorganized, and then somebody would get up courage enough to start back and some would follow them back.

Q. And they would all come in behind and move up toward the marshals?

A. That's right.

Q. Did you see them actually throwing missiles toward the marshals when they got close enough?

A. No, not at that point, no.

Q. Did you at any point see them throw missiles?

A. That was earlier. When you say missiles, you mean rocks and so forth?

Q. That's right.

A. There was a lot of it that went on. Of course, it got a lot worse than rocks before it was over.

Q. Was it noisy on the campus there after this riot was gotten underway?

A. Yes, sir.

Q. Was it difficult for you to hear General Walker com- [fol. 1281] pletely at the monument when he was making his speech?

A. No, I was close enough to hear the part of it that he said while I was in his vicinity.

Q. Now, I believe in some of your prior testimony, you said that there would be a group of people headed in a certain direction and in front of the group would be a flag, a Confederate flag?

A. Yes, sir.

Q. And was that your description of some of these charges that you have referred to?

A. Yes, sir, there were flags in the forefront of some of these charges?

Q. And to you the word "charge", as I understand it, means a group of people headed in a certain direction?

A. Well, it was a group of people headed with determination toward, in the direction of the marshals.

Q. Toward an objective which was the marshals, is that your statement?

A. That's right.

Q. And that is a fair statement of what it was going on there that night, is that right?

A. Yes, sir.

Q. And I believe you said you never saw General Walker actually be in the forefront or included in any of these charges toward the marshals?

[fol. 1282] A. I did not.

Q. Did you see him at any time move with any group of people toward the Marshals?

A. I did not.

Q. Of course, I will you ask you whether or not it could have occurred and you have missed it?

A. Absolutely.

Q. I believe on your direct testimony you said you didn't know how long it was from the time you left while General Walker was speaking at the monument until you returned to the monument?

A. That's right.

Q. And it covered, you said, as much as twenty-five minutes?

A. Yes, sir.

Q. And, of course—

A. I doubt if it was that long, but it covered more than five or ten minutes.

Q. It covered more than twenty-five?

A. Yes, sir. I know at some points during the night we had difficulty getting phone connections. At some points I had to confer with the people on the desk here, that type thing.

Q. In other words, General Walker could have moved up in a generalized movement toward the marshals on one [fol. 1283] of several occasions while you were at the phone making your calls and you not seen him, is that correct or not?

A. Yes, sir.

Q. Now, that could have occurred when you passed him when you first saw him, if he had moved on up toward the marshals at that time, that could have occurred and you not seen it as I understand it?

A. Yes, sir, because as I said earlier, I was on the way to the phone.

Q. Then it could have occurred, as I understand your testimony, immediately after he completed his speech and while you were making your report, is that correct?

A. You mean by "it," his moving—

Q. His generalized moving with the group toward the marshals.

A. Yes, sir.

Mr. Gooch: Top of page 57, for continuity.

Q. Now, I believe you mentioned the fire truck. Tell us about the fire truck and the hose incident, if you will, and about what time it occurred.

A. Well, it was, I would guess that this too was around, oh, certainly after ten or 10:30 and I have a notion it was between—about eleven o'clock probably. But this fire truck was captured by the mob at some point and then they have just drove the fire truck up and down the street there [fol. 1284] in front of the Lyceum.

Q. You actually saw that then?

A. Yes, sir.

Q. Did they have the hose connected up and were spraying water at that time?

A. Yes, sir.

Q. That was the demonstrators or the members of the mob?

A. Yes, sir.

Q. Where were they spraying the water, in what direction?

A. In the direction of the marshals. Actually, I think their main objective was to try to disperse this gas with the water, so they could get back in the vicinity of the marshals.

Q. How long was that after General Walker's speech?

A. It was sometime after Walker's speech, certainly more than thirty or forty minutes after his speech.

Q. Now, what became of the fire truck, was it seized back by the marshals or did you see it disappear or what?

A. I think that fire truck changed hands three or four times that night.

Q. Now, you mentioned something about the bulldozer incident, what happened on that, tell us about that.

[fol. 1285] A. The crowd commandeered a bulldozer. It was a front-end loader type of equipment, and they tried to use this as an assault weapon and it finally stalled at the curb there and they couldn't get it to going again.

Q. Now how do you mean they tried to use it as an assault weapon, tell us what you mean?

A. I don't want to go into too much detail on that particular thing because I didn't see too much of it, except that I did see the bulldozer moving in the direction of the marshals.

Q. I just want you to tell what you actually saw. That is all you saw was the bulldozer moving in the direction of the marshals?

A. Yes, sir.

Q. Where was it, on Circle Drive or in the Grove?

A. On the drive.

Q. And you didn't see the termination of that incident?

A. No, sir, I saw where the bulldozer stalled.

Q. You mentioned also, I believe, tying down an accelerator on an automobile, did you see that incident?

A. I saw the car headed in the direction of the marshals.

Q. Did it have anyone in it?

A. No, sir.

[fol. 1286] Q. Any driver?

A. No, sir.

Q. Apparently then, it was then driverless and just had been turned loose toward the marshals, is that correct?

A. Yes, sir.

Q. What happened to it, do you know?

A. I believe it hit a tree.

Q. Before it got to the marshals?

A. Yes, sir.

Q. Now, in your prior testimony, starting at Line 2 on Page 33—

A. All right.

Q. Now, you tell there about Walker's statement in the speech. "I want to compliment you all on the protest you make here tonight." He did make that statement as you have testified about before?

A. Yes, sir.

Q. Now, at that time did the students jeer when that statement was made by General Walker?

A. Yes, sir.

Q. In other words, they jeered when General Walker mentioned that long route to Cuba—

A. That's right. The point where I recall the jeers coming was when he made some reference to settling the thing peacefully.

[fol. 1287] Q. Then the cheers came when he told them he wanted to compliment them on the protest they were making here tonight, is that correct?

A. Yes, sir.

Q. Did you hear any shouts at that time that the students made incident to that statement, "I want to compliment you."

A. What do you mean by shouts?

Q. Well, you have got, before I think you said the students shouted, "Let's go, Rebels." Do you recall that?

A. Yes, sir. There were shouts and cheers intermingled.

Q. Did you hear the statements made by the crowd there, "Let's go, Rebels"?

A. Yes, sir.

Q. And the crowd surged forward?

A. Yes, sir.

Q. You heard that statement then and you remember it now?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, did you hear anything about who had let the crowd down as far as letting the marshals on the campus?

A. The Federal Government.

[fol. 1288] Q. Did he say anything about Colonel Birdsong?

A. I believe, yes, Walker said that Colonel Birdsong had sold out the students.

Q. You heard that statement at the monument?

A. He said Birdsong had violated Burnett's orders in letting the Marshals on the campus.

Q. You heard that statement?

A. Yes, sir.

Q. Did that have the effect of infuriating the crowd when he made those statements, General Walker?

A. As I recall, it did.

Q. Now, when General Walker, when you first saw him coming on the campus with the two men abreast holding his arms, as best you recall, he was walking at what type of a gait?

A. Fast.

Q. Fast gait?

A. Yes.

Q. Was his eyes fixed ahead or was he looking right ahead or what was his appearance?

A. Fixed ahead. I would say he was—being I had my own observation—

Q. Yes, that's what I want.

A. I would say he was walking on toward the campus like a man with a mission.

[fol. 1289] Q. Did he appear to be in an emotional state at that time?

A. Yes, sir.

Q. What type of emotion would you say, tense or wrought up?

A. Tense, I would say he was in a state of considerable emotional upheaval.

Q. Did he appear to have the same upheaval when he was leaving the campus, if you noticed?

A. Not the same type.

Q. About the same type?

A. I said not the same type.

Q. What difference did you observe?

A. I don't want to get put into the position of rendering expert opinion about what I feel a man looks like, but he was bone-weary, he was still in a state of great tension, great terrific tension, I would say, than when he came on the campus. But, well, let's just say he was bone-weary.

Q. Then I believe that you have at one time said that General Walker was more than an interested observer when he came on the Ole Miss Campus on the night of September 30, 1962, is that right or not?

A. Yes, sir.

Q. You still subscribe to that?

[fol. 1290] A. I still subscribe to that.

Mr. Gooch: Question, line 11. The last one is line 3.

"Question: Could you estimate the greatest number you saw in any single group?

"Answer: I just wouldn't. I tell you what this thing reminds me of more than anything, was a bunch of stampeding cattle in that the rider goes over here and runs them around this way and pretty soon they are going off in another direction and another rider pulls them back. So it was ebb-and-flow type of thing. At times there were maybe fifty in a group and at other times there would be three hundred in a group, so, you know, it moved that way."

Q. Now, is that your best description of the way that crowd looked in the circle that night?

A. Yes, sir, it was an ebb-and-flow type of surging thing.

Q. And as I understand it, cursing and making loud noises?

A. Yes, sir.

Q. Taunting?

A. Yes, sir.

Q. Rebel yells?

A. Yes, sir.

Q. Was it in the neighborhood of a roar, would you [fol. 1291] call it a roar of voices?

A. At times. The roar came like this. The marshals would fire their gas, the crowd would fall back, then the

crowd would begin to surge back toward the marshals and at that point there would be a tremendous roar, pretty much like a footfall crowd roar, as they moved back.

Q. And at the time of those surges and with the crowd roaring like it did, was that best described as a charge toward the marshals or not?

A. I would say yes.

Mr. Gooch: I don't believe the rest of it is admissible. On page 66, at line 13.

Q. Now, I believe at one time you described General Walker's appearance on the campus because he became a focal point of student activity, is that right?

A. I would say he was the focal point of some student activity, yes.

Q. And by student activity, you mean the mob, whether it included students or outsiders that may have come in, is that right?

A. Correct.

Q. Was the crowd drawn to him or not?

A. Some people in the crowd were drawn to him. He was easily recognized.

[fol. 1292] Q. And he was talking in a forceful manner when you heard him?

A. Yes, sir.

Q. Was he talking like a leader at that time?

A. He was, yes, he was giving advice.

Mr. Watts: Go ahead and read the next two while you are at it, next two questions or next question and answer.

Q. Did you hear him give any advice about how to handle the tear gas with sand?

A. No, sir.

Mr. Gooch: Line 23 on page 67.

Q. Now, I believe you said you left during the time that General Walker was making his speech and before he completed it, is that correct?

A. That is to the best of my memory.

Q. Now, after you got back from the Journalism Building, where you made your report immediately after you left the presence of General Walker making his speech, did you sense anything about the nature or tempo of the riot as being changed or different?

A. It had increased.

Q. Now, describe how it had increased.

A. The noise was much louder. I don't recall if the fire hoses had come out at that point, but there was just a gen- [fol. 1293] eral increase in the ferocity of the demonstration.

Q. Was there anything that you noticed about outsiders apparently coming on the campus in greater numbers? What did you notice about that?

A. There were adults who came on the campus, there were other young people with, I saw some Mississippi State sweaters there. You see, what happened was this, that when this trouble started, the radio was full of it, television was full of it, and people from distant points who heard these reports just flocked to the campus, and it took some of them some time to get there.

Q. Now, was the mood of the crowd any different from the time before, just before you heard General Walker make his speech, as to whether it was ugly or what?

A. I can't say whether Walker's speech had anything to do with the mood of the crowd or not, but the mood of the crowd became very ugly as the night wore on.

Q. And General Walker's speech?

A. Yes, sir.

Q. Did you notice anything about any additional weapons and the size of the weapons after his speech or not that was being used?

A. As the riot progressed, the weapons became more plentiful. You saw more of these pointed staves. You saw [fol. 1294] people scrounging around in the underbrush and over by this new building that was going up, collecting big pieces of rock. As I recall, it was about then that I began to see the Molotov cocktails.

Q. Describe what you saw with reference to the Molotov cocktails and where?

A. These were bottles. Some of them were Coke bottles, some of them were beer bottles filled with some inflammable liquid with a rag stuck down in them. Some of them had newspapers stuck down in them. And to ignite these things, you just lit the fuse and threw them.

Q. Were they being thrown toward the marshals?

A. I didn't see any of these being thrown at marshals.

Q. Where were they being thrown when you saw them?

A. I saw some flashes of light going up, up toward the upper end of the Grove.

Q. Toward the Lyceum Building?

A. Yes, sir.

Q. Did you see any of these Molotov cocktails being actually made, that is, the bottles being filled with this fluid that you mentioned?

A. No, sir, the only thing I could say is that at one point I saw some individuals siphoning gasoline out of an automobile parked on University Avenue and the siphon hose [fol. 1295] was in a bottle.

Q. Now, were you on the campus the next morning after daylight?

A. Yes, sir.

Q. At Old Miss?

Mr. Watts: I would like to enter an objection to this, just primarily for the purpose of shortening this thing, all this transaction after on the next day. I don't think it proves or disproves anything in this case.

Mr. Gooch: Well, it has to do with what happened the night before.

The Court: What page and line number?

Mr. Andress: 70, line 10.

Mr. Watts: Primarily to shorten it, we will be here . . .

The Court: I think it's admissible.

Mr. Watts: All right, sir.

Mr. Gooch: Line 10, page 70.

Q. Now, were you on the campus the next morning after daylight?

A. Yes, sir.

Q. At Old Miss?

A. Yes, sir.

Q. What was the appearance of the campus?

[fol. 1296] A. It was a military camp.

Q. What was the appearance in the Circle as far as whether or not there was debris?

A. There was debris, there was the wreck, I mean the stalled bulldozer. There were bullet holes in the Lyceum front door casing. There was a heavy odor of tear gas everywhere. The flowers were trampled down, the grass was trampled. Trees had nicks in them, that type of thing.

Q. Were there remnants of concrete benches broken up there?

A. Yes, sir.

Q. Some of the iron, was it still laying around?

A. Yes, sir.

Mr. Watts: If Your Honor please, I am going to again object to the statements here, if there were weapons noticed in the Lyceum Building, way away from any place that—

Mr. Andress: Page 71, line 3.

Mr. Watts: He goes on to say a lot of things were taken, confiscated from dormitories down at line 20 and 21, which has no bearing on this lawsuit at all.

The Court: I will overrule you.

Mr. Watts: All right, sir.

Mr. Andress: May it go to the whole line there, Judge?

[fol. 1297] The Court: Yes, sir.

Mr. Andress: Thank you, sir.

Mr. Gooch: I will have to go back for the continuity.

Q. Some of the iron, was it still laying around?

A. Yes, sir. And inside the Lyceum Building, of course, there was an arsenal that had been collected on the campus

that night, including some of the ugliest weapons I have seen in my life.

Q. Now, you mean that had been collected by whom?

A. By officers of some description.

Q. These weapons had been taken away from the mob?

A. Yes, sir.

Q. In general, what were those weapons?

A. Chains, clubs, there was one thing that was a home-made spear that was made by taking what I would think would be about a one-inch auger bit and welding it onto a long piece of pipe which made a spear.

Q. Were there any guns or firearms that you saw?

A. Yes, sir, there was quite a collection of firearms.

Q. Rifles, shotguns or what?

A. Rifles, shotguns, pistols. Now, I might add this parenthetically, that some of these weapons were confiscated from [fol. 1298] dormitories. I know of one case where a student tried to turn in his hunting gun and he was apprehended.

Q. Now, did you see any of the burning cars or automobiles there that night on the campus?

A. I saw, yes, I saw one car that was burning. I can't remember now whether it was the canvas top vehicle. I believe that was it.

Q. Did you see any remnants of burned automobiles the next morning at or near the campus?

A. Yes.

Q. How many, if you could estimate?

A. I think it was only one that I can remember.

Q. Now, the report was that there, that two people were killed that night, is that correct?

A. That's correct.

Q. Was that your understanding?

A. That's correct.

Q. And a good many people were injured?

A. Yes, sir.

Q. Now, going back to your method of reporting that you told us about, that you didn't have time to keep notes, you had to remember the best you could.

A. Yes, sir.

Q. Memorize what was said and then at various intervals [fol. 1299] made a break for your line of communication. Is that a customary way to report news items under the situation you were working under there?

A. Under that kind of situation, it is. I have covered lots of them and that is about the only way you can do it.

Q. Now, did you have occasion to be at or present at an interview with General Walker after the Oxford riots that you have described?

A. I interviewed him here.

Q. At about what time, if you remember?

A. Oh, it was, it seemed to me sometime last year.

Q. That was in the year 1963?

Mr. Andress: We think that would be objectionable, all this discussion here some months or years later.

The Court: What is the ground of your objection?

Mr. Andress: That it has nothing to do with the case.

The Court: Not relevant?

Mr. Andress: Not relevant, no, sir. Page 73, line 6.

The Court: Let's recess until about ten minutes until 4:00.

(20-minute recess.)

[fol. 1300] The Court: Mr. Nuss, have the record show the objection made by the Plaintiff's Counsel, made prior to the recess, is overruled.

Mr. Andress: May it go to this entire line about this later matter?

The Court: Yes, sir.

Mr. Gooch: Deposition of Kuettner, of the Associated Press, Plaintiff's witness.

Mr. Cravens: United Press.

Mr. Gooch: United Press, excuse me.

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Q. Now, did you have occasion to be at or present at an interview with General Walker after the Oxford riots that you have described?

A. I interviewed him here.

Q. At about what time, if you remember?

A. Oh, it was, it seemed to me sometime last year.

Q. That was in the year 1963?

A. Yes, sir.

Q. What was the substance of that interview if you recall?

A. As I recall, this was an interview, a press conference that was called on the occasion of Billy James Hargis, who is the head of the, I believe he called it Christian Crusade, and General Walker was making some speeches for Hargis [fol. 1301] at that time and they were here to do one of the speeches and they had a news conference and I covered that just in the role of a newsman.

Q. Now, did you read or see any news from Jacksonville, that General Walker had made a statement down there that it wasn't any riot on the campus on the night of September 30, just a bunch of college boys having a lot of fun?

A. Yes, sir.

Q. Did you read that statement that he made?

A. Yes, sir.

Q. Did you ask him about that statement when he was here in Atlanta?

A. He repeated it at this news conference.

Q. What did he say, the best you recall, at this news conference about that?

A. To the best of my knowledge, I said, he was asked about the occurrences on the night of September 30 and he said, "This was just, this wasn't a riot, it was just a bunch of college boys blowing off steam, having a good time."

Q. He made that statement?

A. Yes, sir.

* * *

Mr. Watts: I would like to read my own redirect, if possible.

Mr. Gooch: Oh, sure, you can read anything you want to.

[fol. 1302] Mr. Watts: Do you want to sit there and answer the questions?

Mr. Gooch: Don't matter to me.

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Redirect examination.

By Mr. Dunaway:

Q. Mr. Kuettner, going back to the first question that Mr. Cravens asked you, when this recess terminated just now, that General Walker was still on the monument speaking when you turned to go back to report to Atlanta. That is correct, isn't it?

A. Yes, sir, the best of my knowledge, it is.

Q. And it was, he asked you about somebody saying, "Let's go, Rebels," was that something that occurred when he admonished them to have no violence and they jeered him, was it after that?

A. I think so. It seems to me that this, "Let's go, Rebels," this was sort of a shout from one or more of these guys while Walker was still speaking.

Q. And did you see any group then leave where Walker was speaking when they had that shout, "Let's go, Rebels"? Did you see any crowd begin to leave the monument and go toward the Lyceum?

A. I couldn't say now that I remember that.

[fol. 1303] Q. Was there more than one person that said, "Let's go, Rebels"?

A. I think it was a single voice.

Q. A single voice?

A. Yes.

Q. And were you ever able to identify them or did you see the individual?

A. No, sir.

Q. Was he near you?

A. Within hearing distance.

Q. I mean physical proximity, was he across the crowd from you or somewhere near you?

A. It was within the crowd.

Q. Within the crowd?

A. Yes, sir.

Q. But after that statement was made, Walker continued to talk and you left?

A. Yes, sir.

Q. Now, when General Walker came on the campus and you first saw him with these two men abreast, three of them abreast, did he speak to you, did you speak to him?

A. I spoke to him. I just said, "Good Evening."

Q. Did you speak to him when he left?

A. Yes, sir.

Q. He said good evening to you then, didn't he?

[fol. 1304] A. That's right.

Q. Do you know whether or not he knew you?

A. I don't think he did at that time.

Q. When you told Mr. Cravens that, something about nothing in these reports as being untrue, these reports, as I understand it, were originated here in this office in Atlanta, based on the information that you and Leon Daniel phoned in?

A. They were written from here, yes.

* * *

Mr. Watts: Now go, please to Page 81.

Mr. Gooch: Wait just a minute.

* * *

Q. And when you say persons were ahead of him and behind him when he first went on the campus, are you saying they were in his party or just persons?

A. They did not appear to be in his party.

* * *

Mr. Watts: The Plaintiff rests.

The Court: Ladies and Gentlemen, will you step into the jury room, please.

Mr. Gooch: I had one thing in connection with the Kuettner deposition.

The Court: I beg your pardon.

Mr. Watts: May I inquire if Counsel has the original [fol. 1305] UPI new release?

Mr. Cravens: Yes, sir.

Mr. Watts: Why don't we identify and offer it?

(Sotto voce conference of counsel outside the hearing of reporter.)

Mr. Watts: We'd better have a conference on this.

(Conference at the bench.)

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Mr. Watts: If the Court please, the court reporter has previously identified Associated Press dispatches that were furnished by counsel for the Defendant. There is a great mass of dispatches here that would take probably the rest of the week to read. We have numbered and identified the specific releases for the court reporter's record here, and at this time I would like to offer in evidence Exhibit 1 through 9-J; and 3, inclusive, of 3-M, and each one of these have various letters. I guess I'd better offer them.

Exhibit 1-A and B. Exhibit 2-A. Exhibit 3-A, B, C, D, E, F, G, H, J, K, L, M.

Exhibit 4-A, B, C, D, E, F, G, H, I, J, K,—down through S; down rather not to but through S.

Now Exhibit 5-A through J.

Exhibit 6-A through I.

[fol. 1306] Exhibit 7-A and B.

Exhibit 8 and Exhibit 9.

Also, we have Exhibit 10. 11 is the plat. Then I do not know if we formerly offered Exhibit 11, which is the plat.

The Court: What about 10?

Mr. Watts: 10 is a news report which we do offer. There is no letters with 10.

Exhibit 12, I think we have offered that. Let's see. And we have 13.

The Court: 13 is in. I admitted those.

Mr. Gooch: We do object to them, if the Court please. I haven't checked through them, but I assume my objection—at least I move an objection unless the matters he has introduced have been encompassed within the Pleadings.

The Court: I will admit them with the understanding that they must have been encompassed within the Pleadings.

Mr. Watts: Incidentally, if Your Honor please, I do not in these releases find copies of the releases furnished to me which include news reports of November 21 and January 21 and 22nd, 1963. Are they in this stack?

Mr. Andress: They are not in these.

[fol. 1307] Mr. Watts: They are not?

Mr. Andress: No, sir.

Mr. Watts: I will need to identify them and offer them separately.

The Court: All right.

Mr. Watts: I have them right here in my briefcase. If Your Honor please, might we take about a five-minute recess?

The Court: Do you have anything to offer after Mr. Watts rests, when he gets through with this?

Mr. Gooch: I don't know. I am waiting to see what he offers on November 21st and 22nd.

The Court: All right.

Mr. Watts: The last one was 13. Here is 14 and 14-A.

(Plaintiff's Exhibits 14 and 14-A, were marked for identification.)

Mr. Watts: If it please the Court, Exhibits 14 are the Associated Press news releases under date of November 21, 1962. And Exhibit 14-A is the release under date November 22, 1962.

Exhibit 15 will be the Associated Press releases under—I am unable to tell the exact date, but these are the releases that include the Stubblefield report, that have the

Associated Press identification on them which I, at this [fol. 1308] period in the lawsuit still don't understand. So we will just mark that as Exhibit 15.

(Plaintiff's Exhibit No. 15, was marked for identification.)

The Court: Is 15 in several parts?

Mr. Watts: Well, there are several pages. Really ought to be stapled together.

Mr. Cravens: 15 is the Stubblefield report?

Mr. Watts: As far as I know. At least that is what you gave me.

Exhibit 16 is the Associated Press release under date of January 21, 1963. 1-21-63.

Exhibit 16-A is the AP release under date of January 22, 1963.

Mr. Gooch: The objection will still be the same, although I don't know for sure. My protective objection is, only if they are encompassed within the pleadings.

The Court: All right, I will admit Plaintiff's 14, 14-A, 15 and 16, if they are within the pleadings.

Mr. Watts: Yes, sir. The Plaintiff, with that rests.

The Court: All right.

The Plaintiff has rested.

Mr. Gooch: I would like to take up a matter with the [fol. 1309] Court.

The Court: All right, Ladies and Gentlemen, I have some matters which will probably take 30 minutes anyway, so I think I will just go ahead and let you go home this afternoon rather than have you wait in the jury room, so as far as you are concerned at this time we will be recessed until 9:00 o'clock, tomorow morning. At that time be back in the jury room.

(Jury out.)

(Following proceedings were had outside of the presence and hearing of the jury.)

The Court: I believe I will take this up in chambers.

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(Thereupon, at 4:20 o'clock, p.m., an adjournment was taken until Tuesday morning, at 9:00 o'clock, a.m., June 16, 1964.)

[fol. 1312] Proceedings

Mr. Watts: If Your Honor please, we have a witness here who is a member of the Mississippi Highway Patrol. I had expected to hold him over here and use him on rebuttal, but he tells me that conditions are such that he cannot possibly stay, and I would like to ask the indulgence of the Court to use him very shortly this morning.

The Court: I will let you re-open. Just one witness, now.

Mr. Watts: Yes, sir, just this one witness, and I will cut him as short as I possibly can.

Let the record show, please, sir, that the Plaintiff requests leave to re-open, to offer the testimony of a witness, Gwinn Cole.

(Jury enters the Jury Box.)

The Court: Good morning, Ladies and Gentlemen. I have permitted the Plaintiff to re-open his case, to offer one witness, so this is the Plaintiff's witness.

Gwinn Cole, called as a witness by the Plaintiff, having been first duly sworn, testified as follows, to-wit:

[fol. 1313] Direct Examination.

By Mr. Watts:

Q. Will you state your name, please?
A. My name is Gwinn Cole.
Q. Mr. Cole, where do you live?
A. Jackson, Mississippi.

Q. Do you hold or have you held any official position with the State of Mississippi?

A. I have.

Q. What is that position?

A. I am assistant director, Bureau of Identification, Mississippi Highway Patrol.

Q. And for how long have you worked with the Highway Patrol?

A. Eighteen years.

Q. Mr. Cole, did you have any training to qualify you for the duties you perform?

A. Yes, sir.

Q. Now, are you a regularly appointed and acting officer in the Highway Patrol?

A. Yes, sir.

Q. What is the brief nature and extent of this training that you acquired to be an officer?

A. Well, I am a graduate of the FBI National Academy in Washington and I am a qualified ballistic expert and [fol. 1314] I am a qualified fingerprint expert.

Q. And have you had practical experience in performing those duties?

A. Yes, sir, I have.

Q. Over what period of time?

A. Over the past eighteen years.

Q. Were you on the Mississippi University campus on the night of September 30th, 1962?

A. I was.

The Court: Pardon me just a moment. Pull microphone over in front of you, please, sir.

By Mr. Watts:

Q. In what capacity were you there?

A. I was there as an official and an assistant to Col. T. B. Birdsong.

Q. Was he the Chief of the Highway Patrol?

A. He was Commissioner of Public Safety and, of course, he's got a chief directly under him.

Q. Was he on campus that night?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. And who else was there when the Highway Patrol—

A. Well, the Chief of the Highway Patrol was there and about sixty uniformed men and about twelve plainclothes investigators, including myself.

[fol. 1315] Q. Did the Highway Patrol have a briefing by its officials that night and receive orders?

A. Yes, sir.

Q. From that briefing and those orders, what did you learn as to the situation and what your directive was?

A. Well, we had—

Mr. Gooch: We object to that. It would be hearsay on the part—

The Court: Sustained. It would.

Mr. Watts: The briefing itself was.

By Mr. Watts:

Q. Did you have a mission that night to perform as a member of the Highway Patrol?

A. I did, sir.

Q. What was that mission?

A. We had information that there was about forty thousand Federal troops—

Mr. Gooch: If the Court please, we object to that as hearsay.

The Court: He asked you as to your mission.

Mr. Watts: Yes, sir.

The Court: What you were required to do.

A. My mission was—

Mr. Gooch: Just a minute. We move that answer be stricken from consideration of the Jury.

[fol. 1316] The Court: It's stricken and the Jury is instructed not to consider it.

A. My mission were there to keep down any violence that might occur on the campus that night.

By Mr. Watts:

Q. Did you have occasion to be out north of town, north of Oxford?

A. Yes, sir, I did.

Q. And was there any type of military installation out there?

A. Yes, sir.

Q. Did you see that installation?

A. Yes, sir.

Q. Did you know what it was for?

A. Yes.

Q. Did you know the nature and extent of the preparations incident to that installation?

A. Well—

Q. Well, within limits. I know you didn't know the details of them.

A. Yes, sir.

Q. Was that a Federal or State installation?

A. It was a Federal.

Q. And what was your knowledge as to the purpose of it?

Mr. Gooch: Object to that, if the Court please.

[fol. 1317] It would have to be hearsay.

The Court: Sustained.

Mr. Watts: Well, all right, sir.

By Mr. Watts:

Q. What relation did your mission have with the use of these troops or the projected use of troops?

A. Well, our mission then was to keep down any violence, to not—so that the Federal Government wouldn't

have any excuse by bringing the troops on the University campus.

Q. And did you organize your group and prepare to perform that mission?

A. Yes, sir.

Q. At what place on the campus was that done?

A. That was in front of the Lyceum Building, at the University.

Q. At what time?

A. That was about 6:00 p. m. in the afternoon.

Q. And pursuant to that directive, what was done?

A. Well, the Marshals, United States Marshals, lined up in a circle around the Lyceum Building and we stationed our patrolmen on the other side of the street, between the Marshals and the crowd of students who had gathered on the grass beyond the street—on the other side of the street from the Marshals. And we had them lined up there. [fol. 1318] Now, were the Marshals—to shorten this a little, were the Marshals east of the Lyceum and forming a ring around it?

A. Yes, sir.

Q. And were your Highway Patrolmen in a line to the east of the Marshals?

A. They were.

Q. And where were the students with respect to the Highway Patrol?

A. They were east of the Patrolmen.

Q. Roughly, how many Patrolmen were there?

A. Well, at that time there was approximately sixty Patrolmen and we had them coming in from all over the State; thereafter, they come in . . .

Q. Now, explain to the Jury, please, Officer, just what the activities of this group of students was or were before tear gas was fired.

A. This bunch of students had ganged up there on the grass in front of the Lyceum Building across the street, and, of course, they were heckling the Marshals, thumping

cigarette butts and about the biggest thing that I saw thrown was an egg up aside of one of the GI trucks—just general student misbehaviour, I would call it.

Q. Now, Officer, are you trained in the use of or in anti-
[fol. 1319] mob tactics?

A. Yes, sir.

Q. And riot tactics?

A. Yes, sir.

Q. And as a part of that training, do you understand the purpose and the nature of employment of tear gas in such a situation?

A. I do, sir.

Q. Will you tell to the Jury what is the proper way of employing tear gas under those circumstances?

Mr. Gooch: If the Court please, we object to that as wholly irrelevant and immaterial—

The Court: Sustained.

Mr. Gooch: —to any issue in this case.

The Court: I am not going to permit him to testify to that kind of an opinion.

Mr. Watts: All right, sir.

By Mr. Watts:

Q. With the students out there as you stated, was there any physical contact at all between students and Marshals?

A. No, sir.

Q. All right, sir. Will you tell the Court and Jury what occurred and just endeavor to re-live this situation, Officer, and project to this Jury just what you saw.

[fol. 1320] A. Well, about, somewhere just before, say, from 6:00 p. m. in the afternoon, the Marshals lined up there and we officers, like all officers do, chatting with the Marshals. There were some from Texas and Oklahoma and all over the United States and naturally we were talking to them. They were friendly towards us.

James P. McShane, the Chief United States Marshal, at about 8:00 p. m., I was talking to him in front of the

Lyceum Building and, of course, the students would begin to come in from the week-end, from the ballgame, and they was all gathering up there more or less to sight seeing, I would call it.

And Mr. McShane, after we had, some of them would keep pushing, want to get down in the street and our Patrolmen would keep pushing them back on the grass.

So, just all out of a blue sky, Mr. McShane walked out in the street by the side of me—

Mr. Gooch: We object to what Mr. McShane may have done or what he may have said, if the Court please.

The Court: Overruled.

Mr. Gooch: Note our exception.

The Court: You may proceed.

Mr. Gooch: It's hearsay and—

A. Mr. McShane says, "Let's 'em have it, gas." And the [fol. 1321] Marshals fired directly into the group of Highway Patrolmen, in the back, wounded some, and directly into the students. And the gas was fired directly into the wind, which, in our opinion, is the wrong way to use it.

And all the students had to do is run back out of the gas into the wind and they would come back. Some of them disbursed and some of them would come back, two or three, and they just kept firing gas into them and finally broke them up into small groups.

Q. Now, for what period of time after the gas was fired did the students stay dispersed?

A. What period of time after the first volley was fired?

Q. Yes, sir.

A. Well, they would, I would say, five to ten minutes, they was going to their dormitories. We was telling them to get to their dormitories and somebody was going to get hurt, and, of course, the majority of them did go to their dormitories, but a few would group over on the right and a few over on the left and come back and throw rocks and brick at the Marshals.

Q. How far were you from McShane when he gave that order?

A. I wasn't but about two or three feet.

Q. And in what manner did the Highway Patrolmen [fol. 1322] employ their tear gas weapons? Were they on a curved or flat projectory—

As you were, strike that.

Mr. Gooch: This is wholly irrelevant and immaterial to any issue in this case.

The Court: How is it material?

Mr. Watts: If Your Honor please, the counsel at great length on cross examination—I'm sure he will on his, in his evidence—and I'm laying out the true facts to show just what happened precipitated this riot; that Walker had nothing to do with it whatsoever; that the entire build-up and the cause, proximate cause of the entire violence and riot was the wrongful act of firing—

The Court: Mr. Watts, I don't see that it is material at all.

Mr. Watts: All right, sir.

Mr. Andress: They have gone into it rather at some length on cross examination, Judge.

Mr. Watts: We appreciate the opportunity of being able to put on the witness at all, sir, so I will try to hold it just to the facts.

By Mr. Watts:

Q. Now, then, Mr. Cole, you say for a period of five or ten minutes, the students were out of contact with the Highway Patrolmen?

[fol. 1323] A. Yes, sir.

[fol. 1324] A. Yes, sir.

Q. And did I understand you to say then, did they follow the gas back?

A. Yes, sir, they would follow the gas back up. After the first volley was fired, they would run out of the gas and then they would come back and, of course, after the first volley was fired the majority of them—we kept hollering telling them to get to their dormitories and get out of the way, and the majority of them left and would go to

their dormitories, but there were a few that kept staying there, and they would run out in different parts of the campus and on top of buildings, and around behind bushes, and what have you, and run back, and they would get a chance to throw rocks, and take off again.

Q. Was there ever—do you know what a charge is?

A. Yes, sir.

Q. Was there ever after that point, and within 10 or 15 minutes, a large charge of all the students?

A. No, sir.

Q. As they came back and this gas would dissipate, what size crowd would build up?

A. Oh, four or five, maybe six in a group, run up and throw rocks, and then take off to the bushes again.

Q. What size did the entire crowd build up to that was there across from the Marshals?

[fol. 1325] A. Well, there never was any large crowd after that first volley of gas.

Q. Where would they go, where did the big crowd go?

A. A lot of them went to their dormitories.

Q. Now were you out in the street at all times after this first volley?

A. Yes, sir.

Q. Were there rocks and missiles being hurled after the gas was fired?

A. Yes, sir.

Q. Did you have a helmet or anything on?

A. No, sir.

Q. How were you able to avoid the missiles?

A. Well, I would just try to get behind one of the Marshals that had on a helmet.

Q. And did any of the rocks or missiles fall close to you?

A. Yes, sir.

Q. How close?

A. Well, two or three feet, and they would hit our cars. We would get behind the cars, too.

Q. Mr. Cole, tell the jury just what the visibility was from the time they—the first mass of tear gas was fired?

A. Well, I would say after it was fired, the first volley, [fol. 1326] it was fired, and the wind was blowing and the gas would rise off the ground, and of course it would look like a fog underneath this gas.

And you could see approximately 100 to 110 feet underneath the gas.

Q. Do you know where the flagpole was?

A. Yes, sir.

Q. Could you from time to time see the flagpole?

A. Yes, sir.

Q. Could you see a single individual who was close enough to the Marshals to throw a rock?

A. Oh, yes.

Q. Could you see him in the actual throwing?

A. Yes.

Q. And what would the Marshals do when those lads would run up there and throw things?

A. Well, they would fire another round of tear gas at him, if they couldn't get ahold of some—some of them had their guns in their hands to try to scare them off.

Q. Now at this point where were you with respect to the front steps of the Lyceum Building?

A. Right in front of the steps, just off the sidewalk in the street.

Q. And could you at all times except when the tear gas had just been fired make out the outline of the Lyceum [fol. 1327] Building?

A. Yes, sir.

Q. All right, sir. Now had you known General Walker prior to this incident?

A. Yes, sir.

Q. Where did you first—where did you meet him?

A. Well, I had read about General Walker a lot and I had saw him on television, his pictures in magazines, and and then I had met him one time at Jackson, Mississippi.

Q. How long did you visit with him when you met him?

A. Well it was just a short while, in a group there that was talking to him.

Q. Was there anything distinctive about his headgear?

A. Yes, sir.

Q. Would you step over here to the chart, please, sir, and bring that little pointer there with you.

To orientate the area here, this street is University Boulevard, this is the circle, here is the Confederate monument, the flagpole and the Lyceum Building (indicating).

A. Yes, sir.

Q. Would you take the pointer and point out to the jury where you were at the time the tear gas was fired?

A. Right there (indicating).

Q. What was the furtherest you got away from that [fol. 1328] point for the next—strike that.

How long were you in that area?

A. I was in that area until approximately 9:50 or 9:55.

Q. All right, sir. Did the Highway Patrol pull out from this area in front of the Marshals immediately after tear gas was fired?

A. Yes, sir.

Q. Where did they go?

A. They went off the campus—I mean down to the bowling—to the gymnasium, right over here (indicating).

Q. I see. The gymnasium?

A. Yes, sir.

Q. Did they later get in their cars and pull clear off the campus?

A. Yes, sir.

Q. What time did that occur?

A. About 9:30.

Q. Where were you when that happened?

A. In front of the Lyceum Building on the porch, or steps.

Q. From your testimony then, you stayed in that area until about 9:50 or 9:55?

A. Yes, sir.

Q. Take the stand, please, sir. At any time from the [fol. 1329] time gas was first fired until the Highway Patrol left were you out of the area for any period of time?

A. No, sir. After 9:50 or 9:55, I got on my radio to see where the officers went, and so they told me—

The Court: Just a minute.

Q. Oh, yes, don't say what they told you.

The Court: Just describe what you saw.

Q. Did you go in the Lyceum Building at any time?

A. Yes, sir.

Q. When and how often?

A. I went in there about two minutes after the gas was fired, and I come right back out about a minute after I went in there, and saw that my commanding officer wasn't wounded any way, and then I came right back out.

Q. Who did you see inside the Lyceum?

A. I saw Mr. Katzenbach and Mr. McShane, who fired the gas.

Q. Was Katzenbach the lawyer from the Department of Justice?

A. Yes, sir.

Q. All right, sir. As you stood out there in front of the Lyceum was your visibility such that you could see an individual moving across the north side of the circle from a point approximately at this sidewalk, and approaching the Lyceum? Could you see a man?

[fol. 1330] A. Yes, sir.

Q. That far away?

A. Yes, sir.

Q. Could you see a man well enough to where you could identify him as to what type clothes, and particularly what kind of hat he had on?

A. Yes, sir.

Q. If a six foot man with a big white hat had appeared in this area here (indicating), could he have escaped your observation?

A. No, sir.

Mr. Gooch: We object to that as a conclusion on the part of the witness, and move that the answer be stricken.

The Court: Sustained. The jury is instructed not to consider it.

Q. Tell us what the visibility was with respect to being able to identify a man six feet tall who had on a big white hat, from the position you were, and that man being in a position just east—as you were—just west of the north-south sidewalk? Tell us what you could have seen?

A. I could have seen well enough to identify him.

Q. What do you mean? Could you have seen him well enough to tell if he had somebody ahold of him by each arm?

A. I sure could.

[fol. 1331] Q. And could you have seen to this point well enough to where you could have identified, we will say, as many as 100 men behind him, if that had occurred?

A. Yes, sir.

Mr. Gooch: I object to that as a conclusion on the part of the witness.

Mr. Watts: That is not a conclusion.

Mr. Gooch: I have a right to object.

Mr. Watts: I have a right to answer.

The Court: Overruled.

Let me do the ruling, Counsel.

By Mr. Watts:

Q. Yes, sir, I am sorry.

Now, Mr. Cole, I wish you would brief the court and jury, please, as to exactly what you saw in this area in front of you from the time the gas was first fired until 9:30.

Mr. Andress: 9:50.

A. Yes, 9:30. Well, directly in front of it I could see two or three students run up ever once in a while out of the bushes, like I say, and throw rocks at the Marshals, and I could see a few over here on this side run out. They were hollering and carrying on, and, of course, every time some would run out from behind the buildings, the Marshals would shoot at them with tear gas, and they would run

back, and—but I never saw over six or eight in one bunch [fol. 1332] at any time run up and throw rocks at them.

Q. Did, at any time from 9:30—from 8:00 o'clock until 9:30—from 8:00 o'clock until 9:30 did any group of people approach the Marshals with three men out in front of them, one with a big white hat on, and the other two on each side holding him by the arm, and as many as 50 people behind, immediately behind them?

A. No, sir, never did.

Q. Was there at any time a charge—strike that.

Was there at any time ever a movement toward the Marshals from that direction of as many as 1,000 people, any time all night?

A. No, sir, never was.

Q. Now are you familiar with the time that the Highway Patrol pulled out?

A. Yes, sir.

Q. How did they pull out?

A. In their automobiles.

Q. Did some of them go to the top of the circle?

A. Yes, sir.

Q. And from and after the time they pulled out until you left there at 9:50 or 9:55, was there any large movement of the crowd from the direction of the circle toward the Marshals that resulted in the throwing of a large number of rocks, bricks or missiles?

[fol. 1333] A. There were not.

Q. Prior to the time they moved out, what was the biggest group that ever approached the Marshals and threw rocks?

A. I would say not more than seven or eight.

Q. Now was that an organized activity, or was it sporadic?

A. It was not organized. No organization whatsoever.

Q. From and after the Highway Patrol left until you left at 9:50, what was the biggest single group that came out and threw missiles towards the Marshals?

A. Not more than seven or eight.

[fol. 1334] Mr. Watts: I believe that is all.

Cross examination.

By Mr. Gooch:

Q. Mr. Cole, you said that you knew what "a charge" was. These people that come out there, the six, seven and eight, and would throw at the Marshals, is that a charge?

A. A charge?

Q. Yes, sir.

A. I wouldn't call that a charge, no, sir.

Q. In other words, the group that came forward and threw the rocks, they weren't charging?

A. No, sir, I wouldn't call that a charge. I would just call it a disorganized group of students.

Q. Doing what?

A. Throwing rocks.

Q. But that wouldn't be a charge?

A. No, sir, I wouldn't call that a charge.

Mr. Gooch: That's all. Thank you, sir.

The Court: All right, I am going to excuse this officer.

Mr. Watts: Yes, sir, I would like to have him excused. He has to return to Mississippi. Thank you, Officer.

Mr. Andress: We rest, now, Judge.

Mr. Watts: Plaintiff rests.

[fol. 1335] Mr. Andress: Thank you.

(Sotto voce conference at the Bench, wherein Defendant renewed its motion made at the close of Plaintiff's prima facie case, the record to be completed later.)

Mr. Gooch: Could you give us about five minutes?

The Court: Yes, sir. Ladies and Gentlemen, step into the Jury room. The defense will start in a few minutes. We will give you about a 5-minute break now.

(Short recess.)

Mr. Gooch: Dean Love, will you come around, please, sir?

LESTON L. LOVE, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name?
A. Leston L. Love.
Q. Where do you live?
A. At the University of Mississippi.
Q. Are you connected with the University of Mississippi?
[fol. 1336] A. Yes, sir.
Q. In what capacity?
A. Dean of the Division of Student Personnel and Professor of Education.
Q. How long have you been connected with the University of Mississippi?
A. Since October, 1949.
Q. What is your educational background, Dean?
A. I hold the Bachelor's and Master's Degrees from Oregon State and the PhD. from Ohio State.
Q. On September 30th, 1962, were you an official in the same capacity you have testified about with the University of Mississippi?
A. Yes, sir.
Q. Do you recall prior, the times, any times prior, briefly, to the 30th of September, 1962? Of a Court battle over the admission of James Meredith to the University of Mississippi?
A. Yes, sir.
Q. Prior to September 30th, 1962, had the Courts ruled, the Federal Courts, the Circuit Court ruled or not that Meredith was to be entered on the campus of the University of Mississippi?
A. Yes, sir.
[fol. 1337] Q. Prior to September 30th, 1962, had Gov. Ross Barnett or anyone acting in concert with him effec-

tively blocked the entrance of Meredith to the University of Mississippi?

A. Yes, sir.

Q. And how had that been accomplished, Dean?

A. Through the—the last one was that—through that doctrine of inter position and then Gov. Barnett barred entrance to the campus at one time and barred entrance to the Board of Trustees at another time and the Lt. Governor barred his entrance at one time, as I understand it.

Q. Was that physically barred?

A. I don't know what you mean by "physically barred."

Q. Well, were they present, these men that you are talking about—

A. Yes, sir.

Q. —present and refused to allow him to come on the campus, is that correct?

A. That's my understanding.

Q. Now, there has been much said about the September 30th, 1962, and I don't want to go into a lot of repetition. Were you present at any time on the campus on the University of Mississippi on September the 30th, 1962, when Federal Marshals were there?

[fol. 1338] A. Yes, sir.

Q. Do you know about what time the Federal Marshals got on campus that afternoon?

A. Approximately 4:00 o'clock in the afternoon.

Q. Did you go to the campus—I believe you lived on the campus. Did you go in the area where the Marshals were located?

A. Immediately after they arrived.

Q. And where is your office on the campus of Ole Miss?

A. In the Lyceum Building, first floor.

Q. Would you describe, as best you can, to the Jury the scene you saw when you arrived at the Lyceum Building somewhat after or around 4:00 o'clock p. m. on September the 30th?

A. The Lyceum Building, which is a large building, was surrounded by Federal Marshals standing shoulder to shoulder, completely surrounding the building.

A large number of Highway Patrol were also on the campus near where the Marshals were at that particular time. When I got there I went through that group immediately into the building.

Q. All right. Did you observe at that time whether or not there were any students or persons other than Marshals and Highway Patrolmen in the area of the Lyceum [fol. 1339] Building?

A. Very few at that time.

Q. All right. Now, describe generally what occurred after the time you got to the Lyceum Building that afternoon?

A. In the building at the time I got there, there were several Federal officials, officials of the Justice Department, in the building.

The Director of the State Highway Patrol was there, the Chief Marshal was there. I would say half a dozen Justice Department officials.

I was there. And Mr. Hugh Claik (phonetic), the director of development, came about the same time I did.

Q. All right. Now, did you have occasion to go back out in front of the Lyceum Building after your first entrance into the building?

A. Many times during the—in the next several hours.

Q. Now, you observed a moment ago that when you got there, there was a small group of students in front of the Lyceum Building?

A. Not even in front. Sort of off to one side at that particular time.

Q. All right.

[fol. 1340] A. Just a very few, as I recall it.

Q. Now, as time went on, what happened to the crowd? Did it increase or decrease?

A. It increased pretty rapidly.

Q. Now, getting down to somewhere around 7:00 or 7:30, in that vicinity, did you have occasion to be back out in front of the Lyceum Building where you could observe the crowd?

A. Yes, I went out and into the crowd at various times, surrounding there, trying to talk the students in the group into leaving and going to their dormitories, getting away from there.

Q. What was your response, Dean?

A. I wasn't very effective.

Q. All right. Do you recall the event of gas being fired that night?

A. Yes, sir.

Q. Do you know where you were when the gas was fired?

A. I was in my office at that time—or in the office adjacent to it, rather.

Q. Prior to the time that gas was fired on that evening, detail as best you can what you observed the students, or whoever they were out in this area, doing with respect to the Marshals.

[fol. 1341] Mr. Andress: We would like to have the time fixed, Your Honor.

The Witness: I'll do the best I can on time because I didn't keep a log of it.

A. Perhaps the best way would be to start with this: That in the early stages there were relatively few students. Then there was a sort of a pep rally-type of yelling, and so on, waving of some flags. That's the best way I know how to describe that.

It was, I would say, relatively good-natured; that was the sound of it.

And as time went on, the crowd got louder and the character of the sounds they made, they sounded more—"vicious" isn't quite the word, perhaps—

Mr. Andress: I believe this is calling for opinion, Your Honor.

The Court: Overruled.

Mr. Andress: All right.

The Court: You may proceed, sir.

Mr. Gooch: Go ahead.

Mr. Andress: May it go to the entire line, Your Honor?

The Court: No, sir. You make the objection.

Mr. Andress: As to what it sounded like?

The Court: You make the objection whenever you think [fol. 1342] it is necessary.

A. The noises became louder and there were some more people out there and the—gradually, as time went on, the crowd was getting up closer to the Marshals, sort of crowding out into the street, so they were getting up not very far from them.

And there was, as I went out there at various times, I would hear remarks that were rather obscene made.

And eventually, there began to be little things thrown, not much, and began to be more up along to the time of the firing of the gas. And it was getting pretty rough before the gas was fired.

Q. All right. Now, I believe you stated that you were not in, out in front when the gas was actually fired. Could you see from your office window the front of the Lyceum Building?

A. Yes, sir.

Q. All right. Now, prior to the time that the gas was actually fired, do you know whether or not there had been any casualties to the Marshals?

A. A few came into the building. There was no one, as far as I recall, no one seriously hurt before that time but I did see, oh, two or three or four or five people with abrasions, apparently had been hit with something. And I heard that they had been—

[fol. 1343] Q. Were they Marshals?

A. I think so.

Q. Yes, sir.

A. I would say yes, they were.

Q. All right. Now, after the gas was fired, can you give a description of what happened out there in the Circle?

A. Well, the gas was fired over a long period of time.

Q. I am talking about right after the gas was fired.

A. I was not out there immediately after the gas was fired, but that drove the crowd back a ways, and then they would surge back up about to the edge of the street there, the width of the street in front of the Marshals.

And the crowd was increasing. And it was becoming pretty loud, pretty boisterous and pretty angry.

Q. At the last time you were out in the front of the Lyceum Building immediately prior to the time gas was fired, would you be able to then estimate the number of persons that were not Marshals or Highway Patrolmen that were in that Circle?

A. It's difficult to do and if you think about around the whole building and if you think about those who were back a little ways, without being too sure of myself at all, of [fol. 1344] course, I would say that maybe 1500 people.

Q. All right, sir. Now, after the gas was fired, did you observe the crowd after that as it would come in back toward the—you said surging forward toward the Lyceum?

A. Yes, I was out not just once but many times after that gas was fired, in and out of the building and watching that.

Q. Would you say, based on your best judgment, that the crowd decreased or increased after the gas was fired?

A. I would say for a time that it probably increased.

Q. All right. Would you say for how long a period of time or would that be just an estimate?

A. It would certainly be just an estimate and I hesitate to answer because I'm not certain.

Q. All right. Now, this crowd that was out there, were they all participating in these throwing of things at the Marshals or was there a lesser group that was participating in that?

A. I would say there was sort of three rings out there: One was a front line group that was pretty active and pretty angry and participating very much in the riot—very, very actively participating.

[fol. 1345] There was a group back of them that seemed

not to be participating, more just wanting to be up to see what was going on. They were up pretty close.

And then farther back, I think there were just spectators, pretty largely spectators farther back in many of the areas.

I went through that group at one time, talking to that hard-corps group, trying to get them to disperse, went into that second group, got some of them to leave. And I never did move on back to those that I thought were just spectators.

[fol. 1346] Q. Now the situation as you have described it, was that before the gas was fired?

A. Before and after.

Q. Now after the gas was fired did you have occasion to go out there in the—in front of the Lyceum Building?

A. Several times.

Q. What did you observe there that was happening in that circle, Dean Love?

A. Well, of course, there was movement going on out there. I could see—a couple of times I saw small groups moving up from further away toward the center, more toward the center of activity, and the gas would be fired, and the crowd would move back. Sort of back and forth movement, part of the time.

Q. Did you observe anything being thrown at the Marshals by any of this crowd?

A. Yes, sir.

Q. Dean, how long did that situation exist, where some of them would break away from the crowd and come up and throw at the Marshals?

A. I really don't know because I was occupied inside the building so much, and my concern was with the group immediately up there, rather than those back. Anything I observed back there was more or less casual. I saw some movement but paid no particular attention to it.

[fol. 1347] Q. Did you make every effort, any effort, Dean, in your capacity as Dean, to try to stop the riot?

A. Yes, sir.

Q. What did you do? Was it successful or not?

A. I didn't have—I tried to get ahold of a loud speaker so I could talk to them, but I was unable to get one.

Q. All right. Now, how long did you remain in the Lyceum Building that night, Dean?

A. I left there one time to go to the Union Building to meet with the student body president and the cabinet, and the leaders in the student government, who were having a meeting. That was about 8:30 at night, and I was gone about 20 or 30 minutes at that particular time.

Q. Was a meeting of the student cabinet held at about 8:30 that night?

A. The time was set for exactly 8:30. I remember that very clearly.

Q. Did you attend that meeting?

A. I attended that meeting.

Q. It would be hearsay and not admissible as to what went on at that meeting, but as a result of that meeting, did the student leaders do anything that you know of?

A. The public address system that is available there at the student union building was manned constantly trying [fol. 1348] to get the students not to come down in the area. It was located in a position that it couldn't reach those out in front of the Lyceum Building. They wouldn't be able to hear it. It was to keep others away.

Then after that some of the student leaders went out into the crowd and tried to talk people away.

Q. Did they have any success?

A. I don't know.

Q. All right. Now during the—I believe I asked you what time you left the Lyceum Building that night, or the next morning. Do you remember?

A. It was about 2:00 o'clock in the morning.

Q. Now during the time you were in the Lyceum Building there—strike that question.

At the time that you went outside the Lyceum Building and observed this crowd were you able to discern whether or not the group was composed entirely of students, or were there some outsiders there?

A. There were outsiders.

Q. Dean Love, you have worked with college age and college looking students for a long time, haven't you, Dean?

A. Yes, sir.

Q. And having been in that business are you pretty well able to tell what is a student and what is not?

[fol. 1349] A. If the extremes are great enough you can tell.

Q. Now during the time you remained at that Lyceum Building that night, were there any casualties brought into the Lyceum Building?

A. A good many.

Q. About how many?

A. There were a few real serious ones. The first one we thought was going to die on the floor right there. One Marshal.

And then there was one with a broken leg, and then somebody with a shot in the back that wasn't serious. Somebody that had been hit in the head, and then I would say they ranged down from those.

The number was pretty large. I don't know how many.

Q. Would you estimate about how many people were brought in there suffering from some sort of casualty?

A. You mean just anything?

Q. Yes, sir.

A. I would have to say I am not sure of my answer but I would say 50.

Q. All right, do you know whether or not any person was brought in there under arrest?

A. Yes.

Q. Did you have any idea of the number of those persons?

[fol. 1350] A. There were one hundred—about 160 people arrested. Not all of them were brought into the Lyceum

Building, I think the number brought into the Lyceum Building must have been 75 or 80 or 90.

Q. Of the number who were arrested did you make any check to determine what percentage of those arrested were students as compared to outsiders?

A. Yes, sir.

Q. What was that?

A. About 25 of this 160 who were placed under arrest were University of Mississippi students.

Q. The rest of them, I assume, were outsiders?

A. Some college students from other places.

Q. All right. Now, Dean, how had you gone over to the Lyceum Building that evening?

A. I was at the Chancellor's house, which is on the campus at the time the Marshals came, and I drove over in my car from his house.

Q. Where did you park your car there, Dean?

A. Almost directly in front of the Lyceum Building.

Q. Did anything happen to your car that night?

A. Certainly did.

Q. What?

A. It was hit with tear gas cannisters and all the glass knocked out, and burned some on the inside; I mean from [fol. 1351] the tear gas. And the chrome was torn off.

Q. All right, did you go home in your car, or walk home?

A. Neither. I was taken out the back way by one of the men who was there in the Lyceum Building who knew a way that he could get out.

Where my car was parked I didn't choose to drive through what I would have had to have driven through.

Q. Was the rioting still going on, when you left there that morning?

A. Seriously.

Q. Did you ever hear that General Walker was on the campus that night?

Mr. Andress: I object to what he heard, Your Honor.

The Court: Overruled.

Mr. Andress: Hearsay.

The Court: You may answer.

A. Yes.

Q. Do you remember about what time it was?

A. I would say it was in the neighborhood of 9:00 o'clock, something like that.

Q. Dean Love, did you keep up with the—or was there any way to determine the comparison of the tempo of the crowd that night?

[fol. 1352] A. I am not sure that I know quite what you mean.

Q. I am talking about the violence and the intensity of the violence.

A. It became much greater as time went on.

Q. Directing your attention to somewhere around 9:00 o'clock, would you be able to state whether or not the intensity of the violence increased after that?

A. Yes, I thought it did. I know that it did. Though the students gradually began to disappear. It was not too long after that.

Q. You say the students began to disappear. Did anybody take their places?

A. More people—more people came in. The total size of the crowd dropped, but it began to be—it was not so much of a student crowd, but there were—I would say by 10:00 or 10:30, that a pretty large share of the students who had been out there were gone.

Q. But there were others?

A. Yes.

Q. Now did you hear any reports of firearms, or firearms reports that night?

A. Yes, I did.

Q. Will you describe that to the jury, please.

A. Well, when I stepped out of the Lyceum Building I heard a bullet whistle by my ear. That was imbedded in [fol. 1353] the front of the building there.

There were several bullets in the course of the night that were imbedded in the front of the Lyceum Building.

Q. Would you be able to fix the time at about what time this bullet whistled past your ear?

A. I am not certain. It was not early. It was along 10:00, 11:00, 11:30 or 12:00, something like that.

Q. It didn't make too much difference to you about time at that moment, did it, Dean?

A. That was my least concern.

Q. Now were you able the next day to determine how many bullet holes or bullets, evidence of bullets coming into that Lyceum Building were visible?

A. I would say that on the front of the Lyceum in the woodwork there, oh, seven or eight or ten bullet holes, and then one went through a window and then two windows were cracked, apparently from spent shotgun pellets.

Q. There is some water there if you care to wet your throat, Dean.

You retired from the Lyceum Building to—at 2:00 a.m. Did you return there the next morning?

A. At 8:00 o'clock.

Q. Now can you describe generally the state of the campus, and particularly from in front of the Lyceum Building eastward toward the monument, when you got there the [fol. 1354] next morning?

A. I walked through the campus the next morning from my home, which I suppose is half a mile from the Lyceum Building. And as I reached what we call the grove, which I suppose would be the far side of the grove, oh, 300, 350 or 400 yards from the Lyceum Building—

Q. Can you stop right there just a moment. The grove has been used interchangeably by the witnesses in this case. They have used the word grove, and circle. Will you step down here with me just a moment.

On Plaintiff's Exhibit 11—it is a scaled map of the University of Mississippi, and I see up here to what I would say would be the northeast of the Lyceum Building a large place entitled "the grove," is that what you refer to as the grove?

A. Yes, sir.

Q. That is not what we have been referring to as the circle where the monument and the flagpole is?

A. That is correct.

Q. I say are they synonymous?

A. No.

Q. In other words this is the grove up here to the northeast?

A. Two entirely different things.

Q. You are talking now about the grove?

[fol. 1355] A. Yes.

Q. Have your seat, please, sir. You had gotten from your home on the way to school to the grove?

A. Yes.

Q. What did you see there?

A. One of the things I happened to observe was that quite a few—I guess cement seats out in the grove, and those were all broken up and most of them were missing, apparently been broken up to use for ammunition.

Mr. Andress: That is a conclusion, purely, Judge.

The Court: Sustained.

Q. Just say what you saw, Dean. The benches were broken up?

A. I am sorry. Those seats—most of them had been pretty well broken up in there. Then as I got up nearer the circle the—of course there was lots of tear gas around there still, but I was still able to see through some of that, and the whole place—the first thing I saw was several burned cars around the circle. And I don't know, six, maybe. And they were badly burned, and I saw my own sitting over there and saw that it was damaged, and one of my staff member's car was right by mine and it was damaged and around in the circle there there was, oh, kind of debris, I guess you would call it, broken up bricks and glass and many things like that, and tear gas cannisters [fol. 1356] there. It was really a very badly cluttered up place.

Mr. Gooch: Please mark this as a Defendant's exhibit. I don't know what it is. I believe it is 18. Defendant's Exhibit 20.

(Thereupon, Defendant's Exhibit No. 20, was marked for identification.)

By Mr. Gooch:

Q. Dean Love, I hand you what has been marked Defendant's Exhibit 20, and can you recognize any of the items you see in that picture?

A. Of course the building is the Lyceum Building, the main one in the background. And this picture must have been taken the next morning.

Mr. Andress: Now just a minute, Your Honor.

Mr. Gooch: He can tell what it is.

Mr. Andress: He says, "Must have been taken the next morning." Either it was or wasn't.

The Court: Ask him if he saw it.

By Mr. Gooch:

Q. To get out of this, Dean Love, does that picture depict the scene in front of the Lyceum Building that you saw around 8:00 o'clock on the morning of October 1, 1962?

A. Yes, sir.

Mr. Gooch: We offer it in evidence, if the Court please.

The Court: Defendant's Exhibit 20, is admitted.

[fol. 1357] Mr. Gooch: Mark this Defendant's Exhibit 21.

(Thereupon, a photograph was marked Defendant's Exhibit No. 21 for identification.)

By Mr. Gooch:

Q. Dean Love, I hand you what has been marked as Defendant's Exhibit 21. Can you or not identify this as a scene that you observed in the early morning of October 1, 1962?

Mr. Watts: If we can be looking at the others, it will save a lot of time.

A. Yes, sir.

Mr. Andress: This hasn't been identified, Your Honor, as to where it is. It is a scene the following morning.

The Court: I am going to overrule that, if he is offering it.

Mr. Gooch: I am offering it in evidence, if the Court please.

The Court: It is admitted.

Mr. Gooch: Will you mark this as Defendant's Exhibit 22.

(Thereupon, a photograph was marked Defendant's Exhibit No. 22 for identification.)

By Mr. Gooch:

Q. Dean Love, I hand you what has been marked as Defendant's Exhibit 22, and ask you if you recognize any of the elements shown in that picture?

[fol. 1358] A. They look like, very much like—

Mr. Andress: Now if the Court please, we think the answer to that is yes or no.

The Court: Mr. Andress, the proper time to object is after the exhibit is offered, not while he is trying to identify it, so you are overruled at this time.

Mr. Andress: All right, sir.

A. This is a picture of the scene along in the late afternoon of September 30th.

Q. 1962?

A. Yes, sir.

Q. Can you observe the Lyceum Building in that picture?

A. Yes.

Q. Can you observe the Marshals?

A. Yes.

Q. Can you observe the students or onlookers in that picture?

A. I would say students and onlookers.

Mr. Gooch: We now offer in evidence Defendant's Exhibit 22.

Mr. Andress: We object to it because it has not been properly identified, Your Honor.

The Court: Overruled. It is admitted.

[fol. 1359] (Thereupon, photographs were marked Defendant's Exhibit Nos. 23, 24, 25, 26, 27 and 28, inclusive, for identification.)

By Mr. Gooch:

Q. Dean Love, I now hand you what has been marked as Defendant's Exhibit 23, and ask you if the items portrayed in this picture are familiar to you?

A. Yes, sir, they are.

Q. And when did you see the scene such as is depicted in that picture, Dean?

A. The first time on the morning of October 1st, in the neighborhood of 8:00 o'clock.

Mr. Gooch: We offer in evidence Defendant's Exhibit No. 23.

Mr. Andress: We object to it because it has not been properly identified.

The Court: Mr. Gooch, the witness hasn't testified as to where the picture was.

By Mr. Gooch:

Q. All right, can you identify it as to the location of the items as depicted in Exhibit 23? Was it on the campus of the University of Mississippi?

A. It was on the campus of the University of Mississippi and on the circle, in the circle.

The Court: Defendant's Exhibit 23, is admitted.

[fol. 1360] Q. Dean Love, I hand you what's been marked as the Defendant's Exhibit 24, and ask you if you can

identify the content of that picture as to location and time, if you observed the pictorial matters that are depicted in that picture?

A. This is on the Circle again and I observed this and the other cars on the morning of October the 1st at approximately 8:00 o'clock for the first time.

Mr. Gooch: We offer in evidence Defendant's Exhibit No. 24.

Mr. Andress: We object, as it has not been properly proven.

The Court: Overruled. Defendant's 24 is admitted.

By Mr. Gooch:

Q. Dean Love, I hand you what's been marked for identification as Defendant's Exhibit 25. I'll ask you to look at that photograph and tell me whether or not you can identify the building and the scene as it is depicted in that picture?

A. The building in the picture is the Lyceum Building and the scene there is as it appeared when I went to the building early in the morning of October the 1st, about 8:00 o'clock.

Mr. Gooch: We offer Exhibit No. 25 in evidence.

Mr. Andress: We object to it as not being properly [fol. 1361] proven and not being relevant.

The Court: Overruled. Defendant's 25 is admitted.

By Mr. Gooch:

Q. Dean Love, I hand you what's been marked as Defendant's Exhibit 26, and ask you if you can identify the matters depicted in that picture, as to time and location?

A. That would be after dark. It's a picture of the Lyceum Building taken from north of it and this would have been after dark on the night of September 30th or even conceivably early in the morning of October the 1st.

Mr. Gooch: All right. We offer in evidence Defendant's Exhibit No. 26.

Mr. Andress: No objection.
The Court: Defendant's 26 is admitted.

By Mr. Gooch:

Q. Dean Love, I hand you what's been marked Defendant's Exhibit 27 and ask you if you can identify the matters as shown in that picture, as to time and location?

A. This is the front of the Lyceum Building and, of course, it's a picture that was taken after dark. There isn't enough detail here that I would know how to estimate the time.

Q. Would you say it was a picture taken after dark on the evening of September the 30th, 1962?

[fol. 1362] A. Yes, or, again, I would say it could conceivably have been real early on the morning of October the 1st.

Q. Was it during the darkness?

A. During the darkness.

Q. All right.

Mr. Andress: No objection—have you offered it?

Mr. Gooch: Oh, no. I now offer in evidence Defendant's Exhibit 27.

The Court: It's admitted.

Mr. Andress: No objection.

By Mr. Gooch:

Q. Dean Love, I hand you what's been marked Defendant's Exhibit 28, and I'm not sure as to whether or not it is a duplicate of one issued earlier.

Will you look at that and see if that's a duplicate of a picture that has been introduced prior?

A. This one has not been introduced prior, I feel positive. This is in front of Carrier Hall.

Q. All right, sir. And what does that depict?

A. It's on the Circle.

Q. And did you observe a scene such as that when you arrived there on the early morning of October the 1st, 1962?

A. Yes, sir.

Q. Does that scene identify any permanent campus ob-
[fol. 1363] ject?

A. The principal object is Carrier Hall, the Engineering Building, which faces the Circle—well, south of the Circle.

Q. Does the Carrier Building face north toward the Circle?

A. Yes.

Q. And in about what distance from the, shall we say, crosswalk that intersects the campus in a north and south direction?

A. Fifty-seventy-five yards, perhaps.

Q. Will you step down a moment to the map just to identify Carrier Hall? On the map here, I believe that Carrier Hall is depicted as almost straight away with the north and south walk that intersects the Circle on the south of the circle, facing north, is that correct?

A. Correct.

Mr. Gooch: We now offer in evidence Defendant's Exhibit 28.

Mr. Andress: It's not been properly proven and we object to it on that ground, that it's not properly proven and not relevant.

The Court: Overruled. Defendant's 28 is admitted.

Mr. Gooch: I will pass the witness for cross examina-
[fol. 1364] tion.

Cross examination.

By Mr. Andress:

Q. Dr. Love, were you personally present at the time that Meredith was barred from the campus?

A. No, sir, I wasn't.

Q. All you know about it, then, was what you heard?

A. That's right.

Q. Where were you on the campus when the Marshals arrived?

A. At the home of the chancellor of the University.

Q. How did you know the Marshals were arriving?

A. I saw them drive past—we saw them drive past his residence.

Q. You mean you had no advance notice that Marshals were going to arrive on the campus?

A. No, I didn't mean that. We knew maybe an hour before.

Q. How did you receive the information that the Marshals were going to arrive on the campus?

A. Mr. Hugh Cleeg, the Director of Development, was also at the Chancellor's home and was in telephone communication with some member of the Justice Department; I'm not sure who it was.

[fol. 1365] Q. Were you having a conference of the top University brass over there at the Chancellor's house, because of this situation at this time?

A. Yes.

Q And the Chancellor, of course, Chancellor Williams, is his name, isn't it?

A. (Witness nods "yes".)

Q. He's the head of the University?

A. Yes, sir.

Q. And who would be second in command?

A. The Provost of the University would be second in command.

Q. Who was the Provost?

A. At that time it was Dr. C. H. Haywood.

Q. He was there?

A. No.

Q. Where would you rank in the chain of command, Dr. Love?

A. There is the Chancellor and three major divisions—four major divisions of the University: The Business, the Academic, the Development, and the Student Personnel. I am head of the Student Personnel Division.

Q. So you would be one of the next echelon, just below the Provost, is that right?

A. Yes.

[fol. 1366] Q. And were the heads of all these other divisions there at this conference that Chancellor Williams had when the Marshals arrived?

A. No.

Q. So you had Mr. Cleeg and Chancellor Williams and yourself, and who else was there?

A. That's all.

Q. Now, I wonder if you would mind taking your pointer there and showing where Chancellor Williams lived? Up on Faculty Row, is it, that I believe is over here?

A. Sorority . . . I have to get—

Q. Here is Sorority.

A. Here is the Chancellor's residence (indicating).

Q. That's the Chancellor's residence down there just north of the Grove.

A. Yes.

Q. And where do you live, please, sir?

A. I live right there (indicating).

Q. You live at the one that is marked number 25, up on Sorority Row, farther north; is that right?

A. Yes.

Q. Now, did the Marshals, when they came in, come up off of old Highway 6 and down Sorority Row?

A. That is new Highway 6.

Q. Oh, new Highway 6? I thought the by-pass was south [fol. 1367] of town here. That is new Highway 6. They came off of new Highway 6, then, and—pardon me—they came off of new Highway 6 and down Sorority Row and around the Grove, Loop and University Circle, until they got in front of the Lyceum, is that correct?

A. I don't know the de—it would just have to be that way. I didn't actually see them.

Q. But, at any rate, they did come past the Chancellor's house here in Sorority Row, close to the Grove?

A. That's correct.

Q. Did you hear the rumble of the truck—thank you, if

you will sit down again—did you hear the rumble of the trucks as you were there?

A. I don't know whether I heard the rumble of the trucks or just happened to be looking out of the window.

Q. Were you watching for the trucks?

A. No, I wasn't. We were in a little study that faces out onto the road there.

Q. Well, all three of you knew that the Marshals were coming?

A. Yes.

Q. Did you know where they were coming from?

A. No.

Q. Now, that evening or right after they arrived on the [fol. 1368] campus—what time did you say they arrived?

A. About 4:00 o'clock.

Q. And you, then, went over to the Lyceum after they arrived?

A. Within a very few minutes afterwards.

Q. You drove over, I believe you said?

A. Correct.

Q. And had the trucks, the transport trucks, the personnel carriers, left the area or were they still in front of the Lyceum?

A. There were some still in front of the Lyceum. I'm not sure how many.

Q. About how many Marshals were there at that time?

A. I would say several hundred. At least they were standing shoulder to shoulder essentially around the, completely around the Lyceum Building.

Q. At that time did you know Mr. McShane?

A. You mean before they came?

Q. Yes.

A. No, I did not.

Q. And had you been in conference with him?

A. No.

Q. Did you know Mr. what's-his-name? Katzenbach.

A. Katzenbach?

Q. Katzenbach.

[fol. 1369] A. I did not.

Q. What is his first name, do you know?

A. Nicholas, d-e, capital B.

Q. Nicholas B. Katzenbach?

A. Small d-e, capital B. I don't know what it stands for.

Q. He's an American citizen?

A. As far as I know.

Q. Now, when you went into the Lyceum, besides Nicholas de Katzenbach, what other Federal officials were in there?

A. Mr. McShane, the Chief Deputy Marshal was in there. A man by the name of Guthman.

Q. Gutman?

A. Guthman, G-u-t-h-m-a-n (spelling), I believe is the way it is spelled. He was a public relations officer for the Justice Department.

Q. Public Relations Officer? All right, go ahead.

A. There was a Mr. Shlei.

Q. Shly?

A. S-h-l-e-i (spelling). And Mr. Dorr, I believe, was in there.

Q. D-o-r-r (spelling)?

A. I think that's the way it is spelled. I'm not certain.

[fol. 1370] Q. Is that the crop?

A. As far as I recall it, for the Federal officials.

Q. That's five men. You have said there were six of them.

A. Well, I may have been wrong in saying six and there have been another one whom I don't recall.

Q. Who was in charge?

A. Mr. Katzenbach.

Q. And Mr. Nicholas de Katzenbach is a what? Assistant Attorney General of the United States?

A. I believe his title is Deputy Attorney General, Deputy United States Attorney General.

Q. All right. Now, I believe you stated that at the beginning of the evening, this was pretty much a pep rally-type of thing?

A. That's the way it sort of sounded to start out with.

Q. And later on, you said that it became more vicious. Would you say that it eventually turned into a mob?

A. Yes.

Q. Now, at what point did it cease to be a pep rally or Halloween-type thing and become a mob?

A. It was a continual—I wouldn't know when to say it was one or the other.

[fol. 1371] Q. Well, with reference to the firing of the first volley of tear gas into the crowd, when would you say that the change from pep rally into mob occurred?

A. It had occurred before that.

Q. It had occurred before that?

A. I would say so.

Q. Would you say that the firing of the volley of tear gas into the group accentuated its unhappiness?

A. Nobody was happy.

Q. The firing of the tear gas, however, do you know whether the public relations officer of the Justice Department had anything to do with the firing of the tear gas?

A. I wouldn't know.

Q. You don't know whether or not that was considered part of the public relations duties?

A. I don't know.

Q. Well, did it improve the public relations as between the students of the University of Mississippi and the Federal Marshals?

A. The whole situation was deteriorating steadily and I don't know how to say what did what, really.

Q. But you didn't see anything more of the pep rally-type thing after the tear gas was fired, did you?

A. That's correct.

[fol. 1372] Q. And do you know approximately when that tear gas was fired?

A. Somewhere around 8:00 o'clock or a few minutes after.

Q. Were you inside at that time listening to the President's speech or looking at the President's speech?

A. I was doing—I was inside and I was doing neither. I don't remember exactly what I was doing, but I just simply heard it fired and didn't know what it was at first.

Q. Did you hear the President's speech?

A. No.

Q. You didn't look at it?

A. No.

Q. Would you say that the tear gas was fired before any effect, before the President's speech could have had any effect on the people that were around?

A. The people who were around certainly were in no position to hear the President's speech or to see it on TV, those who were around the building. I don't even know what time the speech was given.

Q. Do you know whether there were the usual bunch of portable transistor radios that the students had with them?

A. I really don't know.

[fol. 1373] Q. Now, when was it that you made an attempt to get a large loud speaker for the crowd?

A. I tried two or three times and we even tried to get one of our own brought in, which we were unable to do. But they couldn't get in there.

And it was along, I would hate to say when, 8:00 o'clock, 9:00 o'clock, some such time; I am just not clear about the time.

Q. Would you say that it was before that first volley of tear gas was fired?

A. I know we talked about it before that time, if we could get one, and couldn't.

Q. Well, now, why couldn't you get one, Dr. Love?

A. Well, we thought we would be able to get one from the people who were there. They thought they had one there and they didn't. And we were on—we were not expecting this and we, they said we didn't have any equipment in the building at all of that sort.

Q. The Marshals didn't have any loud speaker or communication system there?

A. They had none that I could get. They used none.

Q. Well, did they have one there?

A. I didn't see one.

Q. Did you ask them if you could use one to try and quiet the crowd?

[fol. 1374] A. Yes, yes.

Q. Did they refuse to let you have one?

A. It wasn't a case of refusal. There was some comment to the effect that it was not operational at the time.

Q. There was, however, a loud speaker that the Marshals had there with them; is that right?

A. I had never saw it.

Q. Did they tell you that there was one but it was not operational?

A. Yes, something to that effect.

Q. Who told you that?

A. I have no idea which one it was.

Q. Well, was it—you don't know whether it was Mr. Nicholas de Katzenbach or not?

A. I feel it was not he, but I don't know who it was.

Q. And if you had had an operational loud speaker there prior to the time the tear gas was fired, do you believe that perhaps you could have some influence on the crowd?

The Court: Just a minute.

Mr. Gooch: If the Court please, we object to that as improper cross examination.

The Court: Sustained.

[fol. 1375] Mr. Gooch: Calling for an opinion and conclusion.

By Mr. Andress:

Q. Now, Dr. Love, you are in charge of student personnel?

A. Yes.

Q. And as the man in charge of student personnel, the relations between the University authorities for the maintenance of discipline of students are in your charge?

A. Yes.

Q. And it is your responsibility to quiet and calm students from causing any trouble on the campus?

A. If I can.

Q. And did you want to attempt to do that that night and in pursuance of your duties?

A. Oh, of course.

Q. And was it your opinion that you could do something about it?

A. I was completely uncertain. I wanted to try anything that I thought might work.

Q. And did you, in the said pursuit of your duties, feel that if you had had a loud speaker system—

The Court: I just sustained an objection to that, counsel. It's not coming in.

Mr. Andress: I have laid a predicate for it.

The Court: No, you haven't. You may proceed.

Mr. Andress: All right, sir. We would like it for the [fol. 1376] Bill subsequently.

By Mr. Andress:

Q. Now, are there loud speaker systems on the campus of the University of Mississippi?

A. That's correct.

Q. Did you make any attempt to get one of those?

A. Yes.

Q. And what prevented that?

A. That was after the tear gas was fired and things were so very rough and we simply couldn't get it in.

Q. Did you receive any assistance from the Marshals or these five Federal officials there about getting a loud speaker in from anywhere else on the campus?

A. I don't think we asked them; that we tried to get on the telephone and see if we could get one brought in that was available on the campus at some distance off.

Q. Tell me, is the Lyceum Building the general offices of the administrative officers of the University?

A. Yes, sir, the major officials have their office there.

Q. What other major officials were present in the Lyceum that night, Dr. Love?

A. Mr. Cleeg was there for a period of time and then he had to leave to get with the Chancellor and try to do some other things. And then I called in three or four of my men to come in to help.

[fol. 1377] Q. By "three or four of your men," you mean your assistants in the Department of Student Personnel?

A. Correct.

Q. Were there any State officials there other than as distinguished from University officials?

A. The Director of the Highway Patrol was in there for a period of time.

Q. That would be Col. Birdsong?

A. Yes.

Q. And did you see his assistant, Officer Cole, that was here this morning?

A. Not as far as I can recall.

Q. Did you know him before?

A. I am not sure. The name was very familiar, but I am not sure whether I know him personally or not.

Q. Now, you were, then, the highest official of the University that was present in the Lyceum after—well, even before Mr. Cleeg left, weren't you?

A. Well, I wouldn't say I was higher than Mr. Cleeg.

Q. No. Well, all right. After Mr. Cleeg left, you surely were?

A. I guess that's correct.

[fol. 1378] Q. And then as far as the University was concerned in that situation there, you were Senior in command?

A. Within that particular segment, with the Chancellor and others working in other areas.

Q. Well, now were you issuing as—being in command, were you issuing instructions as to people working there with you, or were you completely under the control of the Federal Officials?

A. Not under the control of the Federal Officials at all. We were trying to telephone and get communications and figure out what we could do.

Q. Now—now when you left about 2:00 o'clock, you said 2:00 o'clock in the morning, any particular reason why you left at that time?

A. Well, sort of a personal reason. I had the flu that day, and I was utterly exhausted. And I knew I had to be there at 8:00 o'clock the next morning.

Q. You certainly had a fine cure for the flu that night. There was still, I believe you said, serious rioting going on?

A. That is correct.

Q. Did you leave some of your assisting personnel there in charge?

A. I did.

Q. I believe you stated there were about 160 people [fol. 1379] arrested that night. Do you know how many of those people were ever prosecuted?

A. No, I don't, it—except that it wasn't very many.

Q. Wasn't very many. Do you know how many had charges filed against them?

A. I don't know.

Q. You say there were about 25 students. Were any of them prosecuted through University channels?

A. Yes.

Q. How many of them?

A. About eight or ten.

Q. And how many of them were disciplined?

A. All of them were disciplined.

Q. To what extent?

A. Some were placed on disciplinary probation, which was just the strongest warning that could be given that if they ever did anything again, they would be gone.

Q. How long were they placed on this disciplinary probation?

about 1500, were mostly students, weren't they?

A. I am not at all sure that they were.

Q. And eight or ten were placed on probation and told not to do it again?

A. These were turned over by the—out of those who were taken into custody the Justice Department turned over statements about them, and those where they were able to substantiate them, were.

Q. Now there is one thing I want to get straight in my mind. About 8:30, you met with the student counsellor, is that right?

A. With the president of the student body and his cabinet, and other student leaders.

Q. Cabinet. Pardon me.

Cabinet. That about 20 or 30—

The Court: Is that a good stopping point?

Mr. Andress: As good as any.

(A 15-minute recess was had.)

Q. Dr. Love, you say it was about 8:30, when you met with the student cabinet?

A. Yes, sir.

Q. And that lasted about 20 or 30 minutes?

[fol. 1381] A. Something like that.

Q. And then was it the understanding that the members of the student cabinet were going to get out and mill in the crowd?

A. Some of the boys were going to go out. There was no agreement that everybody go. Some of them said they were going to go.

Q. Some of them were going to go out and mix and mingle with the crowd?

A. To try to get them to disperse.

Q. That would be about 9:00 o'clock?

A. Approximately that.

Q. And you testified that the intensity of the crowd increased right after 9:00 o'clock?

A. It was certainly increasing along through there.

Q. Of course you have no personal knowledge of what the leaders of the student council actually did when they got out there among the students, do you?

A. If you mean did I actually hear them, I would have to say I don't know.

Q. You don't know whether they actually calmed them or incited them?

A. Well—

Q. You were not there?

A. I wasn't there.

[fol. 1382] Q. But immediately after 9:00 o'clock, after this meeting broke up and the student leaders were going out among the crowd, you did testify there was an increase in the intensity of the crowd?

A. That's right.

Q. Now may I see the pictures in evidence. I believe they are up here.

In this Defendant's Exhibit 20, what were the buses doing on campus at 8:00 o'clock in the morning, Dr. Love?

A. I have no idea.

Q. You did see them there yourself when you first went on the campus at 8:00 o'clock?

A. I wasn't conscious of them. I don't know now whether the buses were there then or not.

Q. In other words you don't know whether at 8:00 o'clock those buses actually were there?

A. I don't know about the buses, no.

Q. Now, sir, Carrier Hall that is shown in Defendant's Exhibit 28, that is off at a fair distance from the Lyceum, isn't it? A quarter of the way around the circle?

A. Which isn't very far.

Q. Uh-huh, but it is quarter of the way around the circle?

A. Just about.

[fol. 1383] Q. There had been no Marshals there, had there?

A. Not as far as I know.

Q. By the way, had Chancellor Williams been out there on the campus with the students during this—the events of the night?

A. It is my understanding that he was. I didn't see him.

Q. Had he been out there in the afternoon about the time the Marshals came?

A. I don't know what time he came up, but he was out late during the evening some. He was on what you might call the back side of the crowd and I was in the front side, primarily at the Lyceum Building.

Q. Defendant's Exhibit 22, can you place approximately what time of day that was taken, please, sir?

A. Well, because of the size of the crowd I would say that it would have to be sometime after 5:00 o'clock, and of course, before dark. I wouldn't be able to pinpoint it exactly.

Q. Was there ever a rope or anything of that sort put up to separate the crowd from the Marshals, or the Highway Patrol?

A. Not to the best of my knowledge.

Q. The Highway Patrol is present in this picture, is it not? You see some of the Highway Patrolmen, don't you? [fol. 1384] A. Those (indicating) may be, right in there. I couldn't tell for sure.

Q. You mean there where there is sort of an open space between the Marshals and the crowd, that may be the Highway Patrol, is that right?

A. I am looking at the backs and I am thinking they may be.

Q. Were you present in the Lyceum Building after the tear gas was fired when there was quite a hassle between the Highway Patrol, Col. Birdsong, and the Marshals about their firing tear gas into the backs of the Highway Patrol?

Mr. Gooch: If the Court please, we object to that as an unfair question based on facts not shown to exist. Not proper cross examination.

The Court: Sustained.

Q. Was there an argument between the Highway Patrol's representative, Col. Birdsong, and the Marshals about the firing of the tear gas?

A. I did not hear it.

Q. You didn't hear it. I am going to hand you the Defendant's Exhibit 27, and ask you—that is a Marshal there in the picture, isn't it, a Deputy Marshal?

A. I suppose. It is difficult for me to tell on this one. This is one it is hard for me to tell just what it is.

[fol. 1385] Q. What has he got around his neck? Can you tell?

A. I just really don't know. I looked at this and I can't tell.

Q. Is that typical of the visibility and the identifiability of people there after dark that night?

A. The front of the Lyceum Building was very well lighted.

Q. Was there anything else in the circle area that was very well lighted after dark that night?

A. That was the most well lighted area, was in the front of the Lyceum. There were lights around the other buildings, but not as bright.

Q. I hand you Defendant's Exhibit 26, which also shows the lighted front of the Lyceum Building. Is that picture fairly typical of the visibility and the identifiability of people there that night?

A. I would say it is not. There was much more identifiability than this. This is a very dark print.

Q. More identifiability in the dark areas than they were in the light areas by the Lyceum?

A. Now what is that question?

Q. They are not identifiable—more identifiability in the dark areas than in the light areas around the Lyceum?

A. It was lighter than this picture would indicate out away from the Lyceum, is what I am trying to say.

[fol. 1386] Q. Have you seen these pictures before today?

A. Yes.

Q. When have you seen them?

A. Day before yesterday.

Q. Who is Black Starr? Do you know?

A. I don't know.

Q. You don't know who took these pictures?

A. No.

Q. Was there anybody taking pictures for the University out there that night?

A. I don't think there was on that particular night.

Q. Do you know whether the Public Relations Department section of the Department of Justice was taking any public relations pictures out there that night?

A. They weren't that I know about.

(Thereupon, a photograph was marked Plaintiff's Exhibit No. 17, for identification.)

By Mr. Andress:

Q. Dr. Love, I hand you what has been marked for identification as Plaintiff's Exhibit 17, and ask you to take a look at that, please, sir. Now would you say that that is the way the Lyceum and the Marshals looked there in the afternoon of the 30th, before it got dark?

A. In the very early stages, yes.

Q. You would say that is a correct representation, of [fol. 1387] the scene?

A. Oh, around in the neighborhood of 4:00 o'clock, or not too long thereafter.

Mr. Gooch: No objections.

Mr. Andress: We offer in evidence the Plaintiff's Exhibit 17.

The Court: It is admitted.

By Mr. Andress:

Q. The Plaintiff's Exhibit 17, was before the Highway Patrol got there, wasn't it?

A. I don't know. I would say probably not. The Highway Patrol was there very early.

Mr. Andress: Mark this 18.

(Thereupon, a photograph was marked Plaintiff's Exhibit No. 18, for identification.)

By Mr. Andress:

Q. I hand you what has been marked for identification as the Plaintiff's Exhibit 18, and ask you to take a look at that. Was that the way the Highway Patrol was employed in front of the Marshals, between the Marshals and the crowd?

A. I would say not after—not after a period of time. There were more than that, and they tended to be across the street.

Q. But in the early stages would you say that was a correct representation?

A. This—I just don't know about that.

[fol. 1388] Mr. Andress: We offer in evidence the Plaintiff's Exhibit No. 18.

The Court: It is admitted.

By Mr. Andress:

Q. Of course you would recognize Chancellor Williams if you saw him, would you not?

A. I believe I would.

(Thereupon, a photograph was marked Plaintiff's Exhibit No. 19, for identification.)

By Mr. Andress:

Q. I hand you Plaintiff's Exhibit 19, and ask you whether that is a picture of Chancellor Williams some place out there on the campus talking to some of the students, probably students, I would say?

A. Well, I don't know whether it is on the campus or not because there is nothing I can identify. That is Chancellor Williams talking to these—I suppose them to be students.

Q. You can't tell from the walk and the trees and so on whether that is in the circle?

A. No, sir, I just can't. I don't think there is enough there for me to tell.

Q. Could be but you are not sure?
A. Could be: I just don't know.

Mr. Gooch: If the Court please, I think it would be proper to try to fix some period of time as to the picture. [fol. 1389] The Court: If you are objecting to it I will sustain it.

Mr. Gooch: I will object to it unless they show what time it was.

By Mr. Andress:

Q. Do you know—is this a daylight picture?
A. It is a daylight picture.
Q. And did you know whether Chancellor Williams was out there in the afternoon of the 30th, among the students at the same time you were?
A. I think he got out there later.
Q. But it was still daylight?
A. Yes.

Mr. Andress: We re-offer it.

A. Yes, but I don't know, I don't know that it was even taken that day.

Mr. Andress: We re-offer it.
The Court: Is the only objection as to time?
Mr. Gooch: Yes.
The Court: All right, I will overrule the objection and admit it.
Mr. Gooch: What I am talking about, the time the picture was taken, whether on that day or some other day, or what is the picture.
The Court: I thought you meant the time of that day. [fol. 1390] Mr. Gooch: No, sir, the time the picture was taken I don't know whether it was a week before or a week after.
The Court: All right. I will sustain the objection.

(Thereupon, a photograph was marked Plaintiff's Exhibit No. 20, for identification.)

By Mr. Andress:

Q. Now Mr.—Dr. Love, I hand you what has been marked for identification as Plaintiff's Exhibit 20, and ask you whether that is a correct representation of the way the Marshals appeared there on the steps of the Lyceum, on the afternoon of the 30th of September?

A. That is the way they appeared—at first I wasn't sure that was the steps of the Lyceum, but I would say that it is now, yes.

Mr. Gooch: No objection.

Mr. Andress: We offer in evidence Defendant's Exhibit 20.

The Court: You mean Plaintiff's Exhibit.

Mr. Andress: Yes, Plaintiff's Exhibit 20.

By Mr. Andress:

Q. Now as far as those two pictures taken during darkness were concerned, Dr. Love, you said you couldn't estimate what time of night they were taken, but it was after dark and before the following morning?

[fol. 1391] A. Yes.

Q. Sometime during the night of the 30th of September—1st of October?

A. Yes.

Q. Do you know who took those pictures?

A. No, I do not.

Q. How long did it take the tear gas to clear off of the circle?

A. Days and days and days.

Q. Did it remain as a cloud that interfered with visibility, or did it just get to the point you could smell it as you passed through?

A. Just smell it. It cleared off as far as the cloud was concerned very quickly.

Q. Still there the following morning?

A. No, the cloud, as I recall it was gone, but certainly the smell was there.

Q. Now the Lyceum Building, tell me, is that the center—the headquarters of the whole university?

A. I would say it is, yes.

Q. It have any particular meaning to the student body, traditional, anything of that sort?

A. It is sort of a symbol of the University.

Q. And of the State?

A. I wouldn't go that far.

[fol. 1392] Q. What is the name by which the football team of the students of Ole Miss is known, just like we have our Texas Longhorns, what is the name by which Ole Miss is known?

A. We have the Ole Miss Rebels.

Q. Known as the Ole Miss Rebels?

A. Yes, sir.

Mr. Andress: I believe that is all.

Mr. Gooch: No further questions.

The Court: I am going to release Dr. Love.

Mr. Andress: Do you have any further questions?

Mr. Gooch: No.

Mr. Andress: I do have one more.

By Mr. Andress:

Q. Dr. Love, did you know a newspaperman named Van Savell?

A. No, I did not.

Q. Do you now?

A. No, I do not.

Q. Never made his acquaintance at all?

A. Never.

Mr. Andress: That is all.

Mr. Gooch: No further questions, thank you, Dean.

The Court: All right. I will release you.

JOHN E. KING, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

[fol. 1393] Direct examination.

By Mr. Gooch:

Q. Please state your name to the Court and jury.
A. My name is John Edmond King, Jr.
Q. Where do you live?
A. I live in West Point, Mississippi; known as Jack King.
Q. How old are you Mr. King?
A. I will be 42, August 6th.
Q. Do you have an occupation?
A. Yes, sir.
Q. What is it, please, sir?
A. I am manager of two radio stations, WROB in West Point, Mississippi, and WAMY in Amory, Mississippi.
Q. Are those towns close together?
A. Yes, sir, about 30 miles apart.
Q. Where is West Point, Mississippi from Oxford?
A. It is approximately 90 miles southeast.
Q. How long have you been manager of these radio stations?
A. I have worked for them—WROB since it went on the air in '47. I have been manager since—I was made manager in 1950. I was called back into service two years, and resumed managership in 1952.
Q. Do you have an educational background?
[fol. 1394] A. Yes, sir.
Q. What is it, please, sir?
A. I am a graduate of the Electrical Engineering School at Mississippi State.
Q. All right, now, what do you do—what are your duties generally, or specifically, in these radio stations?
A. I am station manager of WROB, in that I direct all its operations. I am general manager of WAMY. I have a local manager on the scene, but I am over him.

Q. Do you do any news gathering yourself?

A. In the course of normal operations I have done and continue to do all phases of broadcast. I started out there as an announcer. I have a First Class radio and telephone license with the FCC. I am the chief engineer.

On special events coverage, I have done quite a bit during my time, though basically I am not a reporter.

Q. How long have you lived in West Point?

A. Since I was six years old.

Q. Do you belong to any organizations there?

A. Yes, sir, I am a member of and Past President of the local Rotary Club. I am a member of the local Episcopalian Church, and Past Senior Warden.

Outside of local organizations, I am a member of the Mississippi Broadcasting Association, and was Secretary for this past year.

[fol. 1395] Q. All right, sir, directing your attention to September 30, 1962, do you recall that date in your mind?

A. Oh, yes, sir.

Q. Do you know where you were on that date?

A. Yes, sir.

Q. Would you please give us a chronological account of your activities, say, beginning at noon, September 30, 1962.

A. Of course, most of the time leading up to that, as well as I recall, I first went to the campus at the University of Mississippi on the day that they were expecting the confrontation between the Highway Patrol and the Federal Marshals.

Q. Would that have been—

A. Which never did come off.

This was, I believe, the previous day.

Q. All right.

A. When that did not come off I went back to West Point, Mississippi, and got some additional equipment which I thought I might need, and returned to the campus of the University.

It is very difficult to tell exactly what time that I did get on the campus. I have been told—

Mr. Andress: Now we will object.

Mr. Gooch: Don't say what you have been told.

The Court: Sustained.

[fol. 1396] A. I am sorry.

Q. Just tell the best you can what you did on September 30th. Did you go to the campus?

A. Yes.

Q. Do you have any estimate of about what time you arrived there, based on the sequence of events?

A. Based on the sequence of events, I would say that I arrived at the Oxford Radio Station about 7:00 o'clock.

[fol. 1397] Q. All right.

A. And must have gotten on the campus, oh, sometime between 7:30 and 7:45 p. m.

Q. All right. What did you do when you first went on the campus, Mr. King?

A. I drove on the campus and went to what I believe they call University Circle, which is where the Lyceum Building is at one end of it. I drove around the right hand part of the Circle and got as close as I could with my automobile and parked it on the Circle itself, and I estimate that I was able to drive somewhere between seventy-five and one hundred yards within to—within that distance of the Lyceum Building, and parked my car.

I left my car—

Q. Did you see anything significant when you got there?

A. Of course, the—at that point, the focal point of everything that was taking place was the Lyceum Building.

Q. What did you see there, Mr. King?

A. And you could even see from my automobile the fact that the Marshals were ringing it and that a large crowd had gathered in front of them.

Q. Did you go into that crowd?

A. I left my car and followed the road. At that time the Federal Marshals were ringing the Lyceum Building itself. [fol. 1398] The students were—I say "students"—the people that were there. At that time most of the gates were closed and it was probably students on hand.

But the crowd was separated from the Marshals by almost the width of the street itself. But it did leave a cleared area for the whole length of the Lyceum Building, between the Marshals and the crowd.

Q. All right.

A. So, I traveled the length of the Lyceum Building between the two groups.

At the time I went through there, the Highway Patrol was in position, keeping the two separated and was in process of trying to move the crowd back out of the street and up onto the curb itself.

But I was able to make my way the length of the Lyceum Building between the two groups.

Q. Did you observe any activity there between the group out on the grass and the Marshals?

A. I observed students using a can of spray paint on one of the Army trucks which had brought the Marshals to the scene.

There was a great deal of shouting going on. I did not see any violence, I did not see anything being thrown or any physical contact between the two groups.

Q. All right. Did you proceed on, then, in some direction? [fol. 1399] A. Yes, I continued on around the Circle to the next building, past the Lyceum Building, which I understand is the Chemistry Building, and I went into this building, going in the front door, looking for a telephone so that I could call back to my radio station and give them a report of what I had seen.

Q. The Chemistry Building is south of the Lyceum Building, is it not?

A. It continues—I started around the right hand side of the Circle and as you face the Lyceum Building, the Chemistry Building is to the left of it.

Q. All right. Did you go in the Chemistry Building?

A. Yes, sir.

Q. For what purpose?

A. I was looking for a telephone to call back to my radio station.

Q. Were you successful in getting a 'phone call through?

A. No, sir, there was a telephone in that building but another reporter was using it and indicated that he had no intentions of giving it up.

Q. All right. How long did you remain in the Chemistry Building?

A. Just guessing, I would say maybe fifteen minutes. [fol. 1400] The only reason that I—I continued to look to see if there was another telephone. I found none. And it was while I was in this building that the tear gas barrage was fired by the Federal Marshals.

Q. Did you actually see the barrage fired?

A. No, sir.

Q. All right. After you were unsuccessful in your 'phone call, where did you go then?

A. I continued on around, I went out the back entrance of the Chemistry Building, continuing in the same direction around the left hand side of the Circle and came to the next building, which I understand is the Carrier Building, or the Engineering Building.

Q. That building, I believe, is almost due south of about the center of the Circle, is that correct?

A. Yes, sir, it's to the left of the center of the Circle, yes, sir.

Q. All right. Then, did you enter that building?

A. Yes, sir.

Q. And what did you do there?

A. Again I entered it by a back entrance. In the hallway I met some gentleman who evidently was on the faculty and asked him if he could tell me where I could get a telephone and he let me in one of the offices on the front side of the building.

[fol. 1401] Q. All right. Were you able to use the telephone then?

A. Yes, there was a telephone there. I was able to get an operator and call back my initial report to my radio station from that point.

Q. Do you have any estimate of how long you were there at that time?

A. Again, here, I would guess in the neighborhood of fifteen to twenty minutes. It took me some few minutes to get my telephone circuits, to make my call, make my report.

The room in which I was in was on the front side of the building and I stayed in that room and was able to look out the window and observe some of the action that was taking place.

Q. What did you see as you looked out the window there, Mr. King?

A. At this time during this period, it seems that there was intermittent tear gas barrage—barrages which were being fired. Each time it was done, the crowd would move back or with the gas and getting out of range and as the wind would blow the gas back in toward the Marshals, then the crowds would generally come in behind it and so there was this ebb and flow of people as the gas was released by the Marshals.

[fol. 1402] Q. Did you see any activity on the part of the crowd toward the Marshals?

A. Only the fact that they would follow in behind the tear gas. At this point, I don't believe that any of them were able to get close enough for the throwing of objects—which took place later—because the tear gas was quite thick.

Q. Did you see any objects in their hands?

A. Not at this time, no, sir.

Q. All right. After you had completed your call in the Carrier Building, what did you do then?

A. It had been expected that there would be tear gas used and so I had brought with me a gas mask and I was at that time, thought it would be a good idea to get back to my car, if I could, and get the gas mask because tear gas was very concentrated at that point.

Q. All right, sir.

A. So, I again went out the back of the Carrier Building and continued around behind—

Q. Could you step down here to this large, enlarged map on the wall, which is Plaintiff's Exhibit 11, and show the Jury the route you took when you left the area of the Carrier Hall?

A. I came out the Carrier Building, I believe, at this entrance here (indicating), continued around behind the [fol. 1403] Chemistry Building, continued behind the Lyceum Building.

Q. May I stop you there for a moment? Had you felt the sensation of any gas at the time you—

A. I had been quite severely gassed, I guess you would call it. Of course, no personal damage, but certainly plenty of tears, all the sensation—

Q. Trace your movement from the Carrier Building?

A. And continued on past, from the Carrier Building, behind the Chemistry Building, circled the Lyceum Building and tried to—my car was parked along here (indicating), and I tried to come between these two buildings, reaching my automobile.

Now, the wind, as I recall, was generally blowing at this direction and, of course, the greatest concentration of tear gas seemed to be in this area (indicating), and it was impossible to reach my car. I could not get through the tear gas.

I went as far as I could and finally had to go back.

Getting out of the tear gas, I continued to go with the wind at that time until I wound up here at the Student Union Building.

Q. Now, the Student Union Building on that map is west and a little bit north of the centerline of the Circle; sir, is that correct?

[fol. 1404] A. Yes, sir.

Q. All right. Did you go in the Student Union Building?

A. Yes, sir, I went in the Student Union Building and stayed there some few minutes. I cannot estimate—it must have been fifteen minutes or possibly longer. I tried to use a telephone there, but at that point I never could raise an

operator and so I did not make a call, but I was in there a long enough period to at least try.

Q. All right. After you left the—did you leave the Student Union Building?

A. Yes.

Q. And where did you go then?

A. At that time, since the tear gas was blowing at this general direction (indicating), I thought it was—would be best to get upwind of it, hoping that as the tear gas would move, that eventually I could get back to my car.

And so as I came out of the Student Union Building I retraced basically the same route I had taken getting there and came behind the Chemistry Building, behind Carrier Hall and eventually wound up at this end of the Circle (indicating).

Q. "This end of the Circle," are you referring now to the monument on the east end of the Circle?

A. On the east end of the Circle, yes, sir.

[fol. 1405] Q. Take your sheet, Mr. King. What did you observe as you approached the monument there on the east end of the Circle?

A. The first thing that I observed that caught my attention was a man appealing to General Walker. I later learned that it was Duncan Gray. I did not know him personally at the time.

And he was making an appeal to General Walker to stop —he says, "General Walker," he says, "They will listen to you. Please make them stop what they are doing."

And in reply to this, General Walker turned to him and said, "I am sad for you. Go make your spiel somewhere else."

Q. Did you recognize General Walker at that time?

A. Yes, sir.

Q. Had you seen him before?

A. I had seen him on television, I had seen pictures.

Q. All right. Now, have you detailed as best you can the dissertation between Rev. Duncan Gray and General Walker at that time?

A. There was additional conversation between the two. It was taking place at the time I walked up. And evidently it seems that I must have gotten there near the end of it because this last comment by General Walker, I believe, [fol. 1406] was the last comment that I heard. With that, he turned and walked away.

Q. Where did he go?

A. He walked off. I could not tell you what direction it was. He walked off in some direction in the same general area, I mean, he did not walk a long ways off. He just moved off from the point at which Duncan Gray was.

Q. Was anybody around him at that time?

A. Yes, sir, there were groups that were gathering whenever he would be recognized. It would be those who would come up to where he was standing and at this point he was watching the action which was between us and the Lyceum Building.

Those who were gathering around him were telling him stories of injuries that had been reported taking place, Highway Patrolmen that had been gassed and struck by the tear gas shells.

It was reported that there was a girl that had been severely gassed and they were telling him about the various things that had been taking place.

Q. All right, what did he do then?

A. He listened, listened very quietly to what they were saying and finally he turned to them and says, "You are doing all right." He said, "Riot, riot. You are getting news [fol. 1407] all over the country." He says, "Now you have got casualties," sir.

Q. All right. Did you see him do anything thereafter?

A. Several of them who were in the vicinity called to him to make a speech and he first said, "This is not the time nor the place," but there were continued calls for him to make a speech and finally he agreed to do so.

A. All right. Did you listen to his speech or any portion of it?

A. Yes, sir. I was there during the duration of his

speech. I moved with him. I recognized the importance of his being there and as he moved in these different points, I stayed very close. I was never more than just a very few feet from him.

Q. Did you know at that time that he was a former Major General of the United States?

A. Yes, sir.

Q. All right. Now, did he get—did he make a speech?

A. Yes, sir.

Q. And from what position?

A. Standing at the base of the statue. There was a slightly raised portion of the—as well as I remember, there was a curbing built around the statue and it was filled, [fol. 1408] giving him a slightly raised position to the rest of the crowd.

Q. Did you listen to ~~his~~ speech?

A. Yes, sir.

Q. Are you able to recollect now what you heard him say in that speech at that time?

A. Yes, sir, I took notes on his speech. I had a small note pad which I was able to hold on the side of my leg and I was writing on it without actually looking at what I was writing.

I was not holding a pad up in front of me writing, but I was taking down key phrases, as best I could, during his speech.

Tuesday following, I took these notes and sat down and typed up a compilation of the content of my notes, plus the bare memories that I still had of what took place, and I do have his speech typed up as best I can.

Q. Do you have those notes with you that you took that night?

A. Yes, sir.

Q. Would you produce them, please, sir?

You have made available to me some slips of paper that look about two by, say, three inches?

A. Approximately, yes, sir.

Q. Or maybe one and three quarters. With some writing

[fol. 1409] on it. And there are a series of these notes, is that correct?

A. Yes, sir, those are the actual notes that I took that night.

Q. Were these notes that you took that night, were they actually taken by you at the time you were listening to General Walker's speech on the monument?

A. At the actual time he was talking, yes, sir.

Q. Then later on, did you type up those notes into the form of a statement?

A. Yes, sir.

Q. Do you know who has seen those notes and that statement since the time you typed them up?

A. Yes, sir, I have made a copy of these notes for a Mr. Sullivan. I have his full name here somewhere, I believe. Mr. Sullivan is the private investigator who identified himself to me—

Mr. Watts: Just a minute, if Your Honor please. I object to hearsay statements between this man and Sullivan.

The Witness: I am just stating that I gave—

The Court: Just a minute. Don't interrupt when there are objections made.

The Witness: I'm sorry.

The Court: I will sustain it.

[fol. 1410] By Mr. Gooch:

Q. I want to ask this question, and don't answer it until the Court has ruled:

Did Mr. Sullivan identify himself to you—

Mr. Watts: Just a minute, Mr. Gooch. Come forward.

The Court: Wait, let him finish his question.

Mr. Andress: The question is going to be pretty identifiable as hearsay.

Mr. Watts: If the question is a statement, the war is over anyway. Mr. Gooch will be testifying.

(Conference at the Bench.)

By Mr. Gooch:

Q. All right. You stated that you have made these notes available to a Mr. Sullivan?

A. Yes, sir.

Q. Anybody else?

A. I have made these notes available to Mr. Lynn Smith, who is an FBI investigator.

I have made these notes available to Mr. Fred Smith, an attorney from Ripley, Mississippi.

I have made these notes available to Mr. Tom Tubb, who is an attorney in West Point, is on the Board of Trustees of the Institutions of Higher Learning in Mississippi, or was at this time.

And I have made these notes available to Mr. W. F. Miner, a representative of the Times Picayune who is in [fol. 1411] Jackson, Mississippi.

Q. All right. Now, using your notes to refresh your memory, can you tell the Court and Jury what you heard General Walker say on the monument that night?

Mr. Andress: If the Court please, we would like to see the notes that he's using to refresh his memory before he testifies from them.

The Court: He isn't offering them.

Mr. Andress: No, sir, but if he uses them to refresh his memory, we are entitled to look at them before he uses them for that purpose.

The Court: I think you might be—

Mr. Gooch: Have a look.

The Court: Do you have any objection to them looking at the entire file?

Mr. Gooch: Not at all.

The Court: These notes.

[fol. 1412] Q. Thank you. I don't remember what the last question was. I believe I asked if he would take his notes and refresh his memory and tell as to what he heard

General Walker say on the monument on the night of September 30th, 1962.

I believe that is the question. Do you understand the question?

Mr. Andress: If the Court please, he is not taking his notes, he is taking a letter which he wrote some 60 days or more later.

A. I beg your pardon.

The Court: Just a minute. Let him make his objection.

Mr. Andress: The yellow pages are a letter written December 10, 1962. They are not his type-up notes he made two days later, but a self-serving letter, and we object to his using that letter written 70 days after the occurrence to refresh his memory. The notes made at the time, we have no objections to, but we do object to his using the letter.

The Court: Overruled.

Mr. Andress: Note our exception.

The Court: You may proceed to answer the question.

A. What I am reading is a letter, we have photostatic copies. Each time I would write—

[fol. 1413] Mr. Andress: Now—

A. —I am sorry. I will just answer the question.

By Mr. Gooch:

Q. Take your notes and testify if you can as to what you heard General Walker say on the monument.

A. From the notes that I have?

Q. Yes.

A. General Walker state, "I want to compliment you on your protest. You have a right under the Constitution. I did not come to see violence but any blood you see tonight is on the hands of the Federal Government and the Agencies thereof."

Mr. Andress: If the Court please, he is not testifying,

he is reading a letter not in evidence. The letter, if it is admissible in evidence, would be the best evidence. He was asked to testify, using notes to refresh his memory, not to read a letter that he wrote sometime later.

The Court: Overruled.

Mr. Andress: Thank you. Note our exception.

The Court: You may proceed.

A. He continued, "I have just been informed by a representative of the Governor that the fact that these people are on the campus is due to a sell-out; that there were definite orders that the Marshals not be allowed on the campus, but were allowed on the order of a certain official." [fol. 1414] In response to cries of "Who sold us out, General?" General Walker said, "Birdsong."

The General went on to say, "I am only telling you what has been reported by an official representative of the Governor."

General Walker then said, "Do not expect violence, but you can continue to protest until Meredith is not admitted. This is a long route to Cuba."

At this point the Reverend Duncan Gray again approached the General. Then this is his speech, and said, "General, stop it, you can."

And someone moved in and Duncan Gray was almost pulled into the crowd. Someone moved in from the opposite side of the crowd from where I was standing and escorted Duncan Gray off to one side.

At this time it is not in my notes but—

Mr. Andress: He has answered the question, Your Honor. There is no question before the house.

By Mr. Gooch:

Q. Go forward, please.

Mr. Andress: Wait.

A. Continuing—

Mr. Andress: Wait. "Go forward, please, sir," is not proper examination of his own witness, and we object to it.

If he wants to ask a specific question—

[fol. 1415] The Court: Then did General Walker say anything else on the monument?

The Witness: Yes, sir.

The Court: You may relate what he said.

A. General Walker made the statement that, to the best of my recollection, that, "That man is an Episcopalian priest. I am a member of the Episcopalian Church and I am ashamed of it."

I do not have that in my notes.

By Mr. Gooch:

Q. All right, now, does that conclude, as far as you recollect—

A. No, sir.

Q. Go ahead. Or maybe that is wrong. Did he say anything else?

A. General Walker continued, "You can continue protesting as you are. There is no stopping point. There are many heading toward Oxford, both Mississippians and non-Mississippians, to help you."

This was the end of his speech.

Q. At the conclusion of his speech, what did you do?

A. I went looking for a telephone. I realized that I had a story of great interest, and so I immediately left the area to try to find a telephone, to try to call in another report.

Q. Do you know where you went looking for a phone?

[fol. 1416] A. I have tried to retrace myself exactly, not until recently, and I cannot state positively, but to the best of my recollection I believe that I retraced my steps behind the Carrier Building, and behind the Engineering Building, again looking—and eventually was able to work my way to my car and went to the Oxford Radio Station in order to get a telephone.

Q. In other words your best recollection is that you came back around the Carrier Building, the Engineering Building, behind the Lyceum Building, and back around to the north side of the circle for your car?

A. I believe so.

Q. Did you get a telephone call through on the campus, or did you go to some other place?

A. I had—I had to leave the campus and go to the local radio station in Oxford to get a telephone.

Q. Was that the extent of your—did you return to the campus that night?

A. Yes, sir.

Q. Do you recall about what time?

A. Some time after 10:00 o'clock.

Q. Did you see General Walker any more that night?

A. No, sir.

Mr. Gooch: I believe that is all for the present.

Cross examination.

[fol. 1417] By Mr. Andress:

Q. Mr. King, where is the Oxford Radio Station located?

A. I don't recall the number of the highway, but it is on the highway that runs east from Oxford.

Q. Which side of the town of Oxford is it? The University side or the other side?

A. Actually there is no residential area that you—the radio station is located on the edge of town, immediately on the highway.

Q. On the highway or bypass?

A. It is on the highway. I have not been to Oxford recently, you understand. There may be a bypass. It is on the highway from Oxford to Pontotoc.

Q. And what time did you arrive there?

A. I cannot say exactly. It was—I believe shortly before 10:00 o'clock, but that is just a guess, sir.

Q. Now of course in your business where there is split-second timing, you are accustomed to keeping your eye pretty closely on your watch, are you?

A. I don't own a watch.

Q. You don't own a watch?

A. No, sir.

Q. How do you keep your programs from running over?

A. We have clocks in the station, and we have to watch them very closely, sir.

[fol. 1418] Q. You don't own a watch?

A. No, sir.

Q. Now as I understand it during the interval of time that you went into the Chemistry Building to make the first telephone call was when the first salvo of tear gas took place?

A. Yes, sir.

Q. And when you had, just immediately before going into the Chemistry Building, walked down the area between the Marshals and the Highway Patrol, you saw no violence, you saw nothing thrown and you saw no physical contact between the students and the Marshals?

A. No, sir.

Q. But at that time you were expecting tear gas to be used?

A. I was aware of the possibility that tear gas might be used. Even on the previous day when I was there all of the Highway Patrolmen did have gas masks and I did not know on which side it might be used, but I expected the possibility enough that I carried a gas mask with me.

Q. Did the Highway Patrol have gas masks here on the afternoon of the 30th?

A. Yes, sir.

Q. Did they use gas masks?

A. No, sir.

[fol. 1419] Q. And at the time that you passed through there the Highway Patrol was engaged in moving the crowd back part of the way from the Marshals?

A. Yes, sir.

Q. What was the atmosphere, would you say, of the students as they were being moved back? More of a pep rally type thing, or Halloween type thing?

A. The atmosphere was quite charged, intense. They were responding to the Highway Patrol. The Highway Patrol was controlling them at that point. They were moving back on orders.

Q. The Highway Patrol was moving them back all right, and was controlling the group when you went into the Chemistry Building?

A. Yes, sir.

Q. By the time you came out there had been this salvo of tear gas?

A. Yes.

Q. Which of course carried out what you had expected?

A. It carried out the possibility that I had expected.

Q. Now I am quite interested in the notes, Mr. King. How did you take these notes?

A. Holding the pad on the side of my thigh, sir.

Q. I wonder if you would mind standing up there and playing like this was the pad, and show us—is that about [fol. 1420] the size of it.

A. Approximately, yes. Now as I took my notes, I was holding my pad approximately like this, sir, and writing. (Demonstrating)

Q. And you were just writing without looking?

A. Yes.

Q. And it was a fountain pen, wasn't it?

A. Yes.

Q. Ball point pen?

A. Yes, sir.

Q. You mind if I take this staple out of these so I can hand you these one by one?

A. All right, sir, if you communicate some way of keeping order.

Q. Yes, sir, I will put a paper clip on them and put them up here in plain view, just as quick as I get this out, where everybody can see them.

Now this first page, what does that say?

A. "I am sad for you. Go make your spiel somewhere else."

Q. What are the initials down there at the bottom?

A. Evidently a radio station. I am not sure. It means nothing to me.

Q. And what have you got on the back here?

A. A map, I believe, of the place where I was staying [fol. 1421] that night. Someone was telling me how I could find a place to stay.

Q. So you started taking notes then before the General started making the speech from the monument?

A. Now that map, I do not believe was made before that. That map was made later. It could have been added and I didn't know where I was going to stay until later that night. And evidently I used the back page of that pad later.

Q. I did understand you to say when the General said, "I am sad for you, go make your spiel somewhere else," that was sometime before he got up on the monument?

That was when he was down there talking to Gray?

A. Yes.

Q. So you started taking notes right then?

A. Yes, sir.

Q. This note two, was taken there on the side of your leg?

A. No, sir.

Q. Oh, it wasn't?

A. The letters down at the bottom, I don't know when that was mentioned.

Q. What is this second page?

A. "It says, "You are doing all right."

Q. Does it say, "You are," or "You doing"?

A. "You are doing all right." As in my statement— [fol. 1422] Q. No, no, I am just interested in this.

A. In other words, now—may I finish this now?

Now these notes admittedly are key phrases. The statement which read was typed up two days later.

Q. Well, the statement you read was typed up on December 19th?

A. The letter—the letter was. The statement that I originally typed was two days later.

Q. Have you got that?

A. Yes, sir.

Q. Have you got it with you?

A. Yes, sir.

Q. Let's see the one you typed two days later.

A. I am not sure that I have it with me, sir.

It is not dated, sir.

Q. Not dated. Neither are these notes, are they?

A. No, sir.

Q. So we have nothing except your memory and your statement that any time prior to December 10th, these had ever actually been made or typed up?

A. Yes, sir.

Q. Without—all right, now, you can put those papers back in your pocket.

Without putting anything else in except what is right here on this paper, what does that say, that key phrase? [fol. 1423] That is what I want, the key phrase.

PLAINTIFF'S EXHIBIT NO. 21 READ INTO RECORD

A. "You are doing all right. Riot, riot. You are getting news all over the country. You got casualties."

Q. This is on the third line?

A. R-i-o-t. R-i-o-t.

Q. Yes, sir.

A. Yes, sir.

Q. You don't read that as "not," and "no"?

A. No, sir.

Q. All right, after this word that is supposed to be "country," what does it say there?

A. "You got casualties."

Q. Now the third page of this says what?

A. "I want to compliment you all on your protest."

Q. And the fourth page it says what?

A. "You have a right, did not come to see violence."

Q. And—

A. "Any blood you see tonight is on the hands of the Federal Government."

Q. What is that "w-d-," and "g"?

A. Yes, sir.

Q. Now these are all here together and there is no distinction between when these occurred. And this one says?

A. "And the Agencies thereof." "I have just been informed by representatives of Governor of the fact that [fol. 1424] these people are on campus due to sell-out. Definite orders that Marshals not be allowed on campus; at order of certain officials. Birdsong. I am only telling you what has been reported by an official representative of Governor. Do not expect violence and protest until Meredith not admitted. This is a long route to Cuba. Sorry an Episcopal Church. Duncan Gray says 'Stop it, you can'. Escorted off. You can continue protesting as you are. There is no stopping point. Many headed toward Oxford."

Q. And those are the notes which you say you took that night?

A. Yes, sir.

Mr. Andress: We would like as part of the cross examination of this witness, we would like to have these notes offered in evidence, Your Honor.

Mr. Gooch: I have no objection.

The Court: Plaintiff's 21. Mark them all as one exhibit.

Mr. Andress: Yes, sir, I have stapled them together again, Your Honor.

(Thereupon, said notes were marked Plaintiff's Exhibit No. 21, for identification.)

The Court: I will admit Plaintiff's 21, and recess until 2:00 o'clock.

• • •

[fol. 1425] (Thereupon, at 11:55 a.m., a recess was taken until 2:00 o'clock, p.m., of the same day.)

[fol. 1426] AFTERNOON SESSION

2:00 P. M.

JOHN EDMUND KING, resumed his testimony on cross examination as follows:

Cross examination—(Continued).

By Mr. Andress:

Q. Mr. King, you stated that right after General Walker had made his speech up there on the statue, that you realized that you had a story of great interest and you then went looking for a telephone?

A. Yes, sir.

Q. And that what you did was to reverse your procedure and go from the monument back around Carrier Hall and behind the Lyceum and back behind Peabody Hall until you could get to your car, is that right?

A. Sir, I believe that I stated I did not immediately intend to go back to my car. I went looking for a telephone. I did not make notes of this. I have not—did not make notes at any time in—when it took place and I cannot exactly say, say exactly what route I took.

I know that I did not make a telephone call anywhere on the campus, that I had to go back to the radio station to make it.

Now, I cannot in my mind any longer retrace my road [fol. 1427] to my automobile.

Q. Well, you didn't go riot across the Circle to your car, did you?

A. No, sir.

Q. And the last time you had used the telephone—well, the second time—the first time you used the telephone had been in Carrier Hall, hadn't it?

A. Yes, sir.

Q. Did you go riot back to Carrier Hall then?

A. I cannot say, sir. It's possible I did, but I cannot state a fact, that I did.

Q. Well, when you went into Carrier Hall and used the telephone—no—you didn't use the telephone in the Student Union, did you?

A. No, sir, I tried to but I never got a call through.

Q. All right. Now, when you went into the Chemistry Building and made your first telephone call, was there any particular news or were you just saying that the Marshals were on the campus and the Patrol—

A. Sir, basically, it was a color story, in which I was reporting what I had observed, the scene as it was with the Marshals, where they were, where the crowd was, what they were doing.

And then, of course, at that time, the fact that tear gas [fol. 1428] had been fired. I had—

Q. That was fired while you were in the building, wasn't it?

A. Now, that was fired while I was in the first building, in the Chemistry Building.

Q. Yes.

A. My call—I did not get my call in until I got to the Carrier Building and so the tear gas had already been fired before I made my telephone call.

Q. Oh, well, then, you went into the Chemistry Building?

A. Looking for a telephone.

Q. Looking for a telephone. You were there about fifteen minutes but you didn't use the telephone?

A. No, sir.

Q. And it was while you were in there that the gas was fired?

A. Yes, sir.

Q. Then you came out of there and realized the gas had been fired, or you saw it from inside; you went out the rear of that building and into Carrier from the back?

A. Yes, sir, I—I heard the explosions of the tear gas being fired. Some people started coming into the building

where I was, and, of course, some of them had been caught [fol. 1429] in tear gas and they were making the statements, you know, that the tear gas barrage had been fired, and so I knew that it had been fired.

Q. And then that was what you reported when you went into Carrier Hall and used the telephone?

A. Yes, sir.

Q. The background story and the firing of the tear gas?

A. Yes, sir.

Q. There was nothing else of outstanding importance?

A. No, sir, I had not been there very long at the time and that was all there was to report, as far as I knew.

Q. Then after you had been there some fifteen or twenty minutes, you went around by the Student Union Building. How long did it take you to get there from Carrier?

A. It's very difficult to say, sir.

Q. Ten or fifteen minutes?

A. Possibly.

Q. Then you stayed there about fifteen minutes and couldn't get to your car, stayed there in the Student Union for about fifteen minutes?

A. Yes, sir.

Q. In the meantime, had there been anything in par- [fol. 1430] ticular newsworthy that occurred?

A. I had just rumors, you could—everyone, of course, was talking about it. And students would be telling where they were when the tear gas went off, that they had been gassed, that they had seen people gassed, and, of course, there were a million stories, as far as conversations.

Q. There wasn't anything that you knew at that particular time that made it particularly necessary to get to a 'phone, though, so you started back on around?

A. No, sir, I attempted—I mean, of course, there were —on something like that, if you could get a telephone every five minutes, you would have something new to report, but, of course, it was nothing urgent at that point.

Q. Then you went back around all the buildings, around

the Lyceum, Carrier Hall, and so on, until you came to the monument and you went to the south to do that, or from the Student Union you go to the north?

A. I went back around the Chemistry, to Carrier, to the monument.

Q. Around the south side of the Circle, then?

A. Yes, sir. I assume so. I am not sure of north and south on the campus.

Q. And it was right after that that you saw General [fol. 1431] Walker walking around and talking to Gray and that you heard him say, "Riot, riot, you have got news all over," and so on?

A. Yes, sir.

Q. That was before he got up on the monument?

A. Yes, sir.

Q. And in the course of—did you hear him and see him talking with various groups of students?

A. Yes, sir, from the time I saw him until the completion of his speech, I stayed very close.

Q. And did you ever hear him say, "Rite, rite (phonetic)" to anybody else?

A. At the time he said it, he was talking to individuals who were nearby to him and telling him the stories. That's the only time I heard him make that statement.

Q. What did they do?

A. Oh, nothing in particular. It was soon after that, almost immediately after that that they started calling for a speech, as I recall.

Q. But this group that he was talking with at that time just stayed around there with him or just milled around like they had been doing?

A. Oh, yes, sir, the group at that time was observing what was going on.

[fol. 1432] Q. And they were just milling around?

A. Yes, sir.

Q. And then after he made this talk on the monument, why, that was the story that you realized was of great interest, that you went to 'phone in?

A. Yes, sir.

Q. And was that the only story of great interest that you had to 'phone in at that particular time?

A. With the exception of a rehash of what I had already reported. That, along with the overall picture of the scene as it was taking place.

Q. Uh-huh. And then because the telephone communications were pretty bad, that's when you cut back around or, at any rate, got back to your car, regardless of which way you went—

A. Yes.

Q. —you got back to your car, drove it off the campus?

A. Yes, sir.

Q. Your car hadn't been damaged?

A. No, sir.

Q. It was standing right there on the Circle Drive, by, in front of Peabody Hall?

A. Yes, sir.

Q. And do you have any recollection of whether you [fol. 1433] drove in front of the Lyceum or whether you drove out—

A. No, sir, I wouldn't have any. It would have been impossible to have driven in front. I turned around and went back out the way that I had come in.

Q. You turned around there in the street?

A. Yes, sir.

Q. You didn't have any trouble turning around?

A. I turned around on the lawn itself. Actually, my car was not parked on the pavement but there was a rolling curb there and my car was right up on the edge of the street there.

Q. Didn't have any trouble turning around, then?

A. No, sir.

Q. And went on off to the radio station and that's the last you know of the circumstances?

A. Concerning this, yes, sir. I was on the campus again but it was, of course, it was an hour or so later and as far as General Walker's presence there, I know nothing more.

Q. Were you in on the Circle there too?
A. Later that evening?
Q. Yes.
A. Oh, yes.
Q. And the same thing still going on?
A. Yes, sir.

[fol. 1434] Mr. Andress: I think that's all. Wait a minute. Mr. King, did you—do you know what kind of stories your radio stations ran in connection with your reports?

The Witness: No, sir, I don't. Practically everything that I called back was tape recorded and what they used of the calls I made—several radio stations were exchanging stories, what they got from other stations, what we got from various sources, I don't know because, I mean—

By Mr. Andress:

Q. In other words, the way things were going on that night—

A. I know less about what was actually broadcast during that particular time than most of my listeners because when I came back, I found out and had people tell me the coverage that we had, but I was not at the station and I cannot vouch for what they did.

Q. You didn't have a portable radio with you?

A. In my car I had a tape recorder, which I was able to use later in the evening; I mean, it was not—it was not portable to the extent that I could take it out of my car. It had to be operated off of the automobile's battery.

The next day, eventually, we rigged up radio communications from my car back to the local radio station, but [fol. 1435] I did not have it that night.

Q. Were there students around on the campus carrying transistors and little portable radios in their shirt pockets, and so on?

A. I saw none.

Q. You didn't hear any?

A. No, sir.

Q. It wasn't like being at a football game and hearing another football game in your neighbor's pocket?

A. Not that I know of, sir.

Q. Now, when you were reporting back there to your radio station, did you ever report anything about a mass charge?

A. No, sir.

Q. And you made no report to your station about General Walker having led a charge?

A. No, sir.

Q. You saw nothing of that sort?

A. No, sir.

Mr. Andress: That's all.

Mr. Gooch: Stand aside. Thank you very much, Mr. King.

[fol. 1436] CRAIG ELLIS, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name.

A. Craig Ellis.

Q. And where do you live, please, sir?

A. Nashville, Tennessee.

Q. How long have you lived in Nashville, Tennessee?

A. All my life.

Q. How old are you, Mr. Ellis?

A. Twenty-six.

Q. Are you employed?

A. Yes, sir.

Q. Who is your employer?

A. United Press International.

Q. How long have you been with United Press International?

A. Approximately six months.

Q. Were you employed prior to that time?

A. Yes, sir.

Q. By whom?

A. Nashville Banner.

Q. How long were you employed by the Nashville Banner?

[fol. 1437] A. Approximately three years.

Q. Did you attend a college?

A. I took courses from several schools up there in the Nashville area but not—I did not graduate.

Q. All right, was your first newspaper experience with the Nashville Banner?

A. As far as a daily is concerned, yes, sir.

Q. What other news experience had you had prior to that time?

A. We have a small weekly paper in our home town, or in the suburb, and I had done some work for them, but, you know, just casual type writing.

Q. All right, are you married?

A. Yes, sir.

Q. Have any children?

A. One child.

Q. Now I guess then in September, 1962, you were employed by the Nashville Banner?

A. Yes, sir.

Q. Did you have occasion to go to Oxford, Mississippi, along during the latter part of September of 1962?

A. Yes, sir.

Q. Could you tell us when it was you went over to Oxford during that period?

A. I left late Saturday night. I am not sure what date. [fol. 1438] Saturday night prior to Sunday night when the trouble on the campus was. I left Saturday night and got there early Sunday morning, into Oxford.

Q. Were you sent over there by your newspaper?

A. No, sir, I was not.

Q. What was the occasion of your going over, Mr. Ellis?

A. I have a close friend who is a photographer for United Press. He had been down there several days and had run out of film and some other supplies. Since Nashville is not too far from Oxford an associate of mine and myself wanted to take these supplies to him, so we drove down.

Q. All right, and you got in there, you say, in the early morning on the 30th, Sunday morning?

A. Sunday morning, yes, sir.

Q. About how far is Oxford from Nashville?

A. I would say it is about, maybe, 300 miles, something in that range.

Q. Did you go to a motel or hotel when you got there?

A. We went to—I believe it is the Colonial Hotel, downtown, where my friend was staying.

Q. All right, now, did you go out to the campus of Ole Miss any time on Sunday?

A. Yes, sir.

Q. Do you remember about what time?

A. The first time was about mid-morning. I drove—I [fol. 1439] rode out with this photographer and we just drove around the campus.

Q. All right, did you ever go back to the campus that day?

A. Yes, sir, I think we went back, or attempted—I will say attempted to go back in that mid-afternoon, and we got as far as the bridge on University Avenue and the State Police stopped us and said no one but faculty, students and students' families were being admitted to the campus.

Q. All right, after that incident did you finally get on the campus that evening?

A. Yes, sir.

Q. Do you know about what time, Mr. Ellis?

A. It was shortly after dark. I would say approximately somewhere around 6:00 or 6:30, maybe.

Q. All right, can you tell us generally what you observed that you saw when you got to the campus on this last try?

A. We entered through one of the rear entrances, entrance to the campus, and as far as that entrance was concerned, we were about maybe the second or third car admitted by the State Police.

We drove up along the road that is leading up to the circle area near the Lyceum, and turned onto this drive. I am not sure just the name, what the road is there, and [fol. 1440] pulled on around to the rear and over to the side of the Lyceum Building.

At that time there was, oh, I guess maybe 150 students that were just in the area over to the side of the sidewalk, across the street up from the Lyceum Building.

The Federal Marshals had—were ringing or had set up a line, a complete circle of the Lyceum Building. The State Police were over on the edge of the sidewalk, you might say holding back the students, by keeping them from going out into the street. In other words, here (indicating) were the Marshals, the street, the State Police and the students.

Q. All right. Now did you mingle with that crowd of students you saw there around the Lyceum Building?

A. Yes, sir.

Q. And how long did you remain in that area?

A. I would say approximately maybe 30 or 40 minutes, or something.

Q. All right, did you at any time see any activity between the group that was east of the Marshals and the Marshals themselves relative to throwing anything, or anything of note?

A. Are you referring to the students that were on the other side of the State Police?

Q. Well, I understood you to say you saw about 150 people around there. Where were they?

[fol. 1441] A. Well, the majority—the majority of them were over on the sidewalk. However, there were some maybe, say, 50 of them were over—over—they were sort of—like here is the Lyceum Building (indicating), and here is the—several of the students were here, which would actually have been to the front of the building.

Q. All right.

A. However, of course the police, the State Police had circled around that area, too, and they were behind the police.

Q. Now were you there when the tear gas was fired?

A. Yes, sir.

Q. Now prior to the tear gas being fired, was there any activity between the students and the Marshals?

A. Yes, sir, it seems like that when I first got on the campus and first went up there it was not too much activity. There was some shouting or jeers, or that type of noise. There was no action of any kind that would, you might say, prompt something.

Q. All right.

A. However, as the evening progressed more people seemed to filter into that area around the Lyceum Building, and it seemed like the more people came in the louder the people got and the confusion began—it seemed like it began getting confused.

[fol. 1442] Q. All right.

A. Yes, sir, I saw some—there was of course rocks laying in the area surrounding the other building. I believe there was some construction going on. And I saw some rocks thrown in the direction of the Marshals. Also some cigarettes sort of flipped type at them.

However, I did not see them actually land. In other words I saw them when they left the hands of these people, but as far as watching them until they landed on someone, I didn't. I didn't follow them out.

Of course that—that was at the time that it seemed to be getting louder and more confused and, you might say, unruly.

Q. All right, where were you when this tear gas was first fired?

A. I had moved down into the circle area but over to the side near the drive. Actually almost—the way I recall I was probably in the drive area, coming around on this—that would be the—I'm a little confused on the directions.

Q. Would you like to get down there and look at that map? And see if you can orient yourself, Mr. Ellis?

A. Yes, sir.

Q. In the center of the map is the center—to orient you a little bit, the Lyceum Building is here on the east, the—[fol. 1443] in—I mean on the west; the monument on the east, the flagpole in the center and the various buildings around. Were you generally familiar with the campus when you got to it?

A. No, sir, that morning had been the first time I had ever been on the campus.

Q. All right, sir. Can you orient yourself somewhat with that map?

A. Yes, sir. We had moved, or I had moved from up here next to the Lyceum Building down the drive and I would say maybe half-way down the drive, University Circle here.

Q. Is that where the gas was fired?

A. Well, as I said, I moved into that area and mingled some there for several minutes. Then all of a sudden we heard some noise and I looked that way and could see the tear gas shells.

Q. Resume your seat, please, sir.

A. All right.

Q. Did the gas at that time have any effect on you, or were you far enough away—

A. Well, it seemed like at first—you couldn't call it a volley because there were several. The first one is the one that they fired—didn't seem like they were fired too far. In other words, apparently just in the immediate area from the Lyceum Building.

[fol. 1444] Q. All right.

A. But the more that was fired, it was fired further down towards the flagpole, back down toward the monument and by that time it did, yes, sir. It had. The wind was blowing.

[fol. 1445] Q. All right. Now, after the tear gas was fired, can you describe generally the activity of the students that were out there in the Circle and the vicinity?

A. Well, of course, when the tear gas was fired, it enraged them, the people that were out there.

Q. All right.

A. It—up to that time, they had been, you know, quite loud and, of course, like I said, throwing things. But when the tear gas was fired, it seemed to increase the, their feeling or their emotions and it seemed to get more loud and—it—I guess it had grown into a crowd-type deal by that time.

Of course, the crowd had increased and it caused a lot of confusion and running around.

Q. Did you see the students do anything toward the Marshals after the tear gas was fired?

A. Yes, sir, there was another building over to, over near the monument that is under construction. It would be the Science Building, maybe, and there were concrete blocks and that type of debris laying around the building and they, the people, or the students—I assume they were students—I couldn't swear to that—but they, several of them went to that area, picked up some of the rocks or bricks or whatever they were and came back and went as far as they could up in the Circle and heaved them at the Mar- [fol. 1446] shals.

Q. Could you attempt to fix an estimate of how many people were out there in that Circle, say, along about that time, in groups or scattered about?

A. The groups—that is, to me, it was more of a group situation at that time because not—there were not large groups throwing these. In other—it was just like several here, several there, several somewhere else, and like one group would run forward and throw what they had and then they would fall back and then—that's how it would go.

I would say that in the Circle and down near the monument, I imagine it would run somewhere, three or four hundred at least.

Q. All right. For—some time later in the afternoon or evening, excuse me, did you have an occasion to be down in the area of the flagpole, of the monument?

A. Well, sir, yes, back and forth type.

Q. Did you ever see General Edwin A. Walker?

A. Yes, I did.

Q. And where was he at the first time you saw him?

A. The first time I saw him in the area of the monument?

Q. Anywhere in the campus. The first time you saw him at or near the campus.

[fol. 1447] A. Well, let me go back a little bit. The first time that I saw him that evening or Sunday afternoon was down at the bridge where—the same place that we attempted to get on the campus.

Q. Oh, I see.

A. And he came up in a car and I was not near enough to tell whether he was asking to get on or not, but anyway, the car was turned around and they drove off, he and a man that was driving him.

And that was the first time.

Q. Did you recognize him as General Walker?

A. Yes, I did.

Q. Had you seen him before?

A. Not personally. I had seen him—his features in the newspapers and in the newsreels before.

Q. All right. Now, after that and after you had gotten on the campus, did you at any time see General Walker at or near the campus?

A. At or near the . . .?

Q. Campus itself?

A. Following that, yes, sir, I saw him in the area near the monument, later that evening.

Q. All right. Now, describe as best you can what happened pertaining to General Walker from the first time you saw him at or near the campus until we ask some [fol. 1448] further questions. Would that be all right?

A. Yes, sir.

Q. Go ahead.

A. I was over on University Circle there, about halfway down the street or the Circle.

I saw some activity of the students down near the monument and I wanted to see what they were doing, so I walked down that way.

As I neared that area, I saw a man in a white hat and the nearer I got, I recognized him to be General Walker.

Q. And where was General Walker at that time?

A. He was in—away from the monument in—here is the monument here. He would be out in the street area, actually.

Q. East of the monument?

A. Yes.

Q. All right. Go ahead. Continue with your narration.

A. He, at the time I saw him, it was—the reason I couldn't recognize him at first, because, the way I recall, he was turned away from me,

As I neared him, however, he turned around and was just walking in that immediate area for a very short time and then moved up near the monument.

[fol. 1449] Q. All right. Did you hear any conversation between him and anybody else?

A. Not direct conversation, no.

Q. All right. Did you hear anything that was said to General Walker by anybody that was around there?

A. I heard several of the students, as I neared where he and the students were, I heard several of the people say, "Here is the General. Here is our leader."

Q. All right. Then, what happened?

A. A very short time after that, apparently the students were, had asked him—before—

Mr. Watts: Excuse me.

The Witness: I am sorry.

The Court: You may not testify as to what you thought the students may have asked him.

Mr. Gooch: Just what you saw.

The Court: Just what you saw.

A. Well, anyway, he moved to the base of the monument and then a short time after that stepped up on the monument where he would be up above the group.

Then the crowd, the people, had begun gathering at the base of the monument.

By Mr. Gooch:

Q. Would you estimate how many people finally gathered there around the base of the monument at about the time [fol. 1450] General Walker got on the monument?

A. I would say that it began, it ranged, say, close to two hundred at first because not every one knew that, or—I don't know how to explain—

Q. You can't say what everyone knew.

A. Well, that's true. In other words, it was small at first but it grew, the crowd grew.

Q. All right.

A. As the General was there.

Q. All right. Will you tell us everything you heard General Walker say there at that time?

A. Yes, sir. May I refer to some notes I have?

Q. Did you make notes of what occurred there that night?

A. Yes, sir, I did.

Q. Do you have those notes with you?

A. I do, sir.

Q. Did you make them at the time you were listening to General Walker?

A. I did, sir.

Q. Yes, I would say so, unless the Court objects.

The Court: No objection from me.

Mr. Andress: May we see them first, Your Honor?

The Court: Yes, you can look at them if you want to. [fol. 1451] The Witness: If I can—may I say this, sir—

The Court: Well, he wants to look at them and then you can go ahead.

The Witness: All right, sir.

(Instruments handed to Mr. Andress.)

Mr. Watts: Can't read them.

Mr. Andress: Thank you.

The Witness: May I say something, sir?

The Court: Yes.

The Witness: These notes, what I attempted to was to take—in other words, something would be said and then I would put it down. It's possible that I—well, I know for a fact that I missed some of the things that were said. But I tried to take down things—now, if something would be said, I would put it down and, in other words, I could not listen to all the things that were being said, but I tried to take the key phrase or the key things that I could remember or that I heard him say.

By Mr. Gooch:

Q. All right, go ahead now and tell us what your recollection of what you heard the General say there on the monument was.

A. The first note that I have, the General said, "I want [fol. 1452] to compliment you all on the protest you are making."

Now, the—some of these words are misspelled because I was doing this in the dark and it was just—wasn't too easy to write and listen and everything at the same time, so that's why. . . . "Protest" made. . . .

Q. Go ahead.

A. Or made here tonight. "You have a right to protest under the Constitution."

Q. All right.

A. "Bloodshed. . . . " Let's see, "any bloodshed here tonight is on the hands of the Federal Government and the agencies thereof."

Q. All right.

A. The next, there was some mention of a sell-out.

Q. All right.

A. Now, I haven't got the complete notes on this and it's just part of it. I don't know whether I can follow it directly or not.

Q. Just the best you can.

A. Something concerning the fact that people—people in the middle of the campus had been talking or conferring or something concerning a sell-out.

Q. All right.

A. I remember the word "sell-out". And then some- [fol. 1453] thing to the effect, "Definite orders not to let Federal men on the campus at orders of a certain official." And about this time there were shouts, "Who is this official? Who is this person?"

Q. All right.

A. And my next recollection is that General Walker said, "Birdsong." And who, I—I did not know at the time, but I later learned to be the head of the State Police or the State Highway Patrol or something or other.

Q. All right.

A. Then, he then said, "This has been reported to me by representatives of the Governor."

Q. All right.

A. The next note, "There is . . . . there is . . . . " Now, I believe from reading the notes that I should have said, "This is," but I have got written now, "And there is a long route to get to Cuba."

Q. All right.

A. The next thing, about this time there was some commotion near the base of the monument and a man who I later learned to be Father Gray, Duncan Gray, Episcopal Priest there in Oxford, came there near the base of the monument.

The thing I recall from General Walker is him saying, "We have an Episcopal minister here," and there was some [fol. 1454] commotion. I did not get what was said at that time.

The next thing that I recall him saying is that, "I am sorry that I am in the Episcopal Church."

Q. All right.

A. About this time Rev. Gray was grabbed by two or three of the people that were near him. I think he fell to

one knee or sort of toppled somewhat, but a couple of the students or people near him grabbed him up and hustled him away or moved him away from the area.

Q. All right.

A. The next thing that I recall and have notes, that the General said, is, "There is no stopping point. You can continue. Many people from out of State are heading toward Oxford."

Q. All right. Anything else?

A. Well, the next note that I have here is an observation.

Q. Well, that wouldn't be admissible.

A. But it was not what the General said.

Q. All right. Now, were you there at the conclusion of the General's speech?

A. Yes, sir.

[fol. 1455] Q. Would you describe the action of the General after he left the monument.

A. Yes, sir, he—at the completion of the talk he stood at the, where he was for a short period of time, as I recall, turned to his left, stepped down from the monument and turned where he would be facing the Lyceum Building.

He took several steps up the walk by himself. I recall that there might have been one or maybe two men that came up with him, not came up with him, but caught up with him, I will say, and this group, or these two or three, including General Walker, moved up maybe 10 or 12 feet up the sidewalk.

Q. Then what happened?

A. Well, about that time the people that were listening to the General moved in behind him and followed him for a short ways, maybe just a very short ways, and then a solid line was formed across the campus with the General and these two men in the middle of the line.

Q. Which way did they go?

A. Toward the Lyceum Building.

Q. How far did they get?

A. I did not follow this group. However, I lost sight of them as they neared the flagpole.

Q. All right.

A. Or in that immediate—I mean—immediate vicinity. [fol. 1456] Q. What happened? Do you know of anything that happened at about the time the group got to the flagpole?

A. Either at that time or shortly thereafter, shortly—in other words shortly after I lost sight of the General and these people, there were several volleys of tear gas fired.

Q. And then what? Did you see General Walker there after—

A. No, sir.

Q. Would you estimate the number of people that fell in behind the General as he started up towards the flagpole?

A. I would say it would range from four to five hundred people.

Q. All right. Now, did you see anybody near General—the General, did you see anybody with their hands on the General as they went up there?

A. These two—one or two people that got to him first, or came up with him, I could not tell whether they were actually arm-in-arm, or not. I don't know.

Q. All right. Were they close to him?

A. Yes, sir.

Q. What kind of walk or what kind of movement did they make as they started up there?

A. At first when the General was by himself it was slow, sort of a slow walk, and then it increased to sort of a brisk [fol. 1457] walk. The further it went.

Q. You said you lost sight of the General about the time they got to the flagpole?

A. Near the flagpole, yes, sir.

Q. What was the movement of the crowd at the time you lost sight of the General?

A. My best recollection the further they got the faster they got.

Q. All right, where did you go?

A. Well, when the tear gas was fired it was a large volley and it was fired directly—well, it was fired where

some of the shells landed near the monument, and, of course, I was near that, or near that area, and I just tried to get out of the way because it was all over the place.

Q. Where did you go then?

A. I believe that I went into one of the nearby buildings, or near one of the buildings to try to find water, a water hydrant or water faucet of some kind to wash my eyes out because they were filled up with gas.

Q. Incidentally during the time that crowd was listening to General Walker's speech, did you see any evidence of rocks or missiles in their hands?

A. No, I didn't.

Q. All right, you don't know if they were throwing anything or not. Just what you know is what we are trying [fol. 1458] to get.

So after you went in somewhere to try to get the water (sic) out of your eyes, the gas out of your eyes—

A. Yes, sir.

Q. Did you see the General any more that night?

A. No more that night, no, sir.

Q. All right, and did you make any report of what you had seen and observed and jotted down, to your newspaper?

A. Yes, sir. If I may drop back a little bit, that afternoon I was at the Oxford Airport when the Federal Marshals were brought in by plane. At that time I called the Executive Editor of the paper and told him I was down there. He then directed or instructed me to stay in Oxford and try to keep tab on any local people or students or older people, or just whoever was down there from the Nashville, Memphis, Tennessee Area, which I attempted to do.

Q. Did you know whether or not there were any United States Marshals that might be from Nashville?

A. Yes, sir, two of the Marshals—while in Nashville I was the Federal reporter.

Q. What do you mean, Federal reporter?

A. I cover all Federal activities, Federal Court, anything having to do with the United States Government there in Nashville.

Q. All right.

[fol. 1459] A. And two of the Deputy United States Marshals from Nashville who I met since I have been on the —covering the courthouse, I had—or I had information that they were—had left Nashville and I presumed, just from the activity that—in some of the other cities—that they might be heading toward Mississippi.

Q. All right. Now, was the Nashville Banner at that time a morning paper or afternoon paper?

A. Afternoon paper.

Q. Did you at any time after you left the campus or while you were on it or after you left the campus communicate what you heard General Walker say and this activity of moving with the crowd toward the Lyceum Building—did you communicate that to your newspaper?

A. There were very few long distance lines out of Oxford at the time and I attempted for several hours, somewhere between four or five hours to get a line out, but the best—my best recollection, I don't believe I did.

Q. All right, did you the next day?

A. Yes, sir, the next morning I finally got a line.

Q. All right, do you know whether or not your notes and your quotes were used by the Nashville Banner?

A. The information I gave them the next morning concerning the Federal Marshals from Nashville that I saw getting off one of the planes that Sunday afternoon, I told [fol. 1460] them about that. I began to tell them concerning the—that night before, and what had happened, and they said, "Don't worry about that, we have got both wire services and we will get our story from that.

Q. What wire service is—did that allude to?

A. Associated Press and United Press International.

Q. Have you described as best you can everything that occurred on the campus with particular reference to General Walker?

A. Yes, sir, I believe I have.

Mr. Gooch: Your witness.

Cross examination.

By Mr. Watts:

Q. You say when you tried to tell them the next morning about what happened, the night before, your superiors said, "Don't worry, we take both wire services, the AP and the UPI, and we will get what happened from that?"

A. Yes, sir.

Q. And how long had they taken the UP? Do you know?

A. Since before I went with the paper. But I don't know.

Q. Where did this conversation with your superior take place? After you got home to Nashville?

A. No, sir. I—by over long distance telephone from the hotel there in Oxford.

[fol. 1461] Q. With whom?

A. Sir, I don't recall. We have people that answer the phone and just takes the notes down. I probably spoke with one of my—either the City Editor or Assistant City Editor. Then he referred me to someone to give the notes to, but I don't recall who I gave the notes to.

Q. When did you get back to Nashville?

A. I had some difficulty getting out because of the airport, it was being used by the military, and I don't believe I got out of there until—I believe it was Tuesday afternoon.

Q. That would have been the 2nd?

A. Yes, sir.

Q. And you went directly to Nashville?

A. I went to Memphis and to Nashville.

Q. Did you report in then to your paper?

A. Yes, sir.

Q. With whom did you talk?

A. Well, I would—of course the City Editor is my—my immediate superior.

Q. Well, who is he?

A. He is now the Managing Editor of the Banner. His name is Bob Battle.

Q. Was this conversation you testified to a while ago when you called in and talked to your paper and endeavored [fol. 1462] to tell them what you had seen concerning General Walker and they told you that they took both of the wire services, both the AP and the UPI, was that with your City Editor or someone else?

A. That I don't recall. However, if I can say this, if—if it—if that came from one of the persons I was giving the notes to, why I'd—he would have been instructed to say that, I'm sure, because we take these wire services and we were just actually interested in local people.

Q. Prior to seeing Walker, you had walked from the northeast corner of Park Hill over to the monument, had you not?

A. Yes, sir.

Q. Had a lull taken place in the rioting about that time, as you made that tour back to the monument?

A. It was more of a—it seemed—well, to me, there would be scattered rocks being thrown, and things like that from groups, maybe all the time, but then again there wasn't a lot of movement or a lot of activity in the very early evening.

Q. No, sir, you must have misunderstood my question. My question to you, sir, was as you left the northwest part of the oval and walked over to the monument had there been somewhat of a temporary lull in the rioting about that time? You know what a lull is, don't you?

[fol. 1463] A. Yes, sir.

Q. Well, yes or no, was there a lull?

A. Well, may I answer—let me answer like this.

Q. You can answer any way you want to.

A. I don't believe you would call it a riot until after the tear gas.

Q. Oh, yes, this is way after the tear gas.

A. I know it, but—

Q. There was activity after you left the northwest corner of the circle?

A. Yes.

Q. And went towards the monument?

A. Yes, sir.

Q. Some small activity by small groups of people?

A. Yes, sir.

Q. Nothing large like what you testified you saw General Walker participate in after the speech?

A. Yes, sir.

Q. Nothing like that?

A. No, sir.

Q. You would—you were in a position where you could have seen it?

A. Yes, sir.

Q. Now my question is: Immediately before you went to the monument had there been a lull in the scattered activity [fol. 1464] that you witnessed before you went to the monument?

A. Well, the activity continued, but not—not as—up and down type thing.

Q. That's right, exactly, but now the question I am trying to get over from you or get out of you, and all I want is try to relive this thing, son, and see it and tell us what you saw.

Now the question is: When you decided to leave the northwest part of the circle and come to the monument the crescendo was down rather than up, wasn't it?

A. Sir, I just—I just can't recall.

Q. Why did you leave that area and go to the monument?

A. Because I wanted to move around and just get it from different angles.

Q. Now then when you got back to your paper in Nashville on the evening of the 2nd, were you the only one there that had just come from Oxford?

A. The—one of the photographers for the Banner had drove me down there, he came back Sunday night before all this; came back late Sunday afternoon before anything happened.

Q. Were you the only one around your paper office there, or whatever you call it?

A. As far as the Banner is concerned, yes, sir.

Q. And they were somewhat interested in what you had [fol. 1465] seen, weren't they?

A. Somewhat, yes, sir.

Q. Did you have a lot of conversation with the people there about what you had seen, and what you knew about the situation?

A. Yes, sir. Some. It was more individual type rather than a lot of people gathered around.

Q. I will ask you if this didn't occur when you got back to your office that—perhaps it was the City Editor or some of those people or some of those people told you, "Now we got two reports out of Oxford, one was the UPI report that said that during a lull in the riot General Edwin A. Walker mounted the Confederate statue on the campus and begged the students to cease the violence, and the other report was the Associated Press report that General Walker arrived on the campus, was immediately recognized by the crowd, was requested by the leaders of the riot, or the leaders of the mob to "lead us to the steps; that Walker had assumed command of the crowd and lined up with men on either side by each of his arms, and with 1,000 people behind him led a charge towards the Marshals, after which tear gas was fired, and he fell back to the monument and made his speech."

Now did you learn those two conflicting reports were existing in your paper at the time you first got back?

[fol. 1466] A. No, sir, I don't believe I did.

Q. When did you first hear the UPI report that Walker had begged the students to cease their violence and was met by one massive jeer?

A. I would believe it was much later because at the time of course I was still with the newspaper, and other than just a casual interest in what the wire services had, I was more interested in our local type thing, and I just didn't pay that much attention to what was said.

Q. Did your paper print the AP version that Walker had led a charge before he made the speech on the monument, or the UPI version that during a lull in the riot he begged the students to stop their riot and was met by one massive jeer? Which of those two conflicting reports did your paper print?

A. Sir, I do not recall what the front page—what the dateline was. Our paper, because they take both services, they sometimes take the wire dispatches and use parts of both stories. I do not know who edited—which service they used for the lead story that next morning.

Q. As a matter of fact, to refresh your recollection, try to think back and see if this didn't happen, that these two conflicting reports came in, and the AP report was printed by the paper? Isn't that what happened?

A. Well, I didn't see it until Wednesday—until Tuesday [fol. 1467] afternoon.

Q. I know that, but when you saw it on Tuesday afternoon or Wednesday or whenever it was, wasn't it the AP report?

A. I can't recall.

Q. You just have no recollection about that at all?

A. No.

Q. Well you have a good memory on other things.

A. Well—

Q. Is your memory as hazy on that as these other things?

A. No, sir, these other things, that is something that is in my memory that I will never forget.

Q. Well, to a newspaperman, was it significant to you that there would be such a diametrically opposite report between the wire services and releases of the two biggest wire services in the world? Didn't that strike you as being significant?

A. To tell you the truth I don't—when I first got back I don't recall that there was—that anyone said anything about this, what you call conflicting reports.

Q. Do you know Mr. Al Kuettner, the UPI reporter who was present on the campus and wrote that UPI release?

A. I believe I have spoke to him on the phone. I never met him personally because I haven't been with the service [fol. 1468] that long.

Q. Are you a newsman or a reporter? Or what is the terminology?

A. I was a reporter with the Banner for approximately three years. I am the—have the position of a newsman with United Press.

Q. You are now in the position of a newsman?

A. With United Press, yes, sir.

Q. Now at this time you were 24, I guess, weren't you?

A. Yes, sir.

Q. Were you classified as an experienced reporter, or what? Or what in local terms is called a cub reporter?

A. No, sir, I had been a cub since I started with the Banner in July of 1960, and got out of the Navy. Four months later I was put on the Federal beat, so I had been on the Federal beat, or the Federal Courthouse, reporting for two years, and, believe, me, they don't put cub reporters on there.

Q. So you were a cub for only about four months?

A. Yes, sir.

Q. All right. Now then as I understand when you first got to the Ole Miss area shortly before the time, before the tear gas was fired, you went to the area of the Lyceum?

A. Yes, sir.

Q. And you saw Marshals ringed around the Lyceum [fol. 1469] Building?

A. Yes, sir.

Q. Did you see the pictures that were presented in court this morning?

A. No, sir, I didn't.

Q. Here directing your attention to the Plaintiff's Exhibit 18, is that referrable to the way it looked, and the same with respect to Plaintiff's Exhibit 17?

A. Yes, sir. Let me say this also. This seems to be before dark.

Q. That's right.

A. And, actually, I did not get on the campus until after the sun had went down, so it was becoming dark—it was actually dark at the time we got there. However, this—yes, sir.

Q. Well, how, if any—after that explanation, how if any, did the positions of the reporters (sic) differ from what is in this picture?

A. Position of what?

Q. The Marshals.

A. That is the same.

Q. The same?

A. Yes, sir, that is the same.

Q. Anyone have the pointer?

Mr. Andress: Over by the chart.

[fol. 1470] Q. Son, would you walk over to the board, please, and pick up the pointer. You see the pointer before you there?

A. Yes, sir.

Q. Now then would you put your pointer on the flagpole and the circle. You see an intersection in the middle of the circle?

A. Right here (indicating).

Q. The top of this map is north, the left is west, the right is east. Would you put your pointer on the position where you were when tear gas was first fired?

A. I was in the area—this area here.

[fol. 1471] Q. You are pointing right southwest of the Lyceum Building—as you were—of the YMCA Building?

A. Yes, sir.

Q. All right. Then, where did you go from that point—

A. I moved further down.

Q. Further towards the monument?

A. Yes, sir, or further down in this grassy area next to the Y Building.

Q. All right. And how long did you stay there?

A. Just a short period of time.

Q. Now, assuming the tear gas was fired at 8:00, about what time would you say you moved into the area west—east of the YMCA?

A. Well, let's see, now east would be—

Q. Where you put your finger or your pointer?

A. Uh-huh.

Q. Five minutes, ten minutes, twenty?

A. You mean following the firing of the tear gas, how long did I stay here at the building before I moved further down in the area?

Q. Right.

A. Maybe ten or fifteen minutes.

Q. All right. And where did you go from there? Put your pointer on the next place you went?

[fol. 1472] A. Well, from there, as I recall, I moved down the avenue, University Avenue, past the monument.

Q. Past the monument?

A. Yes, sir.

Q. And was there a vast crowd at that point when you arrived?

A. Well, I wouldn't describe it as vast. It was a lot—several people but it was scattered, I mean, in other words, there would be so many here, so many here, that type.

Q. More or less than a hundred within a radius of a hundred feet from the monument?

A. I would say in all, approximately a hundred.

Q. All right, sir. Now, then, before you left that position up by the YMCA, describe the activity out in the Circle toward the Marshals?

A. There was scattered throwing of the missiles or rocks, firing the gas.

Q. Well, five, ten, maybe, people, something like that?

A. No, sir, I would say that there were more than that.

Q. Well, I am talking about in each little group that would throw.

A. Oh, well, yes, they would range in groups, I guess, [fol. 1473] maybe ten to fifteen apiece.

Q. All right. But in the whole area you, as I remember, I think you said there were some two or three hundred people out there in the general Circle area at that time, is that right?

A. Well, that's covering the entire Circle, sir.

Q. That's what I am talking about.

A. Yes, sir; uh-huh.

Q. Now, as I get your timing, you left that position about 8:15—8:10 or 8:15 and went back past the monument?

A. Uh-huh.

Q. How long did you stay in that area?

A. Just a matter of minutes. I couldn't give you an exact time.

Q. And what did you see?

A. There was—

Q. Would you put your pointer on the area so we can keep up with you?

A. I had moved down past the monument, down University Avenue. As I recall, the—one of the reasons that I moved down there was because the photographer, UPI photographer, that I had came to see, his car was parked that way and I went to check on his car.

Q. Now, as a matter of information, you had some lad along with you, didn't you, that had come from—

[fol. 1474] A. This photographer at first had been with me when we first got on the campus. However, he left me just shortly after we got on the campus and I don't know where he went from there. I did not see him until much later in the evening.

Q. Well, now, were you with the photographer at this time?

A. No, sir.

Q. Were you by yourself then?

A. Yes, sir.

Q. No one that you knew anywhere around you?

A. I might have seen some other newsmen but I did not know them by name—just by sight, from being around the press headquarters.

Q. All right. Would you estimate as a fair time that you arrived at this point near the monument about 8:15?

A. Would I estimate the time? I didn't understand you, sir.

Mr. Watts: Read the question.

(Record read.)

A. Yes, sir, I think so.

By Mr. Watts:

Q. And how long, then, did you stay in that area?

A. Well, let me ask you—

[fol. 1475] Q. No, please—

A. I'm sorry. Well, I—

Q. Go ahead and answer the question first, son, and then you can ask me.

A. If you mean down here for the car.

Q. Wherever you went, yes.

A. Just a short period of time. This is before I went back up in this other area.

Q. I understand.

A. And then back down.

Q. I understand. I am trying to trace your route. You went to the YMCA and down toward the car and you stayed at the car a short period of time?

A. Just a short period of time.

Q. Then where did you go?

A. Well, made my way back up the Circle.

Q. Along the north side of University Avenue?

A. Yes, University Circle.

Q. And taking time out for your trip to the car, what time would you assume you arrived along again in front of the YMCA?

A. Maybe 8:30 or maybe a little bit later.

Q. All right, sir. Then where did you go? Oh, incidentally, as you arrived back in front of the YMCA again, describe to us the activity of the people out in the circle [fol. 1476] when you were there?

A. I would say that it was, as before, some scattered throwing, but nothing—

Q. Nothing massed?

A. No, not at that time.

Q. Would you call it sporadic activity?

A. Yes, sir.

Q. And how long did you stand there in front of the YMCA as you were going back northwestward and observe into the Circle?

A. Again it would just be a short time. The time is something that I am—I can't—

Q. Did you have a watch?

A. I believe I had left it back at the hotel.

Q. All right, go ahead.

A. The way I remember. And so,—I guess maybe 8:30, maybe a little bit later, I don't know, just everything seemed to happen between 8:00 and 9:00, the moving back and around.

Q. Would a fair bracket be between 8:30 and 8:45 that you got back in front of the YMCA?

A. Yes, sir, I believe so.

Q. And that was when you looked out toward the southwestward and saw this sporadic activity in the Circle?

A. Uh-huh; yes, sir.

[fol. 1477] Q. All right, sir. How long did you stay there in front of the YMCA?

A. Five, ten, fifteen minutes, somewhere in that area, but I couldn't give you it exact.

Q. Well, where did you go then from there?

A. I tried—I just moved back and forth. Right around in that area of the building. In other words, it just seemed to me it was the safest place, it was not close enough where you could get the gas and it wasn't—but it was close enough

where you could see what was going on. I tried to stay in that immediate area.

Q. But still, as a newsman, you were very interested in what was going on down in the Circle, weren't you?

A. Yes, sir.

Q. And did you have anyone with you yet or were you still alone?

A. I might have run into someone, but I can't recall. There was certain times I did and certain times that I was alone.

Q. And about how long, then, did you mill around in that area and look down toward the Lyceum?

A. As I recall, I stayed in that immediate area until the time that I saw the activity near the monument.

Q. That is when you reported, you walked back down there and saw General Walker?

[fol. 1478] A. Yes, sir.

Q. Near the monument. Now, as you stood there in that position or in that area, could you see the Lyceum Building or make the outline?

A. Yes, sir. Yes, sir.

Q. Could you see the flagpole?

A. As I recall, the most of the lights were still working at that time. Later they were all, rocks were, had broken them out, later in the evening, but I believe at that time I could still see the flagpole, yes, sir.

Q. You certainly could have seen, if someone had led a massed charge across the north side of that Circle towards the Marshals, starting from the vicinity of the monument, couldn't you?

A. Well, sir, I believe you described it as sporadic. Now, there was times—

Q. Wait a minute, son. I don't believe you understand my question.

A. Well, I'm sorry.

Q. My question was: You could have seen if a massed charge of a thousand people had gone across there. I didn't say it did. I said if a massed charge of a thousand people

had gone across the north side of the Circle, you undoubtedly would, and must have, seen it from that point, couldn't you?

[fol. 1479] A. If there was a thousand people, I'm sure I would have seen it.

Q. As a matter of fact, you couldn't have possibly missed as many as a hundred people?

Mr. Gooch: I object to that as a conclusion, if the Court please.

Mr. Watts: If your Honor please, this is cross examination.

The Court: Well, go ahead and ask him your question. I will permit that.

By Mr. Watts:

Q. Mr. Witness, from your position there, if as many as a hundred people had moved across the north side of that Circle, you couldn't have helped from seeing it, could you?

A. Certain—that was—like I have said, there was more of that in these scattered groups. Some of these groups would join together at times and go as one.

Q. Sure. But they were just milling around, weren't they?

A. Well, sometimes, sometimes, like I said, they were joined together and run up together, throw their rocks and come back and then they would break, break—break away from each other and then they would join and go back up.

Q. Now, at any time—let me borrow your pointer—while [fol. 1480] you were standing in this position, right here by the YMCA, were you out as far as the sidewalk?

A. The sidewalk, actually at the Circle?

Q. Yes.

A. No, sir, I think—the best I recall, I stayed on the other side of the street itself, on that sidewalk and looked across.

Q. Now, then, you say down in this area there was sporadic activity of small groups of people?

A. Well, all over, actually.

Q. Yes, all over the Circle?

A. Uh-huh.

Q. Now, you never did see any substantial group of people form up down here in this area, march across here and then get up in here before they attacked the Marshals, did you?

A. They actually formed in different parts of the Circle. I recall some of them formed over in here (indicating) and went up; some maybe in this area would venture as far as this area before they would form up and then they would go up—I—yes, sir, I believe I recall some forming over here.

Q. Here (indicating)?

A. Yes, sir, they seemed to have got as close as they could to the Marshals before they threw, evidently to make [fol. 1481] sure their missiles would get up there.

Q. Would you say as many as one hundred people formed up in this area here and marched on the Marshals? Think it over now. Yes or no.

A. I don't believe I can answer yes or not.

Q. Well, how can you answer it?

A. Now, it is possible—I am—since some of the groups formed here—

Q. Yes.

A. —now some of them would, say, so many would form here and then maybe some of these would see these going up and would join them at different or various parts of the Circle.

Q. All right.

A. Maybe by the time they got up past the flagpole, there would be a hundred, but now whether—I can't—I couldn't estimate them actually being that many at that time.

Q. Let's see, a man is about eighteen inches wide or two feet, maybe.

A. All right.

Q. A hundred people would be at least one hundred fifty feet wide, wouldn't it?

A. If they went like that, I mean, if they lined up. Now, a lot of times they would just all run in a group, [fol. 1482] I mean just all scattered out and then run forward.

Q. Well, now, as I remember your testimony, when General Walker finally finished his speech on the monument, you saw people lining—

A. Oh, yes, sir.

Q. Now, was that the first lining up you saw all night?

A. Yes, sir.

Q. In other words, prior to Walker's speech on the monument, you saw nobody line up and move toward the Marshals, as I understand; is that right?

A. Not as such, no, sir.

Q. All right. Now, certainly, then, before the speech on the monument, while you were standing here, if a hundred people had lined up and marched across this area here in a charge and cast their missiles at the Marshals, you undoubtedly would have seen it, wouldn't you?

A. If they had of lined up.

Q. Yes, sir. And if a thousand people lined up, you couldn't keep from seeing it, could you?

A. That's true, sir.

Q. And that actually didn't happen before the Walker speech on the monument, did it, anything like that, did it? [fol. 1483] A. The hundred or the thousand?

Q. Either. Let's say, take first, the thousand. Did a thousand people line up and march across here before the speech on the monument?

A. I don't believe there was ever a thousand people in that circle when I was there.

Q. All right. Now, from the time you were here, assuming that someone down here in the vicinity of the flagpole had walked on the campus, conferred with the leaders of the

mob, permitted two leaders, one to get him by the arm on each side—

A. Yes, sir.

Q. —with a thousand people behind him, and had gone across the Circle in a charge on the Marshals, you couldn't conceivably have missed that, could you?

A. No, sir, I really couldn't.

Q. Did you ever at any time before the Walker speech on the monument see a charge with three people out in front leading it? And I'll restrict that a little more: A charge coming to the north side of the flagpole?

A. The fact that there was confusion of these people and that there was scattered groups and these groups joined from time to time, I don't honestly believe that you could have been able to determine whether there was two or three out in front or not, because sometimes there would be some [fol. 1484] that had actually got this far up in the Circle in front of these people, maybe that started out from here, see (indicating).

Q. Yeah.

A. So, now, as a matter of fact, at this time there was no leadership of this operation at all, there were just sporadic little groups, wasn't it?

A. I don't believe there was just any one major person that was doing it, no, sir, not that I—

Q. At least if it happened like I have outlined from where you were standing, you certainly didn't see it, did you?

A. One or two people leading everybody?

Q. Yes, sir, well, say three people leading a mass of other people across this area where I have marked. If that happened, you certainly didn't see this, did you?

A. No, sir, I didn't.

Q. And with you standing right there roughly 120 feet from the center of this right quadrant, if it had happened, you would have had to have seen it, wouldn't you?

A. I believe so.

Q. All right, sir. Take your seat. From what you saw of that crowd out there prior to the Walker speech on the

monument, it wasn't possible for anyone to assume com-
[fol. 1485] mand of that crowd, was there?

Mr. Gooch: I believe I object to that as calling for an opinion and conclusion.

The Court: Sustained.

By Mr. Watts:

Q. Did anyone try to assume command of you?

A. No, I think everybody—we were all trying to assume command of ourselves.

Q. That was just about the extent of one man's capability there that night, was to retain command of himself, wasn't it?

A. Well, I would....

Mr. Gooch: Go ahead and answer.

A. I didn't understand your question.

[fol. 1486] Q. I said about all anyone could command that night, with all the confusion there was, was himself, is that right?

A. Sir, I believe it is according to who it was.

Q. Did you ever see General Walker run at any time that night?

A. No, sir, I don't believe I did.

Q. Did you ever know a young lad, 21-year-old reporter for the Associated Press, named Van Savell, or Savell, I think he so calls himself?

A. No, sir, I don't believe I have met him. I stayed with the United Press people the entire time I was there, and I don't believe I ever met him.

Q. Do you know where Van Savell is now?

A. No, sir.

Q. Have you heard?

A. No.

Q. Son, with whom all have you discussed this lawsuit?

A. Prior to my appearance here?

Q. Right, prior to right now? Just working backward tell us who you have discussed it with.

A. With the attorneys for—
Q. Mr. Gooch?
A. Yes, sir.
Q. Anyone else?
[fol. 1487] A. These three here.
Q. Any other attorneys?
A. Yes, sir, Mr. Smith.
Q. The gentleman with his hand on his face?
A. Yes, sir.
Q. Who else?
A. Let's see. I believe that is all. I mean as far as the attorneys are concerned.
Q. Was that since you got here?
A. Yes, sir.
Q. Were you subpoenaed to come here?
A. I was.
Q. All right, and where? At Nashville? Were you subpoenaed at Nashville, or after you got here?
A. I received it after I was—arrived here.
Q. All right, sir.
A. Excuse me. Do you want to know the other people I have talked with?
Q. If you can remember anyone else?
A. Yes, sir, I gave a statement to the FBI, I testified before the Grand Jury in Oxford.
Q. Do you mean when they tried to indict General Walker?
A. Well, I don't know who they were trying to indict, but during that particular investigation that they had there, [fol. 1488] I was—I testified, yes, sir.
Q. Did you testify concerning General Walker at Oxford?
A. Sir, I am not allowed to say what I testified.
Q. Well, that's right. Yes, sir. But now have you told us everybody else you talked to?
A. I believe that is it.
Q. When did you last talk with anyone with the FBI about this? Before or after the Grand Jury?
A. Before.

Q. All right. Now then you say you saw General Walker, come up University Boulevard, or did I misunderstand you?

A. That is the one leading across the bridge and up to the monument area?

Q. Yes, sir.

A. Yes, sir.

Q. Was he walking slowly or striding?

A. Well, now, as I said, at the time I first saw him his back was to me and he was just standing in the area in front of the monument, out in the street area.

Q. You didn't then see him actually come up University Boulevard, or did you?

A. No, sir, I really didn't.

Q. Was he stationary or moving when you first saw him?

A. When I first saw him he was stationary.

Q. How close to the monument?

[fol. 1489] A. It would have been—oh, it was several feet. It was not a long distance. Just a short distance away.

Q. In terms of the walls of this room, could you pick an appropriate distance?

A. From the monument, from General Walker to the monument when I first saw him? That is the question, right?

Q. (Nods head affirmatively.)

A. I would say from here to—just a short ways further than this door here (indicating).

Q. Well, in terms of this wall back here (indicating) how about it?

A. I don't believe it was that far.

Q. Somewhere between those two distances?

A. Yes, sir.

Q. Now what attracted you to General Walker?

A. Well, the thing that attracted me, not so much to General Walker, but just attracted me to the area, it just seemed to me some commotion or some activity down there that I hadn't witnessed before. I hadn't noticed it before.

Q. Now you were in front of the YMCA you saw that commotion?

A. Yes, sir, over in that area.

Q. In the YMCA area?

A. Yes, sir.

Q. Would you take this pointer, please, and step up [fol. 1490] there and estimate from the Lyceum how far it is? Do I understand you have had some naval training?

A. Yes.

Q. Navy training?

A. Yes, sir.

Q. You know how to read maps, don't you?

A. Well, I don't know, it has been a long time. I don't know whether I can read this or not.

Q. Let me help you a little. Always start at zero, and get your first measurement. Put your finger on here and see how far it is to the YMCA. Just use your finger. Look out now you will have it on the floor if you are not careful.

From the monument. Here is the YMCA: Now put that down on the scale and let's check how far it is. Down on this scale.

A. About a hundred and thirty—

The Court: Talk out if you want this in the record.

Q. Did you say about a hundred and thirty feet?

A. Approximately a hundred and thirty feet.

Q. All right, take the stand. Now at that time all you could see at the monument was the commotion and you could not see Walker, is that correct?

A. That is true.

Q. You decided to walk over there?

A. Yes, sir.

[fol. 1491] Q. What size crowd did it look to you, as you were approaching?

A. Maybe 100, 150 people.

Q. And something less than the width of this room before you could see General Walker?

A. No, sir, I said that was how far he was from the monument when I first saw him.

Q. Oh, I see.

A. When I first saw him.

Q. He was that far east of the monument?

A. East, yes, sir.

Q. And what was he doing?

A. First his back was to me and that was when I noticed the white hat, which I had—I had seen him wearing in newsreels and newspaper pictures, and the closer I got, and as I noticed him he turned around and that is when I realized who it was.

Q. What was he doing then?

A. Just talking with the people, apparently now.

Q. What was the size of the group in his immediate presence?

A. This group of 100 to 150 were sort of scattered right at first in that immediate area of the monument. It seemed like, or I won't say it seemed like—after he was there the group of—group sort of came nearer to him. I guess maybe [fol. 1492] 50.

Q. Did they surround him on all sides, or was there most of the group on one side than the other?

A. I don't believe it was a complete surrounding of him, no, sir. I am sure there was ways he could move out if he wanted to.

Q. Was there still sporadic activity up close to the Marshals?

A. Some.

Q. Were all the people back in the area of the monument, or were some to the westward?

A. That would be near the flagpole?

Q. Right. Right, no, strike that, let's start over. Were all the people near the area of the circle, near the monument, or were some of them further to the west beyond the flagpole?

A. Actually, let me say this. When I saw the activity down there at the monument I disregarded what was happening in the circle, or in the part near the Lyceum Building, and I just walked directly down there, and I did not look back up there to see what the action was. Other than when I first started out there was some sporadic, or some

scattered movement, but I mean in other words my attention was drawn to the monument and to that area, and I just stayed with that.

Q. Well, the last activity you remember toward the Ly-
[fol. 1493] ceum was the same type of scattered or sporadic activity?

A. Yes, sir.

The Court: We will stop right there for our recess. We will recess until a quarter until 4:00.

(Short recess was had.)

[fol. 1493a] Q. Now, Mr. Ellis, do I understand that after General Walker got down from his talk on the monument, he walked a short distance toward the flagpole?

A. Yes, sir.

Q. What distance?

A. Is this without or with someone? Now, it would—I would say he, by himself, he walked near the eight or nine feet.

Q. That would be three steps?

A. I don't know—well, now—maybe I'm confused on the footage but—no, it was several steps.

Q. Would you say maybe eight or ten steps?

A. Yes, sir, that would be more like it.

Q. That would be somewhere between twenty-four and thirty feet?

A. All right, sir.

Q. Something approximating the width of this room perhaps?

A. No, sir, I don't believe he went that far before people caught up to him or before this line was formed.

Q. Well, now, did he stride off rapidly—

A. No, sir.

Q. Or did he stroll?

A. He left—when he got down from the monument, he
[fol. 1494] was, it was just a slow type walk. His walk seemed to pick up, the more steps he took.

Q. Did anyone shake hands with him when he first got down off the monument?

A. I don't recall.

Q. Would you say they did or didn't? What is your best recollection?

A. The way I was standing, the crowd sort of went by me to catch up with him.

Q. Now, incidentally, where were you standing?

A. I was in the fourth row. They had made row type of affairs and I was about in the fourth row from him.

Q. In what direction? North, south, east or west?

A. I believe you said the top is north and—

Q. Right.

A. It would be on the south side—not directly south, but over—

Q. Was he making his speech then facing to the south?

A. Facing down the avenue, yes, sir.

Q. Well, that would be to the east, wouldn't it?

A. Well, the University—University Avenue, the one from the bridge, would be coming from the—well—I am confused. In other words, may I see the map?

[fol. 1495] Q. Find your pointer and take a look.

A. Yes, sir, I am looking—I see, I am sorry. I thought it was like this, but—uh-huh.

Let's see, that would be north, south, east, west? Is that the way it is?

Mr. Cravens: Yes.

By Mr. Watts:

Q. North is to the top?

A. Uh-huh. South, east, west?

Mr. Gooch: North is the top.

A. Yes, sir.

By Mr. Watts:

Q. East is to your right.

A. All right. That's fine. That's right. It would be to the east.

Q. He was facing into the east?

A. Yes, sir, and so actually I was on the eastern side also.

Q. And you were in the fourth row facing him?

A. Yes.

Q. Now, where had the minister gotten on the statue? On which side of the statue with respect to where Walker was?

A. Oh, just right at the side of the statue which, I guess, would be on the, still on the eastern side or just right at the very side of the, sort of halfway on and halfway off, right at the corner.

[fol. 1496] Q. Was he on the same side that Walker was on?

A. My best recollection, Mr. Walker was right in the middle of it and the minister, when I noticed him, he was right at the edge of or at the base of the steps.

Q. Was he to Walker's left or right?

A. He was to his left.

Q. All right. Did you see the heavy set Sheriff take the minister down from the statue?

A. No, sir, that was when the people sort of surged forward and I did not see who, what actually happened then. It was—my view was covered for that split moment until I could move out and get a better vantage point.

Q. Was this surge forward that you are talking about a part of this charge you related?

A. You mean the surge for—or going towards the minister?

Q. Right.

A. No, sir.

Q. How long before Walker got down from the monument?

A. My best recollection, the minister was taken away from the immediate area of the monument and after the, you might say that particular area was cleared, that was when Mr. Walker got down.

[fol. 1497] Q. And when Mr. Walker got down, did he go to the north or the south of the monument? Do you know which way now the north of the monument is?

A. He went to the—be the north.

Q. That way is north, right?

A. Right, went to the north.

Q. Would you take your pointer and trace the direction that Mr. Walker went after he got down off the monument?

A. Yes, sir, he stepped down, turned to his north and went, oh, just right into this little area right here (indicating).

Mr. Nuss: Louder, please.

A. Stepped down, which would—and stepped to his north and then back around to his west, or walked west up towards the Lyceum Building.

Q. And do I understand, then, he walked on out ahead all by himself first?

A. Yes, he did.

Q. Without saying anything to anyone?

A. Following the speech, I did not hear him say anything.

Q. Well, you were close enough to where if he had said something—you were right in the fourth row?

A. Yes, sir.

[fol. 1498] Q. If he had have stopped and talked to someone in this area, you would have certainly heard it, wouldn't you?

A. I believe so, yes.

Q. And had somebody at this point said, if they had said, "General, lead us in a charge, will you lead us," you undoubtedly would have heard that, wouldn't you?

A. Well, there was a lot of hollering. I am not sure I would have heard it unless they hollered themselves, I don't know.

Q. Unless who hollered?

A. If anyone hollered.

Q. As I understood you to say, Walker walked off the statue and walked along here all by himself?

A. He did, yes, sir, when he first got down from the statue and walked some steps before he was caught up with.

Q. Perhaps some thirty feet?

A. Yes, sir.

Q. And during that period of time nobody got up close to him and asked him anything, did they?

A. The people, as soon as he—as soon as he got down from the statue and just made maybe three or four steps, they started in behind him.

Q. Uh-huh.

[fol. 1499] A. First one or two men and then the other people followed.

Q. And had he gotten this so-called approximately thirty feet by the time they started catching up with him?

A. They were in the process of catching up to him when he got to that area.

Q. Where was he by the time this 500 people lined up behind him?

Mr. Andress: Beside him.

The Court: Let the witness testify, Mr. Andress, please.

Mr. Andress: I was correcting him.

The Court: Let Mr. Watts take care of it. One at a time.

Mr. Watts: Yes, sir. Did you understand the question?

The Witness: No, sir.

By Mr. Watts:

Q. I say, how far west had he gotten when this so-called 500 people lined up behind him?

A. There were, I would say, 250 or 300, maybe, maybe a little bit more, that listened.

Q. Uh-huh.

A. That when they determined who it was making the speech, they, the crowd, increased.

[fol. 1500] Q. Uh-huh.

A. Then I noticed that the further he walked, there were some people that had not, in this area over here, that had not been to the speech but came across this area and then joined the group that was going up.

Q. Did these people here walk or run?

A. Run.

Q. And what about the ones over here at the YMCA, did they walk or run?

A. I believe they were all trying to catch up with that group.

Q. And with General Walker?

A. Yes, sir.

Q. And as I understand, then, when Walker walked up the first thirty feet, he was relatively by himself?

A. Yes, sir.

Q. And then after he got about thirty feet, the crowd caught up with him?

A. Caught up with him.

Q. Did he wait for them to catch up, or did they just increase their gait and catch him?

A. It is my best recollection he kept walking and they caught up with him.

Q. Now, did you follow with the group?

A. No, sir.

[fol. 1501] Q. Weren't you interested in what Walker was going to do up to that point?

A. Yes, sir, I was interested, but I did not follow them. I stayed over, almost to the same place that I was. However, I moved out to the street and over to the sidewalk and moved up some way near the YMCA Building.

Q. And was that relatively deserted when you got back there after all these people had gone up there?

A. No, but there were still some people along the porch and right near the steps that were not entering into the—

Q. All right. What point were you when you estimated the numbers in this crowd?

A. The first number I estimated as I approached the monument, which was, like I say, I believe it was a couple hundred feet maybe. And then I looked around prior to the speech being made and I saw other people coming in, making the crowd larger.

And then the crowd went forward after the speech.

Q. Did the crowd dissipate any or any of the people listening to his speech scatter before they started toward the monument? I mean toward the Lyceum?

A. Not that I recall.

Q. So, to you, then, as you could see the crowd, rather [fol. 1502] than scattering and dissipating, actually increased?

A. Yes, sir.

Q. As he started walking westward?

A. Yes, sir.

Q. My point is, did I understand you to estimate, in answer to Mr. Gooch's question, that as Walker walked toward the flagpole, there were approximately a thousand people or—as you were, approximately five hundred people? Lined up behind him.

A. I think so—well, now, either 500 with him, near him, or beside of him.

Q. Well, certainly I would say within the confines of the Circle?

A. Yes, sir.

Q. And they were pretty well lined up pretty straight behind him?

A. When they caught up with him, they got either beside him in this long line or in back of him.

Q. Was it a single file, a single rank?

A. The front rank was, but, however, there were other people behind this front rank.

Q. How many deep would you say they were? Two, three?

A. Well, sir, that was—there was a lot of them but I didn't—I really would hate to estimate because I would [fol. 1503] hate to get it wrong.

Q. Now, let's estimate how wide a person would be. There is a foot, there is another five inches. Now, let's get an average person here. There is a foot and there is another ten inches (measuring Mr. Gooch).

So, somewhere in between there, an average citizen would probably be around, we would say, conservatively, eighteen inches, wouldn't they?

A. Yes, sir.

Q. Foot and a half. Take the stand, please.

A. Yes, sir.

Q. So, if there were two hundred people, that would be less than—that would be two-fifths of this crowd—on the front line, that would be 325 feet in width, wouldn't it, or do you know?

A. Well—

Q. Do you want to get your pencil and paper?

A. I wasn't the best in mathematics, so I—

Q. Did you study Liberal Arts?

A. Yes, sir. Very liberal.

Q. All right. Do you want to get your pencil and paper and figure out how wide a company front would be with 200 people in it at a foot and a half apiece.

Mr. Gooch: If the Court please, I submit that's a matter of argument.

[fol. 1504] Mr. Watts: It's not argument.

The Court: It's a matter of mathematics, so I am not going to require the witness to do it. It's a matter of mathematics.

Mr. Watts: That's why I was getting him a pencil.

The Witness: Thank you, sir, I—

By Mr. Watts:

Q. Well, let's break it down to something simple. If there were 200 people in the line and they were a foot and a

half wide, that would be 300 people wouldn't it—as you were, 300 feet.

A. All right.

Q. Now, then, I wish you would outline to use the rate of speed that this 500-man group took toward the Marshals?

A. At the beginning they were slow and the farther they got, they picked up speed.

Q. And did they ever get into a run?

A. Not while I was watching them.

Q. Where were you when you quit watching?

A. In approximately the area near the—near the Y Building but further down near the monument.

Q. Did it appear to you that Walker had command over this group?

A. Sir, I don't know whether he did or not.

[fol. 1505] Q. Did you hear him issue any orders?

A. I wasn't close enough to hear him speak while he was in the crowd. I did not follow him or stay with him where I could listen.

[fol. 1506] Q. Did you hear him confer with a group of about 15 persons who appeared to be riot leaders any time before he started to walk?

A. Before the walk or before the speech?

Q. First, before the walk, immediately before the walk.

A. Not that I recall.

Q. Did you see him confer with 15 people who appeared to be riot leaders before the speech?

A. Well, now, I don't know whether they were riot leaders. Like I said, he was talking to some people before the speech. I don't know whether they were riot leaders or not.

Q. As a newsman would there have been any way you could have told whether they were riot leaders or not?

A. No, sir. They looked like a group of students to me.

Q. Did you see anyone, a tall young man waving a big Confederate flag at that time?

A. I saw several flags. Very possible. I don't know whether it was in that area or not, but I saw several Confederate flags waving—waved that night.

Q. Well, now going back and reconstructing your memory on this, the very best you can, relive this instant when you first saw General Walker, you first saw him standing [fol. 1507] there by the monument, did you see any young man waving a big Confederate flag? Yes or no, or do you know?

A. I can't recall exactly.

Q. Now then, on the monument, back to the speech.

Did you hear General Walker beg the students to cease their violence, and he was met by one massive jeer?

A. I did not.

Q. Would you say that did not happen?

A. I don't know whether it happened or not. I did not personally hear this take place, but I don't know whether it happened or not.

Q. Could there—from where you were could there have been a massive jeer without you hearing it?

A. Well, no, sir, I don't believe that I ever heard any jeer during the speech, before or after.

Q. My question was could there have been a massive jeer during the speech without you hearing it from where you were in the fourth row?

A. I am sure I would have heard it.

Q. All right, and would you say there was not a massive jeer?

A. My best recollection, there was not.

Q. Did you hear General Walker tell the students that, "Violence is not the answer"?

A. I can't recall that, sir.

[fol. 1508] Q. Would you say he did not say that?

A. As I testified, some of these things I took down and some I did not. I did not hear all that was said.

Q. Well, now, in fairness, General Walker could have said, "If there is any blood shed let it be on the hands of the Federal Government. . . ."

A. Yes, sir, I recall that.

Q. " . . . violence is not the answer. Violence was not intended. Your real enemy is that way in Cuba"?

A. I recall some of that but I don't—I don't recall this part about the violence.

Q. Do you recall him saying something about Cuba?

A. Yes, sir.

Q. What did he say?

A. Well, this is in my notes.

Q. All right, give us verbatim what he said?

A. This is not verbatim, but this is as close to what I—I have got, "There is a long route yet to Cuba."

Like I said a while ago, I believe I meant to say, "this," but I have, "to Cuba". —"there".

Like I said, I wrote in the dark and under a bad situation.

Q. But you wrote down there everything that you could under the circumstances that impressed you as being significant?

[fol. 1509] A. Yes, sir.

Q. And did you hear Governor (sic) Walker say, "Governor Barnett has betrayed the people of Mississippi?"

The Court: He means General Walker.

Q. Excuse me, I am sorry. Did Governor (sic) Walker say, "Governor Barnett has betrayed the people of Mississippi?"

A. I don't recall that.

Q. Would you say he did or didn't say that?

A. I did not hear him say that, but I am not saying he didn't because I don't know.

Like I said, I tried to write down what I could, and I might have missed that while I was writing it down.

Q. Did he say, "Don't let up now you may lose this battle but you will have been heard"?

A. I don't recall that.

Q. Did he say, "This is a dangerous situation"?

A. I don't recall that.

Q. Did he say, "You must be prepared for possible death?" Now that would have been rather a significant and challenging statement.

A. Yes, sir, it would, but I don't recall that.

Q. Did he say, "If you are not, go home now"?

A. I don't recall it.

Q. Did you hear any cheers?

[fol. 1510] A. Yes.

Q. Was it apparent to you that Walker had complete command over the group?

A. I am not sure what your definition of "command" is.

Q. By your definition.

A. My definition of command, where someone could say —tell a group of several, or a lot of people to do something, and they would listen to him. Is that—are the—or they would do what he said.

Q. Well that is a pretty good definition. Did you think he had such command over that group that they would do what he said?

A. They were being very respectful to him. I don't—if I—if he had said something, tell them to go on or something, what they were doing, I believe they would have listened to him.

Q. But he didn't tell them to go on, did he?

A. Well, now—

Q. Did you hear him give any commands of any kind?

A. If I can refer to my notes?

Q. All right, refer to your notes, please, sir, and if you find any command there let me know.

A. I believe when he got to the point, "There is no stopping point, you can continue," I consider that a command. "You can continue."

[fol. 1511] Q. Uh-huh. All right, that is the nearest, by your conception, that he got to a command?

A. Well, I don't really consider that a command, but when he said, "You have a right to protest," I think it was more of a statement, but I believe when he said, "You can continue," I consider that a command.

Q. He didn't say anything like, "Follow me, let's charge," or anything like that?

A. I didn't hear that.

Q. Did he or did he not use the word, "charge", anywhere?

A. I don't—I don't recall the word charge. I don't know that he did not say it but—

Q. Do you know Mr. John Edmond King, the gentleman that testified just before you?

A. With the radio station?

Q. Radio station, yes, sir.

A. Yes, sir.

Q. You have discussed this matter with him, haven't you?

A. When you say, "Do I know him . . ." the only time that I met him was at Oxford. He and I both testified before the Grand Jury. I talked to him then and this is the first time I have seen him since that time.

Q. Well, you visited with him in Oxford, didn't you? [fol. 1512] A. Yes, sir, just a short period of time because I believe he came to town and testified and left. I don't believe we talked any long period of time.

And this morning is the first time I have seen him since I have been here.

Q. Where are you both staying?

A. I don't know where he is staying but I am staying at the Worth.

Q. Did you visit with him out in the hall? Didn't I see you visiting with him out in the hall?

A. Just spoke to him.

Q. Did you talk with him about the fact that your notes were almost verbatim with his, wherein it says, "There is no stopping place, continue"?

A. We did not go over each others' notes together, if that is what you are asking, no, sir.

I wasn't sure what he had in his notes, or he in mine.

Q. Then if the notes are similar it is certainly not any result of any coordination between you?

A. No, sir, it is certainly not.

Q. What is your newspaper?

A. I am not with a newspaper now.

Q. What was it?

A. The Nashville Banner.

[fol. 1513] Q. Did you have access to a copy of that Nashville Banner?

A. Sir.

Q. Do you have a copy or access to a copy of the Nashville Banner about the time the riot took place?

A. I believe I could.

Q. Would you produce it, sir?

A. I don't have it with me. I have a copy at—

Mr. Watts: Do you have a copy of it, Mr. Gooch?

Mr. Gooch: Yes, sir. It is not the AP story, if that is what you want (producing newspaper).

Mr. Watts: Might I have just a minute to have a look at this, please, sir.

(Sotto voce discussion of attorneys not audible to court reporter.)

Mr. Watts: If Your Honor please, I would like to mark as an exhibit on that this part marked in red. That is what I am offering in evidence.

The Court: All right, you will have to mark it.

Mr. Watts: I will have the reporter circle it. Mr. Reporter, will you please encircle this area right here, and mark that as an exhibit. Better circle it with the pen.

(Thereupon, Plaintiff's Exhibit No. 22, was marked for identification.)

[fol. 1514] Mr. Gooch: Are you going to introduce the date-line?

Mr. Watts: Yes, or why don't we just stipulate to it.

Mr. Gooch: Well, I think the stipulation is that is October 1st.

Mr. Watts: October 1, 1962.

Mr. Gooch: It is an article without any credit to any news release.

Mr. Watts: We have stipulated, as I understand, that without the Nashville Banner giving any specific credit to AP, it has this language, which it is agreed, from the AP report?

Mr. Gooch: No, I said it just had some of the same language that was in the report.

Mr. Watts: This same language.

Mr. Gooch: It does not—the article itself does not give credit to AP, and I told you it had some of the same language that was in some of the AP stories.

Mr. Watts: And I will now offer in evidence this same material that is in some of the AP stories.

The Court: That will be out of Plaintiff's Exhibit 22.

Mr. Watts: Out of Plaintiff's Exhibit 22. Has a red circle.

[fol. 1515]

EXCERPT OF PLAINTIFF'S EXHIBIT NO. 22 READ INTO RECORD

"Dispatches from Oxford, Mississippi, said Walker sought to lead a charge by rioters, and quotes him to saying to students, 'If you can't win go on, don't stay at the University, but let's not quit, we can win.'"

Now as I understand, you did not hear that precise language that you have any recollection of, did you?

A. No, I did not.

Mr. Watts: That is all.

Mr. Gooch: We tender in evidence the notes taken and testified to by the witness.

Mr. Andress: I think that we can offer them as part of the cross examination, but we don't believe they can offer them on direct. We object to it.

Mr. Gooch: All right.

The Court: Are you through with this witness?

Mr. Gooch: I have no more questions.

The Court: You may be excused.

* * *

Mr. Gooch: We offer at this time the deposition taken in the Atlanta case by—well, I don't know who took it. I think Mr. Smith.

Mr. Watts: A reporter. And we don't care. It is a legitimate deposition.

Mr. Gooch: And the deposition is of William W. Brit-
[fol. 1516] tingham.

Mr. Watts: Is the Reverend Duncan Gray's deposition in that same deposition, Mr. Gooch?

Mr. Gooch: No, sir. Brittingham, Buckley and Tatum, in this volume.

Mr. Andress: Where was this taken?

Mr. Gooch: I don't know. I wasn't there.

Mr. Watts: At Oxford.

Mr. Gooch: It shows appearance of Watts, Smith, Gambrell, and Thomas.

Mr. Watts: I have found it.

Mr. Gooch: Taken by Mr. Gambrell, I believe, in the Atlanta Case.

Mr. Watts: Yes, sir, and myself.

Mr. Gooch: All right. Beginning at Page 3.

* * *

Q. Would you please state your name?
A. William W. Brittingham.
Q. What is your age?
A. I am 21.
Q. And where are you from?
A. Lewes, Delaware.
Q. Are you in school at this time?
A. Yes, sir.
Q. Where?
[fol. 1517] A. At the University of Mississippi.
Q. How long have you been in the University of Mississippi?
A. This is my second year.
Q. Are you a sophomore?
A. No, sir, I am a Junior. I transferred from Jr. College.

* * *

Mr. Gooch: That is through line—about 4, on Page 4. Skipping the preliminaries, the 5th question on Page 4.

* * *

Q. You are familiar with that section of the campus known as the circle?

A. Yes, sir.

Q. With the Confederate monument at the east end and the Lyceum Building at the west end?

A. Yes, sir

Q. Mr. Brittingham, on the afternoon or evening of September 30, 1962, were you on the University of Mississippi campus?

A. Yes, sir.

Q. What time did you arrive on the University campus?

A. I arrived at approximately suppertime.

Q. Where had you been?

[fol. 1518] A. I had been to Jackson to the football game.

Q. When you arrived back on the campus at approximately suppertime where did you go first?

A. First I went to my room then I unpacked, changed clothes and a group of us went to the Lyceum.

Q. When you got to the Lyceum just describe what you saw and what was going on there.

A. When I arrived at the Lyceum the Marshals had surrounded the Lyceum Building and army trucks were parked in front of the Lyceum Building and there was quite a crowd down in that area there and there was a lot of name calling and cheers and yells of different types and remarks being made and Mississippi State Highway Patrol was holding the crowd back from the Marshals, not a great distance, but just about the width of the street there in front of the Lyceum, and cigarette butts were starting to be flipped on top of the trucks to try to set the canvas top that was on the trucks afire, and there was a bunch of students that were trying to get up close to let the air out of the tires and tried to do as much damage to the army trucks as they could. Then missiles or objects were being thrown by them at that time, and it was getting dark and these objects were starting to be thrown in much larger numbers.

Q. Who were they thrown at?

A. They were throwing at the Marshals and I'll tell you [fol. 1519] those Marshals took quite a beating, really, and then the crowd seemed to be getting a little more wild and a little more aroused as objects were being thrown in increasing numbers and the temper of the crowd was getting more violent. They were particularly aroused at the Marshals and the temper of that crowd reached its climax, when the Marshals fired the first tear gas into the crowd and the crowd receded to the east end of the circle down by the statue, and in the surrounding area.

[fol. 1520] Q. After that happened, just briefly tell us what occurred, then, up until the time you saw General Walker?

A. There were small groups, maybe just a handful of people who would sporadically surge up towards the Marshals and throw objects, bricks and rocks, stones and things like that, there was not a formal group, not organized, but they would just run up, a certain group, and throw and then run back.

That kept on for quite a little time. Along about then I just lost track of time there, but it went on, just kept up and the next thing was when General Walker stepped on the monument.

Q. Had you heard anything to the effect that he was on the campus before he stepped up on that marker, on the monument?

A. Yes, sir, I heard students say, "General Walker is here." They wanted to hear him then and they started crowding around the monument.

Q. How close did you get to the General when he was on the monument?

A. Well, you mean in feet?

Q. Yes.

A. Well, I would say in forty feet. I was in the area of the fountain east of the monument and on the left side of University Avenue. Do you have a map?

[fol. 1521] Q. Yes, here is a map.

A. Thank you, now I was in the area here of which we could call "Circle 2", now the monument is up here at the east end of it.

Q. At the east end of the Circle?

A. Yes, sir.

Q. Approximately where would the fountain be?

A. In this area right here.

Q. Now, you have pointed out by a dot down the street known as University Avenue heading toward the bridge and across that street where the mob was gathered?

A. Yes, sir.

Q. Would you estimate how far that was, approximately, in feet? Would you say it was forty feet?

A. Yes, sir.

Q. Now, somewhere in that neighborhood, is that right?

A. Yes, sir.

Q. Could you hear the General when he was making his speech where you could understand him?

A. No, sir, I didn't hear it clearly due to the fact that there was approximately three or four hundred students in that immediate area. I couldn't say how many or how long they had been there. But they were in that area and in the surrounding area. There was a lots of times that [fol. 1522] people were talking and yelling and laughing and some of them were cussing and coming down into the area on the monument and they were still riled up about the whole situation and because of the noise and confusion, all of General Walker's speech was not clear to me.

Q. You didn't hear and understand everything that was said?

A. No, sir.

Q. Do you recall anything that you heard him say?

A. Yes.

Q. What was it?

A. He made the statement that they had a constitutional right to a protest, that was when I came in from the crowd

and I stood and listened and that is when he said the protest of these students would be heard all over the world or that what they said here tonight would be heard all over the world, now that last is not verbatim. At one time I heard him say something about Cuba, which wasn't clear to me, I just heard him use the word "Cuba".

Q. You didn't understand what else he said about Cuba, if anything?

A. No, it wasn't clear at all and I don't know what it was all about. I heard the term used but at the time I didn't know what he was talking about. When that was going on, I was not close enough to hear what was being said. I did [fol. 1523] not see or hear anything about that and I didn't think anything about that at the time.

Q. All you know about that is hearsay?

A. Yes, sir, just what I heard.

Q. Was anything else that you started to say?

A. No, except that was quite a while ago and I am trying to think of exactly what happened and what I saw and heard.

Q. Now, was there anything else that you heard or observed there right at that time?

A. Yes, before General Walker had been seen by the crowd and had stepped up on the monument, a photographer was getting up the side he was on, that is, just a few minutes later, and then a reporter, but I think he was a private reporter, possibly might have been working with the photographer, and they had come off of field work and the crowd just tore up his equipment there where they had thrown a road-block down below the new Science Building to keep people from coming in.

Q. Did you see any missiles or weapons of any kind in the hands of the people there that night?

A. Yes, sir. Such as rocks and bricks?

Q. Yes. Yes, and bottles, pipes or anything they could use for a weapon?

A. Students had rocks, broken bottles and anything they [fol. 1524] could pick up and they really were worked up and they got anything that they could throw and would charge down towards the Marshals and throw them at them.

Q. What about bricks?

A. Oh, yes, bricks and rocks, lots of them.

Q. Do you know where the bricks came from?

A. Yes, sir, most of them came from the new Science Building they were building there.

Q. Where was the Science Building relative to the monument, how far?

A. It was, I don't know the feet that it was, but I do know where it was and I would say it would be around ninety or maybe 100 feet. It might be more or it might be less.

Q. How did they get those bricks from the building up into the Circle for use?

A. Well, I saw one student who had a wheelbarrow and I saw another that had acquired burlap bags from some place and would load these up and pick them up and heave them to students and go back and load them up again.

Q. What were they doing with these bricks and rocks and bottles?

A. They were making an assault on these Federal Marshals surrounding the Lyceum.

Q. How were they assaulting them by throwing these [fol. 1525] missiles at them?

A. Yes, sir, they would throw anything they could get at them.

Q. Now, the time that General Walker was making his speech, state whether or not people were around there with those things in their hands?

Mr. Watts: Objected to as leading.

The Court: Overruled.

Q. Did you observe anything in the hands of any of these people at the time General Walker was making his speech?

A. Yes, sir, some people had objects in their hands, but I would say the majority did not.

Q. What objects was it that they would have?

A. Bricks and rocks.

Q. Tell us just what happened immediately after General Walker got through with his speech.

A. Well, he came down off of the statue and headed toward the Lyceum and on out, not on the sidewalk but on the grass, and the students then began to have a more sense of direction or feeling of security or to think as a unit of one and—

Mr. Watts: If Your Honor please, I believe I must object to this. This lad is trying to tell what all these students were thinking.

[fol. 1526] The Court: Sustained.

Mr. Watts: That's the type of—

The Court: That part of the answer in which he attempts to interpret the feeling of the crowd. I will permit the balance of the answer.

Mr. Watts: And they started, I think it starts again.

A. —and they started off toward the Lyceum and the crowd generally picked up. I did not see General Walker when he reached the flagpole, I didn't see him any more.

Q. Where was he the last time you saw him?

A. He was headed toward the Lyceum in the front of the crowd with the students.

[fol. 1527] A. Yes, sir, he was right up front with them.

Q. How far had he gone from the monument, I believe you said that was the last you saw of him, now where was that relative to the flagpole?

A. I would say he was about even with the flagpole but if he went to the back of the flagpole, I could not have seen him.

Q. But you saw him about the time he reached the flagpole but you didn't see him afterwards?

A. Yes, sir, that is correct, I didn't.

Mr. Gooch: There was an objection there to leading.

Q. State whether or not you saw him relative to the flagpole?

Mr. Gooch: Then some more objections.

A. He was approaching the flagpole directly but in the same direction he had been going when he left the statue.

Q. Where was he relative to the front of the crowd when you saw him last?

A. He was in or with the front of the crowd.

Q. Do you know whether anyone had ahold of his arms?

A. No, sir, I do not.

Q. You couldn't tell that?

A. No, sir.

Q. What were you doing?

A. What was I doing?

[fol. 1528] Q. Yes.

A. The same thing every other student was doing.

Q. Did you have rocks or bricks in your hand?

A. Yes, sir.

Q. Had you had them in your hand previously that night?

A. You mean before?

Q. Yes.

A. Yes.

Q. What did you do with them?

A. I threw them at the Marshals.

Mr. Watts: Cross examination. Go ahead and read the answers, if you will.

By Mr. Watts:

Q. What is the length of the regular football field?

A. About 100 yards.

Q. Could you throw a football 100 yards?

A. It could be done.

Q. All right. By the same scale, how far could you throw a rock?

A. Well, now first that depends on the size of the rock.

Q. Well the size that the kids were throwing that night at the Marshals?

A. Well, first I think I could state the distance that you [fol. 1529] could throw a rock as compared with a soft ball. I could throw a soft ball, I'd say 50 yards or more, and I think you could throw a rock that far.

Q. That is about half the distance of a football field?

A. Yes, sir.

Q. Do you participate in athletics at the University of Mississippi?

A. No, but I played ball in high school.

Q. Football?

A. Basketball and baseball.

Q. Did you see General Walker with any rocks in his hands?

A. No, sir, I did not.

Q. Now as I understand, when he was speaking, you were in the area of the fountain there in the circle which is somewhere in the neighborhood of 50 feet south of the monument?

A. Yes, sir, I never measured the distance but that sounds about right.

Q. Well, from that point, were there people between you and them?

A. Yes, sir.

Q. Was there a substantial crowd?

A. Yes, sir.

[fol. 1530] Q. Could you estimate the size of that crowd?

A. Oh, I would say around 300 or 400.

Q. That is the area immediately around the monument?

A. Yes, sir.

Q. Well do you know how many was in the area surrounding, the surrounding area, in other words?

A. No, sir.

Q. When General Walker left the statue, did he proceed north or south of the statue or did he proceed west?

A. Well, he stepped down off of the monument and at the time that he stepped down, why, he passed on the left side, which would be the south side. Now I could be mistaken but he passed on this side, I can't be sure about that.

Q. You mean on the north side?

A. Yes, sir, I believe so but I could be mistaken. There was so much confusion going on.

Q. Were there quite a few students or people of some kind close to him and around him?

A. Oh, yes.

Q. When he joined the mob or crowd, as you said, after he got down off of the monument, did you see him again?

A. Yes, sir, when he reached the other side, he was headed towards the Lyceum Building.

Q. In what direction was he headed then?

A. He was headed towards the Lyceum Building almost [fol. 1531] in the direction of this stretch of road right here.

Q. According to this map, that would be slightly to the northwest, would it not?

A. Yes, sir. It was not a direct line between the monument and the Lyceum Building but he was headed in that direction.

Q. Now what was the form of that crowd as it moved forward? Were they drawn up in a formation with a straight line across the front or was it just ragged and sporadic movements?

A. They were not lined up, they didn't form any line or anything like that. They were just grouped up, quite a number would be in each group. They were headed towards the Lyceum Building and all the time they were going, there was more people coming down University Avenue and getting into the crowd, the general movement was toward the Lyceum.

Q. How close were you to the front of the crowd?

A. Oh, approximately the same distance I was when it began.

Q. You mean when what began?

A. Well, when General Walker was on the monument, I was about as close to the front of the crowd as I was to him there on the monument.

Q. That was 40 or 50 feet?

A. Yes, sir.

[fol. 1532] Q. You were about that far from him?

A. Yes, sir, maybe a little more after he left the monument because there were a lot of people and I wasn't in any rush to get in there and mix up with that crowd of people. There were a lot of people passed me, they started off walking but they picked up speed.

Q. Did you go up to the flagpole?

A. No, sir, I didn't, it was just one or two feet, about then was when the Marshals started firing tear gas.

Q. Where was he with respect to the flagpole when you lost sight of him?

A. Headed in the direction of the Lyceum.

Q. But was he east or west of the flagpole?

A. I don't know whether he passed this sidewalk or not. I lost track of him in the crowd.

There was just a lot of people moving forward and were constantly adding to it and I just lost sight of him. In that crowd it was hard not to lose sight of somebody.

Q. Well, about how far north of the east-west sidewalk was he?

A. Oh, that would be hard to say there again because there were so many people moving back and forth, you couldn't say.

Q. Compared to the distance you were from him, was he as far north as you were behind him?

[fol. 1533] A. Yes, he could have been.

Q. You never did see him close to the north-south sidewalk that runs past the flagpole, did you?

A. No, sir, but the crowd there was pretty compact, it was a big crowd and they crossed the sidewalk but I didn't see General Walker cross it, no, sir.

Mr. Gooch: Are you offering the next?

Mr. Watts: I think the rest we will skip.

Mr. Gooch: I will offer it if you don't.

Mr. Watts: It's self-serving, if Your Honor please. Let's check it with the Court. It's entirely irrelevant and it's discovery matter.

The Court: Let's see now, what line are we talking about?

(Sotto voce conference at the bench.)

Mr. Gooch: The Court is omitting from the bottom question on Page 18.

Mr. Watts: I think that's the rest of the deposition. The last question and answer doesn't quite deal with that but I don't care about it unless you want it in.

Well, let's ask that last question on Page 20.

• • •

Q. Did you go to high school in Delaware?

A. Yes, sir.

[fol. 1534] Mr. Watts: That's all.

Mr. Gooch: Judge, I am out of witnesses. Could we adjourn a little early this afternoon?

The Court: All right. Ladies and Gentlemen, we have finished a little sooner with the available witnesses than we had anticipated so we will go ahead and recess this afternoon and start at 9:00 o'clock tomorrow morning.

(Thereupon, at 4:25 p.m., an adjournment was taken until the following morning, Wednesday, June 17, 1964, at 9:00 o'clock, a.m.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS, PETITIONER,

vs.

EDWIN A. WALKER.

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[fol. 1537] PROCEEDINGS

REVEREND DUNCAN GRAY, JR. called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name.
A. Reverend Duncan Gray, Jr.
Q. Where do you live, Reverend?
A. Oxford, Mississippi.
Q. How long have you lived in Oxford?
A. Since September 1957.
Q. What is your vocation or occupation, please?
A. I am a priest in the Episcopal Church, presently serving as Rector of St. Peters Episcopal Church in Oxford.
Q. How old a man are you, Reverend?
A. Thirty-eight.
Q. Had you lived in Oxford before the time that you mentioned that you went there as a priest?
A. No, sir, I had never lived there before.
Q. Of what state are you a native of?
A. Mississippi.
Q. Where were you raised?
A. I was borned in Camden, Mississippi, raised there and at Columbus and Greenwood, Mississippi, and gradu-
[fol. 1538] ated from high school at Jackson, Mississippi.
Q. Who is your father?
A. Bishop Duncan M. Gray, Episcopal Bishop of the Diocese of Mississippi.
Q. What is your educational background, Reverend?
A. As I said, I graduated from high school at Central High in Jackson, Mississippi. I received a Bachelor of Engineering Degree in Electrical Engineering at Tulane University in New Orleans. And then later I went to

Seminary at the School of Theology, the University of the South, Sewanee, Tennessee; received a BD Degree from there.

Q. BD, is that—a—Bachelor of—

A. Bachelor of Divinity.

Q. Now directing your attention to September 30, 1962, at Oxford, Mississippi, did you have occasion to go on the campus of Ole Miss University sometime on the 30th of September, 1962?

A. Yes, sir, I did, on two occasions.

Q. When was the first occasion, Reverend?

A. The first was around 6:00 p.m., when I received a telephone call, long distance call—

Q. I don't believe you can testify as to any long distance call.

Mr. Watts: That is all right, sir. He may.

Q. All right, go ahead.

[fol. 1539] A. As to the occasion of my going there, the mother of an Ole Miss coed had called. She had been hearing news on radio and television, and asked that I go and get her daughter off the campus and have her spend the night with me.

I went to the campus to Ward Hall, where the coed was living. She was not ready at the time and I went up to the Lyceum Building for some 15 minutes around 6:00—between 6:00 and 6:15.

Q. What did you observe at that time, Reverend?

A. Well, at that time the United States Marshals were already ringing the Lyceum Building, the Mississippi Highway Patrolmen, some of them were standing between the Marshals and the crowd that had gathered there. A crowd of predominantly students, as far as I could tell.

The crowd was out on the grass in the portion that is known as the circle. The Highway Patrolmen were in the street there between the crowd and the Lyceum, at that point.

Q. How long did you remain there on that trip, Reverend?

A. I would say about 15 minutes, before I returned to the dormitory and picked up the coed, who by then was ready, and took her back to my house for the evening.

Q. Now, did you later return to the campus on that date? [fol. 1540] A. Yes, sir, I was back on campus—I think—I crossed the east—the east bridge about 7:50 p.m., went to the home of a faculty member and watched the President's speech on television which I believe began at 8:00 o'clock.

Q. All right. Now, were you on the campus when the tear gas was fired?

A. Well, this home of the faculty member is actually on the campus but I was not down in the portion of the campus where the tear gas was fired, no, sir.

Q. Excuse me, were you out in the area of the circle when the tear gas was fired?

A. No, sir.

Q. About what time did you get on the campus, or get on the circle, if you did get on the circle that evening?

A. It must have been around 8:25, I would estimate, because it certainly was after the President's speech was completed, and it was a few minutes after that before I left the home.

I imagine about 8:25 when I got to the circle.

Q. For what purpose did you go to the circle, Reverend?

A. We had heard that on the—on the radio and television that violence had broken out on the campus. The Reverend Wofford Smith, assistant chaplain at the University and I were together, and we went down to the circle [fol. 1541] to see if we could go and do anything to calm the students down, or to get them to go back to their dormitories.

Q. All right. Now will you give us, as best you can, what you did or what you tried to do in that endeavor.

A. Well, when we first reached the circle the tear gas was fairly heavy at that point, and so Mr. Smith and I

stepped into the "Y" Building first, the YMCA Building on the campus, and which is just on the edge of the circle. We stayed in there a very few minutes, and then came out and, as we did, there was a car moving down University Circle toward University Avenue, going away from the Lyceum. It had what appeared to be a deputy sheriff's insignia on it, and a Harrison County, Mississippi license plate. The car was moving rather slowly because of the people in the street, and we walked up to the car and Mr. Smith asked the man if he were not a law enforcement officer and he said he sure was.

And we asked him if he would help us to try to calm down the students and bring an end to what was going on, and try and bring some order out of the situation.

He said there was nothing he could do, and he drove on.

Q. And then what did you do?

A. After this we moved out into the circle, the part of the circle down toward the Y Building, and began to stop students who were coming down there carrying bricks and [fol. 1542] bottles and pieces of pipe and sticks and whatever. We would stop the students and ask them to give us their weapons, and ask them to return to their dormitories; try to explain to them that what they were doing was wrong, that they were hurting themselves and the University and the community.

Q. Did you seek to enlist the aid of anybody else in that crusade that night, Reverend?

A. Yes, sir, I asked General Edwin Walker to help us.

Q. Where did you first see General Edwin Walker?

A. I first saw him at a point somewhere between the Confederate monument and flagpole.

The Confederate monument is at the east end of the circle away from the Lyceum.

General Walker was there in the circle with a group of men, none of whom appeared to be students. They appeared to be 10 or 12, maybe 15, men with him.

Q. All right. Now had you known prior to that time, or had you heard that General Walker was on the campus?

A. Well, we had heard during the day that he was in Oxford. I understood that he was in the town. Just prior to seeing him I had heard a group of students saying, "Now we have a leader, now we have a leader."

And I had assumed that this was General Walker, although I had not heard his name mentioned.

[fol. 1543] Q. Had you known or heard of General Walker prior to this time?

A. Yes, sir, I had, of course, seen him on television, seen news photographs of him and had read about him certainly in the newspapers.

Q. All right. Now would you give us the gist of the conversation that you might have had with General Walker when you first encountered him there on the campus there that evening?

A. Well, when I first saw him, I walked up to him and asked him to help us try and calm the students down and to put an end to the violence, to ask the students to go back to their dormitories.

Q. Reverend, why did you think that—why did you seek out General Walker for that purpose?

A. Because I knew that he was something of a hero to the students that they identified him with their cause and that I thought a word from him would have a great deal of influence in bringing a stop to what was going on or, at least, moderating it to a considerable extent.

I felt that he could have great influence with many of the students in getting them to call it off and go home.

Q. All right. Now give us the gist of your conversation with General Walker there on that first encounter?

[fol. 1544] A. Well, when I first asked him to speak to the students and to help us bring the rioting to a halt, he said that he was not interested in putting a stop to what was going on.

He said he was there only as an observer and he, also, said that the students have every right to protest.

And I pled with him some more, pointing out to him just what I have said, that I thought he could have a great deal of influence with the students because they did identify him with their cause and he was something of a hero to them. And again he refused. He said he was not interested in stopping it; he was there only as an observer.

I believe at one point he said, "I couldn't stop it if I wanted to but I don't want to."

Q. Now prior to that time if I may interrupt, you stated that you had approached groups that were carrying these rocks, sticks and bottles, et cetera.

Had you had any measure of success in getting them to drop those articles and some of them leave?

A. Yes, we had had success with a great many of them as far as giving up their weapons were concerned.

The general pattern was, so many of these students seemed to be in something of a daze. We would stop them, [fol. 1545] or I would stop them—Mr. Smith was doing the same thing but we were not all in the same area—asked them for their weapons. Many times they would simply hand them over to us and we would throw them out of the way in the direction of the "Y" Building.

Other times they would simply drop them and respond and cooperate, for the most part, rather well at this point.

Now how many of them actually went back to their dormitories, I don't know, sir, but they did give up their weapons, most of them.

Now there were some who did not. I remember one student in particular with a shovel, he refused to and threatened me with a shovel.

At that point, there were a few in the crowd who did not appear to me to be students. Some of them were young, seemed to be perhaps teen-agers but not dressed as students, and I am certain they are not students. Now these did not respond. They would simply brush on by and we had very little luck with them.

But we did have any number of students give us their weapons or drop them when we asked them to.

Q. All right. Now you have detailed as best you can your first encounter with General Walker. Did you thereafter have an encounter with General Walker?

A. Yes, sir. I didn't finish the first encounter.

[fol. 1546] Q. I'm sorry. Go ahead, sir.

A. After I had asked him twice, I believe it was, to help, he finally asked me, "Who are you?"

"What are you doing out here anyway?"

Q. Yes, sir?

A. And I told him that I—I gave him my name and I said that I was Rector of the local Episcopal Church; that this was my home, my community; that I was deeply concerned about the damage being done to it and I was out there to put a stop to it, do anything I could to halt the violence and to get as many students as I could to go back to their dormitories.

And at that point he said, "You are the kind of an Episcopal minister that makes me ashamed to be an Episcopalian."

Q. All right. Now thereafter—did you finish?

A. Well, as far as I can tell. As I can recall, that was the last direct exchange with General Walker. I had some further exchanges with the members of the group that was with him at that time.

General Walker walked away soon after that and I started to follow him but several members of the group stopped me and began to argue with me and say that the students had a right to protest; that the Federal Government was violating their liberties and their rights.

[fol. 1547] And there was one man in particular who seemed to be talking more than the others, a young man, perhaps around 30 years of age, dressed in a suit and tie but he had his tie pulled down at this point.

I remember his making reference to his courses in Constitutional Law and to Judicial Procedures and I assumed at the point that he was a lawyer—I certainly couldn't be sure of that, and by the time this conversation had ended, General Walker had disappeared, or at least to my sight, in the direction of the Confederate monument.

Q. All right. Now, did you thereafter have an encounter with General Walker?

A. Yes, sir, I had gone back to the "Y" Building, standing at the top of the step, when my attention was directed to a crowd that was gathering at the Confederate monument, just to the east of the Confederate monument, and looking in that direction I saw a man who appeared to be General Walker standing at the base of the monument or on the base of the monument, at least at a point where he could be seen above the crowd and I went back—I went to the monument at that point and I think I got there just as he began his speech or address to the students.

Q. Do you recall anything that he might have said in that address, Reverend?

A. The first thing I heard him say was, "I want to con- [fol. 1548] gratulate you on what you are doing here this evening."

He went on to say, "You have every right to protest." He said, "Stand fast, firm. There are thousands behind you. You will win in the end."

He continued with criticism of the Federal Authorities. I remember particularly—

Mr. Andress: We don't have any objection to repeating what was said but when he says, "criticism, of the Federal Authorities," I think that's a conclusion.

The Court: Do you remember what he said? If you do, state that as near as you can remember?

A. I beg your pardon. Yes, sir.

He said something about, "This is a long way around to Cuba;" that the Marshals and troops should be in Cuba and not where they were.

I was moving through the crowd at this point, toward the monument. But this was the substance or the essence of what he was saying at that point.

Now once I did get to the monument, the base of the monument, I was much closer to him. I remember very clearly another thing he said. He said, "I have just come

from a conference with the representative of your Governor and he said to tell you that you had been sold out, sold out by the man who led the Marshals onto the campus."

At this point there were cries from the crowd, "Who? [fol. 1549] Who?" And one or two voices said, "The Chancellor, the Chancellor."

General Walker paused at some length at this point and it was my impression that he bent over and spoke to somebody standing beside him but when he did raise up again, he said, "The man who sold you out was Col. Birdsong."

Q. All right.

A. By this time I was on the base of the monument, very close to General Walker, addressing him and asking him once again to try and quiet the students, to ask them to stop the rioting and what they were doing and to go back to their dormitories.

And he turned and looked at me and said to the crowd, "Here is an Episcopal minister that makes me ashamed to be an Episcopalian."

And I started to speak to the crowd at this point. I was at the base of the mon—at the base of the monument, started to speak to the crowd myself but was pulled down before I had spoken more than a very few words, pulled down by members of the crowd.

I hit the ground on one knee and was then picked up and pushed and shoved and moved through the crowd and out to the edge of it.

By the time I got to the edge of the crowd, I felt that those who were with me then who were pulling me along [fol. 1550] at that point were not hostile but friendly, were trying to protect me.

Q. Then where did you go?

A. Well, at this point, I became aware, first of all, of a man whom I had seen previously with General Walker on our first encounter. A man who appeared to be a law enforcement officer who was one of the ones pulling me away from the crowd at that point, and he spoke to me, identified

himself as a law enforcement officer, and he said, "I am a law enforcement officer and I can't do anything about this. You'd better get on home or you are going to get hurt."

It was, also, at this time that a man came up to me and shook my hand and said that he was a Methodist minister. He said, "I want to thank you for what you are trying to do here tonight."

After this, I moved back toward the "Y", back into the steps at the southern end of the "Y".

Just about the time I got there, two or—two other students, two students—two people who appeared to be students came up to me and asked me to go back to address the crowd again at the monument. They said that they thought the crowd would listen to me.

So I turned around to go back to the monument but by the time we got there, the crowd was breaking up and moving toward the Lyceum, moving around both sides of [fol. 1551] the monument and moving in a general movement of what you might call a charge toward the Lyceum.

Q. Were you able to discern whether or not, who was leading that charge?

A. No, sir, I was not able to tell.

Mr. Gooch: I believe that—

A. I moved into the circle itself, trying to talk to the students that I could reach. The crowd was much, much bigger at this point and I would stop as many as I could and try and ask them to stop and to go back but at this point I had very little success.

The few that would stop at all would stop to argue and curse and many of them with tears in their eyes, were comparing themselves to the Hungarian Freedom Fighters and, in general, though, there was—we had—I had very little luck at this point.

Q. That was now after you had left the monument?

A. Yes, sir, it was after the crowd had moved away from the monument and started toward the Lyceum, into the circle.

Q. I see.

A. And I had moved out into the circle and was giving ground with the crowd, going—trying to stop as many as I could and turn them back. I gave ground, I suppose, and ended up as close as a point about midway between the flag-
[fol. 1552] pole and Lyceum, doing this same sort of thing, until the tear gas got so bad that I had to come back to the "Y".

Q. That was my next question. As that crowd moved toward the Lyceum Building, what, if anything, happened in the way of a tear gas burst?

A. Well, of course, once they got in the vicinity of the Lyceum, close enough to it, well, tear gas was fired in great quantities. That was the reason finally that I turned and came back myself: The tear gas got too heavy for any of us to take it.

[fol. 1553] Q. How long did you remain on the campus, Reverend?

A. The next time—in fact, the only time after the President's speech that I saw a clock and remember registering what time it was was when I had gone back in the Y Building at about five minutes after 10:00. I made a telephone call to my home at that point. And I know I was standing in front of Dr. Willis' house at 11:15 p. m. I would imagine I left the Circle a little before 11:00 o'clock, perhaps a quarter of 11:00, and left the campus itself just after that.

Q. Did you see General Walker anywhere after you had had this meeting with him on the monument?

A. No, sir, I didn't see him again.

Mr. Gooch: Pass the witness.

Cross examination.

By Mr. Watts:

Q. Rev. Gray, will you please pick up the pointer there and walk over to this chart. I am sure you probably will recognize that chart, but just to start you off, the top of

the chart is north, the right is to the east, and of course the left is the west. Here is the so-called Circle, the monument, the Lyceum, the YMCA Building and University Avenue (indicating).

A. Yes, sir.

Q. Now, as I remember your testimony, you testified that [fol. 1554] you arrived about 7:50?

A. I crossed the east bridge, which is right here (indicating) about 7:50, yes, sir.

Q. Since you are definite on the time, you must have checked?

A. Yes, I looked at my watch at that point, because I was afraid we would miss the President's speech.

Q. Were you walking?

A. No, sir, I was in an automobile.

Q. And would you trace your course, please, sir?

A. We turned right here by the Alumni House, we moved along Rose Loop, then moved by Faculty Row, then down Faculty Circle to this point right here (indicating).

Q. Now, what is that point?

A. This is the home of Dr.—Mr. and Mrs. James Silver.

Q. Dr. Silver?

A. Yes, sir.

Q. Now, to identify Dr. Silver, Dr. Silver, whether it be right or wrong, we are not involved in that, but he had taken a very active part in an effort to advance the cause of integration, hadn't he?

Mr. Gooch: If the Court please, I object to that.

The Court: Sustained.

[fol. 1555] Mr. Gooch: I ask the Court to instruct the Jury not to consider it. That is not part of the case.

The Court: Ladies and Gentlemen you are so instructed. We are not trying an integration case.

By Mr. Watts:

Q. That's right. Well, you then did go to Dr. Silver's house?

A. Yes, sir, I had gone to Dr. Willis' house, who was a member of my congregation. We were to watch the President's speech on TV there, but when we found their television set broken, then we went over to Dr. Silver's house. The Silvers were not there.

Q. And what time did you leave there, Reverend?

A. It was shortly after the President's speech was over. I would say fifteen or so. I imagine the speech didn't last more than seven or eight minutes.

Q. Then, were you afoot when you left, or did you go in a car?

A. I started out on foot, along with Rev. Wofford Smith, Dr. Willis, and one other faculty member, Dr. Fortenberry. We were picked up somewhere near around this intersection of Faculty Row and Faculty Circle, picked up in a car, and were driven to a point approximately along about the law school here, Lamar Hall.

Q. All right, sir. Trace your course from there on.

[fol. 1556] A. From there on we moved down Grove Loop, the Rev. Wofford Smith and I going together. The two faculty members dropped behind a bit. We came down Grove Loop to the edge of the Circle here, then, as I said a moment ago, we stepped into the Y.

Q. All right, sir. And how long were you in the Y?

A. Just a very few minutes at that point.

Q. Say five minutes?

A. I doubt if it was that long. Three, maybe.

Q. Where did you go from there?

A. I started out this door of the Y, and it was right about in here that the automobile with the Deputy Sheriff was passing, and we encountered him at this point (indicating).

Q. All right, sir. That is when you talked to him seeking his aid as an officer in quieting down what you were seeing?

A. Yes, sir.

Q. Incidentally, at that point and by that time, what were you seeing? What was going on out in front of you?

A. Well, of course, by then around this part of the Circle—

[fol. 1557] Q. By "this part of the Circle" you are pointing to the northeast quadrant?

A. Yes, sir.

Q. Now, that Circle, by sidewalks, is divided roughly into four quadrants?

A. Yes, sir.

Q. Northeast, southeast, northwest and southwest?

A. Yes, sir.

Q. And the two on the west are somewhat larger than the two on the east—

A. No.

Q. As you were, the two on the east are somewhat larger than the two on the west?

A. Yes, sir.

Q. I was looking at it backwards?

A. Yes, sir.

Q. Then when you are saying, "This area," you mean the northeast quadrant?

A. Of course, this was the point that was most visible to us at this point and I remember that many students were running up, or many members of the crowd—

Q. Yes.

A. I don't want to use that term too loosely.

Q. All right.

A. But people, anyway, were moving back and forth [fol. 1558] most of them carrying weapons of some sort, I mean bricks or bottles, coke bottles, pieces of pipe, concrete and things such as that. A number of them were moving toward the Lyceum. They were moving in all directions at this particular point when we first moved out there.

We concentrated on those that ran in this area, right at that time, those who had weapons, and were running in a

general northwest direction, trying to stop them and take their weapons away from them and ask them to go back to their dormitories.

Q. And I believe you said that the lads would frequently look somewhat dazed?

A. Yes, sir, as we would stop them the ones who seemed to be students did—they more or less were cooperative and they would give their weapons, drop them where they were, and, as I say, I don't know how many went home.

Q. At least they would drop their weapons and took off?

A. Yes, sir.

Q. And at that point you seemed to be having some effect on some of them?

A. With some. Of course, we were catching a very small portion of the crowd.

Q. These lads had obviously been through a lot of tear [fol. 1559] gas, hadn't they? Weren't their eyes inflamed?

A. I couldn't notice their eyes at that point. I imagine they were, like I was.

Q. Well, your eyes were a little smarty, too, weren't they?

A. Yes, sir, they were smarting.

Q. Now, about what period of time would you say you remained there in the northeast quadrant?

A. Right in the northeast quadrant?

Q. Yes, sir.

A. I don't know the exact length of time. We were moving during this period, after we moved into the circle, we moved out into here, generally. At the beginning we were in here.

Q. By "here" you mean closer to the flagpole?

A. Still in this northeast part.

Q. Now, this right here (indicating) is the flagpole?

A. Yes, sir.

Q. If I get your picture right, you started out in the northeast part, the northeast quadrant?

A. Yes, sir.

Q. You remonstrated there a while with the students?

A. Right.

Q. And gradually worked your way down southwest-
[fol. 1560] ward, somewhat closer to the flagpole?

A. No, sir, I didn't go—at this point I was close to the flagpole. I worked my way more in this direction.

Q. Right.

A. In the southeast part of the Circle. I remember, for example, sometime I was right about here (indicating) and watching the Highway Patrol pull out. At least the Highway Patrol cars; seemed to be about fifteen cars at that point pulling out here.

Q. Now, let's get the time of the action absolutely straight because we are getting down to the critical part of the operation.

A. I understand.

Q. As I understand, about 8:20 or 8:30 when you appeared at the YMCA Building you moved down into the northeast quadrant of the Circle and spent some little time there remonstrating with students, gradually worked your way down so that you worked on across this sidewalk, and as of about this time the Highway Patrol pulled out and you were down in the southeast quadrant?

A. Yes, sir. Well, I had been in the southeast quadrant once earlier too, because I believe a light standard was there, when I had tried to get some students to quit breaking out the lights there.

[fol. 1561] Q. All right, sir.

A. Now, I was down in the east end most of this time, not close to the flagpole at this point. And at one point I was back in the Y during this period of time.

Q. For what period of time?

A. Again it is hard for me to say exactly, sir. But several minutes.

Q. All right.

A. And in one instance I remember specifically in connection with that visit, was stopping some students inside the Y Building who—well, one student particularly, who had

bricks in his hand, and speaking to him and taking the bricks from him and dropping them in the wastebasket in the Y. I was in the Y that time several minutes. How long, I wouldn't be able to say.

Q. Would you say more or less five, or approximately five?

A. I would say probably five, somewhere around in there.

Q. Now, then, Rev. Gray, you had met General Walker in the Circle?

A. Yes, sir.

Q. Would you put your pointer as nearly as you can to where you met General Walker?

A. Well, as best—as best I can remember, it was between [fol. 1562] the flagpole and the monument.

Q. All right.

A. I think it was perhaps closer to midway between, right about in here (indicating). The Grove—the Circle was fairly clear at this point. The tear gas was heavy up towards the Lyceum. Most of the crowd had backed away. There was considerable concentration back down in here, and General Walker and his group of perhaps ten or twelve or fifteen men stood out rather clearly at that point.

Q. Now, then, let's endeavor as the very best your recollection will permit to fix the time when you saw General Walker there in the southeast quadrant, with the time you saw the Highway Patrol leave?

A. You mean which came first?

Q. If you can, yes.

A. Well, my recollection is, sir, that the Highway Patrol —watching the Highway Patrol leave came before I saw General Walker.

Q. Would you say shortly before or could you fix any kind of a time bracket at all?

A. Certainly it was not too long before, but I couldn't give an exact time.

Q. Now, at the time the Highway Patrol left, did you hear any outcries by the students, "Governor Barnett sold us out, what are they leaving us for," or anything to that effect?

[fol. 1563] A. No, sir, the crowd that was gathered along each side of this University Circle, this part over in here, were cheering when the Highway Patrol pulled out.

Q. They were cheering the Highway Patrol?

A. Cheering the Highway Patrol for leaving.

Q. For leaving?

A. This was my impression, anyhow.

Q. Anyhow, they were cheering?

A. And they were pulling out.

Q. But you didn't hear anyone say they were cheering them for leaving?

A. Well, no, sir.

Q. Well, now, isn't it a fact that shortly after they left, or about the time they were leaving, many of the students were talking and spontaneously sounding off, "Well, Ross let us down, we have been betrayed," or something to that effect?

A. No, sir.

Q. You didn't hear that?

A. No, sir.

Q. All right. If you didn't hear it, you didn't hear it.

Now, then, from the time you encountered General Walker right here at this point. Let's work backward and you tell [fol. 1564] us, starting from meeting General Walker and talking to him, and work your course backward to the YMCA, and tell us in as much detail, because this is critical, if you can possibly remember just what you saw and what occurred?

A. To get these things in exact chronological order is a little difficult,—

Q. I understand.

A. Mr. Watts, but I can tell you a number of things that happened in the period of time before I saw him.

Q. Well, let's—excuse me. Let's try to do it this way, if you can.

A. Yes, sir.

Q. You have a very distinct recollection of meeting General Walker?

A. Yes, sir.

Q. In other words, you can mentally close your eyes and go back and relive that experience. Could you?

A. Yes, sir.

Q. As nearly as you can from the time of that experience, I wish you would follow the same process of recollection and try to project to the Jury, and extend back just what occurred from the time you and General Walker were talking in this vicinity (indicating) until you worked your way [fol. 1565] back to the YMCA.

A. This is moving backward?

Q. Yes, sir, moving backward.

A. This happened prior to that time?

Q. Yes, sir.

A. I remember, of course, that I was standing approximately here when I saw General Walker.

Q. Yes, sir.

A. My recollection is that I had come from this section of the Grove, I mean the Circle, to that point. Because it had been over here that I had watched the Highway Patrol leave. I remember that very distinctly. I had been over talking to some of the students here, and my recollection places this as being before seeing General Walker. I know I had been back—I also remember that when I heard the students saying, "Now, we have a leader, now we have a leader . . ."

Q. That's right.

A. That this was down again in this general area closer to the monument. It was at a point where I would say perhaps—along the walk here, or in this general area to the south (indicating), but I was moving in this direction (indicating).

Q. Uh-huh.

A. And so that I would say that I remember hearing the [fol. 1566] students say this here (indicating), my recollection being this was just very shortly before I saw the General himself.

Q. Uh-huh.

A. So, that, reconstructing it again, I imagine it was moving back in this direction when I turned back in the direction of the Grove—of the flagpole and the Circle and saw him.

Now, I had also been in the Y, as I say, earlier. This second visit to the Y is hard for me to relate to this whole sequence we are now talking about, but apparently it must have been prior to my going over here to talk to the—I mean, where I was talking to the students in this street.

I know I was in the Y several minutes there, as I said.

Q. And then, meanwhile, working your way backward from the encounter with Walker timewise to your first appearance in the YMCA, you have pretty well summarized it, now. Did anything else happen prior to that, and working your way on back to the YMCA?

A. To get the time sequence here—

Q. That's right.

A. Prior to what?

Q. You are working your way back.

[fol. 1567] A. Yes, sir.

Q. You saw Walker here?

A. Yes, sir.

Q. Just before you saw him you said you had been strolling along in here (indicating).

A. I had seen him from approximately here (indicating).

Q. You think you had walked down here near the monument and walked back up, occupied this position here, and had seen him.

Now, prior to that, as I understand, you had been working around in this northeast—northeast quadrant, along in here, remonstrating with the students, taking bricks and rocks and bottles from them, and endeavoring to quieten them down?

A. This is when I first came out of the Y?

Q. Right.

A. Yes, sir, right after we stopped the Deputy Sheriff.

Q. All right. Now, working it again the other way, we have you coming out of the Y, spending about less than five

minutes, coming on out, seeing the officer, or watching him leave. You drove—walked on down with Rev. Wofford Smith, down to the northeast quadrant, you spent some time down there, then you walked back here, walked back to this [fol. 1568] point, saw General Walker at this point, and talked to General Walker?

A. The only thing we left out there was the second visit to the Y.

Q. That's right, and in here sometime you said approximately five minutes that you were in the Y?

A. Yes, sir.

Q. All right, sir. Now, then, had General Walker come striding up University Avenue, met the leaders of the mob in a position near the Confederate monument, conferred with them a few minutes, held up by the portly dressed—portly well-dressed man that approached the group, two leaders of the mob, one waving a big Confederate flag, and each taking him by the arm, and they positioned themselves in front of 1,000 people in the vicinity of the Confederate monument, walked in a charge across the northeast quadrant of the Circle, arrived at a point just northwest of the Lyceum—flagpole, veered off to the left and rushed forward, through the missiles, the tear gas was fired, and they all raced back—had that occurred from the time you arrived at the YMCA and from the time you met General Walker here you undoubtedly must have seen it, wouldn't you?

A. Unless I was in the Y at the time, or perhaps down in this part of the Circle (indicating).

[fol. 1569] Q. Yes.

A. Now, there was some time in the Y, and there was the time here (indicating). I know that there had been a very heavy volley of tear gas fired just before I saw General Walker here, because this Circle had cleared out pretty well then, when he was out there with the group, when I first saw him.

Q. From the time you were walking down in here, went back over here, and saw General Walker, you didn't hear

any comment among the crowd that Walker had led a charge, did you?

A. No, sir, I didn't hear that he had led a charge, no, sir. I heard the comment, "Now, we have a leader."

Q. "Now we have a leader," and that was when you were in the vicinity of the flagpole?

A. No, not the flagpole.

Q. Strike that, I mean in this vicinity (indicating).

A. Yes, sir.

Q. Now, then, in terms, you were there and you are endeavoring to relive that dramatic incident that I have outlined, 1,000 people following General Walker and two men in a charge against the Marshals across the northeast part of the Circle, they would have had to run over you to make that kind of a charge, unless it would have been in the five [fol. 1570] minutes you were in the YMCA?

A. The 1,000 people is the only thing, I believe, I would have seen 1,000. Now, there were lots of things going on that I couldn't see. I didn't know about during that period. But a crowd that included a thousand people—if they had all moved at once across the Circle.

Q. You must have seen them, if that had occurred?

A. Again, it depends on the size of the crowd, and it depends on whether I was in the YMCA, or perhaps down in this area (indicating).

Q. And from your knowledge of the students and from your observation of what was going on out there, if General Walker had led that charge during the five minutes you were in the YMCA you know that there would have been complete bedlam when you got back out there, wouldn't there?

A. Of course there was bedlam pretty well all the time.

Q. I know, but in other words, there was a lot of sporadic activity, wasn't there?

A. Yes, sir, quite a bit of activity along before then.

Q. Now, in your deposition previously taken in this case, I asked you questions and—I asked you questions at that time?

[fol. 1571] A. Yes, sir.

Q. Wasn't it your testimony then that prior to the speech on the monument, there was no concerted activity that you saw, it was all sporadic, by groups of five or ten and so forth?

A. What I was trying to do was compare that with what took place after the speech on the monument and I said this, and I will say it now, that I saw nothing that involved the numbers before the speech at the monument—

Q. That's right.

A. That I saw after the speech at the monument.

Q. That's right.

A. After the speech at the monument, there seemed to be more coordination, or let's put it this way, they were moving more as a unit. There were more people involved. Now, there were a number of charges and advances on the Lyceum prior to the speech on the monument, but they were not of the magnitude that came after the speech.

[fol. 1572] Q. And didn't you previously testify that they were of a sporadic nature?

A. You asked me about if that word would be adequate and I said, "In a sense," as I recall.

Q. Yes, sir.

A. My testimony there. That certainly, by "sporadic," if we mean that it was not of the same magnitude as what happened after the speech, yes, sir.

But this did not mean that there were not groups that moved in the direction of the Lyceum.

Q. All right.

A. And did attack the Marshals.

Q. I didn't say that.

A. —before that, yes, sir.

Q. The previous testimony as I understood it, was—

A. Yes, sir.

Q. —that you said before the speech on the monument, there were small, disorganized groups with apparently no unified leader, or words to that effect, wasn't that your concept of it?

A. Again, in terms relative to the size—

Q. Right.

A. —of after the monument, the charge after the monument.

Q. Now will you take your seat, please, sir.

[fol. 1573] A. Yes, sir.

Q. Now Reverend Gray, was there not a lull in the rioting shortly before General Walker mounted the monument and shortly before the Highway Patrol left?

A. Well, as I said, when I saw General Walker the first time out in the circle, there was a lull at that point in the sense that the tear gas was pretty heavy up around the Lyceum. The crowd had moved back and was—a number of them were concentrated around the monument and even to the east of the monument so that at that point, there was—we could call that a lull, a lull presumably brought about by the tear gas.

Q. Well, and when the Highway Patrol left, too, that caused somewhat of a lull in the activity next to the Marshals, didn't it?

A. I was not aware of it, sir. I saw the Highway Patrol pulling out University Circle in front of the Engineering Building. They were at that point a long way from the Marshals.

Q. Did you see in your press or learn of the United Press report that during a lull in the rioting, General Walker mounted the Confederate statue and begged the troops (sic) to avoid their violence and was met by one massive jeer; did you see that United Press report?

A. I don't recall having done so, sir.

[fol. 1574] Q. You have heard about it many times, haven't you?

A. About being greeted with a massive jeer?

Q. About Mr. Al Kuettner's report that during a lull in the rioting, General Walker mounted the Confederate statue and begged the students to avoid their violence and he was met by one massive jeer; haven't you heard of that news report?

A. No, sir, I really haven't.

Q. Well—

A. Haven't saw that.

Q. Wasn't there actually a lull in the rioting just about the time the Highway Patrol left?

A. I don't tie this to the departure of the Highway Patrol. Certainly when General Walker was making his speech at the monument, the crowd, most of the crowd was gathered back at the monument.

Q. Uh-huh.

A. Listening to him. But—and if that had been a lull, yes, they had withdrawn from the circle—not all of them necessarily but a large number had moved back to the monument at the time General Walker spoke to them.

Q. In other words, at all times during that evening, there were groups of students in contact with the Marshals; that is, they would gather together, get their rocks and their bottles and things and run up and throw them.

[fol. 1575] Now that went on continuously, even during the speech, didn't it?

A. That I don't know, sir, because I was down at the monument with the crowd and looking at General Walker and standing there. I wasn't watching the Lyceum. This is a long ways from the Lyceum. I didn't—couldn't tell what was going on at the Lyceum right at that point.

Q. You didn't see the Lyceum then from where you were near the monument?

A. Well, certainly, you could see the lights of the Lyceum from the monument because it was lighted very well.

But the point I was making is, I was not looking at the lights—at the Lyceum. The Lyceum stood east; I was coming from the "Y", which is north of the monument. I was looking at General Walker and the crowd that was gathered at the monument and then moving through the crowd.

I could not describe to you what was going on at the Lyceum while the speech was going on because I was—I was watching—I was looking in another direction. I was looking at General Walker.

Q. Could you hear tear gas still being fired up near the Lyceum before, during and after the speech?

A. I don't recall tear gas being fired during the speech but I couldn't be absolutely certain of that.

Again, I was pre-occupied with what was going on right [fol. 1576] in front of me. I certainly remember tear gas being fired in great quantities after we, after the—after the speech, when the crowd moved toward the Lyceum, certainly the tear gas had been fired in quantity just prior to the time that I saw General Walker, because this is what had seemingly cleared out the circle, that so many had moved back.

Q. Did you hear General Walker state this or this in substance: "No one came here for violence. Violence is not the answer. Your real enemy is in Cuba, that way," and he pointed toward Cuba?

A. No, sir, I didn't hear that. I testified to what I did hear. I remember a reference to Cuba but it was more in the nature of, "This is the long way around to Cuba. The Marshals ought to be in Cuba, not here."

Q. Did he say, "the Marshals", or "the troops"?

A. Marshals and troops.

Q. Or do you remember?

A. Of course, the troops were not on the campus at that point. They were—

Q. They were where?

A. Presumably still in Memphis and around about but, I mean they had not come onto the campus at that point.

Q. But actually you knew, didn't you, by that time they were in a staging area about 15 miles north of town?

A. I knew there—I knew they were—I didn't know they [fol. 1577] were that close, no—except, of course, I knew the local National Guard Unit, they were down—

Q. Of course, when you saw General Walker over there between the monument and flagpole, you went over, had this talk with General Walker.

Now at that time you had been in there remonstrating with students and walking back and forth through that tear

ga for a considerable period of time, hadn't you—at least 20 or 30 minutes, maybe 40?

A. Yes, off and on.

Q. And weren't you somewhat excited at that time yourself by all of these events and violence that was going on?

A. I was certainly worried, yes, sir.

Q. And didn't you come up and catch General Walker by the arm, or do you remember, or take his arm?

A. Not that I recall, no, sir. Not that I recall. I walked up to him and addressed him as General Walker.

Q. Did you stick out your hand and shake hands with him?

A. Not that I recall.

Q. You didn't like him very well, did you, Doctor, or Reverend?

A. That had nothing to do with it at this point. I just went up and asked him to help us because I knew that he could be of help. I knew the students would listen to him. [fol. 1578] Q. Well, you had read quite a bit about him?

A. Yes, sir.

Q. Had he represented a concept that you bitterly disapproved of, didn't he?

Mr. Gooch: If the Court please, I object to the form of that question. We are not talking about integration in this case.

The Court: Sustained.

Mr. Watts: I wasn't talking about integration at all.

Mr. Gooch: All right, it has that implication and I move the jury be instructed not to consider that question for any purpose.

The Court: The jury is—

Mr. Andress: I would like to say something on it. We can ask things of this sort to show bias and prejudice. It certainly would go to bias and prejudice of the witness.

The Court: Overruled. Ladies and Gentlemen, you are instructed not to consider the last question and answer of the witness.

Mr. Watts: Anyhow, Reverend Gray, you didn't go up and stick out your hand and shake hands with him?

A. Not that I recall.

By Mr. Watts:

Q. Well, if you had, you probably would recall it, don't [fol. 1579] you think?

A. I should think so.

Q. And did I understand you to say that General Walker said at that time, "You are the kind of an Episcopal minister that makes me ashamed of being an Episcopalian"?

A. Yes, sir, that was toward the end of our conversation.

Q. That's right. That's right.

A. Yes, sir.

Q. In other words, you went up to him at that point between the flagpole and the monument, and you asked him to stop, and he said, "I can't. I'm just an observer," or something to that effect.

Q. And then you talked with him a little more and he said, "You are the kind of Episcopal minister that makes me ashamed of being an Episcopalian"?

A. Yes, sir.

Q. All right. Now, at that time, as a matter of fact, there is—there are two very definite schools of thought in the Episcopal Church—let me finish the question—the so-called liberal and the so-called conservative groups and there is considerable conflict between them, isn't there?

Mr. Gooch: If the Court please—

The Court: We are not going to get into that. I'm not going to permit anything like that at all.

[fol. 1580] Mr. Andress: May we have our Bill on that?

The Court: Yes.

By Mr. Watts:

Q. Now then Reverend Gray, what was the meaning to you when he said, "The kind of Episcopal minister," what did that mean to you?

A. Well, since I had just been telling him why I was out there, I said I was there to do whatever I could to stop the violence, to get the students to go home and quit what they were doing, and when I—I had just finished describing what my purpose of being there was, which was to do everything I could to calm the students and to curtail the violence, and it was in that context immediately after my having said that that he said, "You are the kind of minister that makes me ashamed of being an Episcopalian."

My interpretation was that, as he had said, the students had a right to protest and that we ought to let them protest and keep going and that I shouldn't be out there trying to stop them.

Q. That was your impression. In other words, that was the impact it had on you, what he said?

A. Yes, sir.

Q. Now what was your impression of the fact that he said he was there only as an observer and couldn't stop it if he wanted to?

A. Well, my impression, I, of course, continued to urge [fol. 1581] him to speak to them because I thought he could be very helpful in this respect.

Q. You saw him doing nothing at any time other than observing, did you?

A. He made a speech, of course, to the students. I saw him make that.

Q. How did that speech affect you? Did that speech indicate to you that he was trying to lead the crowd in adverse action toward the Marshals?

A. Well, it certainly impressed me that it was further inflaming or inciting the students, telling them, congratulating them on what they were doing. He was encouraging them, telling them to stand fast, be firm, that there were thousands behind them.

This certainly had the effect of encouraging what already amounted to rioting. It was a riot.

Certainly, to tell them that they had been sold out by the man who led the Marshals onto the campus. This was,

also,—this would serve also to further inflame or incite them.

Q. But the point is, you got no impression and have so testified, have you not, that Walker was going to lead the students in any kind of activities against the Marshals?

A. I did not hear that, sir. Remember, I was pulled down from the monument some time before the incident at the [fol. 1582] monument was completed so that I was—there may have been many things said after I was pulled down from the monument, I don't know about that, and taken away.

Q. Now refreshing your recollection a little from your deposition which was taken on May 11, 1964—

A. I beg your pardon, sir. It was taken in February, I believe.

Q. That's what I thought. Oh, this is the wrong one. No wonder I couldn't find it. I couldn't find where Mr. Kuettner said what I thought you said. Thank you, sir, for helping me out there.

Your deposition was taken on February the 4th, 1964?

A. Yes, sir.

Mr. Watts: Do you have a copy of that, Mr. Gooch?

Mr. Gooch: Yes.

Mr. Watts: Might he have it, please, to save me running back and forth?

Mr. Gooch: What page?

Mr. Watts: Page 59.

By Mr. Watts:

Q. Now, Reverend Gray, refreshing your recollection from your deposition, I'll ask you if this wasn't your recollection on February the 4th:

"Question: After the speech was finished, did you heaf General Walker say or did you get the impression that he [fol. 1583] had advised the students that he did not intend to lead them in any actual violence?

"Answer: No, sir, I didn't.

"Well, you certainly did not have the impression that he was going to lead them in acts of violence such as a charge on the Marshals, did you?

"No, sir, I didn't have the idea that he was going to lead them."

Now, that was your impression at that time, was it not? Yes or no.

A. Yes, sir.

Q. All right, sir. Now would you turn, please, to Page 41. "Did you see a rather heavy-set man around him at that time?

"Yes, sir.

"How far was he from General Walker?

"I don't know, he was right with him, standing right beside him. I recall seeing him right in the group.

"Now then Reverend Gray, was there any change in the character of these charges by the students from before General Walker's speech and after?

"Yes, sir.

"What was that change?

"Well, after the speech, why, the charges involved far more people, and before the speech, it was just an action by [fol. 1584] groups of people, they were not all working together.

"Question: You mean there was no concerted action at all before General Walker's speech, in other words, it was just a group of people that would move forward at one time, is that right?

"Yes, sir."

Would you prefer to read that? Go ahead and read that.

A. (Reading) I am not sure about the last, though, that there was no concerted action at any one time, I'll say this, if you would compare what happened before—" Before that. I think that means before the speech.

Q. Yeah.

A. "With what happened after the speech there at the monument and what happened before, certainly what hap-

pened after the speech at the monument involved more people moving in the charge toward the Lyceum than had been before the speech." Is that—

Q. No, go ahead and finish it.

A. "But before the speech, there was those groups moving as a group, not as the entire crowd, they would, some of them would move there and some here and advance to where they could throw their weapons and then run back to form again, but I did not have the feeling, as many people [fol. 1585] moved all at once together before the speech as they did after the speech. There is no question about that." [fol. 1586] Q. "You mean after the speech?"

Answer: "After the speech."

A. Yes, sir, after the speech.

Q. I will just read it for a while.

Question: "Would the term 'sporadic' be accurate as to the activity before the speech?"

Answer: "Perhaps, though I would say this was not as if it might have been a charge, it was just a few people then because there was quite a number of charges. It was just a continuing thing, but by small groups and individual people and their action depended on the intensity of the tear gas as to whether they moved right straight close to the Lyceum or whether they would fall back. But I think after the General's speech, we had a continuing thing but it was all of the crowd moving forward together. It might have been just the same number of people moving altogether, but it was quite different from the various groups moving separately. Now, that happened after the speech at the monument."

Now, that was your testimony at that time?

A. Yes, sir. The inflection there—it might have been just the same number of people, but moving altogether. After the speech is what I mean.

Q. Well, you read that and we will get to the inflection. [fol. 1587] A. I say it might have been just the same number of people in the whole crowd, but after the speech

they were moving—after the speech they were moving altogether.

Q. Well, let's see now, let's start reading.

A. All right.

Q. I'll tell you what, let's go back so we will get your inflection, and I will read my question.

"Would the term sporadic be accurate as to the activity before the speech?"

Now, read your answer.

A. "Perhaps, though I would say this was not as if it might have been a charge, it was just a few people then because there was quite a number of charges. It was just a continuing thing but by small groups and individual people, and their action depended on the intensity of the tear gas as to whether they moved right straight close to the Lyceum or whether they would fall back. But I think after the General's speech we had a continuing thing but it was all of the crowd moving forward together. It might have been just the same number of people moving altogether, but it was quite different from the various groups moving separately. Now, that happened after the speech at the monument.

Q. "Did you at any time prior to the speech see a movement of substantially the entire group with only one or [fol. 1588] two in line, one or two groups, I mean?"

A. "No, sir, I didn't notice it. Not the whole group, I mean. Not the whole crowd. It was after. The crowd was circling the Circle pretty well. I mean the east end of the Circle. They were all—I mean, from the Fine Arts Building, around the Engineering Building, with concentration, so much of the time, being down in the east end around the monument and in that general area."

Q. By circling, you don't mean they were moving around?

A. No, sir.

Q. They were just standing in a position—

A. That's right.

Q. That would encircle it?

A. Well, of course, up to a point. I would say about halfway, but not close to the Lyceum.

Q. What I am getting straight—what I am trying to get straight, you don't mean that they were circling like a demonstration?

A. No, sir, I don't mean that.

Q. Now, Rev. Gray, turn over to page 45, please, sir. The question about the middle of the page.

"Then during this period before the speech, did you at that time ever see a charge that could be compared to the participation of the entire crowd on both sides of this east-[fol. 1589] west sidewalk?"

A. Wait just a minute. I believe I have lost you. What page?

Q. Page 45.

A. Page 45. Which question?

Q. I will read it again: "Then during this period before the speech, did you at that time ever see a charge that could be compared to the participation of the entire crowd on both sides of this east-west sidewalk?"

A. "No, I never saw one that did involve everybody that night. People came from all around. A group would come up from one direction and some from another, but I never saw a charge such as you have described."

Q. "Did you ever see that night a charge of all the people in fairly close proximity to the Lyceum?"

A. "If you are asking if the whole crowd moved at one time, no, sir."

That needs to be clarified. I mean, there were plenty of people standing out there, that I would say were observers. I wouldn't say everybody who was standing on the edges was actually participating in the riot itself. In fact, I know of several who were simply there standing and not participating at all. That is the point of the question, that it didn't involve everybody out there that night.

[fol. 1590] Q. In fact, General Walker told you he was an observer, didn't he?

A. Yes, sir, he did. Most of the observers were on the edge of the crowd. I mean, sitting or standing around the Y Building, or in that area.

Q. You never did see General Walker with anything in his hand, did you?

A. No, sir.

Q. And you were an observer also, were you not? Well, you were a little more than an observer?

A. I was trying—

Q. You were actually a counter rioter, weren't you?

A. I was trying to do what I could to stop it, yes, sir.

Q. Bottom of page 45, the last question:

"Now, Rev. Gray, with reference to these so-called charges that you saw and described them as to the area and the size of the crowd and the activities anytime before the Walker speech on the monument, I will ask you to now please just draw us a word picture of it."

A. "I don't recall these charges to where I could describe one of them at a particular given time. It is a dynamic thing, it wasn't something that just happened and it would be hard to draw a word picture of it."

[fol. 1591] Are you asking me about—

Q. Now, just wait. Let's just read it.

A. All right, excuse me.

Q. Then we will get to the conversation after a while.

A. All right.

Q. The inflection is what I am trying to get at, the word picture, just what you saw.

A. I'll say this, there was a movement at all times in the area. There were people on the ground, you see, just moving aimlessly about, it seemed. Some were going some way and some the other. They would go up toward the Marshals, a big crowd of them, and then they would fall back and that went on all during this period of time, advance and fall back.

Q. "And there would be a large crowd doing that?"

A. "Yes, sir, there would be, but the whole crowd didn't do the same thing at the same time. There was a whole crowd but there was a number of groups."

Q. Now, Rev. Gray, what was your official position as far as your relationship with the students were concerned? Weren't you an assistant Chaplain, or had some kind of relationship with the University?

A. When I first moved to Oxford in September, 1957, I was Rector of St. Peters Episcopal Church and also Chap- [fol. 1592] lain for the Episcopal students at the University.

In January, 1961, the Reverend Mr. Smith came there as Chaplain and I was Rector, so actually he was Chaplain of the students at that time.

Of course, many members of the University faculty are —and some students as well, are actually parishioners of St. Peters Church in Oxford, so that I had no official connection with the University, no, sir, but many of my members were on the faculty staff.

Q. You were very familiar with the students, of course, and their reaction and how to handle students, weren't you?

A. Hopefully. I wouldn't begin to judge my competence in that respect, but I had worked with students, yes, sir.

Q. Rev. Gray, in fairness, don't you think if Mr. Meredith had been brought on the campus area Monday morning when most of the students had come back from the football game—

The Court: Mr. Watts, I am not going to even permit you to go any further with that question. That is highly speculative.

Mr. Watts: I was trying to qualify him as an expert, but I guess nobody is quite that expert. I will withdraw it. [fol. 1593] The Court: All right.

Q. Finally, Rev. Gray, after the speech at the monument you had no impression at all that Walker had either

told the students he would or that he intended to lead them in any violent activity against the Marshals, did you?

A. I had no impression he was going to lead them in a charge, that he personally would do it. I did not hear anything to this effect.

Q. And how far away from the monument, going to the westward, was he when you lost sight of him?

A. Now, I beg your pardon, here, this is after the speech?

Q. After the speech, yes.

A. He—the last time I remember seeing him was as he stepped down, or out of sight, when I was still fairly close to the Y, and as best I could tell he moved around on the south side of the monument, but I can't be certain of that. I didn't see him again.

Q. But it was your impression, was it not, from where you were standing over toward the YMCA, that General Walker, having faced the east making his speech, turned to his right and went around the south side of the monument, and then proceeded toward the flagpole?

A. That was my assumption, sir, since I didn't see him. [fol. 1594] Q. At that time you didn't see any people run over to where he was from the area of the YMCA, did you?

A. From the area of the YMCA?

Q. Yes, where you were.

A. Well, I, myself, was moving in that direction. I think there were one or two with me. The students had come and asked me to go back and try to talk to the crowd again.

But as—when we got there, as I say, after the crowd had moved around, the monument, I moved out into the Circle.

Q. But the point is, after you saw General Walker step down from the monument, turn to his right, and then move toward the flagpole, along in this direction, there was no large movement from this area (indicating) where you were, down toward the flagpole, was there?

A. There was a movement, but I think most of these people were coming from around here. Now, this is where

I had actually encountered the crowd. This was where I was spending my time, in this northeast quadrant, after the speech. On my way from the Y. The crowd moved in and came more or less engulfed me, and I was giving ground in this general area over here, so that the crowd was coming this way, and coming on this side of the monument too.

[fol. 1595] Q. Did you then, after you had moved away from the YMCA and gotten down here, did you see General Walker any more?

A. No, sir, I didn't see General Walker. I was in this area pretty much with my back to the Lyceum, giving ground, trying to stop whoever would stop, and get some of them to go back, and the crowd more or less passed me by, but there were still others coming on up, and I would stop them as best I could, and give ground with them.

Q. Now, let's draw this Jury, please, sir, a word picture. First, where you were, where you were when you last saw General Walker?

A. Somewhere between the Y Building and the monument.

Q. That is from here to here (indicating)?

A. Yes, sir.

Q. That is flat terrain there?

A. Yes, sir.

Q. There is a street light off over here somewhere on the south?

A. I am not sure of that. There was some light.

Q. So, from where you were you couldn't see General Walker step down and start off?

A. I saw him disappear. And I am assuming he stepped down from the elevated spot he was on.

Q. Now, could you take this pen and put a little X with [fol. 1596] a circle around it where you saw him disappear.

A. Well, at the monument. I mean, at the base of the monument. I mean, he presumably stepped down and he disappeared to my sight in the crowd. My assumption—

Q. Don't give your assumption.

A. All right.

Q. Then you did not see him after the speech, move one yard to the west of the monument?

A. No, sir, I didn't see General Walker again.

Q. And all you saw after the speech a crowd moving toward the monument, toward the flagpole?

A. Toward the Lyceum, yes, sir, and I was in the crowd. I mean, out in it with my back pretty much to the Lyceum most of the time, trying to talk to those headed toward the Lyceum.

Q. Prior to that time as you were standing at the YMCA, wasn't there still tear gas being fired up here, and activity up in this area (indicating)?

A. I don't recall being aware of any heavy—any tear gas barrage, actually. Now, whether there was sporadic firing, I couldn't say, but no, sir, certainly there was not a heavy firing of tear gas at that point, because again my attention and my interest was concentrated down here.

Q. Sure. Where Walker's speech was.

[fol. 1597] A. I couldn't say exactly what was going on up there, but I think if a lot of tear gas was being fired, I would have known it.

Q. Can you fairly or accurately say to this Jury that you did or did not ever see General Walker lead a charge?

A. I did not see him lead a charge.

Mr. Watts: That is all.

Mr. Gooch: Nothing further.

The Court: I am going to excuse the witness.

Mr. Andress: May we make our Bill during the recess?

The Court: Yes, wait out in the hall.

Mr. Gooch: It is nearly recess time now, I don't want to break into another witness.

The Court: Ladies and Gentlemen, let's recess until twenty-five minutes until 11:00.

* * * * * * *

[fol. 1604]

JOHN CHARLES HILL, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name.

A. John Charles Hill.

Q. And where do you live, Mr. Hill?

A. When I am not attending the University of Mississippi, I live with my parents in Dover, Delaware.

Q. How long have you lived in Dover, Delaware?

A. My family just moved to Dover this March, this past March, from Chicago.

Q. And prior to living in Chicago, where did your par-

[fol. 1605] ents live?

A. In Jackson, Mississippi.

Q. How long did you reside in Jackson, Mississippi?

A. For two years.

Q. Where were you born?

A. Fort Worth, Texas.

Q. What's your father's name?

A. John Lee Hill.

Q. Was he formerly the manager of Swift & Company here in Fort Worth?

A. I believe he worked as—on the sales force with the cheese end of it.

Q. All right. Now on September, 1962, September the 30th, 1962, were you a student at Ole Miss at Oxford?

A. Yes, sir, I was.

Q. And in what year were you there?

A. As far as—

Q. Scholastic.

A. Sophomore.

Q. Yes, sir. And how old are you now?

A. Twenty-two.

Q. You would have been roughly 21 at that time—20 or 21?

A. Yes, sir.

Q. Directing your attention to September 30, 1962, can [fol. 1606] you give us your whereabouts on that day?

A. Yes, sir, I was in Jackson Sunday morning. Of course, we had had a football game and played Kentucky, the previous night and I went to church with mom and dad and then spent the early afternoon with my parents and then continued to Oxford that afternoon, a little later in the afternoon.

Q. Do you know about what time you arrived in Oxford?

A. I would say approximately around 4:30, 5:00, in there, in that area in the afternoon.

Q. All right. Where did you go when you got to Oxford that afternoon?

A. Well, I went to my dormitory room, which was Baxter No. 4, and I unloaded my suitcase and whatnot.

Q. And then what did you do?

A. And then I proceeded back to the Ole Miss Motel to see Dan Rather, who was a CBS correspondent out of Dallas, covering the problem we had.

Q. Did you have any connection at that time with CBS news?

A. Yes, sir.

Q. What were you?

A. Well, I was a stringer. This is a type of individual who carries film, sets up interviews, just helps out in any way, shape or form that he could, drive cars, just help out. [fol. 1607] Q. All right. Now, do you know about what time you went back to the hotel to see the man from CBS?

A. It was directly after I got on campus, approximately 5:00, 5:30 or 4:30, in there, in that area.

Q. All right, did you thereafter return to the campus?

A. Yes, sir, I did.

Q. And about what time?

A. Well, first of all, Mr. Katzenbach with the Justice Department was to give a talk to the newspapermen at the Ole Miss Motel and this was going to be scheduled for I guess, 6:30.

And my first duty was to find our cameraman. I forget what his name was. I think it was Dick Perez. And get him back to the motel for this interview.

Well, after I found Mr. Perez and whatnot, I went back to the motel and it was getting on towards 7:30 after we got this all straightened out, at which time a man by the name of Gordon Yoder, who works for the, one of the Movietone Motion Picture News-theatre type affair, had come back to the motel and told the story where he had been beaten up, his car had been demolished, all of his equipment, his cameras, his briefcases, all of his notes were still on campus and that, he just went on to tell the story of what had happened to him.

At that time I suggested perhaps I could go back on [fol. 1608] campus and retrieve some of his papers and documents, which was his lifework.

And so Dan said it was all right, so I continued, I went back up on campus around 7:30.

I drove my own car and I parked on the circle and I went then up to Mr. Yoder's car and I got as much camera equipment and whatnot as I could and loaded it in my, back in my car, and came back to the Ole Miss Motel.

When I was at—when I was going around trying to get this equipment, I had noticed that the students that were spectators were getting very restless, cat-calls, a lot of swearing, and I saw a couple of missiles thrown.

There was a, some type of a fire bomb which was thrown on what they call a deuce and a half, the National Guard. It's a two and a half ton truck. And it landed on top of the canvas and then I went, as I say, left and just as I was leaving the back part of the campus, I noticed where the crowd broke and started running in all directions.

Now I don't know why. I presume—and I say it's only presumption—that tear gas had been thrown at that time.

Q. You didn't see the tear gas?

A. No, sir, I did not.

Q. All right, you left the campus then, say, sometime before the tear gas was fired?

[fol. 1609] A. Yes, sir.

Q. And then where did you go?

A. I went back to the Ole Miss Motel, gave Mr. Yoder the briefcases, spiders, tripods, camera, whatnot.

And then I proceeded to see Mr. Neal Straucer who is, also, a CBS correspondent, who was at the motel at this time, and I told him what I had seen, as far as the crowd, what was happening, the fire bomb, or whatever it was.

And then the reports started coming in that the riot had started—

Mr. Watts: If Your Honor please, just a minute. The reports would clearly be hearsay.

Mr. Gooch: That's right.

The Court: Sustained.

By Mr. Gooch:

Q. All right. Now how long did you stay there at the Ole Miss Motel before you went back to the campus, if you went back to the campus?

A. Maybe 30 minutes; 15-30 minutes.

Q. Well, after you had carried Yoder, his equipment, such as you could retrieve, back to the motel, did you then return to the campus?

A. Yes, sir.

Q. Would you have any idea about what time you got to the campus?

A. Well, I would say it was approximately 8:00—8:30, [fol. 1610] although I don't—I really have no way of knowing.

Q. Well, will you describe what you saw when you returned to the campus at that time?

A. Well, the reason why I returned to the campus was that when I understood that the riot was going on, I knew that a man, another newspaperman, had a portable tape recorder and I asked if I could take the tape recorder on my person and go up on campus and just record noises of the riot.

And this I did. And I went back on campus and just milled around in the crowd and took recordings.

Q. All right. How long would that tape play?

A. Well, the tape, as far as, if it had been rewound all of the way, it would have lasted approximately an hour. However, the man who loaned me the tape recorder only rewound it for 15 or 20 minutes.

Q. All right. When you got back to the campus there with your tape recorder, what did you do?

A. Well, I just milled around in the crowd and for a time—of course, once I got on campus, I turned the tape recorder on and adjusted it and just left it alone because I didn't want to play with it.

I had the microphone in this hand (indicating), with the cord running up my sleeve and I had the actual recorder under my belt and I carried it sort of to conceal it because it's—it wasn't exactly an intelligent thing to be doing, run-
[fol. 1611] ning around that campus as a newspaperman or stringer or what-have-you.

I just got noises, tear gas bombs exploding, people screaming, conversations, what-not, that were irrelevant.

Then after a time went by I noticed over on my left—let's see, do you have any kind of display?

Q. Let's take a look at this map down here, if you will. That's Plaintiff's Exhibit 11. And there is a pointer there if you want to detail where you were and what you saw, just try and give the jury a graphic picture.

A. Thank you. Well, I was right in this area right here. I had been milling up and around back over in here and

I was right, oh, right about here when I heard an awful lot of people to my left saying, "Let him through. Let him through. Make way," and what-not.

And as I came over to see what was going on, people said, "Here is General Walker. General Walker is here. Here is our leader. What should we do?"

And so General Walker continued on to right in front of the monument. There is this statue of a rebel soldier at the beginning of the monument or which I refer to as the monument. And he stood there for a moment. He didn't say anything.

And then people continually said, "What shall we do? Tell us what to do." Of course, the riot was going on all [fol. 1612] the time, all up in through here (indicating), the tear gas bombs and what-not.

Behind me on my right somebody screamed out, "General Walker, we got a movie," or "a newspaperman and we tore up all of his movie equipment and we beat him up," and General Walker said, "Good. Good."

And then again Mr. Walker didn't say anything and people started, "What shall we do? Tell us what to do." And there were other comments made but the one that really sticks out in my mind was that General Walker said, "How long has this been going on?"

And again back from my right a voice came out and said, "About an hour."

And he said, "Well, keep it up all night. We have got more people coming."

Q. Then what happened?

A. Then there were some other comments, sort of vague in my mind and I won't refer to them.

But General Walker then started walking in a northwest manner at a steady pace, going up towards the Lyceum Building.

Now by this time there was, well, I tried to stay as close to him as possible with this tape recorder because I figured that I was getting a recording and what-not, which,

as it turned out, I wasn't, but, at any rate, we continued on [fol. 1613] up the circle at a steady pace and got up to about here, I would say (indicating), right where the "H" is.

Q. You have indicated a position west of the crosswalk that runs north and south through the circle?

A. Yes, sir.

Q. All right. Now as he went in that direction, what happened to the people that had been down around the monument?

A. Well, they sort of fell in behind him. It was, oh, possibly from, oh, here to the crosswalk (indicating) was the main body of people.

Of course, all the time there was still people running all around in this whole area and as they walked up to about where the "H" is, the Marshals fired a heavy barrage of tear gas.

Well, at this point, General Walker turned to the south and started cutting across, going over to here (indicating).

Now when this barrage broke loose, most of the people that were behind us broke off and ran back over here and back here.

Well General Walker at this point—well, let's see, there was—we got over here and it was sort of as if he were reconnoitering, just looking around, and another heavy barrage of tear gas came and I figured, well, this is time for [fol. 1614] me to come—go home, so I just—I left General Walker in this area, came back and got my car and went back to the Ole Miss Motel.

Q. As General Walker, as you have described, walked west there, was anybody around him?

A. You mean walked over here (indicating)?

Q. No, as he started from the monument?

A. Oh, yes, sir—oh, you mean directly next to him?

Q. Yes, sir.

A. Yes, sir, there was a heavy-set man which I believe is the Sheriff in one of the Mississippi counties, he was a very heavy-set man..

Q. Anybody else?

A. Well, I only remember the, this one individual.

Q. How close were they together?

A. Well, right, as they just started walking off, it looked as if General Walker may had of gone over to say something to him, just leaned over and possibly said something and just sort of like a little conference, and they just took a few steps and then General Walker headed back off in that area.

Q. Now when General Walker and the Sheriff or Deputy Sheriff took off, what happened to this crowd that was behind him?

A. Well, it just followed—just everybody fell in behind [fol. 1615] him. I don't know, everybody had been screaming, "Tell us what to do. Show us what to do. You are our leader. Follow— Let's go."

And, well, when he started walking off, everybody just fell in behind him and went with him.

Q. Would you estimate the size of that crowd that went up there behind General Walker at that time?

A. Oh, I'm not very good at estimating figures, but it would, I would say several—several hundred people.

Q. Take your seat, please, sir, unless you want to mark something else.

After you decided it was time to go home, what did you do?

A. I continued back and got in my car and continued back to the Ole Miss Motel. I ran over a piece of glass or something which slit one of my back tires and it blew out, so I had to park my car and continue at a half walk, half run affair. And when I got back to the motel, I immediately handed the film, or the recording to Dan and told him what I thought was on it and he seemed very, very pleased—

Mr. Watts: Now, if Your Honor please, this is getting out of the realm—

Mr. Gooch: That's right, just what you did.

The Court: Just what you did.

A. Well, all right. At any rate, I handed him the tape [fol. 1616] recorder and then we sat and we played it back and there were sounds and what-not and then it just went blank and I didn't know why it stopped recording until Cecil said that—

Mr. Watts: Just a minute.

Mr. Gooch: Never mind.

A. All right.

By Mr. Gooch:

Q. In other words, you didn't have any of the conversation with General Walker on there?

A. No, sir, I did not.

Q. All right. Now did you return to the campus later?

A. No, sir—well, just to go back to my room and go over—just go to bed.

Q. Do you remember about what time you went back to the campus that night?

A. Well, there had been reports that several people had been—

Mr. Andress: That's not responsive.

The Court: He asked you what time you went back.

A. That's what I'm trying to think. Let's see, it would be 11:00 o'clock, I would say I went back.

By Mr. Gooch:

Q. Did you see General Walker at the time you went back?

A. No, sir.

Q. Did you see him any more after you saw—

A. No, sir.

[fol. 1617] Q. —after you saw him going ahead of that group up towards the Lyceum?

A. No, sir.

Mr. Gooch: Your witness.

Cross examination.

By Mr. Watts:

Q. You are a member of the so-called news media, are you?

A. If—I work with CBS, which is a member of the news media, yes, sir.

Q. Did you study journalism at the University of Mississippi?

A. No, sir, I am taking—I am majoring in advertising—and as, through advertising, we are studying the medias of newspapers, magazines, radio, television, direct mail and what-not.

Q. Are you still in Mississippi University?

A. Yes, sir.

Q. Live in Delaware, I understand?

A. Yes.

Q. Did you know this young lad Van Savell, or Savell, I think he calls himself, with the Associated Press?

A. Yes, sir, I did not—I do not.

Q. Sir?

A. I do not.

[fol. 1618] Q. Have you ever seen him or talked to him at all?

A. Not to my knowledge.

Q. Have you ever talked to anyone who purports to know him or is a friend of his?

A. Yes, sir.

Q. Friends of his you have talked to—

A. Yes, sir.

Q. And have they briefed you on Savell's testimony by deposition in this case?

A. No, sir.

Q. You haven't heard a word of his testimony?

A. Well, I—not of his testimony, no, sir.

Q. Have you heard a word of what his story purports to be?

A. Just what he read or what he wrote in the, in his—I haven't heard. I read the article, that's all.

Q. I see. You have then read that Savell wrote that utilizing his youth to the fullest extent, and so forth, and so on, he participated in a crowd of a few students and many outsiders as they charged the Federal Marshals, Walker first appeared in the riot area at 8:45 Sunday, nattily dressed, the crowd welcomed Walker, one unidentified man queried Walker as he approached the group, "General, will you lead us to the steps?"

That, "I observed Walker as he loosened his tie and shirt [fol. 1619] and nodded yes, without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

"Walker assumed command of the crowd which I estimated to be at a thousand but it was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes.

"Two men took Walker by the arms as they headed for the Lyceum and Federal Marshals.

"Throughout this time I was less than six feet from Walker.

"This march toward tear gas and some 200 Marshals was more effective than the previous attempts. The crowd was unarmed but the crowd said this was the moral support they needed.

"We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went back a few feet further before we had to turn back.

"Before doing so, many rioters hurled their weapons, bricks, bottles, rocks, sticks. We fled the tear gas and charging Marshals.

"I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed half-way up the Confederate monument and addressed the crowd."

[fol. 1620] You have read that news account, haven't you?

A. Yes, sir.

Q. And that substantially is what you say you saw when General Walker first came to the campus?

A. Yes, sir, I did not see the last part of it when he addressed the—when he climbed up on the statue.

Q. But everything that you have related to this Court and jury, young man—and will you step down here, please?

A. Yes, sir.

Q. —took place before General Walker mounted the statue?

A. Yes, sir.

Q. In other words, you never did see him get on the statue at all at the time you were there?

A. Not get on the statue, no, sir, he didn't.

Q. You have seen Reverend Duncan Gray out in the hall, haven't you?

A. I saw him.

Q. As you moved or allegedly moved across this quadrant of the circle, the northeast quadrant of the circle with General Walker in front of you and a neatly dressed, portly man by his side and a group of people behind you, did you encounter the Reverend Duncan Gray out in here?

[fol. 1621] A. I did not recognize him or see him to my—

Q. Now, were there only one or two men that had General Walker by the arm?

A. Well, there may have been two. I only remember seeing the one. There were people running all around the place and I do distinctly remember seeing one. There may have been two.

Q. And how far in front of the crowd was this one man that was holding General Walker by the arms?

A. Well, he was right next to the General—General Walker.

Q. Did he have hold of his left arm like this (indicating), or his right arm?

A. Well, let's say I was General Walker.

Q. You are General Walker and sort of be—

A. Sort of be like this.

Q. Like this (indicating)?

A. Yeah, and I came over and possibly said something to you or something like that.

Q. And did the portly man lock arms with General Walker like this?

A. No, it was more like this (indicating).

Q. Like this? I see. As they marched towards the Marshals, were they in step (indicating)?

A. Well, I don't know if they were in step together. In [fol. 1622] fact they—to me, as I recall, they had just walked along and you went—we got apart and then continued.

[fol. 1623] Q. Were they strolling, or were they moving rapidly?

A. Well, they were just going at a steady pace.

Q. And how far behind General Walker and this portly man walking toward the monument, the Lyceum, were you?

A. Well, I was trying to stay out close to them, as possibly as I could.

Q. The question is: How far behind them were you?

A. I would say approximately ten feet. Ten feet to the immediate rear.

Q. Were people in front of you and General Walker—in between you and him?

A. Yes, sir, they were around, all around him, but I tried to stay to the front.

Q. Now, at the time you tried to stay to the front of this crowd, how large was the crowd?

A. As I say, it was approximately several hundred. I am not very good at estimating how big, but it was—the crowd was all back in through here (indicating).

Q. Were they lined up pretty much abreast behind General Walker?

A. You mean in file and block formation, military manner? No. It was just a mass mob.

[fol. 1624] Q. Well, was the front relatively straight?

A. Well, it was just—in a manner of speaking, yes. Not as a straight line.

Q. And how far from the front of the group was General Walker and this portly man?

A. Oh, it would be—I would be in the very front of the crowd, be about here (indicating).

Q. How far did the right flank extend toward the north side?

A. I would say approximately almost to the—to the road, because you had people, you had the main body, and you had people over to the right, more or less, and a lot of people on the left carrying on the attack against the Marshals.

Q. By the left, you mean down at the southwest quadrant?

A. Well, of course, the main body was here (indicating).

Q. All right.

A. Then we had people over here and people over here, and people all over the place.

Q. Now, as General Walker and the portly man advanced toward the Lyceum with you ten feet behind him, in this vast crowd of people, how far was the left flank of this group extending to the south?

[fol. 1625] A. Speaking of the left flank as a separate bunch?

Q. No, the flank is the left end.

A. The left side?

Q. Yes.

A. It is not as if it was a Military formation where you have a direct—direct line to make. They had the—he had a mob, a group of people that were hysterical, or something was wrong with their minds, then over on the west you had people running up and down all over in this area, you had people continuously throwing broken bottles and what not.

Q. Now, just a minute right there. When you saw General Walker and this man across the northeast quadrant of the intersection, were there still people running out and throwing bottles up ahead of you?

A. No.

Q. They were behind?

A. Well, this is something I noticed. There was no one ahead.

Q. In other words, the people nearest the Marshals as General Walker and this man marched out across that quadrant were General Walker and this man, is that right?

A. Yes, sir, he was in front.

Q. And nobody was between him and the Marshals?

A. Oh, there may have been one or two people. May have [fol. 1626] been more than that, but not many.

Q. But as far as you saw, and what you are trying to tell this Jury, or what you are telling this Jury, is that in front of this crowd of which you were a part, that General Walker and the man, and in front of that were the Marshals?

A. Basically, yes. Sidewalk up here.

Q. What did they do.

A. Well, they continued walking up to approximately the point here.

Q. Would you measure down here on this scale and tell us how far that is?

A. Approximately seventy-five feet.

Q. About seventy-five feet in front of the sidewalk?

A. Yes, sir.

Q. All right. Now, then, tell us what happened.

The Court: Talk a little louder. The Reporter can't hear you when your back is toward him.

The Witness: Yes, sir.

Q. Tell us what happened as Walker and this Marshal—and the portly man—strike that.

Did you see whether this portly man had a badge on?

A. When General Walker approached I seem to remember he did flash a badge. I don't know whether he had it on [fol. 1627] his tie or inside his jacket.

Q. How big was the man?

A. He was a big individual. I would say he would probably wear a 46 coat.

Q. Was he still hanging onto General Walker's arm as he tried to cross this sidewalk?

A. No, sir, I don't believe he was.

Q. When did he turn loose?

A. Back over here (indicating).

Q. Did he stay then some eight or ten feet ahead of the crowd?

A. Yes, sir.

Q. As they crossed the north-south sidewalk, what did they do?

A. As they got up there they just continued walking.

Q. As they got up to this point you pointed out seventy-five feet from the sidewalk, what did they do?

A. Well, when they were getting to the Marshals at the Lyceum the tear gas—they started throwing their bricks and bottles and ran, and then there was the tear gas fired, and then General Walker went to the left and went south, at which point there was another round of tear gas fired.

Q. Did he walk or run?

A. He was walking.

[fol. 1628] Q. Did he ever run?

A. No, sir.

Q. Never ran at all?

A. No, sir.

Q. Did he walk casually, slowly, or how?

A. He just walked—he kept a steady pace the whole time.

Q. And how far did you observe him walk toward the south?

A. He walked to approximately right here (indicating).

Q. Did he stop?

A. Just—well, I don't remember if he stopped or not. I remember we had a second barrage, a big barrage of tear gas, and there was a Marshal coming towards him from the Lyceum, and that was when I retreated to the rear.

Q. You were following very closely, then, General Walker all this time?

A. Yes, sir, when I got into this area I was within a very few feet of him.

Q. Do you remember seeing, or identifying one Van Savell, a rather plump, rather short individual, along closely observing and watching General Walker?

A. No, I was watching General Walker and I was trying to watch the Marshals because they had clubs and I didn't want to get caught.

[fol. 1629] Q. And did you stay on with General Walker after this point here?

A. Yes, sir.

Q. And where did he go from there?

A. I don't know. That is where I left him.

Q. At no time you saw him run?

A. No, sir. Well, you couldn't actually run because when you run into tear gas you quickly discover your eyes become extremely tender and you can't really see where you are going.

Q. From the time tear gas was fired, would you say that Walker raced back toward the monument?

A. I don't know what Walker did from this point on.

Q. If he did any racing at all it was after you and he walked slowly from this point some seventy-five feet southeast of the walk to where the missiles were thrown?

A. He didn't walk slowly.

Q. How did he walk? Walk out across there and show us about how he walked?

A. (Witness demonstrates.)

Q. All right. Now walk back.

A. (Witness demonstrates.)

Q. And did that gait continue all across this northeast quadrant of the Circle and the northwest quadrant of the [fol. 1630] Circle?

A. Yes, sir.

Q. And did that same gait continue from the northwest quadrant of the Circle into the southwest quadrant of the Circle, after the gas was fired?

A. Yes, sir.

Q. And that was the last you saw of him?

A. Yes, sir.

Q. All right. Sit down. Did General Walker assume command of this crowd as stated by that article read you, down by the flagpole?

A. General Walker was—you could say he assumed command. He continued going forward in front of the leaders, leading the mob, yes, sir.

Q. And did you see down in that mob one of the leaders waving a big Confederate flag as General Walker appeared at the monument?

A. I don't remember seeing it. I know what—I know there were some big Confederate flags being waved down there. I don't remember seeing any—

Q. Well, would you say one of the lads who came up to General Walker may or may not have—and may or may not have taken him by the arm, was waving a big Confederate flag?

A. Would you repeat that?

[fol. 1631] Mr. Watts: Repeat the question, please.

(Question read.)

A. I don't remember seeing anything like that.

Q. Now, after you left where did you go?

A. After I left General Walker, I went back to my car.

Q. Then what?

A. Then I continued in my car back to a point, and blew out a tire, and then I went back to the Ole Miss Motel, and gave my tape to Dan Rather.

Q. Dan who?

A. Rather.

Q. How do you spell that?

A. R-a-t-h-e-r (spelling).

Q. And what was his official position with CBS.

A. He is CBS—at that time he was a CBS correspondent, and out of the Dallas Bureau, and Bureau Chief.

Q. He was the Chief CBS correspondent in the area at the time?

A. He was not in this area, but as far as the—

Q. Excuse me, I mean in the Oxford area.

A. In the Oxford area they had people coming in and going out. I don't know who would have control of this CBS Bureau. It is more—I couldn't say that.

[fol. 1632] Q. To whom did you look for orders and directions?

A. Well, mainly from Dan.

Q. And when you got back there did you report to Dan—

A. Rather.

Q. Rather. Did you report to him that you had seen General Walker come up University Boulevard, confer with the leaders of the mob, issue—assume command of them and then march in front of a group of several hundred people, as you have outlined to us?

A. Well, as I think about it, Dan was in Memphis, or he wasn't—I remember talking to Neil Strauser. He was on the telephone.

Q. Well, to whom did you repeat this?

A. Well, this is what—well, I started to—

Q. Let's back up and start over again, son. You got in your car going to the Ole Miss Hotel?

A. Right.

Q. You are sure you were in your car?

A. Yes, sir.

Q. You are sure you had a flat tire?

A. Yes, sir.

Q. From that point on let's go on. What else are you sure of?

A. Yes, sir.

[fol. 1633] Q. Do you remember arriving at the hotel?

A. Yes, sir.

Q. Do you remember seeing Strauser?

A. Yes, sir. It was Neil Strauser.

Q. What did you tell him?

A. I told him General Walker was on campus and that I had a tape recording and that the riot was going on and I had recordings of General Walker and I had some recordings of the sounds of the riot.

Q. And who was this gentleman Neil—Rouser was it?

A. Strauser, another CBS correspondent.

Q. How do you spell that?

A. S-t-r-a-u-s-e-r (spelling) or f-e-r, I am not sure.

Q. All right. Go ahead.

A. Now, you see these newspaper, or these correspondents—there must have been seven Bureau Chiefs in from all over the country, from out of New York, and it is difficult to remember exactly who you see, but I did most of my dealings with them, really, and that is why I imagine the name pops up in my mind, but I gave—or we found Cecil—I am sorry, I don't have his last name. He was the man whose tape recorder this was. Then we played the tape back and we heard what was on it and we—I don't [fol. 1634] know what happened after that.

Q. Did you by any chance report this story, or relate this story to anyone associated with Associated Press?

A. No, sir.

Q. You are sure of that?

A. Positive.

Q. Go ahead. You were going to tell us what you told the gentleman at the Ole Miss. You handed him back the tape recording?

A. Yes, sir, and I said—

Q. Go ahead.

A. "General Walker is on campus and I have got recordings here, let's hear them." As much as said, "Let's find out what I have got."

So, then, we proceeding to play the tape back.

Q. Is that all you said to him?

A. Well, I was anxious to hear what was on the tape, yes, sir.

Q. And how long did your conference with him last?

A. Just a few minutes until we started playing the tape back.

Q. Well, now, as you—or did you at that time tell any person connected with the Associated Press this story you

just outlined from the witness stand?

[fol. 1635] A. No, sir.

Q. Did you ever tell anyone connected with CBS?

A. Yes, sir.

Q. Well, who?

A. Well, Neil Strauser and these people I had been talking to, all of these CBS people.

Q. When did you tell them that?

A. When I took the tape back.

Q. I thought you said when you took the tape back you just returned it.

A. No, I said, "I have a recording."

Q. Well, I asked you, young man, to tell us exactly what you told the CBS representative when you got back to the Ole Miss Hotel? Tell us.

A. Oh, I am sorry, I thought I had.

When I went back to the Ole Miss Hotel, I went to room—the CBS room where I knew these individuals were, and I took the tape recording with me, and handed it to them, and I said, "General Walker is on campus. I have a recording here of the sound of the riot, and I think I have a recording with General Walker on it."

And then we proceeded to listen to the tape.

Q. All right. What did you say in addition to what you testified to? Tell us what was said, what your report was.

[fol. 1636] A. Well, I don't remember what all went on, what all went on at that particular meeting. I haven't given it much thought.

Q. Well, you remembered all of these other things. Tell us what you told the CBS personnel there at the motel, or anywhere else.

A. I really—I told them, well, last night we listened to the tape.

Q. All right, go ahead.

A. All right. We listened to the tape, and we discovered that the tape had malfunctioned, something happened, which it turned out later it had not been re-wound to that extent, and then I said, "Well, what happened is General

Walker came on campus, and then I related to them exactly what I related here, except perhaps not in as much detail.

Q. Who is "them"?

A. CBS.

Q. Who is CBS?

A. Neil Strauser.

Q. Who else?

A. I believe Nelson Benton had come in by this time. I think Dan Rather had gotten back. I don't remember what all was going on.

Q. Do you know what they did with that report?

[fol. 1637] A. Yes, sir. You mean the recording?

Q. No, the report you had made to them.

A. No, I don't know what they did with it.

Q. Do you know if your reports were secondhandly turned over by them to the AP?

A. No, sir, I do not. I don't know.

Q. Did you ever discuss that with them?

A. No, sir.

Q. And that is all you know about this?

A. Well, yes, sir. My tape—the tape was—the tape that was good was put out on CBS news on some of the broadcasts.

Q. Where is that tape now?

A. I understand—well, my copy was destroyed by accident. The Justice Department, I believe, has a copy and CBS is supposed to have a copy.

Q. Did you also appear before the Grand Jury in Mississippi?

A. Yes, sir.

Q. When was that?

A. I don't remember.

Q. January of '63, perhaps?

A. Yes, sir.

Q. Were you subpoenaed to come here today?

A. Yes, sir.

[fol. 1638] Q. When did you get the subpoena, before you left or after you got here?

A. After I got here.

Q. Who arranged for you to come?

A. The Associated Press, or—Mr. Smith, I believe, or Mr. Leon Pearl.

Q. Is that Mr. Leon Pearl from New York?

A. Yes, sir.

Q. You personally discussed this, then, with Mr. Leon Pearl?

A. No, sir.

Q. Who have you discussed it with?

A. Mr. Gooch, Mr. Smith and the other lawyers.

Q. What other lawyers? When and where?

A. You mean from the Grand Jury to today?

Q. Well, don't—

The Court: You can't tell about the Grand Jury.

The Witness: I know I can't. Just to Mr. Gooch and Mr. Smith.

Q. How soon after the incident?

A. After what incident?

Q. After the riot of September 30th.

A. After the riot? Well, I was just contacted by them the last part of school, which would be in June.

[fol. 1639] Q. Oh, yes, speaking now of riots, how long did you hear General Walker talk to these lads in the vicinity of the monument when he first came out?

A. I would say he talked to the group approximately four or five minutes.

Q. Well, he also talked to the individuals, didn't he? Didn't people come up and shake hands with him and say, "General Walker, I am so and so,"?

A. I don't remember anyone coming up like that.

Q. He just talked generally to the group?

A. Yes, sir. He stood in front of the monument, and then the group gathered sort of around him, people just in a semi-circle.

Q. And various individuals would come up and report to him things that had happened, didn't they?

A. Yes, sir.

Q. Did you ever hear him in answer to any of those reports say, "Riot, riot"?

A. I don't remember. He may have.

Mr. Watts: That is all.

Mr. Gooch: Stand aside. Thank you.

The Court: Going to release this witness?

Mr. Gooch: Yes, sir.

The Court: I will let you go back home.

Mr. Gooch: Call Mr. Proehl.

[fol. 1640] DONALD JAMES PROEHL, called as a witness by the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name?

A. My name is Donald James Proehl.

Q. Where do you live, Mr. Proehl?

A. I live on the University of Mississippi campus, in the back of the campus, the Village Apartments they are called.

Q. Have to speak out a little louder.

A. I live on the campus of the University of Mississippi, in the back of the University grounds, called Village. And my wife and child and I live there.

Q. How old are you, Mr. Proehl?

A. I am twenty-nine years old.

Q. Are you or have you been a student at the University of Mississippi?

A. Yes, sir, I have.

Q. When were you first enrolled as a student in the University of Mississippi?

A. I started to school in 1953. I stayed down there a year and I left and went into the Army and spent three [fol. 1641] years in the Army over in Okinawa and Japan, came back to school on the GI Bill. I stayed at Ole Miss for one year, and after that I went up North to work. I went to work for the Western Electric Company for four years in the engineering department and then came back to Ole Miss to finish up on the GI Bill.

I have gotten my undergraduate degree in education, a school teacher in history, and I received my Master's Degree in Guidance Counseling in September.

Q. All right. Are you working now, Mr. Proehl?

A. Yes, sir, I do various and sundry odd jobs. My wife and I are putting ourselves through school. I work in a factory on the night shift from 7:00 at night until 5:00 in the morning and I go to classes during the day, and previous to this job I worked as a bouncer at fraternity and sorority parties, and I referee athletic events on the campus, work with the physical education department, take tickets at the theatre up town, and you name it, I have done it.

Q. When do you sleep?

A. In class.

Mr. Watts: I think that's immaterial.

[fol. 1642] Q. Directing your attention to September the 30th, 1962, were you on the campus of the University of Mississippi on that date, Mr. Proehl?

A. Yes, I was.

Q. Had you been away from the campus that weekend?

A. No. My wife and I had stayed there. We didn't go to the football game in Jackson.

Q. All right. Directing your time down to around mid-afternoon, 4:00 or 5:00 o'clock, did you have occasion to be up near the Lyceum Building or in the circle?

A. Yes, we had gone to church and come home and eaten dinner and I had gone up town to the drugstore, I had driven up town and didn't go by way of the circle going up town but coming back I did and when I came back, I saw the Marshals and I went over and told my wife and she—

Q. You can't tell what you told your wife.

A. I told my wife—

Q. I say, you cannot tell what you told your wife.

A. Oh, I cannot? I am sorry.

Q. That would be hearsay. You went home and then what did you do?

A. I got my wife and we went—brought the baby and my neighbor across the hall and we came back to the circle.

Q. And when you got back to the circle, what did you see?

[fol. 1643] A. I saw Marshals surrounding the Lyceum Building and a crowd of students and adults in the front.

Q. All right. How long did you remain there in front of the Lyceum Building when you came back with your wife and baby?

A. I brought my camera with me. I wanted to take some pictures. And we stayed there, oh, I would say about an hour and 45 minutes, maybe two hours.

Q. What was occurring, if anything, between the people and the Marshals and the Highway Patrolmen, if anything?

A. Oh, the Marshals were surrounding the building and the students were laughing and calling them names. The Marshals were laughing and joking right back with them and they called—am I allowed to recite some of the names they called?

Q. I guess you'd better not.

A. Oh, not curse words, I mean, just—

Q. All right.

A. I put my little girl up on my shoulders and went up to the front of the crowd. The wife stayed behind on the

grass and I watched for a while and I saw a boy with a Confederate flag on a long pole waving it up there and the students were actually just, to me it looked just like good-natured fun, to start with, and then it started getting [fol. 1644] rougher as time wore on.

Q. All right. When it started getting rougher, how did it get rough?

A. Oh, things were thrown. I couldn't say exactly what. Two, three army duce and a half, Army trucks came in with more Marshals on them.

I took some pictures of those, also, and some of the students started flipping, and grown-ups, flipping lighted cigarette butts up on top.

In fact, the Marshals were laughing and joking about it. I have one picture where the Marshal is bending down, joking with the students.

Like I said, I looked like—it was actually good-natured fun there for a while.

Q. After it—did it ever quit being good-natured fun?

A. Oh, yes, I started—as I said, I had my camera there and I saw some of the photographers start having their cameras taken away from them, tape recorder, and being smashed, and things starting to get rougher and so I told the wife and child to go home and I gave my wife my camera so mine wouldn't be destroyed and I sent them on home.

Q. Did you remain there?

A. Yes, sir, I did.

Q. Were you there when the tear gas was fired?

[fol. 1645] A. No, sir, I wasn't.

Q. Where were you when the tear gas was fired?

A. About 10 minutes before President Kennedy was to come on TV, the YMCA is located kitty-corner on the circle there and I had actually stayed there because I wanted to hear Kennedy on television and I had left with another band of students who I cannot place who they were, just a small group of students, we had gone, we went over to the "Y", and—early to get a seat because we knew the place

would be packed and I was not present when the tear gas was fired.

First thing I knew was my eyes started smarting.

Q. All right. Now you did listen to President Kennedy's speech over in the "Y"?

A. Yes, sir, I did.

Q. After the speech, where did you go and what did you do?

A. After the speech, we had—oh, I remember explicitedly two boys came in. One of them had been shot with bird-shot, you know, "Boy's been shot. Boy's been shot," and pulled up his shirt and we saw a lot of the pellets or little red marks on his back.

After Kennedy's speech, I tried to look out the window. It was pretty hard to see with the tear gas and all. And at times I would go to the door and try to look out the doors. I was worried—I wanted to get back to the apart-
[fol. 1646] ment but I didn't know how to get back.

I saw some Marshals and students actually fighting out in the grove, maybe one Marshal and one student or two Marshals and a student.

And so I stayed in the safest place. I stayed in the "Y". At times, as I said, I would go out and look out the door and that's all.

Q. All right. Now after you came out of the "Y", let's get down to it, did you ever see Walker that night?

A. I heard in the "Y" that General Walker was—

Mr. Andress: We are going to object to that.

The Court: No, sir, he asked you if you saw him.

A. If I saw General Walker? Yes, I did.

By Mr. Gooch:

Q. Where was General Walker when you saw him?

A. He was standing on an elevated portion of the Confederate statue, on the front of the statue.

Q. Now you had not seen him prior to the time you saw him standing on that campus?

A. No, I hadn't.

Q. On that monument?

A. No, sir; I hadn't.

Q. Did you hear or were you able to hear—well, now where were you when you saw him standing on that statue? [fol. 1647] A. You could make an outline, a sideview outline of a man—

Mr. Andress: If the Court please, this is not responsive.

The Court: Overruled. You may proceed.

A. You could see the side profile, let's say, of a man standing up there. I couldn't distinguish who it was until I got up there and I pushed right to the front, pushed right up.

I was within, oh, maybe three or four feet from him, stood right up, could look right up at him, and I saw General Walker with his white hat on.

Q. All right, did you hear any of the statements that General Walker made there in his speech there that night?

A. Yes, sir, I did.

Q. Will you detail as best you can your recollection of what you heard General Walker say on the monument there that night?

A. I heard him tell the students that they had a right to protest under the Constitution; that they were doing the right thing, and that he would lead them in this protest.

Q. Do you remember anything else he might have said?

A. There were things I am not sure about. I wouldn't [fol. 1648] want to say. I am sure I did hear this, though.

Q. All right. Did you see Reverend Duncan Gray there while General Walker was on that monument?

A. Yes, Duncan—Reverend Duncan Gray and myself and a man I don't know, the three of us met actually on the steps of the Y and walked over to hear him talk, hear General Walker speak and Gray went right up there with me and I was there when somehow Gray was pulled off the

monument. I don't know who did it but I was there and I helped pick him up and get him over to the trees and then take him back to the Y.

Q. Did you hear General Walker say anything to Reverend Gray there that night?

A. Yes, he said that we have—he says, put his hand (indicating), "We have an Episcopalian minister here." He said, "I am an Episcopalian but when we have ministers like this in our church, it makes me ashamed to admit that I am an Episcopalian."

Q. Then what happened to Reverend Gray?

A. Somehow he was down on the ground. The events were so hurried, the crowd had been yelling, "Kill him, kill him," pertaining to Duncan Gray.

The crowd was worked up and . . . just for Duncan Gray's life, actually, and got him over to the tree, I mean and got him back to the Y, the steps on the Y.

Q. Did you see General Walker after you had assisted [fol. 1649] Reverend Duncan Gray away from there?

A. I did not see General Walker at—when I took the Reverend over to the—when we went over to the trees, the crowd started to surge forward and I could not see General Walker then at all.

Now when we went across the street, I stood up on the steps of the Y and I was able to see General Walker up at the head—not at the very front because you had stragglers of people out there in advance, one or two people out in advance, but I saw General Walker right up near the front, yes.

Q. All right. What direction was General Walker and this crowd moving?

A. They were moving towards the Lyceum Building.

Q. And how far did you see them get?

A. I saw them get, I would say, midway between the flagpole and the front of the Lyceum Building.

Q. Then what happened?

A. Tear gas was fired and they all turned around and ran.

Q. Now did you see General Walker after that that night?

A. No, sir, I didn't. I didn't see him any more.

Mr. Gooch: Your witness.

[fol. 1650] Cross examination.

By Mr. Andress:

Q. How do you spell your name, Mr. Proehl?

A. P-r-o-e-h-l.

Q. h-l?

A. Yes.

Q. German name, I take it then?

A. Yes, sir.

Q. Now what time was it that you decided this was no place for the—for your wife and baby?

A. It was approximately—now I would say it was approximately 5:30. Now I had taken these colored slides and one of the slides showed the time on the clock as 10 minutes after 5:00. It was just about 20 minutes, or so, after I took these that I sent them home.

Q. Well, then you must have gotten there on the campus about 2:30, at the circle?

A. Well, no, I came back from the drugstore, I think it was about 3:30, quarter to 4:00, or so.

I didn't have occasion really to look at my watch then but I went home and Rose, my wife, dressed the baby and everything and she got some clothes on and we went back. I would say it was about, oh, a little after 4:00, maybe 4:30, closer to 4:30.

Q. And then when did you finally go home that night?

[fol. 1651] A. I don't know the exact time, sir. It wasn't too long after the last charge that they made, the large group that went up there. I wanted to go home. I didn't know how I could get back. We had expected company that night and I knew the company was already there.

Q. Well, now wait just a minute. When was the last time you remember looking at your watch before you started for home?

A. The last time I remember looking at my wife?

Q. At your watch?

A. At my watch?

Q. Yes.

A. I don't remember looking at my watch.

Q. In other words, then, you can't—you say it was about —you went to the Y just before the President made his speech?

A. Yes, sir.

Q. But from that point on you don't have any memory as to time?

A. I don't even remember if I had a watch on. There was a large clock up on the top of the Lyceum Building and I saw the time from that when President Kennedy was going to speak.

Q. And how long did you stay in the Y, as being the safest place, after the President's speech?

[fol. 1652] A. I wouldn't be able to say, sir. I—oh, may have been an hour, may have been two hours. Things, events that night happened so fast and everything, it's pretty hard to place the time.

Q. Well, you said you tried to look out of the window and the door there in the Y and you couldn't see very much?

A. No, sir, you couldn't. Gas and many people crowding there and you couldn't get to the phone. It seemed as though everybody was waiting in line for a telephone.

Q. You couldn't even see much out of the door of the Y?

A. You could if you went out and you stood on the steps but there were maybe one or two Marshals would come by and students were running out from in back of the Y and running across the grove and throwing things and the Marshals would come forward with tear gas and when your eyes would start to smart and burn, you would go inside.

Q. How much light was there out there on the campus that night?

A. There was quite a bit of light coming from the front of the Lyceum Building which would shine into the grove and there were lights in the grove for quite a while until they were broken out.

Q. And what other lights were there around?

[fol. 1653] A. I couldn't say right off.

Q. Now you said that after the General finished his speech on the monument and stepped down, that you couldn't see him there for a while?

A. No.

Q. Which direction was he standing at when he stood on the steps of the monument?

A. When he stood on the steps of the monument, he was facing towards University Avenue, which is east.

Q. And then when he got down from the monument, which way did he go?

A. I do not know, sir, because I was with Duncan Gray. We got him over to the trees.

The next time I saw General Walker—in fact, I could not see General Walker's face. I saw a man with a tall hat, unless—unless General Walker put his hat on somebody else, it was him. But I saw him up at the head of the large mass of crowd—

Q. I didn't ask you that.

A. You asked me the last time, or the next time I saw him, and that's when I saw him.

Mr. Gooch: Just wait a minute.

By Mr. Andress:

Q. I asked when he stepped down, which way did he go around the monument?

A. I don't know.

[fol. 1654] Q. Now you then said after you crossed the street and moved away from there with the Reverend Gray, that you got up on some steps?

A. Yes, sir, I did.

Q. What steps did you get up on?

A. The steps of the YMCA building.

Q. Now you didn't see the General then from the time that you got off of the monument until you had walked back to get on the steps of the YMCA and that is where you had come from to begin with, wasn't it?

A. Yes, sir.

Q. And I believe that you said that when you came out of the YMCA there with the Reverend Gray, you could just see a figure down on the monument but you couldn't identify it?

A. You could see part—you could see that a person was standing up there but you couldn't tell—you couldn't tell if it was a man or a woman. You couldn't see until you got up close because—

Q. When you were there at the YMCA and starting down towards the monument, you could just see that there was somebody at the monument but you couldn't identify them?

A. Yes, sir, that's right.

Q. And you said that you couldn't identify them—who it was until you got up close and crowded in there into the [fol. 1655] first two or three feet?

A. That's right. I had never seen General Walker before.

Q. And then after you turned around and left and went back up to this same YMCA, from that point you could identify a white hat?

A. I could see a tall man in the front with a white hat, yes, sir.

Q. And outside of that, that was still just as difficult from the YMCA to identify people at a distance as it had been before, wasn't it, outside of the distinction of the white hat?

A. No, I am saying it was difficult to identify General Walker at the statue because the way the statue was standing and he was standing in front and you could only

see part of—well, the state was in the way. You can see part of a man's arm, part of a man's legs standing but you couldn't see who the man was.

But when I was looking across the grove, I could see that white hat distinctly right out in front there. I couldn't miss that.

Q. Was that the only white hat on the campus, Mr. Proehl?

A. The only man I saw. There may have been—

Q. You, of course, don't really know whether or not [fol. 1656] there were a lot of white hats there or not, do you?

A. I didn't see any other white hats in that crowd, where the people were standing out there, sir.

Q. You mean there weren't any other white hats that came up there by the YMCA where you spent most of the evening?

A. Pardon?

Q. There wasn't any other white hats that came up by the YMCA where you spent most of the evening?

A. I don't remember.

Q. Actually then from the time you sent your wife and baby home and just a few minutes before Kennedy's speech before you went to the YMCA, you never left the YMCA to get around anywhere except the one time that you walked down to the monument and then right back to the YMCA?

A. That is right, I did not leave the Y to go anywhere else. I met Duncan Gray right on the steps of the Y and another man and we walked down to hear the man speak.

Q. Is Duncan Gray a pretty good friend of yours?

A. No, sir, I don't—the first time I met Duncan Gray was that night. I have never been to his church. I am not of his denomination.

Q. At the time you first came out on the steps of the YMCA there with Duncan Gray, there was already a figure up on the monument, wasn't there?

A. Yes, sir, a figure was on the monument.

[fol. 1657] Q. So that how long did it take you to walk—I guess it must be what? 200 feet from the Y down there?

A. A hundred fifty, 200 feet. At a normal pace, I wouldn't know how long it took me to walk. Just at a normal pace.

Q. Were you hurrying down to hear his speech?

A. I didn't run, no. I didn't run. We walked. We didn't run over there.

Q. Strolled down?

A. Strolled down, that's right.

Q. And when you got there the speech was already in progress, is that right?

A. Yes, sir, it was.

Q. And all you say that you heard is the couple of things that you have mentioned here?

A. There were a few more things that I heard. I heard him say that—first, he said, your Governor had sold you out and I heard 'em say, no, no, and then he bent down and he talked to a man with a suit on in front of the crowd there and he raised up and said, "Birdsong has sold you out," I remember that.

Q. Was that about the time the Reverend Duncan Gray tried to climb up on the monument?

A. I don't remember if that was exactly at the time or not. I distinctly remember him saying that, though.

[fol. 1658] Q. And was it after that that his attention was attracted to the Reverend Gray?

A. It was after that his attention was attracted—

Q. What was Reverend Gray doing to attract his attention?

A. Well, the Reverend Gray was standing alongside of me up against the statue here and he said, he said, "You can stop this if you will.

"You can stop this." And that's when the General said. . . .

Q. Now then you left there with the Reverend Gray at that time and was the General still on the monument?

A. I do not remember if the General was on the monument or not.

Like I said, we went over to help Duncan Gray. The crowd had started to surge forward and I heard people yell, "Kill him, kill him, kill him," and from what I—the noise and tumult and everything that night, I didn't know what was to happen and, to me, a member of the church is a member of the church, no matter what—I mean you don't want to see a man done bodily harm and from the way the crowd was worked up there, I didn't know what was going to happen.

Q. Did the Reverend Gray ever say anything to you about hearing the crowd say, "Kill him, kill him, kill him"?

A. I don't remember Reverend Gray saying that to me [fol. 1659] but I heard the crowd say, "Kill him, kill him, kill him."

Q. Where did you all take back to?

A. Back to the Y, and that's the last I saw of Reverend Gray. Got him up to the steps. I don't know if he went inside or not. I stood on the steps.

Q. You were one of the people who took him?

A. Yes, sir, I was one of the people who took him over there.

Q. Was the Deputy Sheriff there, one of the people that helped you?

A. I remember the Deputy Sheriff going over with us towards the small trees, I believe—I'm not sure but I believe he was the one that said somebody take care of him, help him. But I don't remember the Deputy Sheriff—I don't think but I'm not positive that he went back to the Y. He wasn't with me.

Q. Well, did you say to the Deputy Sheriff, "Well, I know this man. We'll take care of him."?

A. I don't recall saying that.

Q. Did somebody there in your little group that took Reverend Gray back to the Y?

A. Somebody may have. I'm not sure. I don't recall that.

Q. But you were taking over the protection of the Reverend Gray from the Sheriff?

[fol. 1660] A. I was helping. I was helping, yes.

Q. Was the crowd around the Marshals still indulging in good-natured fun at the time that you went to the Y to listen to the President's speech?

A. No, it had turned a little bit more than fun. In fact, I saw one student, I don't know who it was, there was some more Army trucks pulled up and I saw a student say, "There is a nigger in there," the truck driver, Corporal. And they broke the truck window and they grabbed a fire extinguisher off the side of the truck and they squirted it in the window and the colored boy got out the other door. I heard tires hissing. I didn't actually see any slashing of tires but you could hear air escaping from tires so I assumed that tires were being—

Q. You don't know whether they were just letting the air out of the tires or cutting them?

A. Well, they weren't letting air out; otherwise they would have been chased away by the police, sir.

Q. At that time the Highway Patrol was between the Marshals and the crowd, weren't they?

A. I remember seeing some of the Highway Patrol, yes, sir.

Q. And mostly the crowd was back across the drive from the Lyceum?

A. They were pushed back, they were pushed back across [fol. 1661] and then it would lax, the Marshals or so would lax their attention there and the crowd would come back and cross and then they would be pushed back again.

Q. And there was nothing else that you can think of that you saw there that night about the circumstances? Just more of the same?

A. Yes. Now when I—I didn't know how to get back home. I was thinking about cutting around the back of the campus but I had heard or I had seen some Marshals being in conflict, let's say, with students or with people out in the grove and I didn't want to take a chance so I

raised my hands like this (indicating) and I said, "I haven't had a thing to do with it. I have been in here, I have got a wife and child at home and I want to get home to my family."

The Marshals said, "Come on. It's okay." They had their masks on. And the one took it off and said, "Come on." I didn't know what they were doing—what they were going to do with me but I wanted to get home and I was tired of all of it and I walked right through and the Marshals didn't do a single thing to me. In fact, one of them took off his mask, and said, "What's the matter? Those kids nuts or something?" And I said, "I guess so."

I kept on walking and I cut—

Mr. Watts: If Your Honor please, I don't believe this is responsive to the question and some place it has got to [fol. 1662] stop and I would object to it as hearsay.

The Court: Mr. Watts, Mr. Andress asked what else happened out there that night.

Mr. Watts: He's telling what the Marshals said not in the presence of any of the parties.

The Court: Well, I'm going to permit the witness to answer the question.

By Mr. Andress:

Q. Now tell me—

A. I am not done, sir. Pardon me.

The Court: Will you go ahead and finish.

A. After the Marshal made the remark to me, not a thing was done and I walked between the library and this other building and went home. That was it.

By Mr. Andress:

Q. Now you teach physical ed, you say, or work in Physical ed?

A. No, I assist in the Physical Education Department but I am going to be a Guidance Counselor.

Q. Well, you are in pretty good shape, aren't you, pretty good physical shape, now, aren't you?

A. Oh, well, for 29 years old, I think I am. I don't indulge too much in athletics.

Q. How long do you reckon it would take you to run from the monument back around the Fine Arts Building and into LeBuve Hall?

A. How long do I think it would take me to run from [fol. 1663] the monument to the Fine Arts Building?

Q. Around behind the Fine Arts Building, behind—Peabody. Peabody in through there?

A. Peabody and into LeBuve? I wouldn't—it all depended who was after me and why I was running, sir. I really couldn't say.

Q. You reckon you could run that far without stopping for a breath or something?

A. Yeah, I could run a lot further than that if I had to.

Q. Would you be out of breath by the time you made a roundtrip run in there and telephone and run back to the monument?

A. Well, I might have been but—but I might not have been.

Q. Do you think you would be able to do it eight or nine times?

A. I don't see the point—yeah, I probably could do it eight or nine times. I don't see your point in it but I probably could.

Mr. Andress: All right, that's all.

Mr. Gooch: Stand aside.

The Court: I'm going to release this witness, Gentlemen. I will let you go ahead and release you and you can [fol. 1664] go back.

Mr. Gooch: Do you want to start another witness?

The Court: No, it's too close to 12:00.

Ladies and Gentlemen, we will recess until 2:00 o'clock.

(Thereupon, at 11:50, a recess was taken until 2:00 o'clock, p.m., of the same day.)

[fol. 1665] Afternoon Session.

Doy L. Gorton, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name?
A. Doy L. Gorton.
Q. Where do you live?
A. Greenville, Mississippi.
Q. How old are you, Mr. Gorton?
A. Twenty-two.
Q. Are you now or have you been a student at the University of Mississippi at Oxford?
A. Yes, sir.
Q. Were you on campus at any time during the day of September 30, 1962?
A. Yes, sir.
Q. Do you know about what time you got on campus that day?
A. Well, a little bit after 7:00 o'clock.
Q. Where had you come from that day?
A. From Greenville.
Q. Had you been home for the week-end?
A. No, I was working at Greenville.
[fol. 1666] Q. All right. Now, what attracted your—did anything attract your attention when you got on the campus that evening?
A. Yes, sir, as I got on the campus I drove in past the gym with some friends and I saw tear gas and I saw some police, Highway Patrolmen running away from the vicinity of the Lyceum Building.
Q. All right. At any time during that day, did you—or night—did you see General Edwin A. Walker?
A. Yes, sir.
Q. Where was he when you first saw him?

A. He was right beside the Confederate monument near University Avenue.

Q. Did you go down where he was, or were you in the vicinity?

A. Yes, sir.

Q. Where had you been before, do you remember?

A. The Y Building, the YMCA.

Q. All right. Do you know how long you had been over in the YCMA Building, in that vicinity?

A. Been there about thirty, or maybe forty-five minutes.

Q. Had you been inside the YMCA, or not?

A. Yes, sir, I had.

Q. Do you say you saw him at or near the monument? [fol. 1667] Did you go in that direction?

A. Yes, sir, I did.

Q. Then what did you see him do, if anything?

A. Well, when I got to the monument, General Walker was standing on the base on one of these ledges of the monument, and there was a crowd all jammed up around him, and I stayed about ten or twenty feet back, and General Walker started speaking.

Q. What did he say that you heard?

A. Well, he told the students that they had a right to protest, that it was their constitutional right to protest like this, and that their constitutional rights were being infringed upon. He spoke for a few minutes about that and then he looked down and to his left and he saw a man standing there. I guess it was a man I recognized as a man named Duncan Gray, and he said, "This is an Episcopalian minister here and that makes me ashamed to be an Episcopalian." And people started yelling and screaming at this man, and they took him away, the minister. And after that he mentioned that we had been sold out. I think his exact words used were, "You have been sold out."

And everybody asked, "Who sold us out, who sold us out?" And he said—well, I don't think he remembered there for a minute, and he said,—asked somebody beside

him, and he came back up and mentioned this Col. T. B. [fol. 1668] Birdsong, of the Mississippi Highway Patrol.

Q. Do you recall anything else he might have said?

A. He talked about Birdsong there for a minute and then seems like he looked straight ahead toward the University Avenue, and then he said a few more things about—most of these things were the kind of things like constitutional infringement and, keep up the protest, and then people started asking if anybody was going to help, if anybody was going to help the students at Ole Miss, and I didn't exactly hear what General Walker said, but I know he made them understand—

Mr. Andress: I object to what he made them understand, Judge.

The Court: You can't give your conclusion. Just tell what he said and what he did.

A. Well, he nodded and said something like this, yes, or at least in the affirmative.

Q. Then what, if anything, did he do, or was that the conclusion of his speech, Mr. Gorton?

A. He said some more things after that, mostly about the Constitution, and mostly about the troops being there, and something about Cuba and the "... troops should be in Cuba and shouldn't be," there at Ole Miss, and told—then he looked straight ahead toward University Avenue [fol. 1669] and started stepping down from the monument.

Q. Then what happened?

A. Then he—it seemed like he had a bunch—the crowd was very, very tight around the monument and they pushed around to the front of the monument, and then to the right of the monument as you look down University Avenue, then came back this way toward the Lyceum Building.

Q. Then what happened?

A. Then when I saw him, he was walking at what you would call sort of a brisk—not a real fast pace, toward the Lyceum Building.

Q. And what did the crowd that was there with him at the monument?

A. Well, when General Walker did this it seemed like he was responding to the crowd.

Mr. Andress: Just a minute.

The Witness: Is that a mistake?

Q. Strike that. Tell exactly what you saw.

A. The crowd let up a great big yell, a big whoop, and they started yelling for General Walker, and that attracted the attention of the people over here near the YMCA Building and Hume Hall, the Science Building being put up there, and the people to the left over here and the people to the right. They seemed to know it was General Walker, or at least that is what this crowd was doing. And General [fol. 1670] Walker went straight toward the Lyceum Building, maybe off to the right a little bit on the grass, I guess it was, and the students and everybody around them started moving in behind General Walker, or being drawn to this group here that was making all the noise and yelling rebel yells and cursing and screaming.

And I stood there for a minute and I saw students runing from as far away as Hume, and that area, trotting by me and running by me to catch up with the main body, or main crowd gathered around the General.

Q. Where did this crowd go that you said Walker was at the head of?

A. It headed toward the Lyceum Building, and they—when they got to that area, and the last time I saw General Walker was about three-fourths of the way to the flagpole from the statue. However, the Marshals, when they heard this big whoop—

Mr. Andress: Now, just a minute, if Your Honor please.

Q. Just tell what happened as they were proceeding toward the flagpole. What did the Marshals do?

A. Well, the Marshals shot off a tremendous volley of tear gas, which partially obscured the crowd, and then the people who were in the crowd, you could see them running

up and throwing rocks and whatever they had in their [fol. 1671] hands, brick and running toward the Lyceum Building.

Q. What did you do?

A. I walked over toward the YMCA. I didn't go with the crowd.

Q. Did you see General Walker any more that night?

A. No, sir, I didn't.

Mr. Gooch: Your witness.

Cross examination.

By Mr. Watts:

Q. Where had you come from, Greenville?

A. Greenville, Mississippi, yes, sir.

Q. How did you come on the campus?

A. I came on in a car with some friends.

Q. Alone or with someone, when you approached the monument?

A. Oh, in the monument area? I was alone.

Q. Where was you going?

A. I was coming from the YMCA toward the monument.

Q. You were traveling, then, southeastward?

A. I am sorry, I think I am confused. You mean when I first came on the campus?

Q. No, when you saw Walker.

A. When I first saw Walker?

Q. Right.

[fol. 1672] A. Was at the memorial, the monument.

Q. Where were you coming from then?

A. From the YMCA.

Q. Step down to the plat there. That is Exhibit 11. Will you take the pointer.

Mr. Gooch: Right there on the base.

Q. Do you know which way is north?

A. North would be this way (indicating).

Q. Will you put your pointer on the YMCA?
A. Be right here (indicating).

The Court: Have to talk a little bit louder, you are facing away from the Reporter.

A. Yes, sir, the YMCA Building is right here.
Q. And the monument?
A. Right there (indicating).
Q. From which direction did you approach the YMCA?
A. I am sorry, sir, I didn't approach the YMCA. I approached the monument, is what your question was.
Q. When you came on campus, did you go to the YMCA, or not?
A. No, sir, when I first came on campus I was over here at the Union Curve, near the Library, near the Gymnasium, and as the night went on, I came through here and back through here to the Y.
Q. Now, you saw—you say you saw tear gas fired, there [fol. 1673] about 7:00?
A. No, sir, it was after 7:00 o'clock.
Q. Now, then, with respect to when the tear gas was fired, when did you make that trip you pointed out on the map?
A. The trip to the Y or the monument?
Q. No, sir, the trip from around behind the Lyceum.
A. Right through here and all through here?
Q. Right.
A. It took me thirty or forty-five minutes, all through this area, right in through here. Then I gradually wandered over in this part of the Circle here, where I could see the people running around.
Q. And did you go from there to the YMCA?
A. Yes, sir, I went from, I guess that is the northeast section of the Circle there over to the YMCA.
Q. You went from the YMCA directly to the monument where you saw General Walker?
A. Yes, sir, I was beside the Y for a while, and inside, then I heard this noise over there, and then I went over to the monument.

Q. How long were you inside the YMCA?

A. I was probably in there about twenty minutes or thirty minutes.

[fol. 1674] Q. Did you hear any noise while you were in there?

A. Yes, sir, there was firing going on the whole time I was inside.

Q. And when you came out, you walked from there down to where Walker was?

A. Yes, sir. He was at the monument here (indicating).

[fol. 1675] Q. Did you hear all of his speech on the monument?

A. No, sir, I didn't hear all of the speech.

Q. I believe you said the first you heard—you may take your seat now. Walker told the students they had a right to protest?

A. Yes.

Q. They had a Constitutional right to protest?

A. Yes.

Q. Then the next thing you saw that occurred, Reverend Gray tried to get on the monument?

A. Yes, sir.

Q. And was pulled down?

A. Somebody seemed to knock him down from there, yes, sir.

Q. Oh, he was knocked down?

A. Pulled down or knocked down, yes, sir.

Q. Did you notice a big heavy-set Sheriff there with a badge on?

A. No, sir, I didn't.

Q. You don't know whether he helped him get down or not?

A. No, sir, I don't.

Q. And then Reverend Gray was taken away?

A. I assume so, yes, sir.

Q. So it would have been impossible then for Reverend

[fol. 1676] Gray to have heard the things that you have

testified to after these two statements that you have a right to protest under the Constitution—

Mr. Gooch: If the Court please, I object to that as improper cross examination.

Mr. Watts: I will change the terms of that question.

The Court: Don't answer that question.

By Mr. Watts:

Q. Was Reverend Gray in a position to where, with normal human hearing, he could have heard the things and statements you have related which occurred after he was pulled down from the monument?

The Court: Mr. Watts, I won't permit this witness to testify as to whether somebody else could have heard it.

Mr. Watts: I understand.

The Court: The only point, what he heard and saw.

By Mr. Watts:

Q. Going back to the point when Reverend Gray was taken away, all of the things you have testified to that were said except that they had a right to protest and had that right under the Constitution, were said after Reverend Gray was taken away, is that right?

A. I'm sorry, sir, would you repeat that, please, sir.

Mr. Watts: Would you read it?

(Record read.)

[fol. 1677] A. After Reverend Gray was taken away, the things that I remember was the thing about Col. Birdsong and then the thing about Cuba, I believe and the—

Q. Did or did not General Walker say that Governor Barnett had betrayed the people of Mississippi, did you hear that?

A. No, sir, I'm sorry, I didn't.

Q. Did or did not you hear General Walker say, "But don't let up now"?

A. I don't remember hearing that, sir.

Q. "You may lose this battle but you will have been heard," did he say anything like that that you heard?

A. There is some doubt about that, I'd be afraid to answer it. Something about being heard around the world or, keep up the protest because you will be heard around the world."

Q. Well, you have not testified that you heard him say anything about being prepared for possible death, did you?

A. No, sir, I didn't hear anything like that.

Q. Now that, to you, would be a very dramatic statement, wouldn't it?

A. Yes, sir, I think it would be.

Q. And you heard nothing like that at all?

A. I didn't hear it, no, sir.

[fol. 1678] Q. Did you hear then the remainder of this alleged statement, "You must be prepared for possible death. If you are not, go home now?"

A. No, sir, I didn't hear that statement.

Q. Would you say he did or did not say that?

A. I'm sorry. I really couldn't say.

Q. Did you read the Savell report of this that came out on the 3rd of October, 1962?

A. I really couldn't say. I don't know what the Savell report—is that the AP report?

Q. Right.

A. I don't know if it was in the paper or not, which paper I read.

Q. Have you at any time since that and prior to the trial of this lawsuit seen that alleged report?

A. No, sir, I haven't.

Q. Well, anyhow, you didn't hear Savell say anything like that?

A. Savell?

Q. As you were. Walker say anything like that?

A. No, sir, I didn't.

Q. All right. Now when Walker finished his speech, as I understand, he got down from the monument?

A. Yes, sir, he did.

Q. Will you please step back up to the chart, take your [fol. 1679] pointer? Would you point out to the jury please, sir, what direction he went after he got down from the monument?

A. The monument's here and when he got down, he went this direction (indicating).

Q. About how far?

A. About maybe 10 feet.

Q. You are sure?

A. Five to ten feet, in that area.

Q. You are sure of that?

A. Yes, sir.

Q. Positive?

A. Yes, sir.

Q. All right, sir. And what did he do when he got five or ten feet to the southeastward of the monument?

A. Five feet here, and then he would—then he turned back toward the Lyceum.

Q. Did he stop and talk to anyone before he turned toward the Lyceum?

A. The crowd was there so I would say he may have talked to somebody, he may have talked to people to his left and to his right, then he started walking directly toward the Lyceum Building.

Q. How closer to him were you at that time?

A. Within about 10 feet.

Q. Did you follow him to the westward?

[fol. 1680] A. To the what, sir?

Q. To the westward?

A. I followed him—you mean did I follow him this way (indicating)?

Q. What way is that?

A. I guess that's west. Is that what you mean, yes, sir. I followed him about six or eight feet here and then cut over towards the YMCA.

Q. Now from the time he stepped down and went southward until he passed the point you have marked and you left, did you see him stop and talk to anyone?

A. No, sir, I didn't.

Q. He just kept right on moving?

A. It seemed like he was walking with sort of a brisk pace there, kind of a military pace.

Q. Was he, do you know—have you ever had military training?

A. ROTC, yes, sir.

Q. You know what a cadence is, don't you?

A. Yes, sir, I do.

Q. Was he in cadence?

A. It was pretty much, pretty close to that.

Q. So, marching along there in cadence, General Walker would not have had time to stop and talk to anyone from the time he got down from the monument until you last [fol. 1681] saw him, would he?

A. Probably not. I just couldn't say.

Q. All right, sir. Take the stand. Did anyone ask him during that interval between the time he got down and the time you last saw him to, "Lead us in a charge"?

A. Yes, sir, people were screaming all over the place for him to lead them.

Q. Was that the big whoop that you heard?

A. That was one of the whoops that I heard, yes, sir.

Q. Repeat that whoop to us, what kind of noise it was?

A. A Rebel yell.

Q. Was it a Rebel yell?

A. Yes, sir.

Q. Well, you can repeat it in a very low voice?

A. No, sir, I really don't think you can repeat it in a very low voice.

Q. In other words, a Rebel yell is a Rebel yell?

A. I'm afraid so, yes, sir.

Q. And that stuck out heavily in your memory, that there was a regulation Rebel yell after the speech on the monument?

A. On there of the best I ever heard, sir.

Q. And that started off the charge?

A. Yes, sir.

[fol. 1682] Q. And from that time on, nobody was thinking about talking to anybody else, were they?

A. I don't believe so.

Q. Did you hear anyone walk up to General Walker and say, "General, will you lead us in a charge?"

And the General said in a low voice, "Yes, I will"?

A. No, sir.

Q. That didn't happen, did it?

A. I just couldn't say, sir.

Q. Well, you would have heard it, as close as you were?

A. With the Rebel yell, sir?

Q. After the Rebel yell?

A. They were going on all the time.

Q. Oh, a constant Rebel yell?

A. A roar.

Q. Were you yelling any?

A. No, sir.

Q. Had you yelled any at all that night?

A. No, sir.

Q. You hadn't participated in any way?

A. No, sir.

Q. The operation didn't have your sympathy then?

A. No, sir.

Q. What organizations do you belong to, son?

[fol. 1683] A. None, sir.

Q. None at all?

A. No, sir.

Q. Have you ever received any money for activities in connection with your work on the campus?

A. What work, sir?
Q. Any work?
A. No, sir.
Q. You have received no money or no contributions from anyone?
A. No, sir.
Q. On the campus. Do you know one Van H. Savell?
A. No, sir, I don't.
Q. Do you know who he is?
A. You said something about the Savell report. I believe that's the AP newsman, is that correct?
Q. Right. You have never seen him?
A. No, sir, I haven't.
Q. Do you know anyone who purports to know him?
A. Yes, sir.
Q. Who?
A. I believe some of the lawyers that I have spoken to know Van Savell.
Q. Which ones?
A. Mr. Smith, I believe.
[fol. 1684] Q. That is, the lawyers in this case?
A. Yes, sir.
Q. What did they tell you about Van Savell?
A. We never discussed Van Savell.
Q. Did you discuss the fact that Van Savell made a report that General Walker arrived on the campus, met the leaders of the mob, assumed command and led a charge before his speech on the monument?
A. I'm sorry, would you repeat that?

Mr. Watts: Sure. Repeat it to him.

(Record read.)

A. Before his speech?

By Mr. Watts:

Q. Right.
A. No, sir.

Q. If such a charge had been led and had occurred prior to the speech on the monument, from the position you were, you would undoubtedly seen or heard something of it, wouldn't you?

A. No, sir, I was—I don't really know when it happened but I was outside the Lyceum there for quite sometime.

Q. How long were you outside?

A. I am sorry, I meant the YMCA. I didn't mean the Lyceum.

Q. How long were you outside the YMCA before you saw [fol. 1685] General Walker on the monument?

A. About 10 minutes, 15 minutes, perhaps.

Q. Tell the jury exactly where you were, what direction you were looking and what you saw during that 15-minute interval before you saw General Walker.

Stand up there at the board with your pointer and brief the jury.

A. Before I saw General Walker, before I saw General Walker, sir?

Q. Right.

A. After I walked out of the YMCA?

Q. Right.

A. Well, I was standing right here in this area right here beside the YMCA and I was looking over mostly in this area through here (indicating).

There seemed to be like there was a lot of people coming on the campus that weren't students at that time and I wanted to know who they were, what they were doing there and then there was a lot of noise over in this area right through here, too, right in through there, there was a constant charge, people running up there and you could see them if you looked through here, you could probably see a few people running up there every once in a while or maybe large groups run up and there was a constant din of a battle going on plus the people over in this area [fol. 1686] right through here, is pretty much what I saw (indicating).

Q. Was Walker standing or moving when you first saw him?

A. When I first saw him, he was just getting up on the monument.

Q. You don't know then where he had come from?

A. No, sir, I don't.

Q. Do you know where LeBuve Hall is?

A. Yes, sir.

Q. Do you know where LeBuve Hall is?

A. LeBuve is a men's dormitory. It's down here, I believe.

Q. Within the period that you were standing at the YMCA, would a man have time to run from LeBuve Dormitory over to the flagpole, if you know?

Mr. Gooch: Just a minute. If the Court please—

Mr. Watts: Well—

The Court: Mr. Watts, I will permit him to give distance and things like that but I won't permit him to testify as to what somebody else might have done.

By Mr. Watts:

Q. All right, sir. Do you know how far it is from the monument to LeBuve Hall, going around behind the YMCA and the Fine Arts Building?

A. Going behind the YMCA through here, sir? I know roughly what the distance is.

[fol. 1687] Q. About 600 yards, isn't it?

A. Probably something like that.

Mr. Watts: That's all.

Mr. Gooch: That's all.

Stand aside. Thank you.

The Court: I will release you, sir.

Mr. Gooch: Call Mr. Travis Buckley.

TRAVIS BUCKLEY, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name.
A. I am Travis Buckley.
Q. Where do you live, Mr. Buckley?
A. I live in Louin, Mississippi, and I practice law down at Bay Springs, just south of Louin.
Q. Spell "Louin".
A. L-o-u-i-n.
Q. And you practice law at Bay Springs?
A. Yes, sir, I practice law. That's in Jasper County.
Q. Do you hold any public office there?
A. Yes, sir, I am County Prosecuting Attorney of Jasper County.
Q. When did you become the County Prosecuting Attorney?
[fol. 1688] A. I was elected in August of last year and took office in January, the 6th, of this year, on January the 6th.
Q. All right. Did you run for office?
A. Yes, sir, it was an elective office.
Q. All right. How old are you, Mr. Buckley?
A. Twenty-nine years of age.
Q. Are you a married man?
A. Yes, sir, I am married and have two children, two girls.
Q. Do you hold any other office or positions in your home town?
A. Yes, sir, in Louin I am General Superintendent of the Sunday School and a Sunday School teacher, also.
Q. In what church?
A. In the Convention Baptist Church.
Q. All right. Were you a student in the University of Mississippi on September the 30th, 1962?

A. Yes, sir, I was at that time.

Q. Was that your last year?

A. Well, yes, sir, that was my last semester. I graduated in the following January.

Q. Yes, sir. Did you happen to be on the campus of Ole Miss on September the 30th, of 1962?

A. Yes, sir, I was on the campus during part of the [fol. 1689] day, part of the night, rather.

Q. Had you been down to Jackson to the football game?

A. No, sir, I had not. I had been to Memphis. A friend's home that day.

Q. Did you live on the campus with your wife?

A. Yes, sir, I lived on the campus with my wife. My wife was not on the campus at the time. We had housing facilities—

Q. Did you have any military training?

A. Yes, sir, I spent two years in the United States Army, 15 months of which were spent in Korea, 1957 and '8.

Q. All right. Now tell me about what time—well, let's shorten this thing up. Were you around the Lyceum Building when the tear gas was fired that evening?

A. Yes, sir, when a great deal of it was fired, I was.

Q. Were you there when the first outburst occurred?

A. No, sir.

Q. Do you know where you were?

A. No, sir. I presume I was on my way home from Memphis but I'm not positive as to where I was.

Q. In other words, tear gas had already been fired when you got back to the campus?

A. Yes, sir, it had, a great deal of it.

[fol. 1690] Q. All right. Now, during the course of that evening, did you see General Edwin A. Walker on that campus?

A. Yes, sir, I did see him.

Q. Where was he when you saw him, Mr. Buckley?

A. When I first saw him, he was in the vicinity of the area which is called the grove, just beyond or, rather, just east of the monument.

Q. All right. Now describe, if you will, please, sir, what action he took and what he said that you heard from the time you first saw him.

A. Well, it first drew my attention by the fact several students commented on the fact that General Walker was in the vicinity.

I asked them where he was and several would say, "Well, he was right there a minute ago," but after a while I did see him and shortly thereafter, the students began to holler or yell, "Speak to us, General Walker."

And after having done that several times, General Walker—the students—or, rather, the students and people around—maybe not all of them were students—said, that he mounted the lower rim of the monument on the—that's the east side of it—and made from there a speech.

Q. Did you hear that speech?

A. Yes, I heard it.

Q. Will you try to recall as best you can the things you [fol. 1691] heard General Walker say in the speech that night.

A. Yes, sir, I will. I don't know that this would be in sequence he said the speech but as—after he mounted the monument, he said, "If there be any bloodshed, let it be on the hands of the Federal Government."

And he said, "This is the long way to Cuba."

Somewhere in around that time, the Reverend Duncan Gray appeared and asked General Walker to stop this; he said, "You can stop this because the boys think you are on their side. Please stop it."

Several of the students—well, General Walker said, "I am ashamed of the fact to admit I am an Episcopalian and belong to the same church that this man does."

He was an Episcopalian minister.

And several students said, "Kill him, get the traitor out of here."

Some of the crowd began to hit, or rather hit at, strike at, and grab Reverend Duncan Gray and when they did,

two or three of the boys stepped in and asked them to stop it and led him away. One of them, I believe, was a very large man and he and another student—or he and another individual—whether he was a student or not—led him away.

There were several students had their hands on him, leading him away to begin with, but as it finally turned [fol. 1692] out, I believe there was only two.

But at any rate, he resumed after that, he said that, I believe, he said this was a long way to Cuba. He said, "You are exercising your Constitutional right to protest by your presence here."

And he said, "You are exercising a Constitutional right by protesting this unconstitutional mandate of the Federal Court in putting Mr. Meredith in."

At that time several students began to holler and jeer in a rather sarcastic manner, "Mr. Meredith, Mr. Meredith."

And of course, during most of the rest of it, the atmosphere seemed to be congenial to General Walker. That was the only jeers I heard then.

Shortly thereafter, a minute or two, lapses, maybe more, General Walker went around one side of the statue or the monument and I walked around the other side. I was standing on the southeastern side of it. He went around —I believe he went around to the northeastern side of the—anyway, the next I saw him, he was on the other side of the monument.

Q. What do you mean "the other side"?

A. The other side would have been the west side.

Q. All right.

A. And several students or a good many of those present [fol. 1693] began to yell, "Lead us on, General Walker. Be our leader," and made that remark several times.

And after a minute, General Walker nodded his head and said, "All right, all right, I will."

And the students gathered around him and he proceeded toward the Lyceum, I believe, or what is the Lyceum

Building, toward the flagpole at any rate. A good many students were around him.

And as it turned out, a lot of them had rocks, were throwing in the general direction of the United States Marshals, and they proceeded on up for, I suppose, at least 250 yards, or more, toward the Lyceum Building, at which time I turned to the left and toward my apartment in Veterans Village. That would be south.

And General Walker veered to the north. How far he went after that, I don't know. I lost sight of him shortly because it was dark and there was also a great concentration of tear gas.

It was not very dark but there was some light but still it was dark enough that I could see—

Q. Did you see General Walker any more?

A. No, sir, I didn't.

Mr. Gooch: Your witness.

Cross examination.

By Mr. Andress:

[fol. 1694] Q. Mr. Buckley, you say the first time you saw General Walker, he was east of the monument?

A. Yes, sir, he was east of the monument.

Q. How long was it before he got up on the monument to make his speech?

A. Well, after I first saw him, it was only a short period of time. Oh, I would say five minutes, maybe a little longer.

Q. And he stayed over there east of the monument for that five minutes?

A. Well, sir, now I don't exactly recall. He was walking around, commenting to several students. There was a bunch of them trying to get to him and talk to him at the time. They were yelling, hollering, "Here is General Walker. Speak to us."

Q. Was he just kind of milling around through the crowd?

A. Well, yes—the crowd was milling around him, you might say more properly, yes, sir.

Q. He was moving around a little, wasn't he?

A. Well, he was moving around a little.

Q. Folks coming up to him and shaking hands and introducing themselves to him?

A. Well, they were shaking hands with him. Whether or not they were introducing themselves to him, I don't know.

[fol. 1695] Q. But from the time you first saw him until the time he got up on the monument, it was about five minutes, you would say, then?

A. Well, I would say approximately. But of course, this has been a long time and I don't remember the exact length of time or anywhere near, but I would say approximately five minutes, yes, sir.

Q. All right. Now before you first saw General Walker where had you been for the preceding, oh, let's say, 30 minutes?

A. I had been—well, I came on the campus off of Highway 6—I believe it is Highway 6. Anyway, through Sorority Row, approximately 45 minutes to maybe as much as an hour and a half before, and I had proceeded slowly in the direction of my apartment in which I was going to—in Veterans Village.

Q. Well, how long had you been, shall we say, in the circle area prior to the time you saw General Walker?

A. I had not been in the circle area prior to that time.

Q. How did you get down to the monument? What was your path?

A. I walked from the Law School down behind the Fine Arts Building, behind the Y, and then across to the Y Building and then across to the area just south—I mean [fol. 1696] just east of the monument.

Q. So you hadn't been on or within sight of the circle up until just before you saw General Walker?

A. Well, within sight of it, yes, I had been, but not in the circle.

Q. Well, how long had you been in sight of the circle, then, let's say that?

A. Well, I would say before I saw General Walker, approximately 15 minutes, not more—

Q. During that 15 minutes, did you—well, of course, you had seen General Walker then until that time, so you didn't see General Walker lead a charge of a thousand people across the circle, did you?

A. At which time are you speaking, sir?

Q. Before he made his speech from the monument?

A. No, sir, I did not.

Q. And you were in such a position that if there had been a charge of a thousand people before he made his speech from the monument across that circle, you would have seen it, wouldn't you?

A. No, sir, I would not have seen it.

Q. You would not have seen it?

A. No, sir, I would not have.

Q. You mean a thousand people could have moved across the circle without it attracting your attention?

[fol. 1697] A. Why, very easily, because of the fact I was behind the Y Building and in the vicinity of the Law School. I could only just vaguely see the circle area, which there was a great concentration of tear gas at the time.

Q. Do you know what time of day it was or what time of night, I should say, when you first saw General Walker?

A. No, sir, I do not. I know that I came on campus somewhere around 8:00 o'clock. It could have been earlier, it could have been later.

Q. Did you hear the President's speech?

A. No, sir.

Q. How long a speech did he make?

A. General Walker's speech, I presume?

Q. Yes.

A. Well, sir, I would say that the speech itself and the things that happened in connection with it, like Duncan Gray, Reverend Duncan Gray coming up, probably took 10 minutes—not much more.

Q. Well, you would call it a short speech, wouldn't you?

A. Yes—I wouldn't hardly consider it a speech, in a sense. It was just a group of comments.

Q. Uh-huh. And that was done in response to demands that he talk to them or say something to the crowd?

A. Well, he did it in response to—when the students [fol. 1698] kept yelling, "Speak to us," yes, sir.

Q. Do you know when that was with reference to the Highway Patrol leaving?

A. It was shortly after.

Q. Did you hear—

A. In fact, I arrived just about the time the Highway Patrol came through, just about that time.

Q. Did you hear a bunch of comments there, cries through the air that, "Ross has sold us out"?

A. I don't remember having heard that. I do remember the General, General Walker, one of the first things, I believe one of the first things he said when he got on the monument was that, "I understand that one of your State leaders sold us out. I just returned from a meeting downtown where I learned that."

And the best I remember, he didn't know who it was at that time and he leaned over to a boy in the crowd—the students and other persons there began asking who. He leaned over to the boy in the crowd and whispered something in his ear, or it appeared it was, and he straightened back up and said, "It's Col. Birdsong."

[fol. 1699] Q. Now, you said something nobody else had mentioned here about "unconstitutional mandate of the Federal Court"?

A. Yes, sir.

Q. Are you definitely sure you heard the General say "Unconstitutional mandate of the Federal Court"?

A. Yes, sir, I am absolutely positive that that was the essence of the words. I don't attempt to recite any of it verbatim.

Q. You don't know whether he used the words "Unconstitutional mandate of the Federal Court"?

A. Well, sir, of course, those are legal words that I would term in my own phraseology, but it was to that effect. I am certain the word unconstitutional—the word "unconstitutional" was used. As to whether he said mandate or order, I wouldn't—I don't distinctly remember that.

Q. In other words, when you used the term "unconstitutional mandate of the Federal Court," that was an impression or conclusion you got from what he said?

A. No, sir, it was not an impression or conclusion that I got from what he said in the sense that I think you are referring to. It was words to that effect. I may have gotten them out of order, but—or I may not have used the exact words, but I haven't changed them in any material way.

[fol. 1700] Q. How close were you to him?

A. I was within two or three feet of him in distance. Close enough I could have touched him, most of the time.

Q. Now, then, I gather from statements we have heard here that there must have been quite a large number of people within two or three feet of him?

A. Yes, sir, there were. They were just as close around the monument as they could pack.

Q. And if he used the term "unconstitutional mandate of the Federal Court," it was sufficiently audible that anybody around there could have heard it, couldn't they?

A. Yes, sir, I think so, very definitely.

Q. Let's see. He got off the monument, and which side of the monument did he go on to get away?

A. Well, sir, I don't believe I said. I said I thought he went over to the north side. I don't know for sure. But I think he did. I know I went on the south side.

Q. You went on the south side?

A. Yes, sir.

Q. And went on the opposite side?

A. I don't know that he went on the opposite side, but [fol. 1701] I think he did.

Q. Now, after he went around the monument there you say he stopped and talked to some people?

A. No, sir, I don't believe I said that. But the students started talking to him, or rather yelled to him to "lead us, be our leader".

Q. Was there a group that stood there and talked to him briefly?

A. Well, I don't recall any groups standing there talking to him. I don't see how they could have talked under the circumstances. There was too much hollering and yelling going on.

Q. Were there rebel yells going on?

A. Well, I frankly don't know what you mean by "rebel yell".

Q. You don't know what a rebel yell is?

A. No, sir, I really—I really don't.

Q. Where were you born, Mr. Buckley?

A. I was born in Mississippi, south central Mississippi, Jasper County.

Q. And where did you go to school?

A. Ole Miss.

Q. Where did you grow up and go to high school?

A. Stringer, Mississippi.

Q. And how long had you been at Ole Miss?

[fol. 1702] A. Three years almost. Be about two and a half years.

Q. And you don't know what a rebel yell is?

A. Well, I have heard different yells that were supposed to be rebel yells. I don't have any idea what they are referring to.

Q. Well, at any rate, you didn't hear things you would refer to as rebel yells when the General got down from the monument?

A. Well, I heard all manner of yells, noises, cursing, and talking at the Marshals and Federal authorities. Cursing them. And I just heard all kinds of noises. Frankly, I don't see how anyone there under the circumstances could make a sentence out of any of it.

Q. Well, what were these jeers you heard?

A. The only jeers I had heard, I believe I repeated a while ago, was when—rather—other than those directed at the Marshals—

Q. I mean the ones you heard directed at General Walker?

A. The only ones I heard directed at General Walker was when he said, when he referred to James Meredith as "Mr. Meredith".

Q. Oh, he called him Mr. Meredith?

A. Yes, sir.

[fol. 1703] Q. And that got jeers from the crowd?

A. Yes, sir, there were jeers, repeated it several times, "Mr. Meredith, Mr. Meredith".

Q. What kind of jeers were they?

A. They were just bad. "Mr. Meredith, Mr. Meredith," and the kids were hollering, "Oh-h-h-h," like that.

Q. Sort of a boo or something of that sort?

A. Well, I suppose you could call it boos, yes, sir.

Q. Did you hear the General say violence is not the answer?

A. No, sir, I didn't. I believe the statement I made a while ago was what I heard him say, about peace or violence, was that if there was any violence or bloodshed, let it be on the hands of the Federal Government.

Q. And when was that with reference to the time you heard the boos or jeers?

A. I don't remember the sequence of events that distinctly, frankly.

Q. Now, your deposition has been taken in this case on the 5th of February, 1964?

A. Yes, sir.

Q. And at that time didn't you say that General Walker walked off on the opposite side of the statue from where he [fol. 1704] was standing, a few feet from me, and walked around on the opposite side, and I believe he talked to a member of the group briefly."

A. Well, I believe he did. And I also said in my deposition these statements were general and I don't intend to be specific on any of them.

Q. Well, we are asking you to be as specific as you can.

A. Well, I will.

Q. You are a lawyer and you understand what we mean by being specific in a question.

A. I was as specific as I possibly could be.

Q. Also, didn't you say, I believe, he had some students with him around there, and some of them started hollering, "Lead us and be our leader,"?

A. Yes, sir, he said that.

Q. Well, now, how long would you say he talked to some members of that group there?

A. I don't believe I said he talked to any particular member of the group. I said they were around him talking to him.

Q. Did he start to walk off away from the group?

A. Not that I recall, no, sir. He walked away in the group with him as he led the charge up toward the Marshals, I mean up toward the Lyceum.

[fol. 1705] Q. What was his gait?

A. Well, it was rather brisk, I will say.

Q. Did you ever see him run?

A. No, I didn't see him run.

Q. Now, I believe you said that—did he go over there to the, right along the walk, up through the center of the Circle, or did he go off to the north?

A. Well, at what time, now? Eventually he went off to the north, yes, sir.

Q. Where was he when he went off to the north?

A. He was—when I last saw him he was headed north, but was just a piece south of the—well, I would say south and east of the flagpole.

Q. East of the flagpole?

A. Yes, sir.

Q. That is the last time you saw him?

A. Yes, sir.

Q. How far east of the flagpole would you say he was when you last saw him?

A. Well, it would only be a rough estimate. I would say fifty feet.

Q. Fifty feet east of the flagpole?

A. Maybe a little further.

Q. That was the last time you saw him?

A. Yes, sir, he turned—I saw him shortly after that, but [fol. 1706] that was the point he turned. I turned one way and he turned the other.

Q. Which way did he turn?

A. He turned north, slightly north.

Q. Did anybody have ahold of him?

A. Not at that time. Now, there had been before, at the time he left the area of the monument. They had their hands around him or on him.

Q. This, of course, was all after the speech, wasn't it?

A. Yes, sir.

Q. Did I understand you to say he went 250 yards towards the Lyceum?

A. No, sir, I said approximately 250 feet. Or that is what I intended to say.

Q. Then, when he turned off when you were fifty feet east of the flagpole, and he turned off, which direction did he turn?

A. North or northwest.

Q. You turned south?

A. Yes, south or west—southwest.

Q. Is that the last time you saw him?

A. Yes, sir.

Q. Now, where—all the time you saw General Walker there were there a lot of students telling him what had hap- [fol. 1707] pened, asking him questions, urging him to do things and so on?

A. Sir, I was only close to General Walker at the time he was making the speech and at the time he started toward the Lyceum Building and I don't know of any conversation, personal conversation that was carried on with him. I don't think anyone could have, under the circumstances, as much noise and confusion as there was.

Q. But you did hear him say up there one time when they were yelling at him to lead them, you did hear him say, "Riot, riot," sir?

A. No, I don't remember that. I don't recall it.

Mr. Andress: All right. That is all.

Mr. Gooch: That is all.

The Court: I am going to excuse this witness.

KINGSBY KINGSLEY, called as a witness by the Defendant, having been first duly sworn, testified on his oath as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Please state your name?

A. Kingsby Kingsley.

Q. Where do you live, Mr. Kingsley?

A. Memphis, Tennessee.

[fol. 1708] Q. How old are you?

A. Thirty-five.

Q. What do you do for a living?

A. Reporter for The Memphis Commercial Appeal.

Q. Where were you born?

A. Tupelo, Mississippi.

Q. Did you attend any schools in Mississippi?

A. Yes, sir.

Q. Which ones?

A. East Tupelo High School and University of Mississippi.

Q. Did you graduate from the University of Mississippi?

A. Yes, sir.

Q. When?

A. 1953.

Q. All right. Now, were you working—what did you say, the Memphis Appeal?

A. The Memphis Commercial Appeal.

Q. Memphis Commercial Appeal, on September 30, 1962?

A. Yes, sir.

Q. Did you have occasion to be in Oxford, Mississippi on any time on September 30, 1962?

A. Yes, sir.

[fol. 1709] Q. Do you remember when you got there prior to September 30, 1962?

A. You mean that particular day?

Q. Yes, sir.

A. About 2:30 in the morning, between 2:00 and 2:30 in the morning.

Q. That was on Sunday morning, September 30?

A. Yes.

Q. Do you remember where you were staying?

A. At the Henry Hotel.

Q. All right. At any time during that day did you see General Walker?

A. Yes, sir.

Q. Where?

A. At the Mansion, a restaurant uptown, then he had a press conference in this parking lot, or in the middle of the Ole Miss Motel down on Highway 6.

Q. Did you cover that?

A. Yes, sir, I did.

Q. Now, after the news conference did you thereafter see General Walker?

A. Yes, sir.

Q. Give us an account of that, please.

A. It was later this night that I had come back—we had gone in—we had rooms in the hotel, and we had written [fol. 1710] some stories that afternoon and sent them out at Western Union, and then we made arrangements to get back on the campus that night, and then we made arrangements—and I went on about between 6:00 and 6:30, and we had been working all night in different areas of the campus, and it was around 9:00 or sometime there that I saw General

Walker coming on the campus, walking down in front of the Journalism Building.

Q. Where were you at that time?

A. This was on—I was almost in front of the Journalism Building on the sidewalk.

Q. Did you recognize General Walker at that time?

A. Yes, sir.

Q. What was he doing?

A. He was walking down the sidewalk toward the Circle and the Lyceum.

Q. Where did you—did you have any conversation with him?

A. No, sir, I was en route to the telephone that we were trying to use in the building, and I saw the General and some other people walking toward the Lyceum. I saw him wave his arms to some other people. By this time there were a good many students on the side of the street. He waved his arms and he said something to the effect, "Come on . . . "—

[fol. 1711] Mr. Andress: Just a minute, we will object to the effect.

The Court: Unless you are using the exact words—

The Witness: He waved his arms and motioned to these people to come on with him.

By Mr. Gooch:

Q. All right, did you stop there at that time, or did you keep going to the Journalism Building?

A. I turned around and watched them as they proceeded on down, then I went in. I was using the 'phone inside the Journalism Building.

Q. How long would you say you were in the Journalism Building, Mr. Kingsley?

A. I would say anywhere from thirty-five to forty-five minutes. I am not sure of the exact number of minutes. Time didn't really mean too much at this particular time.

Q. Did you then come back from the—come back to the campus from the Journalism Building, after you got your 'phone call through?

A. Well, the Journalism Building is on the campus.

Q. I mean, did you come back toward the Circle, is what I am trying to say.

A. Yes, sir.

[fol. 1712] Q. Did you see General Walker when you got back to the Circle?

A. I saw the General in the Circle close to, or—there is a monument right at the edge of it, and I saw him about fifteen or twenty feet toward the Lyceum Building, off to the left at that time, yes, sir.

Q. And what was he doing?

A. He, and there was just a mass of people in this area, and they were proceeding up toward the flagpole and trees, up toward the Lyceum Building at that time.

Q. When they got up a distance there do you know what happened?

A. Well, they got pretty close to the flagpole, and then in the tree area the United States Marshals fired another series or round or rounds of tear gas, and they retreated back.

Q. Did you see General Walker there after that night?

A. At this particular time I was—I saw him behind a—as they retreated, then they got behind the trees and after that I may have seen him somewhere during the night, but General Walker was just one—I was covering other things, and was not really concerned with his activities.

Mr. Gooch: You may have the witness.

[fol. 1713] Cross examination.

By Mr. Watts:

Q. You were coming east along University Avenue when you first saw Walker?

A. East is toward Oxford, yes, sir.

Q. Take the pointer please and step up to the map and

identify the location. First, put your pointer on the statue. Now, locate the journalism building. Keep coming. A little more.

A. Right in here?

Q. No, it is down below that. Can you read the letters on the building there?

A. Journalism Building. Here it is.

Q. All right. Now, at exactly what point were you when you saw Walker?

A. I was on the sidewalk, and I would say I was about fifteen feet—it would be west of the walkway to go up to the Journalism Building.

Q. Were you on the north or south side of the sidewalk?

A. I was on the street—toward the street. I don't know whether that would be north or south.

Q. Which way is the top of the map?

A. I would presume that would be north, and I would be—

[fol. 1714] Q. All right, sir?

A. On this side of the sidewalk (indicating).

Q. You, then, were on the north side of the sidewalk?

A. Yes, sir.

Q. On the left side of the sidewalk going east?

A. Going east it would be the left, yes, sir.

Q. And General Walker was walking on his left side of the sidewalk going west?

A. He was walking on the side of the sidewalk going toward—well, he would be on this side here (indicating), and I was coming back up on this side. He would be down on this side, or maybe in the middle of the sidewalk. He wasn't—it wasn't all that large.

Q. Just a regular GI sidewalk?

A. Yes, sir, just a regular street sidewalk.

Q. And you were walking east on the north side of the sidewalk?

A. Yes, sir, back toward the Oxford area, yes.

Q. And Walker was walking westward on the left side of the sidewalk?

A. Yes, sir.

Q. So, you were both meeting each other on the left side of the sidewalk, rather than on the right side?

A. We were both meeting, I mean, on the walk, the [fol. 1715] sidewalk. You just automatically meet. I mean he would be—I would be on the street side and he was on the Journalism, or grass side, this side of the sidewalk (indicating).

Q. Do you ordinarily walk on the left side of a sidewalk when you go anywhere?

A. I don't even remember how I walked on the sidewalk.

Q. The question, sir, do you ordinarily walk on the left side of the sidewalk, or the right?

A. I think I walk on the left.

Q. How do you drive your automobile?

A. I—

Q. Do you drive on the right side of the road, or the left?

A. The left.

Q. Left. Were you raised in England?

A. No, sir. You drive on the right side, in an automobile.

Q. All right. And did you walk on the left side of the sidewalk?

A. I think I did.

Q. And you think General Walker, being a soldier, normally would occupy the left side of a sidewalk?

A. I think General Walker, at this particular time, was [fol. 1716] going down the sidewalk and I wouldn't say, just two or three feet this way or two or three feet the other way, no, sir.

Q. Okay, take your seat. Walker waved to them to come on, you say?

A. Yes, sir.

Q. Who is "them"?

A. People on—he was walking down the sidewalk and there were people up on automobiles, sitting on the sides of cars, and that kind of stuff, yes.

Q. Now, would they be on the left or right side of the sidewalk?

A. Sir?

Q. The ones he waved to?

A. They were people sitting on cars, they were out in the grass. I mean, they would be on both sides. The cars were on the street side.

Q. Well, how do you know, then, whether he waved to them or to one individual to come on the campus with him?

A. Well, I wouldn't say that he waved to anyone or one hundred, but he waved, and then I saw these people that had—some of them getting off cars and off the grass, and they just followed him on down.

Q. As I read your testimony you say, "I saw Walker [fol. 1717] wave his arms at these people."

A. Yes, sir.

Q. That was the testimony?

A. Yes, sir.

Q. Do you know whether he had a single friend behind him?

A. I wouldn't know if he had one single friend, or who his friends were.

Q. Well, how do you know, from your observation, that he didn't wave his hand at a man in the place of "these people"?

A. He could have waved it at one particular individual, if he knew them, yes, sir.

Q. So, all you can say, you were walking on the left side of the sidewalk, Walker was approaching you on his left, his left side of the sidewalk, and you saw him wave his arm?

A. Yes, sir.

Q. And you don't know whether he waved at one man or one hundred, do you?

A. No, sir, I wouldn't say if he waved his arm at one or a hundred.

Q. Was he alone, or was someone with him?

A. No, sir, there were two or three other people. The General was in the center, and there was a man or two on [fol. 1718] each side of him, or right behind him, or there was about four or five men in one little group, yes, sir.

Q. Somewhere around him?

A. Yes, sir.

Q. You didn't have to get off the sidewalk as you met that group?

A. No, sir.

Q. Did they all pass you on your right, then, as you went eastward?

A. Well, I was coming—I was coming back, and they passed me. We didn't have to run into each other, no, sir.

Q. Did any of them have ahold of him by the arms, like this (demonstrating)?

A. I don't believe—I don't remember whether they did or not.

Q. That would have been rather singularly positioned for a man to be walking in, wouldn't it?

A. I don't think that the General would walk down with anybody holding his arms when he was waving, no, sir.

Q. You would have certainly noticed it if he had been waving at somebody with one arm and somebody else had ahold of his other, wouldn't you?

A. I am not sure whether I would have noticed whether [fol. 1719] anyone was holding his arm. It is possible.

Q. You didn't see anybody holding his arms, though, did you?

A. No, sir.

Q. I wish you would walk back up to the monument there. After you came out of this Journalism Building did you go back toward the monument?

A. Yes, sir.

Q. And you saw a group of people around the monument?

A. Yes, sir, up in the area, right in here (indicating).

[fol. 1720] Q. And where was General Walker?

A. He was about the monument—he would be about 15,

20 feet probably, or an estimate anyway, I wouldn't say, right in this area of the site of this walkway up through in there, yes, sir.

Q. Was he conferring with anyone at that time?

A. No, sir.

Q. Was he north or south of the sidewalk?

A. He would be on the south side, yes, sir.

Q. Where were you?

A. I was cutting across right through here and I was going over to the Y.

Q. How far from him?

A. Oh, maybe 20 feet or something like that.

Q. Did anyone have ahold of his arms at that time?

A. I don't know, sir. He was in the front, up in the front and I was cutting around behind.

Q. You didn't see anybody holding on to his arms, did you?

A. No, sir.

Q. Did he cut off to the north and follow you or to the south, the opposite direction, or go straight?

A. He went up in this area up in here, up into this area, and I cut across and went over to the Y because there was a telephone in there that I had to call into the office on [fol. 1721] something.

Q. In other words, then, he was just walking straight alongside that sidewalk?

A. He was over in here and they were walking up through this way, yes, sir.

Mr. Watts: All right, that's all.

The Court: Do you have any further questions from this witness?

Mr. Gooch: No further questions.

The Court: All right. I will release you then, sir.

Mr. Gooch: Let me see if I have got a witness. Would you give me just a minute?

The Court: Yes.

Mr. Gooch: Mr. Sheriff, call Mr. Gregory.

TOM GREGORY, called as a witness by the Defendant, having been first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gooch:

Q. Will you state your name?
A. Tom Gregory.
Q. Where do you live, Mr. Gregory?
A. Meridian, Mississippi.
Q. How old are you?
[fol. 1722] A. Twenty-nine years old.
Q. What do you do for a living?
A. I am a reporter for the Meridian Star.
Q. Is the Meridian Star located in Meridian, Mississippi?
A. It's a daily newspaper of Meridian, Mississippi.
Q. How long have you been in the employ of the paper there in Meridian?
A. A little more than three years. Three years and three months, about.
Q. Prior to that time, did you have any educational background?
A. Yes, sir, I am a graduate of the University of Mississippi in Journalism and English.
Q. All right. Did you keep up with the, shall we call it, the Meredith incident that came to a climax along in September of 1952?
A. Yes, sir, I covered much of it.
Q. Were you at Oxford frequently or infrequently during the month of September, 1962?
A. Three times, as I recollect.
Q. Well, we will not go into all those others because we have had so much background.
Were you on the campus of Ole Miss on September 30th, 1962?
[fol. 1723] A. I was.

Q. Did you know about what time you got there on that date?

A. I went on campus about 6:45.

Q. That's P.M.?

A. That's P.M. 6:45 or 7:00 o'clock, I'm not exactly certain of the time.

Q. Prior to the time you went on the campus that day, had you seen General Edwin A. Walker?

A. No, sir, I had not.

Q. Did you know who he was?

A. From pictures only.

Q. All right. Did you observe the Lyceum Building and the Marshals, and so forth, up there at the time you got to the campus?

A. Yes, sir, the Marshals were already lined around the Lyceum Building at the time I got on campus.

Q. Did you observe any brick throwing or rioting or anything of that sort?

A. After about 8:00 o'clock, I did.

Q. All right. Were you there when tear gas was fired?

A. Yes, sir, I was. I was in front of the Lyceum.

Q. Could you describe what happened before the tear gas was fired relative to any contacts between the crowd [fol. 1724] and the Marshals?

A. Prior to the time the tear gas was fired, I did circulate in the crowd and I saw some cigarette—lighted cigarettes thrown in the direction of the Marshals. I saw some Coca-Cola bottles or drink bottles of some sort thrown—these I saw were thrown over the heads of the Marshals in the direction of the Lyceum Building.

I also saw Marshals and students talking during that time.

And other than that, two different kinds of contact.

Q. Well, eliminating—after the tear gas was thrown, describe generally what was going on there in the circle around the Lyceum Building?

A. After the tear gas was fired, it became almost a proc-

ess of the students gathering in groups, in the lower part of the circle, and they would rush up in the direction of the Marshals, some of them would throw bottles or bricks in the direction of the Marshals and the Marshals would fire tear gas at the students and the students would retreat, regroup and then go forward again.

Q. Was that more or less continuous? After the tear gas was fired?

A. More or less a continuous process. There would be lapses of time between the charges.

[fol. 1725] Q. All right. Now did you see General Edwin A. Walker in the circle there that night?

A. Yes, sir, it must have been about 9:00 o'clock, about an hour after the thing had started, I was standing almost in front of the YMCA Building, inside the circle but in front of the, the area in front of the YMCA Building, when Van Savell came up to me and said, "General Walker is on the campus," and I turned around and I recognized him and walked in his direction.

That was the first time I had seen Walker.

Q. Had you known Van Savell before?

A. Yes, sir, I met Van Savell previously in Meridian during the trial of Chancellor Williams.

Q. All right. Have you seen him since that time?

A. We both covered a football game at Starkville and other than that, I don't recall having seen him.

Q. All right. When you saw General Walker, what did you do?

A. I went in his direction. Walker—a group was forming around Walker and I joined the group that was forming around Walker.

Q. Did you hear anything that General Walker might have said at the time you joined that group?

A. Well, yes, sir, I heard some things that were said to Walker.

[fol. 1726] When I arrived at the group shortly after, I remember some students had ganged around and there was

a commotion as other students called out that General Walker was on the campus.

And there begin to be a crowd around him and one of the students asked General Walker when he would bring his men that he had promised onto the campus and he said, "They will be available when they are needed," and he also asked, says, "Well, where are they now?"

He says, "Oh, they are around town. We can bring them in if we need them."

Q. All right, anything else?

A. There was also some discussion at that time about weapons that went on around General Walker.

Q. Well, now unless General Walker said it, let's don't go into that.

A. Well, General Walker, as I recall, did not participate directly in this conversation. He was listening.

Q. Well, never mind what he was listening to. Just keep it to what General Walker said.

A. Now shortly after this conversation with the students took place, Reverend Duncan Gray came up to the group and Reverend Gray asked Walker if he wouldn't leave the campus, if he wouldn't help to calm the mob and specifically I recall he asked him, "If you will go off the campus, the [fol. 1727] students will follow you."

And going—and General Walker told him that he wouldn't leave, that he intended to stay.

And Reverend Gray made other entreaties to Walker and Walker always refused him, declined to leave.

And at one point Walker asked him if he were not the Reverend Duncan Gray?

And he said that he was and Walker said, "You make me ashamed to be an Episcopalian," and after that Gray left the scene, this crowd around General Walker, and about that time I moved away from it, too.

Q. Did you thereafter see General Walker?

A. It was very shortly thereafter. I was standing in the same general area when I began to hear cries of, "Follow General Walker," and I turned around and I saw a very, a

much larger group forming around the General and there were other cries of, "He's going up to the monument— He's going up to the Marshals," and "he won't let"—"General Walker won't let the Marshals stop him," cries like, "Gas won't stop General Walker."

And at that point the General, in the front row of a group, began striding at a rather fast clip in the direction of the Lyceum Building with the crowd, which I estimate at the time to be about 200 behind him and following him. [fol. 1728] Q. And how far did they go westward?

A. Well, I was off to the side, not directly in the crowd, and I walked past the sidewalk that crosses the circle I believe in a north-south direction.

I walked past it about 15 yards, I would imagine, and they went well ahead of me to what I would estimate to be maybe 15 or 20 yards, within 20 yards of the driveway that circles the Lyceum Building.

Q. What happened then?

A. At that time there were—there was a burst of tear gas from the Marshals that obscured the crowd from our vision and they began to disperse.

I saw them running out of the crowds and retreating and I did, too.

Q. All right. Now did you thereafter see General Walker that night?

A. Yes, sir, I saw him somewhat later when I had gone to the foot of the circle where the Confederate monument is and just as I arrived there, I heard someone say, "General Walker is going to speak to us."

And about that time Walker stepped up to the foot of the monument and began speaking.

Q. Did you hear any of the speech that General Walker made?

A. Yes, sir, I was within several feet of the General and [fol. 1729] I heard parts of it. There was quite a commotion in my area of rather loud-mouth people who would clap and cheer and for that reason I could not hear all of

the speech and my memory of it is, therefore, in disconnected phrases and sentences.

Q. All right.

A. I heard him, I can recall him saying, "This is a long road to Cuba," and something about, "A splendid protest," quote, "splendid protest, quote.

I also recall him saying, "Give them protest, give them casualties."

And later on he said, "told the students that he had just come from a conference with the representative of Governor Barnett and he said that Governor Barnett did not want the Marshals on the campus and that there had been a sell-out and the students asked, "Who, who," were crying out, they wanted to know who sold them out.

He conferred with some man at the foot of the monument there and then he said, "Col. Birdsong," and there was a great deal of booing at that time.

It was shortly thereafter that Duncan Gray again appeared on the scene on my and as I recall, it was saying, asking the General to stop his speech and someone pulled him away from the foot of the monument, pulled Gray away from the foot of the monument, and began to pull [fol. 1730] him out of the crowd and again I heard General Walker say, "There is a man who makes me ashamed to be an Episcopalian."

At that point there were a number of the people in the crowd directly around me who began to follow Duncan Gray away from the monument and so I went with them. But two men took charge of Gray and I don't recall who they were, outside of the crowd, maybe 30 yards away from the monument, and convinced him that he should leave the campus or told him he should and he began to leave the area.

At this point I, too, left the area of the circle and went to the YMCA Building.

Q. Did you see Walker after that?

A. Later on during the night, I would see him at various

places in the circle as various other assaults were launched at the Federal line.

He would be watching and perhaps occasionally speaking to somebody in the area but I did not hear him say anything after that time.

Q. Did you write a story for the Meridian Star on what you saw on the campus that night?

A. Yes, sir, I wrote one the next morning, which was probably showed the next day.

Q. Did you write it from what you saw or from any news service?

A. I did not—at the time I wrote my story, I had seen [fol. 1731] no other reports of what had occurred. I wrote it strictly from what I saw and heard.

Mr. Gooch: What's the next exhibit number, do you know?

(Thereupon, Defendant's Exhibit No. 29, was marked for identification.)

By Mr. Gooch:

Q. I hand you what's been marked as Defendant's Exhibit 29, and ask you if this is a photocopy of the story that you wrote in the Meridian Star?

A. Yes, sir, this is my story.

Q. Is that based on the things that you saw and heard there on the campus that night?

A. It is.

Mr. Watts: We have no objection.

Mr. Gooch: I won't take the time to read this at this time.

By Mr. Gooch:

Q. Did you call the march by Walker a charge, as he went towards the Lyceum Building?

A. Yes, sir, I did.

The Court: Are you offering 29?

Mr. Gooch: Yes, sir, we offer 29.

The Court: Defendant's 29 is admitted.

Mr. Gooch: We pass the witness.

Mr. Andress: Your Honor, we would like to have a conference before we start, since it is 3:15, could we have a [fol. 1732] recess right now.

The Court: All right. Ladies and Gentlemen, we will recess until 25 minutes until 4:00.

* * * *

[fol. 1733] Q. Mr. Gregory?

A. Yes, sir.

Q. Just before the recess did I hear Mr. Gooch stand there and caution you not to talk to anyone during the recess?

A. Yes, sir.

Q. And after you got out in the hall didn't you talk to Mr. Fred Smith, the gentleman sitting here, and Mr. Travis Buckley, another witness who has been in here testifying?

A. I talked to Mr. Smith. Mr. Buckley is to carry some stuff back to the hotel room for me.

Q. So, you did talk to Buckley?

A. Yes, sir.

Q. Where and when did you first know Van H. Savell?

A. The contempt trial of three Ole Miss officials, Chancellor Williams, Dean Lewis and Registrar Ellis, was held in Graham, Mississippi, in the Federal Court, and I covered that, that trial for my newspaper. Van was covering it for the Associated Press, and we met during the process of that trial.

Q. Now, about when was this?

A. As I remember it, well, it was on the Friday preceding the Sunday of this riot. I may be a day or two off. [fol. 1734] I don't recollect.

Q. Did you get pretty well acquainted with Savell?

A. No, sir, we—as I remember, we sat at the press table side by side and I met him. I know or knew his name, it

was just an acquaintanceship through the reporting side by side at the trial.

Q. You knew him as you were both newsmen?

A. Yes, sir.

Q. Both were in the same general fraternity?

A. Yes, sir.

Q. Were you friendly there with him?

A. Like I say, I never—during the process of the trial was the only time I knew him. We didn't have any opportunity to converse at that time. I—we introduced ourselves as we sat down, as I remember it, and had very little other opportunity to converse.

Q. As I remember your testimony, you saw Savell one time that night?

A. Yes, sir.

Q. Near the YMCA?

A. Yes, sir.

Q. Would you step to the chart, please, and take the pointer? Would you point to us exactly where it was?

A. Exactly, sir, it would be difficult. It was just about [fol. 1735] in this area.

Q. Somewhere in the northeast quadrant of the Circle?

A. In this area I am pointing to (indicating).

Q. About how long before Walker's speech was that?

A. That would be difficult to say in point of time.

Q. Well, let's see, do you remember when the Highway Patrol left?

A. As I remember it, it was sometime between the time of Walker's speech at the monument and the time that the tear gas was fired.

Q. It was just almost coincident with Walker's speech, wasn't it, just before he made his speech?

A. Not as I remember it.

Q. Where were you when the Highway Patrol left?

A. I was standing at—it would have been right here when they drove by (indicating).

Q. Now, then, put your pointer up there where you met Savell?

A. (Witness complies.)

Q. Where had you been just before that?

A. I had been over this general area. I had been following the wave of students as they went forward toward the Lyceum Building.

[fol. 1736] Q. In other words, you, yourself, had been in that northeast quadrant for some few minutes before you met Savell?

A. Now, exactly, whether I was in this northeast quadrant a few minutes, or how long I had been there, I don't know. I had been over this entire general area just moving around.

Q. You have a distinct recollection of meeting Savell and he told you Walker was on the campus?

A. Yes, sir.

Q. You can mentally close your eyes and relive the point and the incident, can't you?

A. Yes, sir.

Q. All right. Now, then, you have put the pointer right where you were when you met Savell?

A. Yes, sir.

Q. Could you tell us where you were for the previous, or preceding fifteen minutes?

A. As I say, sir, I was over this general area. It is—during that preceding time, between the time I met Savell and the time that the tear gas was first fired, I moved around generally. I was, oh, down in here, I was up in here, and I was over the general area, and where I was at any other point of time I could not say.

Q. What attracted your attention to Savell?

[fol. 1737] A. Savell walked up to me, and as I say, I remembered him, and he spoke to me first and he says, "General Walker is on the campus."

Q. Now, this occurred, as I remember, and as I noted in your testimony, this contact with Savell occurred after you had seen General Walker in contact with Rev. Gray?

A. No, sir, it—it occurred prior to that time.

Q. Oh, before. I see. In other words, then,—

A. I had not seen General Walker before Savell came up to me and told me that General Walker was on the campus.

Q. I see. After you saw Savell in the northeast quadrant, you walked down in the southeast quadrant and saw General Walker talking to Rev. Gray?

A. No, sir, in point of chronology, I remember incidents that occurred during the night. Now, this has been better than a year and a half ago.

Q. But, now, young man, you have talked to people connected with this lawsuit almost immediately after this thing happened?

A. No, sir.

Q. Mr. Smith?

A. No, sir, no.

[fol. 1738] Q. When did you first talk to Mr. Smith?

A. Oh, I first talked to Mr. Smith perhaps a month or two ago.

Q. Is that the first time you talked to anyone connected with the lawsuit?

A. No, sir, I had talked prior to that then with an attorney out of Jackson, and that had been last fall, as I remember it.

Q. Was that someone out of Mr. Thomas' office?

A. Yes, sir.

Q. In the fall of 1963?

A. Yes, sir, about that time.

Q. Did he take a tape recorded statement from you?

A. No, sir, he did not.

Q. Was that the first man you talked to?

A. I talked to an FBI agent within a matter of a few weeks after the riot.

Q. Did you testify at the Grand Jury?

A. Yes, sir, I did.

Q. So, these incidents since the occurrence have remained fairly clear in your mind, haven't they?

A. Well, as I say, the incidents that I have been asked about, the incidents I have talked about, I had reason to remember those incidents.

[fol. 1739] Q. Now, you do distinctly remember seeing Savell?

A. Yes, sir, I distinctly remember seeing Savell.

Q. And you do distinctly remember his telling you General Walker was on the campus?

A. Yes, sir.

Q. You distinctly remember that after learning that General Walker was on the campus, a short time thereafter, you saw General Walker talking to Rev. Gray?

A. It was sometime after that. Like I say, my chronology is a matter of incidence that occurred during the night, and chronologically I am not exactly certain how these incidents did take place.

Q. Now, when you—when you saw Savell and he told you that Walker was on the campus you didn't say, "Well, yes, I know it, I just saw him talking to Rev. Gray?"

A. No, sir, I did not. I turned around, as I remember it, and saw Walker at that point.

Q. So, undoubtedly, then, when you saw Savell and he told you Walker was on the campus, it was before you had seen Rev. Gray talking to Walker, that is a fair conclusion, isn't it?

A. Oh, yes.

Q. Now, then, after you saw him in the northeast quadrant, you went down and saw him talking to Rev. Gray [fol. 1740] in the south—southwest quadrant.

A. Now, as I recall it, sir, when I saw Gray talking to General Walker, it was in an area still in this same quadrant.

Q. In the northeast quadrant?

A. Yes, sir, as I recall.

Q. All right. Anyhow, you saw him talking to General Walker, and you distinctly remember Rev. Gray telling General Walker that he ought to leave the campus?

A. Yes, sir.

Q. And Walker distinctly refused to leave?

A. Now, I don't recollect any words that Walker said at this point. I do remember that Walker declined to go. I do remember that Walker did say something to Rev. Gray.

Q. At that point, and at that incident, did you see Gray before you saw Walker, or did you see Walker before you saw Gray?

A. I saw Walker before I saw Gray.

Q. So, you then saw Gray coming up to Walker?

A. Yes, sir.

Q. The Rev. Gray, being a minister, did he stick out his hand and shake hands with General Walker?

A. I don't recall that he did.

[fol. 1741] Q. You don't know one way or another?

A. I just don't recall. I don't really believe that he did.

Q. Then, about how long did they talk?

A. Oh, it was just a matter of a couple of minutes, as I recollect it.

Q. And did Rev. Gray leave?

A. Yes, sir.

Q. And your next testimony was that later you saw Walker in the same general area, and you saw a large crowd standing around him?

A. Well, now, whether, at this point, that occurred prior to the time he talked to Gray, or after the time he talked to Gray, I am a little bit hazy on that.

Q. Since your first testimony, or since you left the witness stand, you went out and talked to Mr. Smith?

A. Mr. Smith talked to me.

Q. Yes, sir, he talked to you, and he told you that you got your time fouled up, didn't he?

A. Well, now, as I told Mr. Smith, and—and the attorneys I have talked to throughout this trial, or prior to this trial, sir, my chronology on many instances is not good.

Q. Young man, that was not my question. My question to you, please, was did Mr. Smith tell you—

[fol. 1742] A. —Mr. Smith came up to me and said that my story pointed it out a different way, and I wrote the story the next day, and I am testifying sometime later.

Q. And he pointed out to you out in the hall, between the time you testified a while ago and right now, that you were getting your timing fouled up, on this charge.

A. He said my timing did not coincide with my story?

Q. And your testimony was before you went out and talked to Mr. Smith that later, and you testified immediately after you saw the Rev. Duncan Gray, and Walker talking, that General Walker, a large crowd formed around General Walker, and then you saw General Walker walking fast with a crowd of 200, about 200 around him as they went on west fifteen or twenty yards from the curb around the Circle.

A. That was an estimate as to distance, sir.

Q. Sir?

A. That was an estimate as to distance.

Q. As to what?

A. Estimate as to distance.

Q. I understand, but this was after you had seen Gray talking to Walker.

A. Now, like I say, sir, my chronology is not good on [fol. 1743] some of these points.

Q. Well, when you testified before it was good.

A. Well, when I testified before there was no specific reference to chronology.

Q. Well, didn't you testify when you were in here fifteen or thirty minutes ago that after General Walker talked to Rev. Gray, you then saw the crowd gather around General Walker, you then saw a crowd of about 200 people move toward the Lyceum and get within fifteen or twenty yards of the curb, the tear gas was fired, and they went back; and then you testified, if I am mis-quoting your testimony, stop me, you testified, "And then at the foot of the monument you heard Walker speak."

Now, wasn't that your testimony a while ago?

A. As nearly as I can recall the testimony.

Q. And since then you have talked to Mr. Smith?

A. Since then I have talked to Mr. Smith, yes, sir, but—

Q. What is your testimony now?

A. Well, my testimony now is that I am trying, as I am trying to get it.

Q. Sit down over there and give it to us.

A. I tried to tell you—

Q. I don't want to know what you are trying to tell me. I say now what did happen, in the proper sequence starting [fol. 1744] with talking to Van Savell.

A. Well, Van Savell—

Q. Just a minute, please, let me finish the question. You started with meeting Van Savell southwest of the YMCA in the northeast quarter of the intersection, and take it from there in the absolute chronology, because this is critical and important. You relive it and testify for us as you remember, who said what to who and who did what.

A. I met Savell, rather Van Savell came up to me, and he spoke to me and he said, "General Walker is on the campus." I don't recall that I said anything to Van, but I turned around and at that point I remember seeing General Walker, as I testified before. I believe that there was a period of time when a crowd was gathered around Walker, and in that same period of time Duncan Gray came up to General Walker.

I have tried to tell you as truthful as I know how that my chronology is not good.

Q. Well, now, I am not talking about that. Tell us what you saw?

A. Well, I can only restate what I said before. As to when these things happened, I can't be that exact.

Q. But you were exact a while ago.

A. I was not pressed on points of chronology.

[fol. 1745] Q. Go ahead and tell us what you told us before you talked to Mr. Smith.

A. I can only re-tell what I told you a while ago.

Q. All right. Will you tell it, then?

A. At the time I moved into the crowd.

Q. Where was Duncan Gray when you moved into the crowd?

A. Duncan Gray was not present at that time.

Q. How long had he been gone?

A. He was not there.

Q. You said he had talked to Walker and you had seen him?

A. But you are asking me to tell it as I told it before, which I am trying to do.

Q. Go ahead.

A. All right.

Q. All right.

A. All right, at that time there were students gathering around, and there was a great deal of hullabaloo, and a student, I remember asked him, said, "General Walker, where are all these men you promised us?"

And General Walker said, "They will be here when the time comes."

And the student asked him, "Where are they?" And [fol. 1746] General Walker said, "They are around town. They will be here when we need them."

Then there was some conversation around about weapons, and which I don't recall General Walker joining. At some point shortly thereafter Duncan Gray—Rev. Duncan Gray came to the scene, and Duncan Gray began to ask General Walker if he would leave the campus, and he asked General Walker specifically, "If you will go off the campus, the students will follow you."

And I can't recall General Walker's words, but he did decline to go, and it was—

[fol. 1747] Q. Just stop right there, or excuse me, let me stop you. Did you hear Reverend Gray say, "You could stop this if you could, if you would"?

A. I don't recall that specifically, no, sir.

Q. All right, go ahead.

A. It's possible he said some things that I did not recall specifically.

Q. Go ahead.

A. General Walker then asked him if he were not Reverend Gray and he said he is, an Episcopal minister, and he said he is, and General Walker said, "You make me ashamed of being an Episcopalian."

Whatever conversation may have taken place between them, I don't recollect now.

But Gray did leave, and I left the group shortly thereafter.

At a period of time around that time, I saw General Walker at a time when I was not immediately close to him, and a group of men gathered around him and I estimated at the time the total to be about 200, it's purely an estimation again, and then Walker began to move in the direction of the Lyceum Building at the head of this group of people.

And he was not in front but he was in the front row of the group and they began to walk in the direction of [fol. 1748] the Marshals with people crying out, "The Marshals won't stop General Walker," and, "Gas won't stop General Walker," and that sort of thing, a great deal of activity and I did not follow them all the way up to the front.

I went to a point across in the Lyceum Building side of this north-south crosswalk that crosses the circle and stopped there.

Q. Would you go over and put your pointer on it, please?

A. As nearly as I can recollect, I must have stopped right about here (indicating).

Q. Now where was Walker then?

A. Walker at the time was moving in this direction, past me and I was slightly ahead of this crowd that was coming until I stopped and then—

Q. Excuse me right there. Where had this movement formed up? You said this group—

A. To the best of my recollection, down in this area (indicating).

Q. I see. Go ahead.

A. And I stopped about here. The group did not move

in a straight line but, rather, in a very tight arc in this direction but always toward the Lyceum Building.

Q. They were—

A. They passed me and with me remaining there (indi-
[fol. 1749] cating) and when they got up in this area, the tear gas began to fall.

And then they—

Q. Did they throw anything, anyone?

A. Now I did not see anyone throw anything. There was a great deal of movement. There might have been something thrown, I personally did not see it.

Q. Now the nearest you can tell, how long after you first saw Savell by the YMCA did this incident happen?

A. Chronologically, sir, I don't know.

Q. Well, could you estimate? Ten, fifteen, thirty minutes?

A. It could have—it could have been five minutes. It could have been ten minutes. It could have been a shorter time. I am just not exactly certain on the chronological order of some of these events.

Q. You know it wasn't as long as 30 minutes, don't you?

A. Oh, no, it wasn't that long.

Q. Now, as you saw Walker going by there, you say he was in the front rank of this group?

A. Yes, sir.

Q. Did anybody have him by each arm?

A. From where I was standing, sir, I could not tell that anybody did.

[fol. 1750] Q. At least, if they did, you couldn't see?

A. If they did, I couldn't see it, no, sir.

Q. Did you see a young man waving a big Confederate flag out in front?

A. Not at this time, no, sir. That had occurred somewhat earlier than what I saw.

Q. What did you do after Walker passed you with this group going west?

A. I stayed where I was.

Q. What did Walker do?

A. They continued going this way until the tear gas came and I lost sight of General Walker (indicating).

Q. What happened then?

A. Well, the crowd around him began to disperse. I saw those from the crowd moving back in my direction away from the clouds of tear gas and I moved backward, too.

Q. When did you next see Savell—strike that. When did you next see Walker?

A. Oh, well, as far as I can recall, it was at the monument.

Q. Now then prior to the time you saw Savell, you were in the general area of the circle. Stand there for just a minute. Put your pointer on the monument.

A. Here is the monument, I believe.

Q. Move it out about 10, about a hundred feet down [fol. 1751] eastward on University Avenue.

Assuming that General Walker had approached the campus, striding westward toward the monument, had been met by a group of leaders of the mob a little to the west of where you are—now move slightly to the west—more yet—back, no, back to the east a little—had been met there by leaders of the mob and had encountered a large portly, well-dressed man, had been welcomed by the crowd, had been requested to lead the crowd to the steps, had then and there loosened his tie, nodded yes without speaking, conferred with a group of about 15 persons who appeared to be riot leaders, assumed command of the crowd estimated at 1,000 people, was taken by each arm, by two leaders of the mob, marched westward—first northwestward and then southwestward across the northeast quadrant and then into the northwest quadrant from where you were, you could not have missed any movement that dramatic, could you?

A. If they moved in my direction, I would have seen it, yes, sir.

Q. Well, you know, do you not, that all during that period of time, before you saw Savell and after you saw

Savell and before Walker's speech on the monument, had an incident that dramatic occurred, you couldn't have kept from seeing it, could you?

A. That's correct, sir.

[fol. 1752] Q. Wouldn't you say, in fairness, from what you saw and where you were, that such an incident did not occur? Yes or no.

A. That Walker went toward the Marshals?

Q. At that time, with a man on each arm and a thousand people behind him?

A. I didn't see any thousand people behind him. I saw General Walker from a point of about here (indicating).

Q. Yes, sir.

A. In the forefront of a group, a crowd, which I personally estimated to be about 200, move in the direction that I have stated, to a point somewhere around there (indicating).

Q. All right, I understood your testimony on that. And that was between the time you talked to Reverend Gray and the time you heard the speech on the monument?

A. I still say that my chronology is not perfect on that time.

Q. All right, sir. Take the stand. Was General Walker walking fast, slow or medium?

A. I would say he was walking at a fast military clip. He was not walking slowly, he was not running.

Q. Do you have a military background?

A. I spent three years in the Army.

Q. You know what cadence is, don't you?

[fol. 1753] A. Yes, sir.

Q. Was he walking pretty much in cadence?

A. As far as any particular cadence, he was walking at a, what I would call a rather fast clip, was standing rather straight and walking at a rather fast clip.

Q. Was anyone else in step with him?

A. I did not notice anybody, whether anybody kept step with him.

Q. Now if at the end of that march that you have outlined there, the crowd had been met with a barrage of tear gas and then went a few feet further and hurled their weapons, bricks, bottles, rocks and wooden stakes, a crowd of that size, you couldn't have helped seeing them hurling these weapons, could you?

A. I testified, sir, that I do not recall seeing anything thrown there. Tear gas fell and tear gas obscured my vision. Whether they were thrown after the tear gas was fired, I don't know.

Q. So you then lost sight of Walker as he proceeded southwesterly up in the northwest quadrant of the circle?

A. I am not too clear, sir, on your directions.

Q. Well, let's get it clear. Get your pointer and let's go up there and get clear. Put your pointer on the point where you lost sight of Walker.

A. Sir, it must have been generally in this area right [fol. 1754] here (indicating).

Q. From there, where were you?

A. I was down in the direction just north of this crosswalk here, just about in this area (indicating).

Q. Then where did you go?

A. I went backwards.

Q. Back where?

A. Back in this direction (indicating).

Q. And where did you next see Walker?

A. My recollection of next seeing Walker was at the monument.

Q. All right. From where did you leave to go to the monument? Put your pointer on it.

A. I don't know. Again I moved throughout this area pretty generally throughout the night (indicating).

And I came from this area over here to a point somewhere along in here when I first heard somebody say that General Walker was going to speak.

Q. And you went over and heard his speech?

A. Yes, sir.

Q. Take the stand. Did Walker say anything at all during this movement he made to this group you testified about?

A. During the movement I couldn't say whether he said anything or not. I was not close enough to him to even hear [fol. 1755] him if he had said something.

Q. Did you hear the start of Walker's speech on the monument?

A. I heard—I was standing there when all of it took place up to the time that Reverend Gray left. Now as to my recollection of what was said at various points is rather limited.

Q. How near Walker were you standing?

A. I must have been 10 or 15 feet.

Q. Which direction?

A. It would have been, as the monument faces east, then I would have been to the north of the easterly direction. I would have been on Walker's left.

Q. Did you see Reverend Gray when he attempted to get on the monument?

A. Yes, sir.

Q. Had you known Reverend Gray before?

A. Yes, sir.

Q. Closely or—

A. No, sir, I only knew him as a face and that was all.

Q. I see. Now what did you do when he started to get up on the monument?

A. When Reverend Gray started to get up on the monument?

[fol. 1756] Q. Right.

A. I didn't do anything.

Q. Now you testified you heard loud booing. Was that before or after Reverend Gray started to get on the monument?

A. Oh, Reverend Gray appeared and there was a great deal of noise as they pulled him back and away from there.

Q. Oh, was that when the booing was?

A. As I recall it, there was some booing at that time, yes, sir.

Q. So you figured the booing was at Reverend Gray?

A. Yes, sir.

Q. But there was very definitely booing?

A. There was—there was uncomplimentary sounds, yes, sir.

Q. Well, you know what a boo is, don't you?

A. Yes, sir.

Q. Was there or was there not a boo?

A. As I recall, there were some boos.

Q. All right. Now, then who brought Reverend Gray down?

A. I don't know, sir.

Q. Did you see a heavy, portly sort of an individual with him?

A. No, sir.

[fol. 1757] Q. Where did you see Reverend Gray?

A. At that time?

Q. Yes.

A. He came from my right, from the edge of the crowd and—somebody pulled him back down and they began to move away from the crowd and went over there with them. Now who was with him at that time, I did not know the people and had no reason to . . .

Q. Where did you go?

A. From that point?

Q. Right.

A. I went to the YMCA Building.

Q. Did you go in?

A. Yes, sir.

Q. How long did you stay in?

A. As it turned out, I stayed for some time. I was in there and at a period of several minutes after I went in, the Marshals came down and threw tear gas all around and it got into the YMCA Building and I couldn't get out.

Q. Now you wrote a report for your paper?

A. Yes, sir.

Q. That has been offered in evidence as Defendant's Exhibit 29.

EXCERPTS OF DEFENDANT'S EXHIBIT 29 READ INTO RECORD

Refreshing your recollection from this, "Into the mob walked Edwin C. Walker, former Major-General of the [fol. 1758] United States Army."

Now where was the mob when he walked into it? Go up there and let's identify and orient this.

A. This was a reference to this point here, when I saw him at this point here (indicating).

Q. All right. The mob then was already formed?

A. Well, there was a mob all over the campus.

Q. No, I am talking about at this point.

A. Well, there were groups of people all around here. When I first saw him, he was with a large group of people.

Q. All right. Oh, well, you didn't see him then walk into this group of people?

He was already with them, is that right?

A. Well, there was—when I first saw him, he was in this group of people.

Q. Well you have stated here, "into the mob walked Edwin C. Walker".

I want to know from which direction he walked and where the mob was when he walked there?

A. Well, when I first saw him, he was walking in this direction and the mob was around him (indicating).

Q. I see. Well you then didn't see him walk into the mob, did you?

A. Well, he was inside—walking in the mob when I saw him, yes, sir.

[fol. 1759] Q. In other words, rather than "into the mob," he was walking with the mob, wasn't he?

A. He was—I had wrote that, sir, on the morning after it occurred.

Q. I understand it.

A. And—

Q. Well, which time is right, then or now?

A. I am trying to explain to you as I recall the thing—

Q. That's what I want.

A. —how it happened. Now there was a crowd, there was Walker (indicating).

And he was in the crowd when I saw him, yes, sir.

Q. He was in the crowd and he did not walk into the crowd after you saw him?

A. Well, he was walking among the crowd and walked to the front of it, yes, sir.

Q. —"around him swirled a whirlpool of humanity and human emotion. Two hundred yards away, a line of gas-masked, club and tear-gas-armed Federal Marshals had turned the ancient Lyceum Building into a Federal fort.

" 'Now we have a leader,' screamed somebody. 'Rally to General Walker!' "

Now where did you hear that?

A. From the crowd behind General Walker.

[fol. 1760] Q. And that's when he was already in the crowd?

A. Yes, sir.

Q. "Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him."

Now he walked and didn't run?

A. No, sir, I never did say he ran.

Q. " 'Tear gas won't stop him,' another person yelled. 'Follow General Walker.'

"About 50 yards from the Federal line, tear gas bombs began falling around the group.

"General Edwin Walker (retired),—"

Did you understand he was retired?

A. Yes, sir, that was my understanding.

Q. You didn't know he had resigned?

A. It was my understanding he's retired at that time.

Q. All right. "General Edwin Walker (retired), who wouldn't retreat, did."

Did you see him retreat?

I thought you said you didn't see him any more?

A. Well, I saw him later. He didn't get to the Federal lines.

Q. You didn't see him retreat, did you?

A. I did not see him retreat. I did not see him stop. I did not see him go forward.

Q. In simple language, that's somewhat extravagant [fol. 1761] words, isn't it, young man?

A. Extravagant? The things that occurred around that thing would lead you to believe that he did not go forward.

Q. Well, anyhow, you didn't see him retreat, did you?

A. I did not personally see him retreat, no, sir.

Q. You have stated here, "General Edwin Walker, (retired) who wouldn't retreat, did."?

A. Yes, sir.

[fol. 1762] Q. You may sit down now.

"The former Army officer was just one of the number of outsiders—how many will probably never be known—who egged and aided a hard corps of Ole Miss students into a rock flinging, destructive riot that left two dead, seventy-five to one hundred injured, at least thirty-one arrested and seriously damaged the reputation of a university. I walked through that howling, passionately unthinking mob for more than four hours during the violence here last night. I saw the rock throwers and the agitators. I stood under a Confederate flag hoisted on the flagpole before the stately Lyceum and watched students and outsiders rush the Marshals' lines, retreat before tear gas, regroup and charge again, all without any attempt at control."

And nobody had any leadership whatsoever over this mob, did they?

A. Nobody exercised any leadership.

Q. "Most of the rioters were students, although the number of Ole Miss men steadily decreased through the night. The number of outsiders, non-students, steadily increased. Denim-trousered adults and teenagers from nearby towns furnished the impetus that kept the college boys at their job of injury and destruction."

I am leaving some out.

[fol. 1763] "About an hour after the rioting started, General Walker entered the scene. After his abortive attempt to reach the Marshals' line, he confined his activity to speech making and watching."

That was your understanding? He participated no more after this first attempt?

A. I did not see him participate in any—any more, no, sir.

Q. A crowd gathered around him at the edge of the Grove and he finally said, "All right, I'll speak to them."

Were you down there when that occurred?

A. Yes, sir.

Q. Now, did—I understood you to say that you were attracted to him on the monument as you left the YMCA?

A. No, sir, I did not say that.

Q. Well, what—well, start back up at the YMCA then and tell me what you did immediately before the speech?

A. Well, I had come down to this general area around the monument and I had come down from the direction of the YMCA Building. I see it. I did not say I came from the YMCA Building, whether I was there immediately after, or exactly, I don't remember.

Q. Take the pointer again and point where you were [fol. 1764] when you next saw Walker.

A. I seen him from somewhere up in this area. I had tried to follow things as they went along, and I came down into this area here, and was standing by the monument when next I saw Walker. And he was walking toward—

Q. Well, now, you drew a circle. I wish you would put the pointer where you were standing and where Walker was standing.

A. Well, that is difficult to do, sir. I will try. The best of my recollection, I was standing about here, which is about the same area I remained in, and I moved up and saw Walker, and Walker was standing somewhere over in here (indicating).

Q. Did you see the Highway Patrol go past about that time, or shortly before?

A. I had seen the Highway Patrol go past, but whether it was about that time or shortly before, I don't know. I believe it was prior to this time.

Q. What did you hear Walker say?

A. Walker—I heard some students say, or somebody say, "Walker is going to talk to us." And Walker was standing here. He says, "All right." He turned around, and I could see Walker, and he said, "All right, I will talk to them," and he stepped to the monument.

[fol. 1765] Q. You say, "He finally said 'all right, I will speak to them.'"

What do you mean by "finally"?

A. I don't recall, sir.

Q. Prior to that time had he refused to speak to them?

A. Not to my knowledge, or I don't know.

Q. Take your seat.

"Just prior to that an Episcopalian Priest, Rev. Duncan Gray, Jr., had tried to talk him into leaving and taking the crowd with him. 'They'll follow you,' Gray said. But Walker stood at the foot of the old Confederate monument and began speaking. He told the crowd there had been a 'sell-out'. He said a representative of the Governor's office had told him that Ross Barnett's orders were not to let the Marshals on the campus. After an impromptu whispered conference with a blue-coated follower, Walker said that a member of the Highway Patrol had been responsible for the sell-out. Again there was a conference and Walker said, 'the name is Birdsong.' Col. T. B. Birdsong is the head of the Highway Patrol and was in the car that led the first group of Marshals to the campus during the after-

noon. Then referring to the Episcopal Priest who had asked him to leave, 'I am ashamed that I am an Episcopalian.' At this point Rev. Gray appeared in front of the [fol. 1766] crowd and was forcibly taken from the area by men who feared that he would be injured. Later a group of students attempted to arrange a truce, but were unable to make the deal."

Walker was not part of this, was he?

A. Not that I recall.

Q. Where were you when that occurred?

A. When the truce occurred?

Q. Yes, sir.

A. I was up in the area where the truce talk was taking place.

Q. How long after the speech on the monument did this truce incident take place?

A. I couldn't say. I don't recall.

Q. You have no idea how long you were in the YMCA?

A. In the YMCA?

Q. Yes.

A. Oh, it was ten or twelve minutes, until the gas had cleared around the YMCA, until I could get out.

Q. Was Walker's speech just started, just finishing, in the middle, when Rev. Gray was taken out?

A. When Rev. Gray was taken out? Now, anything that was said after Rev. Gray appeared I don't know, because I left with Rev. Gray and I did not hear any more [fol. 1767] Walker.

Q. Did you hear Walker say Governor Barnett had betrayed the people of Mississippi?

A. No, sir, I didn't.

Q. Did he say not to let up now, "You may lose this battle, but you will be heard?"

A. I don't recall that.

Q. Did he say, "This is a dangerous situation, you must be prepared for possible death, if you are not go home"?

A. I don't recall that.

Q. There were cheers, apparently Walker had complete command over the group. Anything like that?

A. Yes, sir, there were cheers, now. And it was evident to me that the group seemed to be behind General Walker.

Q. Also there were boos?

A. Well, there were boos at the time Rev. Duncan Gray came up.

Q. Did you ever hear General Walker beg the students to cease the violence?

A. No, sir, I did not.

Q. As a newsman, did it come to your attention that the United Press International report written by Mr. Alfred B. Kuettner said that, "During a lull in the riot, General Edwin A. Walker mounted the Confederate statue on the [fol. 1768] campus and begged the students to cease their violence, and was met by one massive jeer". Did that come to your attention?

A. No, sir, I never saw that.

Q. Did you ever hear of it from that day to this?

A. No, sir, I have not. This is the first time.

Q. This is the first time?

A. This is the first time I have heard of it.

Q. You never even heard any discussion of that around the newspaper?

A. No, sir, I haven't.

Q. That is all. Just a minute.

Did you see General Walker after he got off the monument?

A. As I recall it, I saw him in the general area. I did not hear anything.

Q. Will you tell us about what you saw him doing in the general area after the speech on the monument?

A. Well, sir, after the speech was over on the monument, my recollection is I did see him in the area walking around, occasionally talking to somebody, and I was never very close to him after that.

Q. No charge then after the speech on the monument?

A. I did not see one.

Q. Now, there is a headline on this dramatic account [fol. 1769] here, "Walker charges then falls back." Did you write that?

A. No, sir, I did not.

Q. You never did see him charge, did you?

A. I saw what I called a charge in my story, sir, which would be the move toward the Lyceum Building.

Q. Pardon?

A. I saw the move that I—that that charge is referring to, is the move toward the Lyceum Building.

Q. Would you read to us, please, sir, out of that story anything you wrote that said that Walker led a charge?

A. I did not say anything—I did not say that he made a charge, no, sir.

Mr. Watts: That is all.

Mr. Gooch: That is all.

The Court: I am going to excuse this witness. You may be excused.

Mr. Gooch: The defense rests.

The Court: What says the Plaintiff?

Mr. Watts: The Plaintiff is ready to start reading depositions, sir.

The Court: All right.

Mr. Watts: Might we have a five-minute recess to get these depositions assembled?

[fol. 1770] The Court: All right, Ladies and Gentlemen, the Defendant has rested, and the Plaintiff will offer probably some rebuttal evidence, so step into the Jury room for about five minutes until I call you back.

(Short recess was had.)

[fol. 1771] Mr. Watts: This is the deposition of Louis Milner, Associated Press employee, taken at New Orleans, on March 30, 1964.

LOUIS MILNER, testified by deposition as follows:

Direct examination.

By Mr. Watts:

Q. Your name is Louis Milner?
A. Yes, sir.
Q. Your profession?
A. Newsman.
Q. For whom? And how long?
A. For the Associated Press. Since January 27, 1946.
Q. What is your education, Mr. Milner?
A. Bachelor of Science in Journalism from the University of Illinois.
Q. When did you graduate?
A. 1934, on July 11th—make it June 11th.
Q. During your undergraduate days, give us all the organizations to which you belonged?

Mr. Watts: I think we can skip that. Wait just a minute. On Page 144, line 10.

Q. What was your assignment in the New Orleans AP Bureau?
A. As of the present?
[fol. 1772] Q. What has it been since you have been with them?
A. Well, we have several shifts here. There is a radio assignment, day rewrite, day editor, overnight, night editor, night filing editor, night radio.
And first of all, my time has been spent on the night side.
At present, I am night editor.
Q. How long have you been night editor?
A. I couldn't give you an accurate answer.
Q. Since before or after September 30, 1962?
A. Long before.
Q. Where were you on September 30, 1962?
A. I was on the night desk.

Q. Where were you working that day?

A. That day?

Q. Yes.

A. That night, you mean?

Q. Yes. I will make it more specific. Were you on duty from 8:00 o'clock through midnight of that night?

A. Let me check and see. And what time did you say? From 8:00 p.m., through midnight?

I reported at 5:30 p.m., and I left at 8:30 a.m., the following day, 8:30 a.m., yes.

Q. What was your assignment and duty?

A. Night desk.

[fol. 1773] Q. What is the nature of that duty?

A. Was that a Sunday or a Monday?

Q. That was a Sunday.

A. Yes, I was correct. Night editor and night editor has charge of the night desk, and, also filing the wires.

Q. Did you do anything else during the course of that evening?

A. What do you mean by "anything else"?

Q. Other than handling the night desk and filing the wires?

A. No.

Q. Did you operate the telephone at any time specifically?

A. No, sir.

Q. Could you take your copy here from the night of September the 30th, and pick it up and let me ask you some questions about it?

A. Yes. Is this the original copy or a teletype copy? What specific story?

Q. Well, I am interested in any stories during the course of the evening with which you had any contact that to do with General Walker.

A. Well, here—

Q. Well, I have some others here that were apparently [fol. 1774] presented to me at the time of the taking of the Savell deposition.

A. Well, that would be difficult to—you see, unless I saw the original typewritten copies so as to see whether it passed through my hands or not, because the normal procedure on a normal night, the story comes to me and then it goes on the wire after it has been edited for grammatical errors and ready for the wire.

And in times of stress, it is possible for someone else of equal, shall we say, experience to put it on the wire directly.

Q. How long had you known Van Savell?

A. I had known him ever since he had joined the Bureau.

Q. Did you consider him to be an experienced news reporter on the night of September the 30th, 1962?

A. I did.

Q. What did you understand his experience to be?

A. The past performance.

Q. Did you understand that he had only one year of college and less than a year of full experience?

A. Yes.

Q. What past performance are you referring to now that indicated his experience?

A. Well, his general performance in the Bureau.

[fol. 1775] Q. Outline to us what you mean.

A. Well, just his handling of various stories nearby in comparison with the others.

Q. I wish you would turn to the earliest release there that you can identify that may refresh your recollection and tell us what happened that night.

A. I recall having read this story and this is noted as XAB, and I don't recall whether I was the one who put it on the wire or not.

Q. What is the timing on that?

A. 3:45 a.m., on the morning of October 1st.

Q. Who handled the incoming calls to the New Orleans Bureau that night?

A. I don't know. There were several people.

Mr. Watts: Now, if Your Honor please, in connection with this, I would like to read that communique, XAB, to the jury, but it will involve considerable shuffling of papers and if it is acceptable to the Court, I would like to pick that out over the evening and read it the first thing in the morning, referring back to this portion.

The Court: All right.

Mr. Cravens: Is that the only number you have got on that?

Mr. Watts: That's the only one I have so far.

[fol. 1776] Mr. Cravens: I mean is that the only number designation you have, just XAB?

Mr. Watts: That's his designation.

Mr. Andress: It's capital X dash capital a parenthesis small b parenthesis close.

Q. What is the timing on that?

Mr. Gooch: Where are you reading from now?

A. 3:45 a.m., on the morning of October 1st.

Mr. Watts: I am reading—

Mr. Gooch: Mine shows 3:54. I don't know whether you are right or not.

Mr. Watts: 3:54 is what it is.

Mr. Andress: 3:54. Isn't that what I said? I'm sorry. I reversed it. 3:54 a.m., on the morning of October 1st.

Q. Who handled the incoming calls to the New Orleans Bureau that night?

A. I don't recall. There were several people.

Q. Do you know any of them?

A. I would know anyone who was there but I don't recall who was on duty at this time.

Q. Could you give us the name of anyone that you do know that was on duty?

A. No.

Q. What was the first you heard that night that Walker

[fol. 1777] was alleged to have led the charge against the U. S. Marshals?

A. Well, these stories here are out of order and I don't recall the time.

Q. Have you ever heard of anyone other than Van Savell who reported or has purported to have seen General Walker lead a charge on the night of that riot?

A. Normally I wouldn't.

Q. So the answer is no?

A. No, it isn't no.

Q. Well, what is it?

The question is, please, sir, have you ever heard of anyone other than Van Savell that purported to have seen General Walker lead the charge? Just say yes or no. I think you can answer that yes or no.

A. Well, it's like the question, "have you stopped beating your wife?"

Q. No, it isn't.

A. It is to me. Could you rephrase it?

Q. Did you hear that Van Savell reported that he had seen Walker leading the charge?

A. Yes, sir.

Q. Did you hear anybody else other than Van Savell make such a report?

A. Not to the New Orleans Bureau.

[fol. 1778] Q. Have you heard anyone, to the New Orleans Bureau or elsewhere, that anyone else made such a report, that Walker was leading the charge?

A. I understand there have been reports.

Q. Could you give us the name?

A. No.

Q. I mean of any individual who made such a report?

A. No.

Q. Where did you understand that there had been such reports?

A. Just rumors, reports that had drifted to the Bureau since then.

Q. That have drifted where?

A. To the Bureau.

Q. Has anyone made an investigation of such reports?

A. I don't know.

Q. So that you at this time know, or I should say, do you know at this time of any individual other than Van Savell who claimed that he saw Walker lead the charge?

A. You mean person?

Q. You personally?

A. No.

Q. As of October 1, 1962, from your observation of the news bulletin that went out through the office where you were working, was the news disseminated that Walker had [fol. 1779] led a charge of rioters on Mississippi University on the night of September 30th?

A. Whatever is contained in these stories, it was disseminated.

Q. Did you hear anyone in the Associated Press Bureau or anyone connected with the Associated Press ever at any time discuss the fact that UPI reporter, Mr. Al Kuettner had issued a report in form as I point out to you now on Page 32, of Mr. Kuettner's deposition, starting with Line 17?

A. I have never seen this before.

Q. Have you ever heard of such a report being issued by the UPI wire service?

A. No, sir.

Q. As far as you are concerned, then; you never heard any question as to the veracity of the Savell report?

A. No.

Q. Where were you assigned from September—I mean from October 1 through October 6th, 1962?

A. To the New Orleans Bureau.

Q. Were you doing the same type of work there that you were doing on the night of September 30th?

A. Yes, sir.

Q. During that period of time did it come to your atten-

tion in your official position as evidenced by the certified [fol. 1780] copy, or copies, of the original complaint of the United States against Edwin A. Walker that Van Savell had furnished to the Government the information upon which its complaint was filed against Walker?

Mr. Gooch: If the Court please, I don't know what relevance this has to the case.

The Court: Let me look.

Mr. Gooch: But it's far afield from anything—I don't know what limits we are going to on rebuttal. This does not occur to me to be rebuttal testimony and I object to it.

If he wanted to put something in in his case in chief, but this is not rebuttal of anything that I know of.

Mr. Watts: This man is an official of the Associated Press and it's rebuttal against all these witnesses that have testified.

Mr. Gooch: Mr. Watts, let me finish my objection.

The Court: Just a second, Mr. Watts. Go ahead, Mr. Gooch.

Mr. Gooch: There is no pleadings to support any such issue as now is sought to be taken before this jury, and for the further reason that in connection with the filing of the Complaint, the witness, whoever he has, has no choice as to whether his name is put on a Complaint or [fol. 1781] not, or a list of witnesses; it's done entirely by the law enforcement officers.

Mr. Watts: I will save the controversy and withdraw it.

Question on Line 22.

Q. Were you at a later time assigned the responsibility of covering a sanity hearing involving General Walker on November 21st and 22nd, of 1962?

A. In part, yes.

Q. Who else was responsible for that?

A. Van Savell.

Q. And were you and Van Savell collaborating in the coverage of that sanity hearing?

A. I would say divided responsibility.
Q. To whom did you look as your immediate superior?
A. You mean in Oxford?
Q. Anywhere?
A. That would be to the Bureau Chief in New Orleans.
Q. That was Ken Davis?
A. Yes, sir.
Q. What order did he give you when you went to Oxford?
A. To cover the hearing.
Q. And where did you stay in Oxford?
A. At the Ole Miss Hotel.
Q. Did you encounter Van Savell there?
[fol. 1782] A. Yes, sir.
Q. Did you visit with him concerning this incident?
A. Did I what?
Q. Did you visit with him concerning the Walker incident, discuss it with him in any way?
A. No.
Q. You mean you went to Oxford to cover this hearing and met Van Savell, who had written the original report, and didn't have a word of conversation with him about what he had seen and what he had written?
A. No, sir.
Q. Where did you first see Savell?
A. Where?
Q. Where in Oxford?
A. I don't recall. Possibly at the motel.
Q. Where was he staying?
A. I assume at the motel.
[fol. 1783] Q. Did you see him there?
A. At the motel?
Q. Right.
A. Yes, sir.
Q. What did you say to him and what did he say to you?
A. About what?
Q. About anything.
A. I don't recall.

Q. Do you recall anything? At all you said to him or he said to you?

A. No.

Q. You mean you have not one iota, not one solid recollection of the conference you had, or conversation you had with Savell when you went to report on this hearing?

A. Why no.

Q. Did you arrive the day of the hearing, or the day before?

A. I would have to check my work schedule to find out.

Q. What did you think of General Walker when you went up there—before you went up there—

• • •

Mr. Watts: I think that is probably not—

[fol. 1784] Mr. Gooch: Go ahead and read it.

• • •

Q. Before you went up there did you have any idea about him?

A. No.

Q. Had you read anything about him, or have any concept about him at all?

A. Why naturally I had read stories which had appeared. He was prominent.

Q. All the stories you had read were adverse to him, weren't they?

A. I don't recall any. Purely objective.

Q. You were not one of his admirers?

A. I have no feeling toward him either way.

Q. You were just completely negative, have no feeling pro or con?

A. Naturally.

Q. And you were performing your duties?

• • •

Mr. Andress: You missed one.

Mr. Watts: Skip to the next one.

• • •

A. Why sure.

Q. Now, do I understand that you arrived there the day before the hearing?

[fol. 1785] A. I didn't say. I said I would have to check my work schedule.

Q. And when and where can you check it?

A. I was probably on overtime and my overtime blanks are at home.

Q. Well, would you bring those with you tomorrow?

A. What time?

Q. Whatever time you come. Let's see. What time do you think you will arrive?

A. It will probably be in the afternoon. I think that is about the only plane connection.

• • •

Mr. Gooch: If the Court please, in the interest of time, I can't see any rebuttal in this.

The Court: What is the purpose of a lot of this?

Mr. Watts: The purpose of a lot of this, if Your Honor please, they have brought in a lot—a lot of witnesses. I won't comment on the testimony, Your Honor heard them, and here is a man in the Associated Press, New Orleans Bureau, one of the officials.

The Court: I am not talking about—

Mr. Watts: And the purpose of it is to show the confusion and the disafusion (sic) of information that cir-

[fol. 1786] culated about the district office where this thing was all being related form.

Mr. Gooch: If the Court please, we are trying a case about a story that we admit Van Savell wrote. I don't know the purpose of going a long discourse about what was discussed after the story was written.

The Court: I think, Mr. Watts, you can reduce a lot of this.

Mr. Watts: I think perhaps I can skip some of it as I go along.

The Court: Do that and I will overrule the objection for the time being.

Mr. Watts: Let me have a quick look then. A lot of this is preliminary, and of course this was a discovery deposition, and a lot of the things there I have since learned.

All right, on page 156, line 19. This is offered for the purpose of showing either malice or reckless disregard of the truth.

• • •

Q. Did you ever at any time during your reporting of the Walker hearing on November 21st and 22nd bother to go to the Clerk's office and check the file to see what issues were involved in the hearing you were covering?

A. I believe Savell filled me in on it.

[fol. 1787] Q. What did he say?

A. I don't recollect at this time.

Q. And you didn't consider it worthwhile yourself to go in and check the file?

A. I depended upon him.

Q. I see. Are you sure of that?

A. Positive.

Q. Did Savell tell you that he had been listed on the Government's complaint as a complaining witness?

• • •

Mr. Gooch: If the Court please—

The Court: That wouldn't have anything to do with this.

Mr. Gooch: The Jury should be instructed not to regard that. A witness has no earthly way—

The Court: Ladies and Gentlemen, you are instructed not to consider that in any way. A witness doesn't have any choice of whether or not he is going to be called as a witness. That is not up to him. That is up to the governmental agency involved.

Mr. Watts: I will skip on over here.

The Court: I tell you what I think I will do. I believe I will go ahead and recess and let you look over the depositions tonight.

Mr. Watts: All right. That will give us a better chance [fol. 1788] to eliminate preliminaries.

The Court: Ladies and Gentlemen, we will recess until 9:00 o'clock tomorrow morning.

(Thereupon, at 4:25 p.m. an adjournment was taken until the following morning, Thursday, June 18, 1964, at 9:00 o'clock a.m.)

[fol. 1791]

PROCEEDINGS

The Court: Good morning Ladies and Gentlemen.

The Plaintiff had a witness which he wanted to offer but he isn't here and I told him we had waited what I considered to be a reasonable length of time for him. So what says now the Plaintiff?

Mr. Andress: The Plaintiff closes.

The Court: What says the Defendant?

Mr. Gooch: I would like to offer in evidence, if the Court please, two instruments which are—will you mark this, please, Mr. Nuss, as the Defendant's Exhibit, next number, and this.

(Thereupon, Defendant's Exhibit 30-A and 30-B, were marked for identification.)

Mr. Gooch: This will be 31.

(Thereupon, Defendant's Exhibit No. 31, was marked for identification.)

Mr. Gooch: We offer in evidence at this time news releases of the UPI under dateline of October 1, 1962, in connection with the testimony of Al. Kuettner, of United Press, who testified by deposition.

The Court: What numbers are those?

Mr. Gooch: Numbers 30-A, 30-B, and 31. I will read excerpts from them.

The Court: They are admitted.

[fol. 1792]

EXCERPTS OF DEFENDANT'S EXHIBITS NOS. 30-A, 30-B AND 31 READ INTO RECORD

Mr. Gooch: Reading from a portion of 30-A and 30-B, which are reports of United Press International under dateline of October 1, 1962, "The Justice Department announced today that Major-General Edwin Walker, resigned Army General who has become a vocal advocate of right-wing causes, has been arrested at a roadblock in Oxford and charged with a number of offenses, including inciting rebellion.

"Walker was seen during the riots egging the students on."

And from United Press International under date October 1, 1962, this excerpt, "Students were waving the Confederate flag during a lull in the rioting. Edwin A. Walker, former Army Major-General who commanded troops at Little Rock, mounted a Confederate statue and advised the students to cease their violence. 'This is not the proper route to Cuba,' Walker, who was wearing a big Texas hat, said. The crowd jeered. Later, Walker mounted the statue again and said: 'I want to compliment you all on the protest you make here tonight. You have a right to protest under the Constitution.'"

That concludes the evidence of the Defendant.

The Court: Ladies and gentlemen, that concludes all of the evidence. Now we haven't wasted our time this morning. We have already finished preparing the Charge, so [fol. 1793] we will be ready to argue the case at 2:00 o'clock.

We will recess until 2:00 o'clock. At that time be back in the jury room, please.

(Thereupon, at 11:45 o'clock, a.m., a recess was taken until 2:00 o'clock, p.m., of the same day.)

* * *

[fol. 1794] Afternoon Session

2:00 P. M.

The Court: Ladies and Gentlemen, I will first read you the charge of the Court in the case.

(Charge read.)

The Court: Now, after argument of counsel I will deliver this charge to you and you will actually take it into the Jury room with you. I believe Mr. Andress will open for the Plaintiff.

OPENING ARGUMENT OF PLAINTIFF BY MR. ANDRESS

Mr. Andress: May it please the Court, I will charge on the Jury.

Ladies and Gentlemen of the Jury, we have now reached nearly the final stages of nine long days of presenting testimony. Some of it, unfortunately, we have had to rather present over and over again to see the picture. We have tried our best to bring you all of the portions of the picture, all the paint, brush, all the soap of it, and everything of the sort.

The picture is not complete.

The reason it is not complete is not the fault of General Walker and his attorneys. There is one big portion of this picture missing. That portion is to hear from the witness stand live, presented to you where we can cross examine [fol. 1795] him, the story of the man who started all this, Van Savell; the hired hand of the Associated Press who brought witness after witness, a preacher, the Dean of the college, other newsmen, radio people in here, but they didn't bring in the one man who could stand up here before you and tell you that he acted in good faith, that he thought he was writing a fair comment. That he was telling what he believed to be a truthful story, or who, perhaps, on cross examination, would break down and admit that as a sports writer with the Associated Press for about a year

he fell into this confusion and completely lost his objective and he painted the kind of picture that he wanted to paint, and he sold it to his superiors.

Why isn't he here? We don't control Mr. Savell. He doesn't work for us.

Now, there is another thing that is missing here. Another thing that is missing here. Van Thomas, the first witness who testified by deposition, the re-write man down in New Orleans told you by the deposition that he talked to their photo people up in Oxford; that they had a wire photo network set up down there in the hotel, and they were behind the Marshals where they could take at least [fol. 1796] a couple of pictures in the dark of the Marshals.

Why didn't they bring in here a single solitary picture of General Walker supposedly leading a charge of 1,000 students across that campus to attack or attempt to attack United States Marshals in an act of insurrection against the authority and the President of the United States?

Why didn't they bring those pictures in? We didn't have a photographer to do it, or a photograph network. They had it. If they could take those pictures that they offered here in evidence, I submit to you that if any such charges had been made or led by General Walker that they would have had pictures. Can you imagine, can you conceive of anything more newsworthy under high Heaven, any greater scoop that any news media could possibly have than to have a picture of a former Major General in the United States Army violating every code or canon of ethics that he had been brought up with, to lead in insurrection, a charge against Marshals of the United States right after the President of the United States had made a speech and executive proclamation.

We really submit that that didn't happen.

Now, you are asked here a number of questions, eleven of them. That is just one more than one question per day [fol. 1797] for the time we have spent here. The Court gives you some definitions. I want to call to your attention

a couple of those definitions, and point out the fact that the first one you have is "lead a charge". This paragraph defines both "lead" and "charge" and, of course, the newspaper report was that he led a charge. So that is one phrase. [fol. 1798] So that that's one phrase. "Led," means activities by a person who directs, moves to action, or encourages in some action or movement toward the Marshals or a group of body of people moving toward an objective.

Well, now bear in mind that every time anybody down here at the monument turned and walked west, that is technically speaking a movement toward the marshals.

Is it a Charge?

Where—well, I was brought up on the Charge of the Light Brigade, pickets charged at Gettysburg and Teddy Roosevelt's charge up San Juan Hill and I can't see where there was any such movement that could be defined as a charge or one that General Walker led on the campus of Ole Miss that night because there is one thing, there is one thing on which people are practically unanimous—I hesitate to say "unanimous," because I don't want to mislead you and there were so many witnesses here that, very frankly, I am not sure but what somebody testified to almost everything—but the witnesses were practically unanimous in saying that General Walker never got out of a walk; that some of them said he moseyed along and some said he milled around and some said he strolled around the campus and some said he walked here and around but the best we have ever gotten was a brisk pace—and then only by two [fol. 1799] members of the news media, people who are in the same field of endeavor as the Associated Press.

Now one thing you want to remember about this—these witnesses is, who's got an axe to grind?

Did these kids that were on the campus and for whom disciplinary action and all threat of disciplinary action has apparently passed, have they got an axe to grind or are they telling it to you, laying it on the line the way they saw it?

You saw young Sweat, Dick Sweat, the first boy that testified here today, got himself all scared of the Judge and said, "I take it back," when he was going a little bit farther afield than he ought to go.

Those boys didn't have, haven't got anything to gain by it.

Now what about somebody that's in the news field, that's on the radio or working for a newspaper where the Associated Press controls their news and where their future in the newspaper business, certainly isn't going to help them any if they have been in here fighting the Associated Press.

So bear that in mind when you consider the stories that these various witnesses told you.

[fol. 1800] Now, we only have an hour to the side and Mr. Watts is going to give you most of the details in trying to summarize the manner, so let me go on to these questions.

The first question that was asked of you, "Do you find from a preponderance of the evidence that the statement, "Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus" was substantially true?

We submit to you that from a preponderance of the evidence, that question ought to be answered "No", he didn't lead a charge.

The most that anybody has said is that he was with a group who walked up—Savell's own story, by deposition, is that he started from the monument here and he walked up—where is that pointer?

Well, at any rate, he walked up on a diagonal, off at an angle here until he got up here, and then he walked along the inside edge of the circle until he got some place over in here (indicating).

And he walked. Now, a thousand people takes up a lot of room. That actually is not such a big area. It is about 500 feet across. The scale is a foot to an inch and you all can have this map, you can have it moved into your Jury

[fol. 1801] room and look at it and study it and look at the scale of things on there.

That's not a very big area. And it's full of trees, as, if you get up here close, those dots are trees, that will tell you pretty much about what kind of a place it was.

He didn't lead a charge. There wasn't a charge in the sense of the word that we think of charge and never did he lead one.

Nobody, even those who say he was in the forefront of a big mass movement, the defense witnesses, no one of them ever says that he issued any commands or purported to say, "Bring it up on the right, come up here on the left, all right, now double quick," or anything of that sort. Nobody says he issued any commands.

Now, certainly, if you lead a charge, you are telling people what to do. And we submit that Special Issue No. 1 should be answered "No".

Special Issue No. 2, "Do you find from a preponderance of the evidence that the statement, 'Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus,' complained of by Plaintiff, constitutes fair comment describing the Plaintiff's activities on or about September 30, 1962, at the places described in the [fol. 1802] evidence and under the then attendant circumstances?"

Well, there isn't but one person, really and truly who can say whether what he wrote is fair comment and that's Van Savell and he is not here to tell you that, in his opinion, that was fair comment on what he actually saw.

We don't see how you could possibly, under the evidence, without Savell telling you that he thought it was fair comment on what happened, answer it yes—so we think the answer to it must be "No", that it isn't fair comment.

There was a confusion, a disorderly, disorganized confusion with lots of mad boys that had been tear gassed running up and throwing anything they could lay their hands on, but there wasn't anything of concerted action,

anything bigger than small groups of half a dozen to a dozen who were sporadically running forward and throwing rocks.

Special Issue No. 3, "Do you find from a preponderance of the evidence that the statement inquired about in Special Issue No. 1 was made in good faith in reference to a matter in which the Defendant had a duty to report to its members and then to the public"?

[fol. 1803] Well, that phraseology, of course, is very pious phraseology but it boils itself down to one thing, good faith. Whose good faith? The good faith of the man that wrote the story. Did he come here and tell you folks, "That's the way I saw it, and I was doing my best to do my duty and I think that what I said was fair comment on what I saw and certainly my intentions were good. I did this in good faith?"

You would have to speculate to say that, yes, it was good faith because you don't know from the witness who did it, who wrote it.

We say then that the answer to Special Issue No. 3, from the preponderance of the evidence, we believe, should be "No," it was not in good faith.

It is necessary to establish that it was good faith and unless you think it's established, you should answer that question, "No."

Special Issue No. 4, "Do you find from a preponderance of the evidence that in publishing the statement set forth in Special Issue No. 1, the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?"

And the Court tells you that "malice," is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was [fol. 1804] the result of a conscious indifference to the right or welfare of the person to be affected by it.

"* * * * entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the

person to be affected by it," well, in a certain sense of the word, of course, all of us are dependent for what we believe about what goes on in the world and in our country upon what we read in the newspaper. We get to the point where, if we see it in print, we are inclined to believe it's so.

And I suppose when you come right down to it, very few of us have ever analyzed what goes on behind that and I don't imagine that there are very many citizens who have had the opportunity that you folks have had here in the course of the last nine days to see just exactly how much care or lack of care goes into the printing of a story that can affect an individual and his reputation and his standing in the community as much as this story affected General Walker.

[fol. 1805] Now, we have got a most peculiar situation here. At least I hope it is peculiar. I still want to believe in my own mind and my own heart that most of these things I read in the newspapers are so. But, in this case we have got it real clear, that this young fellow with short experience, and most of that writing sports run out onto this campus and he painted a big beautiful picture as to what happened out there. And I have always heard it said that every newspaperman wants to be an author, and many of them do achieve it.

But, I don't think they ought to start their career in their first year by writing fiction, and I submit to you that from what you have heard from this witness stand, the story Van Savell wrote out there is mighty close to fiction; that there is just lots and lots of inaccuracies on his hands; lots of things that in his excitement and in the confusion that he thought he saw and that he put down.

I am going to leave to my colleague, Mr. Watts, to point out to you the differences between the story that Savell told by his deposition, and that he told to his re-write man about when the charge occurred, and the great discrepancies there are in the stories, about when the incident took [fol. 1806] place, as to whether it was before or after the

speech on the monument, not even including the third story by Mr. Graham.

But, to me, the fact that Van Savell, with his light amount of experience, wrote this story and that nobody checked him, and that Van Thomas said that he got only one report about the speech and the charges and that Savell was the only person who ever reported, so far as he knew—no one but Savell reported the charge, and that Relman Morin, by his deposition, said that when he wrote the follow-up story he just picked it up from Savell and had no information except from Savell.

You have got a situation here where General Walker's reputation has been harmed and ruined by one unsupported, unsubstantiated, uncollaborated story, where nobody ever went back to check on the situation and see whether this story full of gory details could be backed up by anybody except this inexperienced young reporter, just one step beyond a cub reporter.

We think that to dissemble a story like that over the wires of the world without making any attempt to check up on it, we think that that comes under the heading of that entire want of care which would raise the belief that [fol. 1807] the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Now, let me point this out. The mere publication of the story, the original story, is not itself evidence of malice. But, it was followed up, Relman Morin wrote another story and repeated all this, then along comes the story about when the General was thrown into the mental institution without warrant, and when the charges were ultimately dismissed against him, the slanted story that sticks out of context, the things which were unfavorable to the General, and failed to give the same circulation throughout the world to those stories that showed that the one psychiatrist said he was operating under a superior intelligence, and

the fact that those charges were dismissed without any qualification.

[fol. 1808] So we think that when you take all of those together and look at the entire attitude of the Associated Press in this case, that your answer to Special Issue No. 4, should be "Yes," they were actuated by malice.

Now malice is either of these things, ill will, bad and evil motive—I am not going to stand here and attribute an association of many newspapers all over the world to petty gossip or evil motive and so on.

We say that it is a conscious indifference to the rights of General Walker. That is what it is.

Special Issue No. 5, do you find from a preponderance of the evidence that the statement, "Walker assumed command of the crowd," was substantially true?

We think the answer to that is no. Nobody ever testified he gave any orders to the crowd. There is nobody that ever testified that anything more than a fact that with a group around him he was walking around that campus, and nobody said he ever said, "This way, come on, or let's go," or anything you would do if you were assuming the command of the crowd. We think the answer should be "no".

Special Issue No. 6, similar to Number 2. Do you find that the statement, "Walker assumed command of the crowd," was a fair comment.

[fol. 1809] The man that could tell you whether it was a fair comment isn't here. He hasn't stood up and been counted. He is unwilling to let this jury pass on him, his truth, his veracity, his—how he answers questions, whether he dodges, whether he hesitates, whether he equivocates, whether he has the appearance of truth like most of these young fellows from the University of Mississippi before you. Why you could look at those people and tell they were telling the truth.

That is what you haven't had the opportunity to do with Van Savell, and that is what the Associated Press failed to produce for you.

Number 7, do you find the statement made in Special Issue No. 5, was made in good faith. That is the same thing. We think the answer ought to be no. The man who could say it was in good faith is not here, the man who wrote it didn't come in here and tell you he did it in good faith.

[fol. 1810] And "If I hurt somebody, I am sorry."

Do you find that the statement "assume command" was actuated by malice. And the same definition of malice. We say again that the statement was made with gross indifference to the rights of General Walker.

Number 9, what sum of money do you find would compensate him. What sum of money would compensate him for the damage done to the reputation and honor of an Army General accused of insurrection. I don't know, that is the kind of thing that is so very difficult to say. One of the things that is almost impossible to say, by me.

However, we do know the story had wide circulation here through the Star Telegram. We know the Star Telegram is the Bible of the cattle country and West Texas. We know that out in the West here everybody reads the Star Telegram. We know that it's circulation is widespread. How many people read each one of these newspapers? I don't know. But, I strongly suspect there are very few homes that take more than one copy of this paper, and I suppose that almost everybody up to reading age reads that paper. Must be three or four people read every issue, every copy of it, on the average.

[fol. 1811] If the paper has got a circulation of a quarter of a million, say 250 thousand, and four people would read it, the damage that the General is asking is one buck, one dollar bill for everybody that saw and read these false stories about him.

Approximately—using those figures, and I think they are not unreasonable, that is about one million people that saw it in the Star Telegram. That is what he is asking for, one dollar for everybody that saw the story that hurt him, that ruined his reputation, creating a definite impression that

here is a man, who has served his country all these years now leading an insurrection.

The question of the right of somebody who has been in the United States Army to subsequently withdraw from that Army, resign his commission and do battle against the United States has been forever settled one hundred years ago. The Civil War said you can't do it.

So, today the General Walker was doing, was leading an insurrection against his country, is a damaging statement, for a man in his position, and one for which he should be compensated.

[fol. 1812] Special Issue No. 10, do you find that this is a case in which exemplary damages should be awarded. And exemplary damages are, as the Court defines it to you, penalty or punishment.

They are in your judgment, to be awarded if you want to say to the Associated Press, "Don't do it again; don't do it again."

"Don't ruin a man's reputation without checking your story before you put them out all over the world."

We think the answer is yes, that it is a kind of a case where the punitive or exemplary damages should be allowed, and what they amount to is what you are asked in Issue No. 11.

Ladies and Gentlemen of the jury, I wouldn't attempt to tell you what amount of damages to find to punish the Associated Press, that is, if you believe he is due.

But if you view this evidence as I view it, and as I think it comes to you from the witness stand, I think you will agree with me that it is a bad, bad situation, and our knowledge of what goes on in the world can be made to depend on an unchecked, uncollaborated story that paints a man with a long career of patriotism and service to this country as, in essence, a traitor, leading an insurrection. Thank you.

[fol. 1812a] OPENING ARGUMENT OF DEFENDANT BY MR. GOOCH

Mr. Gooch: May it please the Court and Ladies and Gentlemen of the Jury. Mr. Andress, as I view it, has spent most of his time critical of our not bringing Van Savell here to testify in this case. I would respectfully call to your attention the fact that the Plaintiff in the case, through his Chief Counsel, Mr. Watts, took Van Savell's deposition, in which he was tendered to him to ask all of the questions under the sun that he might want to ask him. You heard the testimony offered by the Plaintiff in this case in which, —and we read all of the answers of Van Savell to the Jury, on the questioning by Mr. Watts, Chief Counsel for General Walker.

He says we brought no photographs. Believe you me, if we had had them we would have brought them. We couldn't find any. We brought all we could find. And I might also state to you, Ladies and Gentlemen, that from what we understand and from the witnesses' understanding, it was not very healthy to have even a pen and pencil out there on that campus that night, let alone photographs to try to take a picture.

He also says that the Associated Press should be criticized because they didn't put out that story of the type that during the sanity hearing of General Walker, that General [fol. 1812b] Walker was operating under a superior level of intelligence.

Ladies and Gentlemen, we introduced in evidence in this case, which we did not read to the Jury, but which you can take into the witness (sic) room, if you desire, a verbatim—verbatim report of Dr. Stubblefield's report, wherein it contains that phrase. The Associated Press didn't skimp by just saying "That is what one of the psychiatrists testified to," Ladies and Gentlemen. Associated Press carried the entire story, or the entire statement of Dr. Stubblefield, which contained that statement. It is there and I will not be challenged on the fact that it was introduced in evidence in this case.

Ladies and Gentlemen, at the outset of this case Mr. Watts, the lawyer from Oklahoma City, stated to you, and I quote, "A Deputy Sheriff who will be here to testify will testify that at no time did Walker lead or participate in anything remotely approximating a charge."

That is a direct quote from Mr. Watts' opening statement to this Jury.

He also said, "The Associated Press deliberately smothered the testimony that Dr. Stubblefield's report showed [fol. 1812c] that Walker was of superior high intelligence." That is a direct quote.

I have answered that there is an exhibit here wherein the Associated Press published the entire Stubblefield report, and I will get down further to Mr. Watts' promise to you in the opening of this case, that he had a Deputy Sheriff who would be here to testify, and would testify that at no time did Walker participate in anything remotely approximating a charge.

Ladies and Gentlemen of the Jury, with this nine days of testimony in which there have been some thirty witnesses heard, including depositions, the case has now died down to three simple issues. One,—and I am paraphrasing—did Walker lead a charge?

Two, as to whether or not General Walker, by his actions and the reasonable inferences you draw based on the Court's definition, assume command over a crowd there on the campus of Ole Miss.

As to whether those statements are true.

Basically that is where the case now stands, and goes into your hands.

If I may, and I don't want to impose on this Jury, I would like if I may to review some of the testimony that has been [fol. 1812d] developed before you.

You cannot decide this case on the statement of lawyers, nor can you decide the case on the innuendoes the lawyers make and the inflection of their voices. All lawyers are advocates. It is their duty to present to you all the evidence

available in a way that it will be understood by all persons hearing the testimony.

Let's start out now, if I may, and I shall do my very best to stay within the record in this case as that is, of course, the way in which this matter must be determined, under the instructions of the Court.

[fol. 1813] General Walker, in November of 1961, after a distinguished career in the Army, having attained the rank of Major General, a position that not many men attain—it has to be attained on ability, on leadership study and you have to be a man of those attributes, in my opinion, to reach that high a standard in the Army of the United States—General Walker, for some reason, he explains it, he says, among others, he said, he resigned in November of 1961, and I quote him again, this is General Walker's testimony, "I resigned in order that I might speak out."

Now, I don't criticize in any way General Walker or any other man who says he has a right to speak out.

The Constitution of the United States says a man has a right to speak out. The Constitution refers to freedom of speech and freedom of press. I assume that's to what General Walker alluded.

Now, let's take step by step, though, if you will, please, and see if it was speaking, speaking out, that he was doing or whether there was another connotation, particularly—and I will confine myself now—to the Mississippi incident.

The evidence is quite clear that by September 25th, 1962, [fol. 1814] it was evident to everybody in the world that the highest Court having jurisdiction of this matter had said that Meredith was to be entered as a student at Ole Miss University.

The court had said so, an injunction had been granted against all of the officials of Mississippi and others having knowledge of that Court decree.

What do we find? We find General Walker—and this is his testimony, if you please—calling, as he said he did, a Shreveport radio station and issuing the following statement:

Now, this statement has to come to a listener in the concept of how the listener wants to receive it, but by the same token there are some words that have such a clear meaning that they could not be misunderstood by anybody.

Let's live again, if we will, or hear again a portion of General Walker's address that he asked the radio station over in Louisiana, Shreveport, to carry, his first sentence:

"It is time to move." Now, does "move" mean to anybody in the world that he is to talk?

If you can reach that connotation from that word "move", let's go further and see how General Walker, in his statement, interpreted it:

[fol. 1815] "We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court. Rise."

Now, if there was any doubt in anybody's mind as to what General Walker meant when he said "move" he certainly clarified it in the following portion of his statement.

He goes on down, "Bring your flag, your tent and your skillet. It's time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi."

I don't think that that needs too much argument as to the connotation to be placed on his statement when he invited the world at large to move.

[fol. 1816] But let's take and see if it calmed that down any. Here is an interview—oh, let's make this chronological. He spoke from Dallas on the next night and it was almost identical, when he said the same things:

"We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court."

Then he goes on down to talk about the flags, the tents and the skillets. And then he's asked this question, and do you remember the TV tape on this, "General, if the forces go, would you lead this force?"

General Walker says, "When I introduced this," well, there is stars, there is pauses, so to fill up those pauses,

we play to you the full speech and the moving mouth of General Walker.

"General, if the forces go," inquired a reporter, "Will you lead this force?

for patriotic Americans for patriotic Americans all over the nation. It is a movement of freedom. I will be there. Rise to stand. Now is the time to be heard. Thousands strong from every state in the Union, rally to the cause of freedom."

Again he says, "We have talked too much. Let's rise. Let's get along."

On the 28th of September—mind you, these follow in [fol. 1817] the sequence from September 25th, the day when Meredith was forcibly barred from the University of Mississippi by the Governor, or Lt. Governor Paul Johnson, under the orders of the Governor, all of which General Walker knew—he testified that he knew that.

He goes on to say in this interview, "Sir, what has been the general reactions to your plans of going to Mississippi with troops of citizens? I am sure you have heard from quite a few people throughout the United States."

General Walker, quoting, "We are just utterly swamped here with telephone calls and offers of help and assistance and notifications that people are moving to Mississippi and that they want to assist in every way possible, that they are opposed to what the Administration is doing in opposing the Governor of Mississippi.

"I can assure you that the telephones never stop ringing, calls are backed up six and eight deep. People are telling me it's taking five or six hours even to get into our telephone system and we have seven phones in the house.

"Messages are coming in offering support of groups of 10 to 20 to even 2,000."

[fol. 1818] "Interviewer: Do you have plans, sir, for rallies if and when the Federal troops are entered in Mississippi of a certain point in the State where all your followers will then meet with you to protect the integration, if it does comes about?

"General Walker: I intend to join the movement. There are thousands of people I am sure already in Mississippi. Probably hundreds of thousands there that are already standing beside their Governor Barnett.

"The best place to do this would, of course, be the Capitol or at Oxford, at the University, since that is where the issues involved, and I am sure that is where most of the movements will move to, to show the grass roots in this movement."

Let's go a step further, if you will, please. That's Exhibit 12.

Down at Jackson, Mississippi, where he had gone on the 29th, after he had received a call, as testified from Mr. Leman, who was in Mississippi reviewing the situation for him, he has an interview at the Sun & Sands Motel. Here is what he said:

"I am in Mississippi beside Gov. Ross Barnett. I call for a national protest against the conspiracy from within. Rally to the cause of freedom in righteous indignation, [fol. 1819] violent vocal protest and bitter silence under the flag of Mississippi at the use of Federal troops."

He didn't stop at Federal troops. "This day is a disgrace to the nation in dire peril, a disgrace beyond the capacity of anyone except its enemies. This is the sovereignty of the crucifixion by the anti-Christ conspiracy by the Supreme Court in their denial of prayer and their betrayal of a nation."

That was from Jackson. This is still a part of this matter.

The next one, if you will, please, and I don't want to bore you, but to merely get this in context. This is the one that General Walker made from his home in Dallas around 9:00 o'clock, he testified, on September 30th, 1962, and again at the Ole Miss Motel that afternoon at his press conference when he said—and the heading of it, "On to Mississippi," here is what he said:

"As the Armed Forces of the New Frontier assemble to the north, let history be witness to the courage and deter-

mination that calls us to Oxford to support a courageous Governor. His lawful stand for state sovereignty is supported by thousands of people beyond the state borders [fol. 1820] now on the way to join you at Oxford."

Now, nobody sought out General Walker to issue this call after these orders had been confirmed on September the 25th. By General Walker's testimony, he called the various news media and suggested to them that he had something to say that was of vital interest to the people within the sound of his voice over the various news media.

At that time he was calling upon the news media, of which the Associated Press is one, to let the world know that he was on the move, that he was going to Mississippi, that he was going to join the movement, that he was going to stand behind Governor Ross Barnett.

[fol. 1821] He testifies in his own testimony that at the time he got to Mississippi, that at the time he got on the campus of Mississippi, that he still knew that Governor Barnett was opposing the entry of Meredith and that he had so far, or thus far, barred Meredith's entry into the campus of the University of Ole Mississippi by force.

General Walker, after he got to Mississippi—and let's take his version, not anybody else's—he calls on the Sheriff, and let's see what General Walker said:

"I tendered my services to Sheriff Ford."

At that time he testified that he knew that the National Guard of Mississippi, the police officers, the Constables and the Sheriffs were under the direct control of Governor Ross Barnett.

He testifies that he knew that those three governing bodies or law enforcement bodies had successfully, under the direction of Governor Barnett, barred the entrance of Meredith to the campus of the University of Ole Miss. He tenders his service to Sheriff Ford.

Now he has stated that he heard that there were troops in the vicinity. Yet, he was bound to admit, because of his training as a soldier, that troops in a matter such as this

could be called out only by the President of the United States.

[fol. 1822] He first testified—and I quote him correctly—that he didn't know for sure that Meredith was on the campus when he went there at the time the rioting was going on, on September 30th, 1962.

Yet he finally did admit, because he knew he had to, that he had been told by the representative of the Governor at the Sheriff's office around 6:00 o'clock that night, that Meredith was on the campus.

He was, also, told—and he admits that—he heard President Kennedy's speech that night, the very first of President Kennedy's speech, advising the nation that Meredith was on the campus at the University of Ole Miss.

So at that time, at that time, Ladies and Gentlemen, he knew that Meredith was in the residence on the campus of the University of Mississippi.

What did he do? He said he heard there was some trouble out there and he went out to see it as an observer.

Now Ladies and Gentlemen, let's see if he was an observer and let's see what his actions were and how he had contrasted his actions.

When General Walker was commanding the troops in Little Rock in 1957, at the Little Rock integration, he identified from this witness stand a speech he made there.

[fol. 1823] He refers to the question of integration. "This decision," I quote from General Walker's speech, "This decision by the highest court in the land is, of course, an authoritative interpretation of our Constitution. It is binding on all citizens and government officers, both State and Federal and may not under our law be changed except by amendment to the Constitution.

"What does all this mean to you students? You have often heard it said, no doubt, that the United States is a nation under law and not under men. This means that we are governed by laws properly decided upon by duly con-

stituted authority and not by the Decrees of one man or one class of men.

"Since this is true, it means that we are all subject to all the laws, whether we approve of them personally or not and as law-abiding citizens, have an obligation in conscience to obey them. There can be no exceptions.

"If it were otherwise, we would not be a strong nation but a mere unruly mob."

[fol. 1824] Let's take up next, if you will, please, what President Kennedy said on this same subject, and I think you will note a rather strong similarity. I quote from President Kennedy's speech that General Walker heard at the Mansion House Cafe, 8:00 o'clock on September the 30th, 1962:

"Americans are free, in short, to disagree with any law, but not to disobey it. For in a Government of laws and Government of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a Court of Law.

"If this country should ever reach the point where any man or group of men by force or threat of force could long defy the commands of our Courts and Constitution, then no law would stand free from doubt, no Judge would be sure of his Writ and no citizen would be safe from his neighbors."

Now, Ladies and Gentlemen, it was with that speech of the President which is very closely similar to the one that General Walker made in Little Rock, Arkansas, in 1957, to which General Walker gave utterance, according to his testimony, "nauseating, nauseating."

At about that time he says that he heard of this trouble on the campus, he went out to see. Did he go out to see? [fol. 1825] Ladies and Gentlemen, he testified that he got on the campus, that he asked or sought what was going on. The testimony shows that he was informed that it had been going on in a riotous manner for about an hour.

He was asked in connection with casualties what he said, one witness said he said, "Good, good." He said he does not know whether he said that or not. That's his testimony.

We find, then, according to General Walker's testimony, reluctant though it was, that he did go toward the Marshals with a group.

The testimony on that varies from anywhere from five to six, according to the witnesses, to fifteen to twenty-five to fifty to seventy-five and on up to the astronomical figure of a thousand. I don't know. I wasn't there.

The witnesses have testified, though, without any conflict on those that saw General Walker that he made a movement toward the Marshals that night, before he made his speech in which some number of followers went with him.

Now, let's see what this Deputy Sheriff that Mr. Watts so dramatically portrayed says. He says "The Deputy Sheriff who will be here to testify, will testify at no time. [fol. 1826] did Walker lead or participate in anything remotely approximating a charge." This Deputy Sheriff whom he identified in his pleadings, a man by the name of Witt.

And I take some of this statement, in getting at the pertinent parts:

"Somewhere along during this time, it seemed that all of the State Highway Patrolmen left the campus, as did also some of the law officers, that is, Sheriffs or Deputy Sheriffs, but I stayed on to render any assistance that I could.

"Sometime around 8:00 o'clock or a little later, I began to hear different ones say, 'Here comes General Walker'."

I did not know him prior to that time. And when I first saw him, he was walking toward the Confederate monument, which was several hundred yards in an easterly direction from the Marshals at the Lyceum Building.

"People in the crowd around General Walker began to say different things. Several of them began to say 'We have got a leader now,' or 'Here is our leader.'

"I had on my deputy sheriff's badge and shortly after General Walker arrived in the territory of the Confederate [fol. 1827] monument, he came up to me, shook hands and said, 'I would like for you to deputize me, to help in this matter.' I told him I did not have authority to do that, that I was a Deputy Sheriff, was not a Deputy in that county.

[fol. 1828] Let's pause right there a moment. Earlier in the day, General Walker had tendered his services to Sheriff Ford. At that time Sheriff Ford, according to General Walker, was under the orders of Governor Ross Barnett, to keep Meredith from becoming a student on the campus of Ole Mississippi. In his speech that night, and you will all recall that, he told them that Barnett had not sold them out, that Birdsong had acted contrary to his wishes and to his orders and had let the Marshals on the campus and, therefore, was disobeying the wishes of Governor Barnett.

General Walker now says that that was facetious. That's the first time we have heard that. The Deputy Sheriff was dead serious, apparently, from what he's testified to.

Let's go on with Talmage Witt, the Deputy Sheriff. "I was close to General Walker all the time, from the time he first arrived until a considerable time thereafter.

"Some few minutes after this, various people were asking General Walker to lead them and to make a speech and tell them what to do. Then after a while, he got up on the side of the Confederate monument and made a talk.

"I cannot recall all of the things he said, but I do re- [fol. 1829] member these things: 'Violence is not the answer. Cuba is that way,' and pointed south. He said, 'Protest, protest all you want to. You have a right to protest. They may run out of gas.' He said, 'Help is on the way, thousands are coming.'"

Does that ring true with the statement, when he asked thousands to come, ten thousand from every state to join him, to stand beside Governor Ross Barnett in Mississippi?

"A preacher had been following General Walker," again quoting from the witness, "asking him not to lead the crowd but to get them to stop what they were doing. This preacher said to Walker, 'They will listen to you and do anything you say. Please get them to stop and go home.'"

That's pretty nearly what Reverend Gray testified to.

"And Walker said, 'I am here to watch what happens. I am not interested in stopping it.'"

A portion of that was confirmed by Reverend Gray.

"Walker said, 'You make me ashamed I am an Episcopalian.'" And talks about the threats to the preacher and he took him away.

"After some in the crowd had asked Walker if he would lead them, he stepped down from the side of the monument [fol. 1830] and said, 'Keep protesting and see if we can get closer. . . .'

"He then started towards the Marshals and the crowd of at least a thousand by that time followed him. This crowd was armed with sticks, rocks, Coca-Cola bottles and things as I have heretofore said. They seemed to have everything they could get their hands on. And when they got close enough, they would throw towards the Marshals.

"When the front of this crowd which General Walker was with got within about 200 feet of the Marshals, they fired another blast of tear gas and the crowd ran back with General Walker with them."

At all times during this, I was near or in sight of General Walker and stayed in sight of him until 5:00 a.m., the next morning.

"On a number of occasions, Walker would walk toward the Marshals or in that general direction and whenever he did, a large crowd would follow—would fall in behind him and follow him. In fact, wherever Walker went, the crowd followed.

"During the time after the first march towards the Marshals with Walker at or near the lead, I heard different statements, many of which I cannot remember. But at

one time in talking with the group about the protest they [fol. 1831] were making, he said, 'Good, good, keep it up.'

"I heard people asking how to snuff out tear gas and so forth."

He goes on to describe the various rioting that he saw there that night. Now let's see just what must have been in the minds of those people, students, or what-not, at the time General Walker arrived on that campus, according to his testimony, around 8:45 p.m., on September the 30th, 1962.

Here was a group of howling, mobbing students. [fol. 1832] General Walker was immediately informed of what was going on. He could see, and he tells you he saw that they were rioting, there were bricks being thrown at the Marshals. What does he do? Let's take a look at the situation, from the people that he accosted there on the campus there that night. These boys were of an impressionable age. If they were not students, so they were Walker's Army. These boys on the campus, 17, 18, 19 and 20-year-old boys, wrought up about this thing, they felt very strongly because their Governor had been challenged. They felt that they had been let down. What a beautiful position for a man to take command over the crowd, to walk in, a former Major-General of the United States Army, who had announced publicly on four occasions that he was coming to Mississippi to stand beside Governor Ross Barnett and prevent the entry of Meredith into the University of Ole Miss, what a thing to—what a lift it would have made, what a lift it would make to anybody to have a man of that stature stride on the campus, an imposing figure in the midst of riot and turmoil.

He says they didn't welcome him. Yet he admits to all persons concerned they said, "Here is our leader. Our leader, lead us," said, "will you lead us up to the steps"? He says he didn't. Let's take his action.

[fol. 1833] He says he went up there with the group. He knew that they were throwing rocks, bricks, stones and

bottles at the Marshals. What more encouragement to the group of this impressionable age, than to have the man of the stature of General Walker walk in there amidst them, discuss their problems with them, and then tell them to keep on protesting, keep up the protest, you have every right to protest under the Constitution of the United States. If there is going to be any bloodshed let it be on the hands of the United States Marshals. We have got casualties. You will be heard around the world.

I can't think of any more inviting statement than for a man of that stature to walk on that campus with that group, cast himself in the role, haven't I promised them support, and at that time, the witnesses, some of them, say that he answered, in response, "Where are your troops?

"They are coming; they will be around when necessary."

As to whether or not they were students or not, I don't know. I can't prove it, I can't attempt to prove that they were General Walker's students, but there is testimony in this case by Dean Love that 160 were arrested and of that [fol. 1834] group 25 were students. Mathematically, you can figure that only 17 percent of those arrested were students. I am not trying to project that over the entire campus. There is no way of knowing that, but statistically that is what it shows. We do not—we do know, according to Dean Love, that there was rifle fire, bullets whistling around the heads of some people. We know that a number—I believe Dean Love said 10 or 11 bullet holes were imbedded in the front of that Lyceum Building. We have General Walker's statement that what he said from the monument—I would like to quote that, if you please.

General Walker said—here is General Walker's quote. "I decided to make a speech to about 150 students at the monument."

Now mind you, Ladies and Gentlemen of the jury, the Court has not made inquiry in this matter as to whether or not the charge was before the speech or after the speech. It says was the charge made?

Therefore, under the Court's charge, it is whether or not in your opinion, according to the evidence, the charge was led by General Walker.

You heard him say that—this is what General Walker said, that nobody came to Mississippi for violence, that no violence was intended. Now how does that contrast with [fol. 1835] some of the statements of some of the witnesses attempting to testify on General Walker's behalf that no violence—that there should be no violence, that they should not engage in violence.

Now these are General Walker's words. This is the past tense. No violence was intended. Yet at the very time he was making this statement about no violence intended, the rocks were being thrown, the gas was being shot, and the various activities you heard so graphically described that have been laid out before you were going on. Let's see what else. "If there is any blood shed in Mississippi, or Oxford, let it be on the hands of the Federal Government. Cuba that way." He says he told them, and this is where he says he was trying to appease them, he told them that the "Governor's orders and his desires have not been carried out."

He says who violated them? He leaned over, and he said, "Birdsong."

Now, Ladies and Gentlemen, is it conducive to quieting down a rioting mob to tell them that the Governor's orders that Meredith was not on the campus, that Meredith still shouldn't be there, that Governor Barnett was saying even at that moment, according to General Walker, "It is my order and desire that those Marshals and Meredith not [fol. 1836] come on that campus. The man who sold you out is Col. Birdsong."

I can't imagine any more of a call to arms than to tell those students who had been supporting their Governor Barnett throughout all this time, who had backed him in every way, to keep Meredith out of that University, than to tell them "Barnett says still keep him out; still keep him out."

General Walker says Barnett has not changed his position. He has not sold you out. It is Birdsong.

Now we get down to the conflicting testimony in this case. Not too much conflict. I am not going to try to quote from the testimony of these some 30 witnesses who testified here personally, or by deposition, but at least three-fourths of them told you that all that they saw on the campus that night, they put General Walker walking in the direction anywhere from a saunter to a fast clip from the monument toward the flagpole and beyond, followed by a group of that howling mob.

The Court has not differentiated, if you will notice, between the time that the Charge was made. The Court has defined very properly what a charge is, "a movement toward the Marshals," and they had the General ahead of them, and we had witness after witness putting him there. [fol. 1837] The numbers have varied, but the movement has not varied materially.

Now, Ladies and Gentlemen, again, this case is entirely in your hands. You are the Supreme Court as far as the facts in this case are concerned. You can write in this verdict that a man has the right to take unto himself the law in his own hands; you can write in this verdict the man has the right to flaunt Constitutional authority, flaunt the Courts, by a one-man rule, or you can say that is not the way, the American way in this life to act.

Mr. Andress has told you that in connection with these questions—but before I get to that, many, many times Mr. Watts questioned the witness, "Did you see an AP (sic) report, in which it stated an AP (sic) writer by the name of Kuettner had written a story in which he said Walker begged the students to quit their violence or cease their violence during a lull."

No such newspaper release has been introduced in this record. Just before we closed today we put in this record the UPI story he says Kuettner wrote.

I may have said Associated Press. I meant UPI.

No UPI report purporting to say what he said it said is in evidence in this case. The UPI report says that Walker mounted the statue (sic) I never can pronounce [fol. 1838] that word statue, and said something about violence. I will read it to you. I can't quote it. Then he comes along and says in a paragraph down here that General Walker again mounted the statue and complimented the students on what they were doing that night.

Which are you going to believe? Going to believe both? General Walker says no violence was intended. That is General Walker's statement. Is that urging people to cease their violence? My interpolation of that, and I am entitled to interpolate what I hear the same as you, he says, "Perhaps we shouldn't have had any violence, we didn't intend there to be any, but now that you have got it keep it up, keep it up, you have got a right to protest. Keep up your protest, you are doing all right, you will be heard, let the blood be on the hands of the Federal Government."

As I stated at the outset, I shall not attempt to re-read the vivid instructions that the Court has given you. The first issue inquires whether or not in substance the story stating that General Walker led a charge was true.

I believe that under the evidence in this case that you will find that the true answer to that story is "Yes."

Number 2, as to whether or not the statement that Gen- [fol. 1839] eral Walker led the Marshals, (sic) on the campus—or led a charge against the Marshals is a fair comment. I believe that under the evidence that you certainly should answer that question yes.

The next question is whether or not the statements were made in good faith. I don't see how you can answer it any way other than yes, in that connection.

Now Mr. Andress criticized this 21 or 22-year old boy. Mr. Watts took his deposition all day, which is rather evident. He would seem to think that nobody but a middle-aged man should be allowed to express himself on any matters of important news coverage.

Let's back up just a moment and consider that. Here is General Walker, who according to his testimony, is somewhere around 52, 53 or 54. Let's take his action. Let's take his report. Is youth so bad that youth cannot see and understand the nature and import of an event that unfurls itself in his very presence? I say to you youth is not—is no curse. It is something we all lose after time comes, and something we treasure greatly, and I have great respect for the youth of this country.

Number 5. Did you find from a preponderance of the evidence that Walker assumed command of the crowd?

How much more could a man do of Walker's stature, [fol. 1840] a retired Major-General in the United States Army, after having called four times for people to come to Oxford to assist him in keeping Meredith out of the University of Mississippi, getting on that campus, and there were those rioters. "You are doing all right, keep up the protest."

There is testimony, he said, "I will lead you."

There is testimony "Let's go up and see what is happening." How? Regardless of what he said. I would say at least 15 of the witnesses have testified that Walker went with a howling mob from an area near the statue on the campus of Ole Miss, up, some of them said he didn't get quite all the way to the flagpole, some of them said he got to the flagpole, and some said that he got way up here, but they all said that when General Walker walked in that direction that mob of students, regardless of how many were in it; that the tear gas was shot by the Marshals, and the crowd was forced to retreat.

Now Ladies and Gentlemen, I am reasonably sure, having had some experience in these matters, that long since you have come to a conclusion about how you feel about this entire matter. I am reasonably sure you feel the lawyers are taking up your valuable time in attempting to stand here and tell you their version of the case. I sin- [fol. 1841] cerely hope not, because I think you should do

as you see fit, based on the evidence, with any guidance the lawyers can give you, of course, is what they are for as is the Court.

The Court told you here about malice. Well, who was mad? Ill will? Here is a man that has acquired the stature of Major-General of the United States. He has called in the press. He says, "Tell the world what my plans are, to go to Mississippi. Tell the world, and I will tell the world, come on, bring your flags, your tents and your skillets."

He testified very truthfully he knew his going to Mississippi and to the campus would create publicity. Why else would he call in the news media and ask for these volunteers to come join him there? Why, Ladies and Gentlemen, he hadn't but one purpose in the world, to advertise his going, to seek help to his cause, and to attempt to carry out the directive of Governor Ross Barnett. Let's stop right there a moment.

He testified he let Governor Barnett know where he was, but he says he never was contacted by Governor Barnett. Then he makes the call, "On to Oxford from Jackson." I take that as commanding these hoards that he had sought to come. He says, "Don't go to Jackson as we first planned [fol. 1842] the action—the action is all at Oxford. Come on over to Oxford; on to Oxford; on to Mississippi."

Who could have been mad? Not a question of being mad. A citizen of the prominence of General Walker, who according to his testimony has made speeches throughout the length and breadth of the land—incidentally, he testified there had been a constant demand on his time for speeches from the time he resigned in November, 1961, and that there had been no lessening of that since the Mississippi incident—here is a man who offered himself as a candidate for Governor of the State of Texas, in which he had every right in the world to exercise his views, and I don't criticize that.

I am reminded somewhat of the philosopher Voltaire's statement. I am sure you have all read it, when he stated

with respect to a controversy—I believe these were his words, "Sir, I do not agree with the words you have said here tonight but I will defend with my life your right to say them."

That, in effect, is what the Constitution of the United States says. You can say whatever you please if you can find a forum to listen. General Walker testified he has been able to find listeners, both from the podium and through the media. He says he has no trouble getting press releases. A man of that stature who would call for [fol. 1843] volunteers, who would go and get himself mixed up with the stature that he had in a situation like that, telling the students, "Keep on protesting, your Governor is still behind you, he has not sold you out"—how much more of an incentive would these students want than to be told by a man of that stature, a man of that public action, "Here I am to help you, keep on protesting, you have got a right to protest. Let's go there, let's go up there."

Is there any malice? Is anybody mad? Why, Ladies and Gentlemen, that is the very purpose he went there for, was to get publicity to his avowed purpose of standing shoulder to shoulder with Governor Ross Barnett in defying the orders of the Federal Court and the Constitutional authorities.

Now he has said repeatedly that he only intended to go on that campus to do anything about this matter when Federal troops were used. By his own statement he knew when he went on the campus that night that there were no Federal troops on that campus, and all of his testimony is that Federal troops were not brought on that campus until such time as the Marshals had been almost completely exhausted; that the troops did not come in until about midnight. So his excuse that he was going to take part in [fol. 1844] this matter when and if troops were used is not valid, because he knows and he testified the troops cannot be called in that situation except by order of the President,

and that order shows that no troops was issued (sic) until September 30, 1962.

Malice? Reports? Ladies and Gentlemen of the Jury, this is my firm conviction, based on the evidence and not from a biased standpoint, that the evidence almost without exception shows that General Walker led a charge towards the Marshals there on that campus that night, and that by his actions he commanded the crowd, by voice, by his statements and by his injunction, "Keep up the protest, you have a right to protest."

Ladies and Gentlemen of the Jury, I believe that you will find from a preponderance of the evidence that the story printed by the Associated Press and carried in the Star Telegram was true, substantially true, as the Court defines it. That Walker assumed command of the crowd, as proven by virtue of his speech, by virtue of his taking out and being followed by this massive group that went forward. I don't believe you can say any malice was there.

The way a man stays prominent in public life is to have [fol. 1845] his activities reported by the press. The press owes it to the public to see to it that the activities of public officials are published, or revealed as to their actions to the general public. I don't believe that you can find that any malice occurred. I believe you will find, I sincerely believe these statements as made were true.

Again I address myself, because Mr. Andress made such a point—it was not a question in this case of what Savell has said, or—although he testified fully by deposition. At the very outset of this case the Associated Press stood before you and said, "We stipulate that this story that appeared in the Star Telegram on October 1st, 1962, was the story written by Van Savell. Van Savell was an employee of the Associated Press. And that is the story on which we are trying this case, as to whether the facts as stated therein are true and correct. I don't know what it gives you to bring in a man, even though he was brought to them for all the questions they wanted to ask, and I

knew every one of the questions asked in the Savell deposition was by Plaintiff's counsel in this case. Not one question was asked by the Defense Counsel. They tendered them and turned it over to them to ask anything in the world they wanted to.

[fol. 1846] So the story, in my opinion, based on the evidence, is true. I appreciate your kind attention, you have been a most attentive jury. I am confident to leave this matter in your hands. I thank you.

The Court: I am going to recess until 10 minutes until 4:00.

(Short recess was had.)

[fol. 1847] The Court: All right, Mr. Watts.

ARGUMENT OF PLAINTIFF BY MR. WATTS

Mr. Watts: Your Honor, Ladies and Gentlemen, anything for a story. Anything for a story.

To me, the tragedy of this lawsuit is the ruthless and cold-blooded manner in which an organization that extends its services around the world will mis-use the talents and the concepts of veracity of young men twenty, twenty-one, twenty-two will bring them into a Court of Justice and Law, some of them, and tell conflicting stories such as were tragically produced from this witness stand in a manner such as I have never seen in more than thirty years of the practice of law.

We appear before you Ladies and Gentlemen of the Jury in a solemn hour, facing an ominous and uncertain future for the lives of our country, our children and, above all, the cause of freedom.

The parties to this lawsuit, General Walker and the Associated Press, anxiously await your verdict in this case.

But the issues, Ladies and Gentlemen, now before you and about to be decided by you are far above and beyond, far bigger than the parties to this action, bigger than General

Walker, bigger than even the Associated Press, bigger than [fol. 1848] myself, bigger than even Mr. Gooch.

They involve the question of the absolute survival of this country. While Mr. Gooch was speaking, I sat down and made notes of some of the principles that are involved in this lawsuit.

They go to the very essence of Americanism, of survival, of freedom, not only of America but of Christian civilization itself.

This is what's involved in this case: It's not a question of covering the issues with a smoke screen as Mr. Gooch has so cleverly done, as he has so capably shifted the question of the truth or the falsity of the statement that was printed under the authority of the Associated Press.

Here are the issues involved:

"Know the truth and the truth shall make you free."

Now, the American people, my friends, are dependent, as dependent upon the news service of this country for their knowledge and concepts of the truth as is a nursing baby upon his mother.

And when standards of integrity and irresponsibility, such as I have seen come from the witness stand produced by the Associated Press in this case, are taken as commonplace, by the people who have not only the power and the [fol. 1849] capability to shape the lives and the public image of their human beings, but have a sacred trust to the American people to produce the truth, the whole truth and nothing but the truth.

Now, the issue in this case is not, did General Walker defy a Court order—which I will guarantee you a man of his caliber did not even consider. The issue in this case, Ladies and Gentlemen, is "Who told the truth?" I'll get into that with you in just a few minutes.

Now, the next problem that we have before us, "Thou shalt not bear false witness against thy neighbor." Thou shalt, Associated Press, maintain and carry forward your duty, your responsibility, your sacred trust to the American people, to avoid smearing as a lunatic and an insurrectionist—

Mr. Gooch: If the Court please, there is no testimony in this case of smearing as a lunatic.

The Court: Sustained.

Mr. Watts: We are entitled to relative comments.

The Court: Sustained.

Mr. Gooch: Move the Jury be instructed not to consider it.

Mr. Watts: To smear, if Your Honor please—

The Court: I sustained that.

[fol. 1850] Mr. Watts: Is that charged against me?

The Court: No.

Mr. Watts: To smear, if Your Honor please, and Ladies and Gentlemen of the Jury, an old friend of mine, a man whose concepts of duty, honor, country, reach a sublime plane of selfless devotion, a man who, for the greater part of his adult life, has lived above and beyond the call of duty in the defense of the country for which he would gladly give his life.

If he had the capability to roll back the sands of time and reverse the trend of this great country of ours from supreme greatness to the brink of disaster that has resulted in the last nineteen years, largely from as a direct and proximate result of things that we have seen, from this witness stand, Ted Walker, I'll guarantee you, would gladly give his life. We have here the kind of a man who will come into Court and under oath—he's got enough guts to come in here and look you Ladies and Gentlemen of the Jury in the eye—if you think he's lying—and that's the sole question in this case, is Ted Walker lying when he tells you that he did not lead a charge against those Marshals at the University of Mississippi? O is this absent witness, Van H. [fol. 1851] Savell, indulging in anything for a story? As tragically did this young lad, Hill, who came in here and made the most miserable, the most obviously distorted and twisted, fabricated presentation of an alleged state of facts that I have ever seen in thirty-two years of practicing law, as did this last poor lad whom they brought in here, took

him out in the hall, contrary to the advice and admonition that was given to him, and said, "Say, you are getting your time all mixed up. Get back on that witness stand and tell a different story."

Now, Ladies and Gentlemen of the Jury, is that the concept of integrity? Is that the concept of truth, honor, responsibility? Let an organization such as the Associated Press, who has within their capability to make fools or criminals of everybody in the United States, is that the type of performance that they can come into this Court and ask you to condone?

Are you going to permit them to come in and shift the issues in this lawsuit from questions that are not involved to—and away from the question of who told the truth?

Now, the next issue involved: "He who steals my purse, steals trash. But he who steals my good name steals that [fol. 1852] which enricheth him not and makes me poor indeed."

We have General Walker here converted into a stupid, alleged leader, in the words of Mr. Relman Morin—Mr. Relman Morin, a very capable, widely experienced representative of the Associated Press, who says that Walker's on the opposite side here. He came to lead tens of thousands of volunteers to aid the cause of Gov. Ross Barnett, but his only troops last night were a band of students and other persons—a performance, which if true, as was stated by his old Army buddy, an old horseman, Colonel Dornblaser, made him appear absolutely a lunatic, if that were true.

Now, the question, Ladies and Gentlemen of the Jury, is it true? And as I pointed out to you, there is an unbelievable conflict, there is a conflict, the likes of which I have never seen in a Court of Justice and law, and finally when we get to Courts of Justice and Law, the last and final principle now before you, Ladies and Gentlemen of the Jury, is this:

It is the end of justice that no one shall suffer wrong. Now, the question in this case is, have these people given [fol. 1853] General Walker what he deserves? Or have they

lied about him? This is stark reality. We are dealing with simple issues—truth and falsity, to lie or not to lie.

I have heard General Walker as of the time when he was just a Colonel, as of the time of Korea, come forward with a concept that we must now fight for the right to fight.

In this case, Ladies and Gentlemen of the Jury, under the technical guise of fair comment, the Associated Press is fighting for the right to lie.

They have come in to Court and told you a fantastic state of affairs and a story that General Walker strode down University Boulevard, met the leaders of the mob in the front of the statue, assumed command and with a thousand people behind him, ran roughshod in a charge across the Circle.

Either that happened or it didn't happen. Either it's the truth or a lie.

Now, there is no middleway between it. It's not a falsehood, it's not a mistake, it's not an error—either it's a deliberately fabricated lie that destroyed the reputation of General Walker as a man, a law-abiding citizen of integrity and responsibility or it is the truth. I don't believe it is the truth. I don't believe it's the truth.

[fol. 1854] I think General Walker tells you the truth when he said he came up the sidewalk—not the street—he walked up in this area here about halfway to the flagpole and observed what was going on. After the Highway Patrol left, he made a speech on the monument, which I don't have time to repeat. You know what it is almost verbatim.

After the speech on the monument, he got down, visited around in here for a while, shook hands with a lot of people, talked to them, heard their reports and in many reports—this is typical and symbolic of the depths to which people will go to try to smear a man, they said Ted came out here and said, "Riot, riot."

I'm sure you've heard and I'm sure you followed the very clever cross examination of my colleague, I'm sure you heard General Walker in his testimony say, "Right, right;" that's a very common expression of his and I don't

believe that bird that wrote it down converted "right" to "riot" in good faith. I think it's just like all the rest of this stuff that the Associated Press is bringing into this court of justice and law to confuse and cover up and hide the real issue in the lawsuit.

Now, what is the real issue? Ladies and Gentlemen of [fol. 1855] the Jury, I have never before seen evidence in a lawsuit comparable to what we have here. We are trying not one lawsuit but three. We are trying not one charge, such as Van Savell reported, that Walker came on the campus, led the leaders—met the leaders of the mob, assumed command and led a charge, then he fell back to the monument, made a speech—that's what Van Savell reported, but that's not the lawsuit we are trying. They very cleverly endeavored to shift that from their lawsuit to something they think they can prove.

We have three lawsuits. All of them under oath. Now, the question is, who is telling the truth and when.

There is an old Latin maxim I learned when I first started out in law school: "Falsus en uno falsus en omnis." That means when a guy lies once, you can't believe anything he says.

Now, let's see what they say. Charge—the charge was before the speech. Van Savell—I just hope I have time to do this, but I am going to violate all principles of giving cases to the Jury because Ladies and Gentlemen, to me this is not an argument, this is a matter of principle.

I am going to cover here briefly some of the things that [fol. 1856] Van Savell said. "Then I heard a comment behind me to the general effect and I don't remember the exact wording, 'Here is General Walker, here comes General Walker,' and I turned and I saw striding fifteen yards behind me, General Walker," and I hate to have to go fast but I have got to do it.

"On which side of the road?

"More or less in the middle.

"He stood there looking around and I moved closer. I was probably within five or six feet of him, and this same person with the Confederate flag and multi-colored shirt, mostly red, said, 'General, will you lead us to the steps,' and Mr. Walker made no comment, he sort of scratched his head . . . looked like somebody who might be thinking . . . raised his head and looked this fellow squarely in the face and nodded his head.

"At this time were there any personnel west of the monument?

"West of the monument, I didn't see anyone . . .

"Had all the crowd then moved back into the street east of the monument?

"That's my understanding.

"They were walking due west—no, as you were."

[fol. 1857] "The group backed up or away from the front of Mr. Walker and this boy took his right hand and grabbed hold of the General's left arm, and another person on the other side did the same thing."

A fantastic state of report and something that you know, I know, and Mr. Gooch knows didn't happen.

He can sit there and grin and smirk all he wants to but it didn't happen, Ladies and Gentlemen of the Jury, and he knows it didn't happen.

". . . they were walking due west, they walked around the monument . . . to the north of the monument, and then they walked straight toward the Lyceum Building for ten or fifteen yards.

"On the sidewalk or on the grass?

"On the grass.

"North or south of the walk?

"North of the walk.

Question: "At what rate of speed?

"Normal.

"After Walker went ten or fifteen yards, they sort of veered to the right . . . in more of a northwesterly direction.

"We walked for about ten or fifteen yards . . . veered to the right . . . in a circular manner . . . bordering on the Circle.

[fol. 1858] "Twenty-five feet from the Circle . . . until they were almost even with the flagpole . . . then veered back toward the center of the Circle.

"But they went toward the sidewalk, didn't reach it, and then turned directly toward the Marshals. At this time Walker and the two fellows that had hold of his arms were between the sidewalk or almost even with the sidewalk and street."

Then, "Now, did this young man who took hold of Walker's arm take a position just east of the monument, or not releasing his arm until he reached the position of W-2," which, you remember, is way west of the north and south walk.

"He didn't release his arm.

"What about the man on the left, was he holding onto Walker's arm, too?

"Yes.

"Then what happened?

"There were about seventy or seventy-five yards from the Lyceum, then this tremendous group that was behind them—

"Where was Walker and these two other men at the time these bricks and things were thrown?

"At the very front . . .

"Mr. Walker turned and sort of ducked down, like this, [fol. 1859] and took off running . . . directly to the east.

"I didn't see him after he ran three or four steps, until I was back down at the monument.

"I heard him make some remarks about, 'Well, we'll get together and charge again . . .

"Now, was this down at the monument?

"He was still running, or wasn't running at this time, more or less walking fast or trotting, but out of breath, appeared to be, and I was out of breath and he didn't

make any comment to anyone in particular, just made the comment.

"Now, where is the last recollection you had of Walker, when he said we will charge again?

"In the area of the monument. As soon as he made this comment, I turned and ran to a 'phone."

Now, I'll guarantee you, the little plump sucker ran, from here to LeBauve Hall, 600 yards, Ladies and Gentlemen, and then he raced back.

In his story that he wrote, he said that when he raced back—and I ask you to read it, I don't have time to read it to you, but in this rotten, libelous, filthy publication that they wrote about Ted Walker, he said, when he raced back, he found Walker talking to people near the monument. [fol. 1860] But, in his testimony here, he said he found Walker on the monument speaking.

"As soon as he made the comment, I turned and ran to a 'phone. I ran directly north or a little to the northwest of the monument and I ran between the YWCA and I think the Fine Arts Building, ran near the girls dormitory.

"Did you make a telephone report there?

"Yes, I did."

And I don't have time to read any more. I wish I could read it all because I want to read you the fantastic conflict between that man's testimony and the testimony of the Associated Press, Mr. Ken Davis' number one back there—there sits Mr. Davis, the man under his control that's supposed to preserve, protect and disseminate the truth to the people of the United States of America, here is what he said that Savell reported—

[fol. 1861] He says that Savell reported, "Walker talked to the students, led them on a charge against the Marshals. . . ."

Mr. Gooch: I object to that, if the Court please, once more. Mr. Ken Davis didn't testify in this case.

Mr. Watts: I didn't say he testified.

Mr. Gooch: You just got through saying—

Mr. Watts: I didn't say he testified.

The Court: Go ahead and read from the deposition.

Mr. Watts: That's right. "Walker had talked to the students, had led them on a charge against the Marshals . . ." You can tell when people were getting hurt—yes, sir, walked to the front of the charge, led it against the Marshals. Since I was not actually writing any of the material that he was reporting . . . and so forth and so on, didn't take notes. I remember talking to him; no more than 10 or 15 feet from me. Told him Walker had just led a charge."

"Q. Now then whether this Savell—"maybe I'd better go back and tie him in, because I don't want Mr. Gooch to think I am not tying him in—talking here about Savell's report.

"Now he then approached you on this occasion, when he first reported that Walker had led the charge, that Walker had made a speech from the monument, and that speech seemed to give the boys more organization, and [fol. 1862] then after the speech he led the charge."

Now you see why they didn't bring in Van Savell, because Van Savell's news report, his deposition said that Walker came on the campus, led the charge before the speech, but when he reported to Mr. Ben Thomas he said he reported that Walker led the charge after the speech.

Now let's see who else says something about this. We have the lad, John C. Hill, who came up with a fantastic story that Walker led all this—formed up a charge out in here, and then led it northwest, and northeast and northwest quadrants. And you know what I think about this thing? I don't think Savell saw any charges at all. I think he was hid out here somewhere. I think he reported Walker had been on the campus and the charge, and then when Mr. Relman Morin in the deposition, asked him for a first person report he got a chance for a byline, a chance to really make some individual hay. He then wrote this story which I think came not from Savell, but I think a reason-

able inference from the evidence is that it came from John C. Hill.

Well, do you think for a minute that this charge that Savell had reported, and that this news that the Associated Press spread around the world concerning General Walker [fol. 1863] was true? These are the people that say it wasn't true. Ben Thomas, whose deposition I have just read. Buckley, who says that the charge, the so-called charge, as he called it, occurred after the speech on the monument. I wish I had time to pay my respects to Mr. Buckley.

Mr. Alan, the young man—I am sure you remember him, another news hawk. You can see how much responsibility, how much integrity, how much regard he had for the truth. He was the fancy young lad here with the very sneering self-satisfied manner that testified yesterday. You saw him. Then Mr. Proehl, the rather plump lad who also testified the charge occurred not before the speech but after the speech.

Reverend Gray, and incidentally my friends and Ladies and Gentlemen of the Jury, if this charge that Savell and Hill reported had taken place, they would have run right through the Reverend Gray. Reverend Gray was all out in this area all the time that charge was supposed to have been made. It could not have been made without mowing down Reverend Gray. So Reverend Gray says that he saw no charge there by Walker, nor any major charge before the speech.

Now the Witness Brittingham, whose deposition Mr. Gooch read, said the same thing.

[fol. 1864] But now they are not satisfied with two stories, they came up with three.

It just occurred to me just this second how they came up with three, how they happened to come up with three. They have got three sets of lawyers. They have got lawyers in Fort Worth; they have got lawyers in Mississippi, and they have got lawyers in New York. So naturally when Mr. Gooch put on this witness, Gregory, yesterday, you heard him, the most miserable pitiful, despicable per-

formance I have ever seen on the witness stand, after he had been advised and cautioned not to talk to anybody in the hall, he went out and proceeded to come—he went out and was immediately contacted by the Mississippi lawyer and said, "Say, you are fouling up your time."

But by that time we had him caught. He came back in and said that the charge didn't occur before the speech as Savell had testified, it didn't occur after the speech, as all these other people had testified, but it occurred in between the conference with Reverend Duncan Gray down in this area right here, and Walker's speech on the monument.

So there are three separate complete, conflicting detailed stories presented to this Court of Justice and Law and this Jury under oath by the greatest news service on the [fol. 1865] face of the earth, asking you to believe it.

• • •

[fol. 1866] Now, the question is, Ladies and Gentlemen, not why General Walker went to Mississippi. I will cover that in just a minute. But the question is who is telling the truth. That is the question that you Ladies and Gentlemen are to decide by when you write your verdict in this case. If you approve of the standard of integrity that the greatest news service on the face of the earth has imposed upon young lads who look upon the executives of this great organization literally as God, then cut General Walker off and say you got what you deserved. But, if you think that kind of a standard of conduct is not proper, if you think that a great news service such as this should have a greater regard, a greater respect, a greater feeling of the sacred trust for truth in the news, then you write a verdict, Ladies and Gentlemen of the Jury in this case that will adequately —I don't think you can adequately compensate General Walker. I don't think there is enough money in the world to compensate this man here for the ridicule and complete destruction of his good name, but you write a verdict that will say to the Associated Press, "We don't condone of and we don't approve of this kind of a performance by the

greatest news media on earth upon whom we are dependent [fol. 1867] for the truth."

You are just like the old saying as it used to go, "Caesar is wise." You must be not only above wrong, but you must be above and beyond a third degree of suspicion of wrong.

Now, they should come in here, in this court as I know Ted Walker would do if he had any feeling of guilt of the criminal offenses with which they charged him, he would square back his shoulders, he would sit there on that witness stand and under oath he would say, "I did it." All we ask is the same standard of integrity on the part of the Associated Press. All we ask one story, not three. We are entitled to it. You Ladies and Gentlemen of the Jury, His Honor on the Bench, learned in the law, is entitled to a better performance.

Now, then, I made some notes on some of Mr. Gooch's remarks. As I pointed out to you, he endeavored to pass out a smoke screen, and he did a very clever job. I hope it hasn't confused you. I hope you can still keep your mind on the basic issues in the lawsuit and who told the truth. Did General Walker get on the witness stand and lie when he told you that he didn't lead a charge, when he said that he was just out there observing, or did these people, the [fol. 1868] owners of three separate stories—well, you, Ladies and Gentlemen of the Jury, can pick the one that sounds the most plausible of their stories. Remember, the burden of proof is on them, not on us, to prove the truth of this heinous charge they made against General Walker.

As I say to you, the tragedy of this case is far above and beyond the six gruesome days and nights he spent in that prison nut house amid an atmosphere of criminal insanity. It is above and beyond that. It goes to the very essence and foundation of the survival of the United States of America itself. Because, unless given the truth the people cannot remain free.

And Mr. Gooch has endeavored to smear General Walker for being out of place where he had no right to be in, as I remember he stated, in defiance of the law. He said did Walker go to Mississippi in defiance of the Court order?

Now, you heard General Walker's explanation of that, Mr. Gooch, and he looked to me like somebody that had been stabbed by a red hot poker when he heard it from General Walker.

General Walker said that: "I was relying on the Attorney General of Mississippi and Judge Satterfield, as [fol. 1869] President of the American Bar Association, to keep Governor Barnett straight in Court. All I was going to do was when the United States Government, with all its power, ready, willing and able to make an unfortunate example out of the State of Mississippi made an improper use of troops in a manner that I knew was destructive to the morale of the Army, I intended to be there."

[fol. 1870] Ted Walker wasn't stupid enough to think he could arm a couple of hundred or five hundred or a thousand helpless college kids with sticks, stones and bottles and take on the whole United States Army. He knew that the very worst thing that could happen when they got to Oxford, was, just as he said, to have an act of violence, which gave some color of authority some color of propriety to the commitment of 26,000 troops to the State of Mississippi.

Mr. Gooch said, "What in the world did you go to Mississippi for anyway?"

I saw Mr. Gooch again squench and squirm when Walker told him why. He said, "I went to Mississippi because I thought it was wrong to commit this vast number of Federal troops into the State of Mississippi, especially—especially with enemy missiles being put up in the first Communist bridgehead 90 miles off our coast in Cuba.

Now it is funny to me how so many people heard General Walker's speech, "violence is not the answer. Let's avoid this violence. Our real enemy is in Cuba." And not one, not one of these witnesses up and down here heard a word about it. Not a word about it did they hear. And remember General Walker also in answer to Mr. Gooch's question as to why he went to Mississippi said, "I commanded the [fol. 1871] troops at Little Rock and I knew you couldn't

believe a word you read in the press about integration problems, so I was going down there to see for myself." And that is exactly what Ted Walker did. He went there to see and find out, and he found out that tear gas was fired in the backs, not of the rioters, but in the backs of the Highway Patrol at a time when the students were at least 15 or 20 or 30 feet away from the United States Marshals, under circumstances that are fantastic.

Common sense would teach you that if you are going to use tear gas it must be used not as a direct attack weapon with flat projectory, at pointblank range, but as a warning. Suppose somebody had fired a round—and this is common knowledge, and I am asking you to think this over—they had fired a round up in the air down-wind. Behind the Marshals, for (sic)—

Let them get a whiff of it. Then another round. Maybe two or three.

General Walker found out. And had the press given to his concept the expensive and explosive dramatization that they gave the other side I think the United States of America and the world would have realized that this tragic incident in Oxford was completely unnecessary.

[fol. 1872] So now let's get on with the lawsuit, Mr. Gooch. Let's get away from this business of did Walker make a bunch of statements. I want you to read those statements. You are free to take them in the jury room. You find out if General Walker was advocating any violence. He wasn't that stupid. He knew that violence was the last thing in the world the people of Mississippi wanted. What he wanted was to make it appear as ridiculous as it was. To commit 26,000 troops to Mississippi with Cuba 90 miles off the shores of Florida.

Now Mr. Gooch has come in here and argued, for instance, the UPI report, let me, Ladies and Gentlemen,—and to me, this is fantastically unreasonable—that the two greatest news services of the United States—of the two, one of them says Walker arrived on the campus of the University of Mississippi, assumed command of the crowd

of rioting and scattered students, issued orders, led a charge, and the other great news service would say, if I can find it, "General Edwin A. Walker, who commanded troops at Little Rock, mounted the Confederate statue and advised the students to cease their violence." Said, "This is not the proper route to Cuba," Walker said. "The crowd jeered."

Now how significant is it that not one of these carefully coached, these dynamic-vibrant-ready witnesses, who are [fol. 1873] ready to testify to anything Mr. Gooch wanted them to,—now how significant is it that not one of them heard the jeers, with the exception, I believe, one of them did.

The Court: Five minutes.

Mr. Watts: Thank you.

[fol. 1874] So now, then, Ladies and Gentlemen of the Jury, in final summary in this case, you Ladies and Gentlemen, in the composite wisdom that exists in the diverse background of twelve American citizens, are peculiarly fitted to wade through the mess of conflicting evidence that has been produced by the Associated Press in this case and arrive at the beautiful gleam of shining truth; that is your duty. That is your sworn duty in this case. Assume, as I am sure you will—I don't see how you could for one minute reach a contrary conclusion—assume that you reach the conclusion that the Associated Press misrepresented the facts to the world when they said General Walker led a charge against Federal Marshals under the circumstances, then the question arises what shall be reasonable and just compensation for the destruction of the good name of a man whom, as I have said, has lived habitually above and beyond the call of duty in the defense of his country. He resigned his commission and all of the benefits incident thereto to be able to come in and come before the American people and tell some of his concept as to why we are losing, as to why within nineteen years we would slip from magnificent greatness to the brink of disaster. But, when in [fol. 1875] place of receiving appreciation, that a man of that character and background, that integrity, that motiva-

tion, that he should receive, he promptly gets smeared by the press who, in the language of the Court, in reliance upon one twenty-one year old reporter, and I wish I had the time to read to you Mr. Relman Morin's deposition—by an organization which has a conscious indifference of the welfare of the person to be affected by it, that they didn't even bother to check up on the language of Mr. Morin again when the United Press report came out that said that Walker was trying to quiet the violence rather than advance it.

So, I suggest to you Ladies and Gentlemen sincerely, almost desperately, that we have reached the point in the life of these United States of America, and of the people thereof, wherein we must start getting down to formalities. Where we must say to organizations like the Associated Press, "You, as great and as powerful as you are, extending around the world hold a sacred trust. In that trust is a requirement and a responsibility to place upon your endless networks of teletype the truth, and any time you fail to produce that truth through a reckless disregard of the [fol. 1876] sources of truth and accuracy, then the only capability under our form of Government in order to insure and accomplish the concept that no one shall suffer wrong, is to write a verdict in this case that will reasonably compensate General Walker for the destruction of his reputation by the battle of the range country in the area where he was raised, in the area where he grew up as a live, lean, strong young Texas ranch hand, as he was when I first saw him, a man of absolute integrity, as I say again, and I hate to be repetitious, a man who has the guts to take that witness stand under oath, which their reporter didn't have to do—it wasn't him, I defend Van Savell, it was the people behind Van Savell that made the decision that he shouldn't come into Court, but General Walker the nerve to stand here and look you Ladies and Gentlemen in the eye, and I will guarantee you had Ted Walker led a charge against the United States Marshals you would have heard from that witness stand under oath, "I did; I did."

Thank you.

[fol. 1877]

PLAINTIFF'S EXHIBIT No. 1C

BUT FORMER MAJ. GEN. EDWIN A. WALKER, IN MISSISSIPPI TO LEAD "A NATION PROTEST TO THE CONSPIRACY WITHIN," SAYS "TENS OF THOUSANDS FROM FLORIDA TO CALIFORNIA WILL COME TO SUPPORT GOV. GARNETT."

A219NI PRECEDE DALLAS (A128)

JACKSON, MISS., SEPT. 29 (AP)—FORMER MAJ. GEN. EDWIN A. WALKER ARRIVED HERE TONIGHT AND SAID VOLUNTEERS WILL START ARRIVING AT OXFORD TOMORROW TO BACK UP GOV. ROSS BARNETT IN HIS STRUGGLE WITH THE FEDERAL OVER DESEGREGATION.

"TENS OF THOUSANDS FROM FLORIDA TO CALIFORNIA WILL COME TO SUPPORT GOV. GARNETT," WALKER TOLD A NEWS CONFERENCE.

WALKER SAID HE HAS "BEEN IN TOUCH WITH THE CAPITOL. BUT I HAVE NOT TALKED WITH BARNETT PERSONALLY." HE SAID HE WAS HERE "TO STAND WITH GOV. BARNETT SHOULDER TO SHOULDER."

A NEWSMAN ASKED IF HE ADVOCATED VIOLENCE BY MISSISSIPPI TO BACK UP ITS STAND TO KEEP NEGRO JAMES H. MEREDITH OUT OF THE UNIVERSITY OF MISSISSIPPI IN THE FACE OF POSSIBLE FEDERAL TROOP INTERVENTION. HE DIDN'T ANSWER.

IN A FORMAL STATEMENT READ TO NEWSMEN HERE AND HANDED OUT BY HIS OFFICE IN DALLAS, WALKER CALLED FOR "A NATIONAL PROTEST AGAINST THE CONSPIRACY FROM WITHIN."

[fol. 1878]

PLAINTIFF'S EXHIBIT No. ID

A214NU (TOP ?)

URGENT

SIXTH NIGHT LEAD MEREDITH ROUNDUP

OXFORD, MISS., SEPT. 30 (AP)—MASSIVE FEDERAL FORCES OVERPOWERED STATE RESISTANCE AND MOVED NEGRO JAMES H. MEREDITH ON CAMPUS AT THE UNIVERSITY OF MISSISSIPPI TONIGHT, STUDENTS AND OTHER YOUTHS RIOTED IN WAVES, FORCING A CALL FOR FEDERAL TROOPS.

THE RAMPAGING MOB OF WHITE YOUTHS CHARGES A LINE OF FEDERAL MARSHALS TWICE, DESPITE GOV. ROSS BARNETT'S INDIRECT ADMISSION THAT HE WAS GIVING UP PHYSICAL RESISTANCE IN MISSISSIPPI'S BATTLE TO KEEP THE 29-YEAR-OLD NEGRO OUT OF OLE MISS.

THE 64-YEAR-OLD GOVERNOR, WHO SWORE HE WOULD GO TO JAIL RATHER THAN SEE MEREDITH IN OLE MISS, ISSUED A STATEMENT IN JACKSON SAYING M I S S I S S I P P I WAS "COMPLETELY SURROUNDED" AND "PHYSICALLY OVERPOWERED."

THE FEDERAL MARSHALS BLASTED BACK AT THE RIOTING YOUTHS WITH TEAR GAS—STOPPING TWO CHARGES AND BREAKING UP A RAMPAGE OF VANDALISM.

FORMER MAJ. GEN. EDWIN WALKER LED ONE OF THE CHARGES.

BLASTS OF BIRDSHOT PELLETS KILLED ONE NEWSMAN AND WOUNDED ANOTHER.

THE DEAD MAN WAS IDENTIFIED BY HOSPITAL OFFICIALS AS PAUL GUIRARD, REPORTING FOR THE LONDON DAILY SKETCH AND AGENCE PRESSE OF FRANCE.

BILL CRIER OF THE MEMPHIS BUREAU OF THE ASSOCIATED PRESS, SUFFERED A SLIGHT WOUND IN THE BACK.

A215NU

FLYING BOTTLES, ROCKS AND BRICKS LEFT SCORES MORE BLEEDING AND HURT.

A MARSHALL CLUBBED A WHITE STUDENT ENTERING THE DORMITORY WHERE MEREDITH WAS HOUSED. STUDENTS HOOTED: "ONE NIGGER, ONE DORMITORY." MANY OF THE STUDENTS PACKED THEIR CLOTHES AND LEFT RATHER THAN STAY IN THE DORMITORY WITH THE NEGRO.

EVEN AS THE YOUTHS STORMED THE MARSHALS THE FIRST TIME, PRESIDENT KENNEDY ADDRESSED HIMSELF TO THE OLE MISS STUDENTS IN A NATIONWIDE BROADCAST.

"YOUR HONOR AND THE HONOR OF THE UNIVERSITY ARE AT STAKE," THE PRESIDENT SAID.

IT WASN'T KNOWN WHETHER HE WAS AWARE OF THE RIOTING AS HE SPOKE.

AS THE RIOTING PASSED THE END OF ITS FOURTH HOUR, FEDERAL TROOPS STARTED MOVING IN FROM TWO DIRECTIONS—TEAMS OF RIOT-TRAINED MILITARY POLICEMEN FROM THEIR TEMPORARY BASE AT MEMPHIS, AND AN ARMORED REGIMENT OF THE MISSISSIPPI NATIONAL GUARD FROM TUPELO.

RT1140PCS

A216NU

CORRECTION

OXFORD, MISS., SIXTH NIGHT LEAD MEREDITH ROUNDUP (A214NU) SEVENTH GRAF STARTING "THE DEAD," ETC., MAKE READ X X X AGENCE FRANCE PRESSE, ETC., (INSERTING FRANCE).

8TH GRAF MAKE READ AT START BILL CRIDER ETC., (NOT CRIER)

THE AP

RT1142PCS NM

V

A217AX

URGENT

MEMPHIS, TENN., SEPT. 30 (AP)—THE ARMY SAID LATE TONIGHT A FEDERALIZED MISSISSIPPI NATIONAL GUARD UNIT BEGAN MOVING TOWARD THE UNIVERSITY OF MISSISSIPPI AT OXFORD AT 10:30 P.M.

TWO OTHER GUARD UNITS—ONE STATIONED AT LAUREL AND THE OTHER AT AMORY—WERE PLACED ON STANDBY ALERT.

AN ARMY SPOKESMAN AT THE MEMPHIS NAVAL AIR STATION, COMMAND HEADQUARTERS FOR FEDERAL TROOPS ASSEMBLED FOR THE MISSISSIPPI INTEGRATION CRISIS, DECLINED TO SAY HOW MANY MEN WERE INVOLVED.

KY1244AES NM

A218WX

URGENT

(150)

INSERT

WASHINGTON—THIRD NIGHT LEAD KENNEDY-MISSISSIPPI (A173WX) INSERT AFTER THIRD GRAPH "A FORCE X X X PROBABLY TOMORROW."

[fol. 1879]

PLAINTIFF'S EXHIBIT No. 1E

SEN. LEVERETT SALTONSTALL, R-MASS., SAID OF THE ADDRESS:

"I THOUGHT THE PRESIDENT EXPRESSED THE SENTIMENTS OF THE GOVERNMENT AND THE PEOPLE OF THE UNITED STATES EXTREMELY WELL. I SUPPORT WHOLEHEARTEDLY WHAT HE SAID."

SEN. JENNINGS RANDOLPH, D-W.VA., TERMED IT "BOTH A STRONG AND REASONABLE STATEMENT." HE SAID KENNEDY OFFERED THE OLIVE BRANCH OF CONCILIATION "BUT MADE IT CLEAR THERE CAN BE NO COMPROMISE WITH THE LAW OF THE LAND."

RANDOLPH SAID "AMERICANS GENERALLY WILL BOTH APPLAUD HIS WORDS AND RESPOND TO HIS APPEAL."

REP. WILLIAM M. COLMER, D-MISS., ISSUED A STATEMENT ON BEHALF OF SEVEN OF MISSISSIPPI'S EIGHT MEMBERS OF CONGRESS. REP. FRANK E. SMITH, D-MISS., DID NOT JOIN IN THE ATTACK ON KENNEDY'S ADDRESS. HE IS LEAVING CONGRESS AT THE END OF THIS SESSION TO BECOME A MEMBER OF THE BOARD OF THE TENNESSEE VALLEY AUTHORITY.

SEN. JAMES O. EASTLAND, D-MISS., ISSUED A BRIEF AND POINTED STATEMENT OF HIS OWN. "I DISAGREE ENTIRELY WITH THE PRESIDENT'S SPEECH," HE SAID.

FROM SENATE DEMOCRATIC LEADER MIKE MANSFIELD OF MONTANA CAME THIS REACTION:

"THANK GOD THAT REASON, UNDERSTANDING AND LAW SEEM TO HAVE PREVAILED."

KENNEDY SAID IN A NATIONALLY-BROADCAST RADIO-TELEVISION ADDRESS THAT FEDERAL COURT ORDERS FOR MEREDITH'S ADMISSION ARE BEGINNING TO BE OBEYED.

THEV

(MORE)

NU-JB920PCS

A183NU

URGENT

5TH NIGHT LEAD MEREDITH ROUNDUP

OXFORD, MISS., SEPT. 30 (AP)—BEHIND A MASSIVE SHOW OF FEDERAL FORCE NEGRO JAMES H. MEREDITH MOVED ON THE CAMPUS OF THE UNIVERSITY OF MISSISSIPPI TONIGHT AND STUDENTS ERUPTED IN TWO WAVES OF RIOTING.

FEDERAL MARSHALS FIRED TEAR GAS BOTH TIMES—FIRST WHEN STUDENTS BROKE INTO A RAMPAGE OF VANDALISM, AND AGAIN WHEN FORMER MAJ. GEN. EDWIN WALKER LED A CHARGE OF BRICK-THROWING STUDENTS AGAINST THE MARSHALS.

WALKER SAID HIS STUDENT FORCE, NUMBERING ABOUT 1,000, WOULD REGROUP AND CHARGE AGAIN.

THE VIOLENCE ERUPTED AT THE VERY MOMENT PRESIDENT KENNEDY WAS SPEAKING TO THE NATION URGING A PEACEFUL SETTLEMENT OF THE FEDERAL-STATE DISPUTE OVER RACIAL SEGREGATION.

REFERRING TO THE BUILDUP OF FEDERAL TROOPS READY FOR ACTION IN ADVANCE OF THE FEDERAL GOVERNMENT'S CLIMACTIC MOVE TODAY, KENNEDY SAID:

"MY OBLIGATION AS PRESIDENT WAS INESCAPABLE. I ACCEPTED."

HE ADDED:

"I DEEPLY REGRET THE STEPS THAT WERE TAKEN, BUT ALL OTHER METHODS, INCLUDING CONCILIATION, HAD BEEN TRIED."

THE VIOLENCE ALSO ERUPTED JUST A FEW MINUTES AFTER GOV. ROSS BARNETT INDIRECTLY ADMITTED HDEFEAT IN A STATEMENT ISSUED AT THE GOVERNOR'S MANSION AT JACKSON.

IT APPEARED MEREDITH WOULD BE ENROLLED TOMORROW.

THE SECOND WAVE OF RIOTING TOOK THE FORM OF A DIRECT CHARGE ON THE MARSHALS HOLDING GUARD POSTS SHOULDER TO SHOULDER OUTSIDE THE ADMINISTRATION BUILDING.

WALKER, AN OUTSPOKEN ADVOCATE OF MISSISSIPPI RESISTANCE TO FEDERAL COURT DESEGREGATION ORDERS, COMMANDED THE 101ST AIRBORNE IN THE LITTLE ROCK DESEGREGATION IN 1957. NOW RETIRED, HE SAYS HE WAS "ON THE WRONG SIDE" THEN.

THE STUDENTS RUSHED THE MARSHALS WITH BRICKS AND SOFT DRINK BOTTLES FLYING. SOME OF THEM WORE GAS MASKS.

BUT THE MARSHALS TURNED THEM BACK WTH THEIR GAS LAUNCHERS.

THE FIRST OUTBURST OF VIOLENCE, INSTEAD OF TAKING THE FORM OF A CHARGE, APPEARED MORE LIKE SPORADIC OUTBURSTS OF VANDALISM.

THE MOB OF STUDENTS, 6TH GRAF FOURTH NIGHT LEAD MEREDITH ROUNDUP (A175NU)

JB925PCS NM

[fol. 1880]

PLAINTIFF'S EXHIBIT No. 1F

VASION OF THE CIVIL RIGHTS OF ALL THE PEOPLE OF THESE UNITED STATES AND THE CONCENTRATION OF ALL POWER GOVERNMENT INTO SOME FORM OF A TOTALITARIAN STATE."

SEN. LEVERETT SALTONSTALL, R-MASS., SAID OF THE ADDRESS:

"I THOUGHT THE PRESIDENT EXPRESSED THE SENTIMENTS OF THE GOVERNMENT AND THE PEOPLE OF THE UNITED STATES EXTREMELY WELL. I SUPPORT WHOLEHEARTEDLY WHAT HE SAID."

SEN. JENNINGS RANDOLPH, D-W.VA., TERMED IT "BOTH A STRONG AND REASONABLE STATEMENT." HE SAID KENNEDY OFFERED THE OLIVE BRANCH OF CONCILIATION "BUT MADE IT CLEAR THERE CAN BE NO COMPROMISE WITH THE LAW OF THE LAND."

RANDOLPH SAID "AMERICANS GENERALLY WILL BOTH APPLAUD HIS WORDS AND RESPOND TO HIS APPEAL."

REP. WILLIAM M. COLMER, D-MISS., ISSUED A STATEMENT ON BEHALF OF SEVEN OF MISSISSIPPI'S EIGHT MEMBERS OF CONGRESS. REP. FRANK E. SMITH, D-MISS., DID NOT JOIN IN THE ATTACK ON KENNEDY'S ADDRESS. HE IS LEAVING CONGRESS AT THE END OF THIS SESSION TO BECOME A MEMBER OF THE BOARD OF THE TENNESSEE VALLEY AUTHORITY.

SEN. JAMES O. EASTLAND, D-MISS., ISSUED A BRIEF AND POINTED STATEMENT OF HIS OWN. "I DISAGREE ENTIRELY WITH THE PRESIDENT'S SPEECH," HE SAID.

FROM SENATE DEMOCRATIC LEADER MIKE MANSFIELD OF MONTANA CAME THIS REACTION:

"THANK GOD THAT REASON, UNDERSTANDING AND LAW SEEM TO HAVE PREVAILED."

KENNEDY SAID IN A NATIONALLY-BROADCAST RADIO-TELEVISION ADDRESS THAT FEDERAL COURT ORDERS FOR MEREDITH'S ADMISSION ARE BEGINNING TO BE OBEYED.

THEV

(MORE)

NU-JB920PCS

A183NU

URGENT

5TH NIGHT LEAD MEREDITH ROUNDUP

OXFORD, MISS., SEPT. 30 (AP)—BEHIND A MASSIVE SHOW OF FEDERAL FORCE NEGRO JAMES H. MEREDITH MOVED ON THE CAMPUS OF THE

UNIVERSITY OF MISSISSIPPI TONIGHT AND STUDENTS ERUPTED IN TWO WAVES OF RIOTING.

FEDERAL MARSHALS FIRED TEAR GAS BOTH TIMES—FIRST WHEN STUDENTS BROKE INTO A RAMPAGE OF VANDALISM, AND AGAIN WHEN FORMER MAJ. GEN. EDWIN WALKER LED A CHARGE OF BRICK-THROWING STUDENTS AGAINST THE MARSHALS.

WALKER SAID HIS STUDENT FORCE, NUMBERING ABOUT 1,000, WOULD REGROUP AND CHARGE AGAIN.

THE VIOLENCE ERUPTED AT THE VERY MOMENT PRESIDENT KENNEDY WAS SPEAKING TO THE NATION URGING A PEACEFUL SETTLEMENT OF THE FEDERAL-STATE DISPUTE OVER RACIAL SEGREGATION.

REFERRING TO THE BUILDUP OF FEDERAL TROOPS READY FOR ACTION IN ADVANCE OF THE FEDERAL GOVERNMENT'S CLIMACTIC MOVE TODAY, KENNEDY SAID:

"MY OBLIGATION AS PRESIDENT WAS INESCAPABLE. I ACCEPTED."

HE ADDED:

"I DEEPLY REGRET THE STEPS THAT WERE TAKEN, BUT ALL OTHER METHODS, INCLUDING CONCILIATION, HAD BEEN TRIED."

THE VIOLENCE ALSO ERUPTED JUST A FEW MINUTES AFTER GOV. ROSS BARNETT INDIRECTLY ADMITTED HDEFEAT IN A STATEMENT ISSUED AT THE GOVERNOR'S MANSION AT JACKSON.

IT APPEARED MEREDITH WOULD BE ENROLLED TOMORROW.

THE SECOND WAVE OF RIOTING TOOK THE FORM OF A DIRECT CHARGE ON THE MARSHALS HOLDING GUARD POSTS SHOULDER TO SHOULDER OUTSIDE THE ADMINISTRATION BUILDING.

WALKER, AN OUTSPOKEN ADVOCATE OF MISSISSIPPI RESISTANCE TO FEDERAL COURT DESEGREGATION ORDERS, COMMANDED THE 101ST AIRBORNE IN THE LITTLE ROCK DESEGREGATION IN 1957. NOW RETIRED, HE SAYS HE WAS "ON THE WRONG SIDE" THEN.

THE STUDENTS RUSHED THE MARSHALS WITH BRICKS AND SOFT DRINK BOTTLES FLYING. SOME OF THEM WORE GAS MASKS.

BUT THE MARSHALS TURNED THEM BACK WTH THEIR GAS LAUNCHERS.

THE FIRST OUTBURST OF VIOLENCE, INSTEAD OF TAKING THE FORM OF A CHARGE, APPEARED MORE LIKE SPORADIC OUTBURSTS OF VANDALISM.

THE MOB OF STUDENTS, 6TH GRAF FOURTH NIGHT LEAD MEREDITH ROUNDUP (A175NU)

JB925PCS NM

[fol. 1881]

PLAINTIFF'S EXHIBIT No. 1G

A183WX

WASHINGTON—FIRST ADD FIRST LEAD CONGRESSIONAL-MISSISSIPPI A182WX X X X BE OBEYED.

THE PRESIDENT SAID HE HOPES IT WILL NOT BE NECESSARY TO CALL ON THE FEDERALIZED MISSISSIPPI NATIONAL GUARD OR ON TROOPS MASSED AT MEMPHIS, TENN., TO ENFORCE THE ORDERS.

"I DON'T LIKE THE DECISION OF THE COURT IN THIS CASE A MINUTE, BUT, SINCE IT IS THE LAW, I DON'T SEE HOW IT CAN BE BYPASSED," ELLENDER SAID.

MANSFIELD PRAISED KENNEDY FOR "MAKING HIS OFFICE AVAILABLE FOR THE CONSIDERATION OF EVERY POSSIBLE ALTERNATIVE IN SEEKING A SOLUTION TO A PROBLEM WHICH, IF CARRIED TO THE EXTREME, COULD HAVE HAD TRAGIC CONSEQUENCES FOR ALL OF US."

WITH MEREDITH ON THE UNIVERSITY CAMPUS, AND APPARENTLY TO BE ENROLLED TOMORROW, MANSFIELD SAID "THE FINAL SOLUTION NOW IS IN THE HANDS OF THE STUDENTS AND FACULTY OF OLE MISS AND THE STATE ADMINISTRATION, AND I AM CONFIDENT THAT AS AMERICANS, THEY WILL LIVE UP TO THEIR FULL RESPONSIBILITIES."

SEN. CLIFFORD P. CASE, R-N.J., SAID OF THE PRESIDENT'S ADDRESS "OF COURSE, I AGREE WITH IT AND I HOPE IT WILL BE EFFECTIVE."

(NO PICKUP).

EG1130PED NM

A184WX

O

A185WX (CQ)

URGENT

INSERT:

WASHINGTON—THIRD LEAD KENNEDY-MISSISSIPPI (A178WX). INSERT AFTER 3RD GRAF "A FORCE X X X PROBABLY TOMORROW.":

AFTER BEING DISPERSED ONCE, THE STUDENTS RETURNED IN A BRICK-THROWING AT-

TACK LED BY FORMER MAJ. GEN. EDWIN A. WALKER WHO RESIGNED FROM THE ARMY AFTER BEING REPRIMANDED FOR TRYING TO INFLUENCE HIS TROOPS VOTES. TEAR GAS FIRED BY THE MARSHALS SCATTERED THE YOUTHS AGAIN.

WALKER, A RESIDENT OF TEXAS AND ADVOCATE OF FAR-RIGHT POLITICAL VIEWS, SAID HE WOULD REGROUP THE THOUSAND OR SO STUDENTS AND ATTACK AGAIN.

IN SOLEMN TONES ETC 4TH GRAF A178WX

—O—

INSERT AFTER 4TH GRAF "IN SOLEMN X X X BE REQUIRED.:"

HOWEVER, AN HOUR AFTER HE HAD FINISHED SPEAKING THERE WAS NO WORD OF CANCELLATION OF ORDERS TO THREE UNITS OF THE MISSISSIPPI NATIONAL GUARD TO REPORT TO OXFORD AT 10 A.M. EST TOMORROW.

A SPOKESMAN AT THE PENTAGON HERE SAID HE KNEW OF NO CHANGE OF ORDERS AS YET. NOR WAS THERE ANY WORD FROM MISSISSIPPI OF A CANCELLATION OF THE ORDERS TO TWO BATTLE GROUPS AND AN ARMORED CAVALRY UNIT OF THE GUARD.

ALL TOLD ETC 5TH GRAF A178WX

EG1134PED NM

A186

FIRST LEAD UNDATED KENNEDY-EISENHOWER INTEGRATION (A1227) (270) BY THE ASSOCIATED PRESS

—OR—

NEW YORK, SEPT. 30 (AP)—

PRESIDENT KENNEDY IN ADDRESSING THE NATION TONIGHT ABOUT THE MISSISSIPPI INTEGRATION CRISIS REFERRED, AS DID PRESIDENT EISENHOWER IN THE LITTLE ROCK, ARK., CRISIS, TO THE INESCAPABILITY OF HIS DUTY TO INTERFERE.

IT WAS ONLY ONE OF MANY POINTS OF SIMILARITY IN THE TWO PRESIDENTS' ADDRESSES, DELIVERED FIVE YEARS APART, ON BASICALLY THE SAME TOPIC.

KENNEDY TOLD THE NATION: "AMERICANS ARE FREE, IN SHORT, TO DISAGREE WITH THE LAW—BUT NOT DISOBEY IT." EISENHOWER HAD SAID: "OUR PERSONAL OPINIONS ABOUT THE (COURT) DECISION HAVE NO BEARING ON THE MATTER OF ENFORCEMENT."

KENNEDY: "OUR NATION IS FOUNDED ON THE PRINCIPLE THAT OBSERVANCE OF THE LAW IS THE ETERNAL SAFEGUARD OF LIBERTY." EISENHOWER: "THE FOUNDATION OF THE AMERICAN WAY OF LIFE IS OUR NATIONAL RESPECT FOR LAW."

[fol. 1882]

PLAINTIFF'S EXHIBIT No. 1H

SPLIT

APR NU 2

HERE IS YOUR SPECIAL SUNDAY MORNING ROUNDUP OF LOUISIANA-MISSISSIPPI NEWS:

(RALLY)

(SHREVEPORT, LOUISIANA)—A CROWD ESTIMATED AT 3,000 RAILLIED IN SHREVEPORT LAST (SATURDAY NIGHT TO OFFER VERBAL SUPPORT TO MISSISSIPPI GOVERNOR ROSS BARNETT IN HIS BATTLE AGAINST DESEGREGATION.

REP. PAREY BRANTON OF WEBSTER PARISH SAID A DELEGATION OF LOUISIANA LEGISLATORS AND CITIZENS WOULD LEAVE MONROE TODAY (SUNDAY) FOR JACKSON, MISSISSIPPI, TO TELL BARNETT THEY WERE BACKING HIM. BRANTON DIDN'T SAY HOW MANY PERSONS OR CARS WOULD BE IN THE CARAVAN.

FORMER STATE SENATOR W.M. RAINACH OF SUMMERFIELD TOLD THE RALLY HE HAD TALKED WITH BARNETT AND THE MISSISSIPPI GOVERNOR DID NOT WANT LARGE GROUPS OF "UNDISCIPLINED PEOPLE AT OXFORD INTERFERING WITH THEIR "PRECONCEIVED PLAN TO DEAL WITH "THE DESEGREGATION ISSUE."

—DASH—

(RAINACH ALSO TOLD THE AUDIENCE HE HAD INFORMED THE GOVERNOR THAT LOUISIANA COULD HAVE 10,000 CITIZENS IN OXFORD TO RALLY UNDER HIS LEADERSHIP.

(REP. WELLBORN JACK OF CADDO PARISH TOLD THE RALLY: "I'VE KNOWN ROSS BARNETT FOR A LONG TIME. WHEN HE SAID HE WOULD GO TO JAIL BEFORE HE ALLOWS THE SCHOOLS IN HIS STATE TO BE INTEGRATED, HE MEANT IT."

—0—

(NEW TOP—WALKER)

(JACKSON, MISSISSIPPI)—FORMER ARMY MAJOR GEN. EDWIN WALKER, IN JACKSON, MISSISSIPPI, SAYS VOLUNTEERS START ARRIVING IN MISSISSIPPI TODAY (SUNDAY) TO SUPPORT GOVERNOR ROSS BARNETT IN HIS STRUGGLE WITH THE FEDERAL GOVERNMENT OVER INTEGRATION.

WALKER, AFTER HIS ARRIVAL IN JACKSON LAST NIGHT, TOLD A NEWS CONFERENCE: "TENS

OF THOUSANDS FROM FLORIDA TO CALIFORNIA WILL COME TO SUPPORT GOV. BARNETT." WALKER SAID HE PLANNED "TO STAND WITH GOV. BARNETT SHOULDER TO SHOULDER."

—0—

(MEREDITH)

THE HEAD OF THE NEW ORLEANS BRANCH OF THE NEW ORLEANS NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE SAYS JAMES MEREDITH WILL SPEAK IN NEW ORLEANS TODAY (SUNDAY).

CHAPTER PRESIDENT ARTHUR CHAPITAL SAYS MEREDITH WILL SPEAK AT AN N-A-A-C-P MEETING IN THE GYMNASIUM-AUDITORIUM OF THE CORPUS CHRISTI SCHOOL AT 3:30 P.M.

—0—

STATION K-E-E-L, SHREVEPORT (STATION MGRS)

SHREVEPT

STATION K E E L, SHREVEPORT (STATION MGRS)

SHREVEPORT STATION K-E-E-L JOINS US ON THIS THIS WIRE MORNING . . .

WELCOME ABOARD, K E E L.

ASSOCIATED PRESS, NEW ORLEANS-RADIO

[fol. 1883]

PLAINTIFF'S EXHIBIT No. 1 I

A205NU

URGENT

OXFORD, MISS.—2ND ADD RIOT SEPARATE (A200NU) XXX TRUCK.

AT THAT POINT THE MARSHALS MOVED. THEY DONNED THEIR GAS MASKS AND BEGAN FIRING TEAR GAS.

FOR A TIME, THEY SCATTERED THE TROUBLE-MAKERS.

THEN FORMER MAJ. GEN. EDWIN WALKER LED A CHARGE OF ABOUT 1,000 OF THE STUDENTS AGAINST THE MARSHALS, STILL HOLDING THEIR POSITIONS AROUND THE RED BRICK ADMINISTRATION BUILDING.

THE STUDENTS MOVED IN ON THE MARSHALS THROWING BOTTLES AND ROCKS AND BRICKS.

THE MARSHALS FIRED MORE TEAR GAS.

THE ATTACKERS BACKED UP.

(MORE)

RT1058PCS NM

A206NU

URGENT

INSERT

OXFORD, MISS., RIOT SEPARATE, (A200NU) INSERT AFTER THIRD GRAF "ANOTHER NEWSMAN XX

BUST IT

[fol. 1884]

PLAINTIFF'S EXHIBIT No. 2A

30NU

BULLETIN

MEREDITH DEVELOPING

JACKSON, MISS., SEPT. 30 (AP)—GOV. ROSS R. BARNETT'S OFFICE SAID TONIGHT HE WOULD ISSUE A STATEMENT SHORTLY. APPARENTLY IN CONNECTION WITH THE DESEGREGATION CASE INVOLVING NEGRO JAMES H. MEREDITH AND THE ALL-WHITE UNIVERSITY OF MISSISSIPPI.

JB634PCS NM

A131AX

TELEGRAPH EDITORS (120)

JACKSON, MISS.—MEREDITH-VOLUNTEERS, (A 69AX), SUB FOLLOWING FOR 9TH GRAF: "HOWEVER, A GROUP X X X THE UNIVERSITY."

A GROUP OF ABOUT 20 NORTH LOUISIANA, LEGISLATORS, SHERIFFS AND MAYORS WENT TO JACKSON TODAY TO PLEDGE SUPPORT TO BARNETT.

STATE REP. PAREY BRANTON OF WEBSTER PARISH PRESENTED BARNETT WITH A CITATION HE SAID "SYMBOLIZES THE CONCERN, ANGER AND RESOLVE OF YOUR SISTER STATE OF LOUISIANA."

SHERIFF C. E. HESTER OF TALLULAH PRESENTED BARNETT WITH A CITATION IN BEHALF OF ALL SHERIFFS FROM NORTHEAST LOUISIANA'S 5TH CONGRESSIONAL DISTRICT.

"WE ENDORSE YOUR FIGHT FOR CONSTITUTIONAL GOVERNMENT AND STATE SOVEREIGNTY," IT SAID.

BARNETT, ACCOMPANIED BY MRS. BARNETT, HINDS COUNTY JUDGE RUSSEL MOORE AND DICK MORPHEW OF THE CITIZENS COUNCIL, EMERGED FROM THE MANSION AND TOLD THE GROUP:

"I AM GRATEFUL TO YOU FOR YOUR SUPPORT. I APPRECIATE YOUR SUPPORT. WE HAVE COMMON PROBLEMS. I INTEND TO FIGHT THIS BATTLE ALL THE WAY THROUGH THE COURTS."

GEN. WALKER ETC. 10TH GRAF PVS.

EP739PES

[fol. 1885]

PLAINTIFF'S EXHIBIT No. 3

A12NU

(WALKER)

A12WX

(LD REACTION & BJT)

UM

A12AX

URGENT

OXFORD—FIRST ADD FIRST LEAD OXFORD WITH MEREDITH (A7AX) X X X WERE REPORTED.

DOZENS OF RIOTERS, MOSTLY YOUNG BOYS WITH SHIRTTAILS OUT, WERE BEING ROUNDED UP. AT LEAST 30 AND POSSIBLE MORE WERE HERDED INTO THE FEDERAL COURTHOUSE ON THE SQUARE.

PRISONERS WERE FORCED TO PLACE THEIR HANDS OVER THEIR HEADS AND WERE MARCHED AT BAYONET POINT TO THE COURTHOUSE.

THE LATEST RIOTING CAME AFTER FORMER MAJ. GEN. EDWIN WALKER HAD APPEARED IN THE SQUARE—CLAD IN A DARK BLUE SUIT AND WEARING A 10-GALLON HAT.

HE STAYED IN THE SQUARE BRIEFLY, SPOKE QUIETLY TO SOME OF THOSE IN THE CROWD NEAREST THE TROOPS, AND THEN BACKED OFF AS MILITARY EYES WATCHED HIM CLOSELY.

THE BATTLE LEFT A BLOCK OF LITTER AND DEBRIS.

THE SAME YOUTHS, ALONG WITH 100 OTHERS, EARLIER HAD BEEN CLEARED FROM THE SQUARE AFTER CURSING, SCREAMING, AND THROWING ROCKS AND BOTTLES AT PASSING MILITARY VEHICLES.

THEY WERE DRIVEN FROM THE SQUARE BY MP'S ARMED WITH TEAR GAS, AND BAYONETS FIXED TO RIFLES. REMNANTS OF THE CROWD GATHERED ABOUT A HALF BLOCK AWAY SHORTLY BEFORE THE FIRING BROKE OUT.

MILITARY JEEPS RACED AROUND THE LITTERED SQUARE, RUSHING TO TROUBLE SPOTS. DRIZZLING RAIN, ALTERNATED WITH SUNSHINE, FELL ON THE TOWN BUT FAILED TO COOL THE WRATH OF THE MOB.

MEDICS SET UP A FIRST AID STATION BESIDE THE TOWN'S ANCIENT CONFEDERATE WAR MEMORIAL AND TROOPS, WHO BEGAN CLEARING THE STREETS PLACED A PILE OF DEBRIS NEAR THE GRAY STATUE.

LIFE IN THE USUALLY, SLEEPY SOUTHERN TOWN WAS AT A STANDSTILL. ALMOST ALL BUSINESSES FAILED TOPEN THIS MORNING AND THE STREETS WERE PRACTICALLY DESERTED EXCEPT FOR RIOTERS, SOLDIERS AND NEWSMEN.

NEGRO TROOPS ETC., THIRD GRAF ORIGINAL (A160-61NU)

SF1241PES NM

A13NU

URGENT

OXFORD, MISS., FIRST ADD MORIN'S WALKER (A9NU) X X X FUMES.

WALKER SPPEARED ON THE OXFORD TOWN SQUARE DURING THE DISTURBANCE THERE TODAY.

WALKER MARCHED AHEAD OF A FILE OF SOLDIERS AS THOUGH HE WERE THEIR INSPECTING OFFICER.

FINALLY, AN ARMY OFFICER ASKED HIM TO MOVE. HE REFUSED. THE OFFICER ORDERED SEVERAL SOLDIER CARRYING RIFLES WITH BAYONETS ALONGSIDE WALKER.

THE SOLDIERS HELD THEIR BAYONETS WITHIN INCHES OF THE FORMER GENERAL, BUT DID NOT TOUCH HIM. THE OFFICER SAID SOMETHING TO WALKER AND HE WALKED OFF THROUGH THE CROWD.

AS1143ACS

[fol. 1886] A14WX (LD REACTION & BJT)

FIRST LEAD KENNEDY REACTION (350)

WASHINGTON, OCT. 1 (AP)–SEN. WAYNE MORSE, D-ORE., TOLD THE SENATE TODAY PRESIDENT KENNEDY ROSE TO "THE SUPERLATIVE HEIGHTS OF GREATNESS" IN HIS ADDRESS TO THE NATION ON THE UNIVERSITY OF MISSISSIPPI INTEGRATION CRISIS.

MORSE DECLARED THE PRESIDENT IN THE RADIO-TELEVISION ADDRESS LAST NIGHT REDEDICATED THE NATION "TO GOVERNMENT BY LAW, INSTEAD OF GOVERNMENT BY MEN, OR MOB."

AGREEING, SEN. STEPHEN M. YOUNG, D-OHIO, CALLED THE PRESIDENT'S STATEMENT "SOMBER YET TEMPERATE" AND CONCILIATORY, BUT

"FIRM IN HIS DEMAND THAT THE FEDERAL LAW MUST BE OBEYED."

SEN. JOHN STENNIS, D-MISS., CALLED FOR WITHDRAWAL OF THE NEGRO STUDENT, JAMES H. MEREDITH FROM THE UNIVERSITY "TO AVOID FURTHER BLOODSHED AND LOSS OF LIFE."

SEN. JAMES O. EASTLAND, D-MISS., SAID MEREDITH NEVER SHOULD HAVE BEEN ADMITTED, AND CRITICIZED THE FEDERAL JUDGES WHO ORDERED THE UNIVERSITY TO ENROLL HIM.

REP. DALE ALFORD, D-ARK., TOLD KENNEDY IN A TELEGRAM "YOU HAVE MADE THE SAME TRAGIC MISTAKE AS DID YOUR PREDECESSOR IN SENDING ARMED FORCES INTO A SOVEREIGN STATE."

"SHALL THE AMERICAN REPUBLIC ENDURE OR SHALL WE SACRIFICE OUR STATE SOVEREIGNTY TO AN ALL-POWERFUL SUPER STATE ACTING IN DIRECT OPPOSITION TO THE WILL OF THE MAJORITY OF THE PEOPLE OF A SOVEREIGN STATE AND THEREFORE IN OPPOSITION TO THE CONSTITUTION?" THE ARKANSAS CONGRESSMAN ASKED.

ALFORD'S REFERENCE TO KENNEDY'S PREDECESSOR WAS TO FORMER PRESIDENT DWIGHT D. EISENHOWER, WHO ORDERED FEDERAL TROOPS INTO LITTLE ROCK, ARK., TO QUELL INTEGRATION DISORDERS THERE.

ALFORD SAID "THE GREAT MORAL ISSUE IN MISSISSIPPI TODAY . . . IS NOT SEGREGATION VS. INTEGRATION OF THE SCHOOLS: IT IS, INSTEAD, THE ISSUE OF THE SOVEREIGN PEOPLE AND THE CONSTITUTION VS. DEFAULTING PUBLIC TRUSTEES AS OATH BREAKING SUSURPERS."

SEN. SAM J. ERVIN JR., D-N. C., ALSO SAID "I DEPLORE THE GREAT TRAGEDY WHICH HAS HAPPENED IN MISSISSIPPI."

"IT SEEMS TO ME," HE ADDED, "THAT THOSE WHO ARE ENGAGED IN FOMENTING LITIGATION WHICH HAS SUCH A TRAGIC AFTERMATH MIGHT WELL MEDIDATE UPON THE WORDS OF ST. PAUL WHEN HE SAID: 'ALL THINGS ARE LAWFUL UNTO ME, BUT ALL THINGS ARE NOT EXPEDIENT.'"

SEN. JACOB K. JAVITS, R-N. Y., CALLED THE VIOLENCE AT MISSISSIPPI UNBELIEVABLE, STUPID AND TRAGIC.

HE SAID KENNEDY IS ENTITLED TO THE NATION'S FULL SUPPORT AS HE ASSERTED THE "PARAMOUNT AUTHORITY" OF THE FEDERAL GOVERNMENT.

"WE CAN ONLY HOPE THE LESSON THAT RECKLESS DEFIANCE OF THE LAW ONLY BREEDS ANARCHY WILL AT LEAST BE LEARNED IN MISSISSIPPI," JAVITS SAID.

FOR THE MOST PART REACTION IN CONGRESS DIVIDED ALONG SECTIONAL LINES.

SOMEWHERE IN ETC., 3RD GRAF A7WX.

ER152PED

A15KX (DARLING)

LEAD EXECUTION

SAN QUENTIN, CALIF., OCT. 1 (AP)–MELVIN T. DARLING, 6 FOOT 7, WENT QUIETLY TO HIS DEATH IN THE PRISON GAS CHAMBER TODAY.

THE LETHAL GAS BEGAN GENERATING AT 10:30 A.M., AND HE WAS PRONOUNCED DEAD AT 10:10.

DARLING, 29 X X X 2ND GRAF A96FX

GM1154ACS NM

A16WX (INSERT)

INSERT

WASHINGTON—MISS.-SENATE (A5WX), INSERT THE FOLLOWING AFTER 4TH GRAF "THE RESUME X X X PROTECT MEREDITH."

ALSO AT THE CAPITOL, REP. JOHN BELL WILLIAMS, D-MISS., TOLD THE HOUSE THE RIOT WAS STARTED BY A U.S. MARSHAL "FIRING DIRECTLY INTO A GROUP OF STUDENTS." HE SAID HIS INFORMATION CAME FROM A RESPONSIBLE OFFICIAL ON THE OLE MISS CAMPUS. WILLIAMS WAS ONE OF SEVERAL SOUTHERN CONGRESSMEN, MOST OF THEM FROM MISSISSIPPI, WHO ADDRESSED THE HOUSE ON THE SITUATION IN OXFORD. ALL CALLED IT "TRAGIC."

"EASTLAND SAID, "ETC., 5TH GRAF.

JK157PED

[fol. 1887] PLAINTIFF'S EXHIBIT No. 3A

A'20WX

BULLETIN MATTER

WASHINGTON—FIRST ADD FIRST LEAD WALKER (A19WX) X X X INSURRECTION.

KENNEDY SAID WALKER WAS ARRESTED AT A MILITARY ROADBLOCK NEAR OXFORD, MISS., AND WOULD BE ARRAIGNED LATER TODAY.

EARLIER IN THE SENATE WALKER, WHO HAD PARTICIPATED IN THE RIOTING AT THE UNIVERSITY OF MISSISSIPPI, WAS DESCRIBED AS POSSIBLY A "SICK MAN" WHO "OUGHT TO BE COMMITTED" AND WAS LINKED WITH "VIOLENT SEGREGATIONISTS OR PSYCOPATHS."

SEN. WAYNE MORSE ETC., 2ND GRAF A172WX

BU212PED

A21

TOKYO

A21NU

CORRECTION

OXFORD—Third lead Merédith (A7-8NU) eighth graf counting insert, beginning "Arrests jumped" read: arrests jumped to 112. (Not 150).

AS1214PCS NM

A22

TOKYO—First add night lead Red China (A18) x x x futile."

Peiping has branded as the worst "revisionist" President Tito of Yugoslavia, who only last week entertained Soviet President Leonid I. Brezhnev.

Chou made plain Peiping will stick to its policy of actively aiding "liberation struggles" to spread Communism even at the risk of war. Khrushchev has repeatedly claimed the fight can be won on the economic front with the help of revolutionaries in the various countries.

Chou acknowledged that China was confronted with her own economic difficulties and there were even admissions of some opposition at home with suggestions of a purge.

"The serious natural disasters for the past three consecutive years from 1958 to 1961 and the shortcomings and mistakes in our work have indeed caused us difficulties," he said. But Chou insisted the Chinese people have become stronger since the Communists took over.

R217PED

[fol. 1888] PLAINTIFF'S EXHIBIT No. 3B

A'25WX

BULLETIN MATTER

WASHINGTON—Second add first lead Walker x x x psychopaths.

Kennedy said these charges also have been filed against Walker:

Conspiracy to incite a rebellion or insurrection.

Conspiracy to hinder federal officers in the performance of their duties.

Assaulting a federal officer.

Justice Department officials said the conspiracy to incite rebellion charge carries a maximum penalty of 20 years in prison and a fine of $20,000.

Execution of such a conspiracy, as distinguished from the act of conspiring, involves a maximum penalty of 10 years and $10,000, they said.

The penalty for conspiring to hinder a federal officer could be up to five years in prison and $6,000 and for assaulting a federal officer could be three years and $5,000.

The Justice Department said Walker's arrest came at about 2 P.M. EDT today on the outskirts of the strife-torn college town of Oxford, Miss., and an immediate arraignment before U. S. Commissioner Omar Craig was being arranged.

For his first statement on the Oxford situation since last night's bloody rioting, Kennedy stood in a Justice Department corridor in shirtsleeves, surrounded by newsmen.

SEN. WAYNE MORSE ETC., 2ND GRAF A172 WX

BU230PED

A26WX

—URGENT—

FOREIGN AID (180)

WASHINGTON, Oct. 1 (AP)—The Senate defeated today an attempt to slash $785 million from a committee-approved $4,422,800,000 (B) foreign Aid appropriations bill.

It was only a tentative victory for the Administration in the first skirmish on the big bill for military and eco-

nomic assistance abroad, however, and left senators free to seek reductions in each of the separate items in the measure.

The vote temporarily sustained the recommendations of the Appropriations Committee that the Senate restore $792,400,000 (M) of cuts totaling $1,124,400,000 (B) made by the House.

Sen. William Proxmire, D-Wis., had asked the Senate to reject the increases and substitute all the House cuts but $7.4 million in administrative expenses.

Sen. Allen J. Ellender, D-La., has announced plans to call up an amendment reducing the Committee's recommended $1,450,000,000 (B) for military assistance at least to the $1.3 billion voted by the House and slashing the $1,125,000,000 (B) the Committee recommended for development loans abroad.

Proxmire also offered amendments to restore a House-approved ban on giving any foreign aid to countries which allow their ships to transport military or other supplies to Communist Cuba, as well as another House prohibition against foreign assistance to Poland and Yugoslavia.

BU/PE234PED

A27AT

A27NU

URGENT

FOURTH LEAD MEREDITH ROUNDUP

OXFORD, Miss., Oct. 1 (AP)—Bayonets of the federal government forced a Negro into the University of Mississippi today. Riot troops arrested former Maj. Gen. Edwin A. Walker, who led students in wild charges against Marshals in night long rioting.

The arrest of the controversial general, commander of troop during the Little Rock segregation crisis, came after an outbreak of fresh violence in downtown Oxford that began minutes after James H. Meredith enrolled at Ole Miss.

He was arrested at a roadblock and taken before a U. S. Commissioner later today.

In Washington, Atty. Gen. Robert Kennedy said Walker had been taken into custody on charges of inciting rebellion or insurrection. Conviction could bring 10 years in prison and $10,000 fine.

[fol. 1889] PLAINTIFF'S EXHIBIT No. 3C

A34WX

WASHINGTON—First add foreign aid (A26WX) x x x Yugoslavia.

The vote today was 47-28 to sustain the Committee.

The voting started after Sen. Hubert H. Humphrey, D-Minn., Democratic whip, declared that the House cuts, if allowed to stand, "would be a blow to our national security."

"Never before has this slashing been as ill-timed or ill-conceived as today," he said, "when Communist influence is increasing in the western hemisphere, when Soviet pressure is mounting in Berlin, and when Chinese military, political and economic pressure on southeast Asia is soaring."

ER322PED

A35AT

A35AX (GLANCE) (NU FW)

UNDATED OXFORD-AT-A-GLANCE

BY THE ASSOCIATED PRESS

James H. Meredith enrolled in University of Mississippi under bayoneted rifles of federal government, becoming first Negro enrolled at University at Oxford, Miss.

Violence breaks out anew in downtown Oxford; federalized Mississippi troops fire over heads of angry mob.

New outbreak comes after lull in night-long rioting in which two persons—a newsman and an Oxford resident—were killed.

Atty. Gen. Robert F. Kennedy announced in Washington the arrest today of former Army Maj. Gen. Edwin Walker on charges of inciting a rebellion or insurrection.

Arrests in Oxford jump to 112 and officers say some taken into custody lived as far away as 500 miles.

SF224PES

A36NU

FIRST NIGHT LEAD MEREDITH ROUNDUP (AMS BJT) (300 UP)

BY THE ASSOCIATED PRESS

OXFORD, Miss., Oct. 1 (AP)—Rifle fire echoed in the streets of downtown Oxford today as James H. Meredith, a Negro, ended 114 years of segregation at the University of Mississippi.

Admist the shooting, troops arrested former Maj. Gen. Edwin A. Walker—the man who led the troops during desegregation in Little Rock in 1957 and then decided he was on the wrong side.

Walker led students in charges that failed against the gas launchers of U.S. Marshals during night-long rioting on the University campus (illegible).

Walker led students in charges that failed against the gas launchers of U.S. Marshals during night-long riotin on the un

Walker led students in charges that failed against the gas launchers of U.S. Marshals during night-long rioting on the University campus that cost the lives of two persons and injured 20 others.

The controversial Texan showed up, too, during fresh trouble that broke out today minutes after Meredith's enrollment at the University—the first Negro knowingly admitted in the University's 114-year history.

Troops picked up Walker at a roadblock

Atty. Gen. Robert Kennedy said in Washington Walker had been charged with inciting a rebellion or insumnomo

Troops picked up Walker at a roadblock

Atty. Gen. Robert Kennedy said in Washington Walker had been charged with inciting a rebellion or insurrection. The penalty on conviction: 20 years in prison, $20,000 fine.

The former general was among 176 arrests, about one third students and the rest non-students. Some lived as much as 500 miles away from this college town.

Meredith, 29-year-old Korean war veteran, registered in a 55-minute routine session with Registrar Robert Ellis, failed to find his first class and drove off with an escort.

Infantrymen ringed the University campus, where last night's gas gumes blanketed the central area.

[fol. 1890]

PLAINTIFF'S EXHIBIT No. 3D

A37NU

THERE WERE THESE OTHER DEVELOPMENTS:

—In Congress, Sen. Wayne Morse, D-Ore., said Walker perhaps is "a sick man. If he is, he ought to be committed . . ." Sen. James O. Eastland, D-Miss., said the Justice Department and U.S. Marshals provoked the campus riot.

—The Justice Dept. disclosed that it had okayed Meredith's campus trip yesterday after Gov. Ross Barnett reportedly telephoned a message of capitulation and assurance of police protection. Barnett, who once vowed to go to jail rather than see Ole Miss integrated, branded reports he had altered his defiant stand as "untrue and completely unfounded."

—Still hanging over the 64-year-old Governor and Lt. Gov. Paul M. Johnson, both of whom have personally blocked Meredith's path to enrollment, was a federal contempt of court citation. The U.S. Circuit Court of Appeals in New Orleans gave them until 11 A.M. tomorrow to purge themselves.

—There was widespread praise for President Kennedy abroad and almost universal denunciation of Gov. Barnett and Mississippi officials. Chairman Harold Blot of the British Labor Party called the attempt to bar Meredith a "blot on western civilization."

Renewed uprisings broke out in the tense town of Oxford where tension mounted as residents and others watched more than 4,000 troops stream into the town of 5,200.

Shouting demonstrators, numbering in the hundreds, hurled pop bottles at military vehicles and at a unit of soldiers—which included a large percentage of Negroes.

Military police fired over the crowd and hurled at least two tear gas grenades to disperse them. Troops occupied the

UNEOW

HM — CM

Military police fired over the crowd and hurled at least two tear gas grenades to disperse them. Troops occupied the courthouse square and cleared the area of civilians. Then, a ring of bayonet-carrying soldiers blocked all routes into the square. Many stores put up a "closed" sign.

A mile away, Marshals had escorted Meredith into Lyceum Hall at 7:50 A.M. A confederate flag flew at half mast outside.

A38NU

Meredith seemed outwardly calm, paid his $230 cash for tuition, and asked about class routine. He was given a two-room apartment with kitchenette in a residence hall. His subjects will include History, Political Science and English.

A Justice Department spokseman said Marshals will live with him and escort him to class "as long as he is in any danger."

As Meredith left the Registrar's Office, smiling, he said he was at Ole Miss for purely academic reasons, would attend classes only and would not participate in extra-curricular activities.

He was asked if he was happy that the long struggle had met with success.

"No," he replied. "This is not a happy occasion."

Hundreds of jeering students followed him to his first class—Colonial American times.

"You've got blood on your hands," they cried. Soldiers took the ringleaders into custody.

(MORE)

AS141PCS

[fol. 1891]

PLAINTIFF'S EXHIBIT No. 3E

A51NU

NEW ORLEANS—First add first night lead Meredith roundup (A35-38NU) x x x custody.

Walker's arrest came about noon at a military roadblock on the outskirts of the strife-torn Oxford.

At one time today, he marched at the vanguard of a file of soldiers as though he were their inspecting officers. He refused to move after an officer ordered him to do so. Then finally relented when soldiers held their bayonets within inches of his body.

In addition to conspiracy to incite a rebellion or insurrection, charges filed against him include: conspiracy to hinder federal officers in the performanee of their duties and assaulting a federal officer.

Circumstances surrounding the fatal shooting of two men during last night's rioting remained a mystery.

One was Paul Guihard, 30, a member of the New York Bureau of Agence France Presse. He was found shot in the back with a .32 caliber revolver near a dormitory not far from the scene of the major rioting. The other victim, Walter Ray Gunter, 23, an Oxford juke box repairman, was shot in the head, also with a .32 caliber bullet.

The scars of the night rebellion lay scattered through the tree shaded campus. There were six completely burned

cars. Twenty others were damaged or had their windows smashed. In the door of the Lyceum Building which the Marshals had ringed during the riot, there were .22-caliber rifle bullet holes. Also the scars of pistol shots.

In Washington, Justice Department Officials indicated Barnett had not kept faith with them. They said he had promised that Meredith and the Marshals would be would be admitted without opposition and that he would "guarantee to preserve law and order with state police or in cooperation with U.S. Marshals."

During the night, the Mississippi Highway Patrol withdrew from the gas-shrouded field of battle. Col. T. B. Birdsong, Patrol Boss, said the patrolmen had defective gas masks. One trooper said their orders were to direct traffic only.

In Jackson, the State Capital, both state and national flags flew at half mast at the Capitol building.

(END ROUNDUP)

RK237PCS

A52NU

URGENT

INSERT

OXFORD, Miss., fourth lead Meredith roundup (A27 NU) after third graf "He was x x x later today" insert the following:

Walker waved preliminary hearing before before U.S. Commissioner Omar Craig on a charge of attempting to impede justice. Bond was set at $100,000 and the Texan had not posted it by mid-afternoon.

In Washington x x x fourth graf A27NU.

RK238PCS

[fol. 1892]

PLAINTIFF'S EXHIBIT NO. 3F

A61NU

WITH MEREDITH: WALKER

PRECEDE WASHN DAY (320)

OXFORD, Miss., Oct. 1 (AP)—Maj. Gen. Edwin A. Walker, who led a charge of students against U.S. Marshals at the University of Mississippi last night, was arrested by federal officers today.

He waived preliminary hearing before U.S. Commissioner Omar Craig on a charge of attempting to obstruct justice. Bond was set at $100,000, which the controversial Texan had not posted by mid-afternoon.

When federal officers took him into custody at a military roadblock on the outskirts of this riot-torn town, Walker told them: "I guess I am in custody."

Walker, as a Major General, commanded federal troops sent into Little Rock, Ark., in 1957 to enforce court ordered public school desegregation. He resigned from the Army after a controversy over a troop indoctrination program in Europe.

Walker walked into the courtroom with a slight smile flickering across his face. Craig advised Walker he could waive the preliminary hearing or be represented by counsel.

"My counsel is not in this state," Walker said. Craig told him he could get competent attorneys in Mississippi. Walker asked for and received permission to leave the court momentarily.

He returned, still smiling and asked: "Is it proper to ask that if I waive this hearing, I will be assured that it (his trial comes back to Mississippi?"

Craig told him the trial would be held in U.S. District Court in Mississippi.

"I waive this hearing," Walker said.

Urging a firm stand by Mississippi in the face of federal pressures leading up to Negro James H. Meredith's enrollment at Ole Miss today, Walker had promised last week to deliver "tens of thousands" of volunteers for the final showdown.

But in the end, his role in the resistance on the campus last night was to lead several hundred students storming a line of Federal Marshals guarding the Administration Building. The Marshals turned them back with tear gas.

In Washington, Atty. Gen. Robert Kennedy had announced earlier that Walker would be charged with inciting rebellion or insurrection. Conviction carries a penalty of 20 years imprisonment and a fine of $20,000.

The penalty for ATGTM obstruct justice could be as much ears conviction carries a penalty of 20 years imprisonment and a fine of $20,000.

The penalty for attemptinec
Conviction carries a penalty of 20 years imprisonment and a fine of $20,000.

The penalty for attempting to obstruct justice could be as much as five years in prison and a $5,000 fine.

RK/AS328PCS

A6—

[fol. 1893]

PLAINTIFF'S EXHIBIT No. 3G

A78NU

A78NU

2ND NL MEREDITH ROUNDUP (AMS BJT) (A36NU)
(400)

BY THE ASSOCIATED PRESS

OXFORD, MISS., Oct. 1 (AP)—Battle-ready troops continued to pour into Oxford today as James H. Meredith, a Negro, finally enrolled and went to class at the all-white University of Mississippi.

While Army gunfire—with rifles pointed skyward—and tear gas smashed riots in downtown Oxford, troops arrested former Maj. Gen. Edwin A. Walker.

Walker, who last night led a charge of students against Federal Marshals on the Ole Miss campus where two men were killed in nine hours of rioting, waived a preliminary hearing on charges of trying to obstruct justice. Commissioner Omar Craig held him in $100,000 bond.

The controversial Texan—who led federal forces in the 1957 Little Rock desegregation crisis, but changed sides because he said he was wrong—also showed up in renewed skirmishing in the college town today. Troops took him into custody at a roadblock.

In mid-afternoon, a caravan of 92 vehicles, carrying mostly military police, rolled into Oxford. Units of the crack 82nd and 101st Airborne Divisions landed at the Oxford airport, and at Columbus, fresh troops of the 1st Airborne Battle Group of the 328th Infantry disembarked after flying from Ft. Campbell, Ky.

Gov. Ross Barnett, who once vowed to go to jail rather than see Ole Miss integrated, called for an end to violence. Law and order must prevail "even though our state has been invaded by federal forces," Barnett said in a broadcast from Jackson this afternoon.

He told Mississippians not to leave their hometowns. To out-of-states who had rushed to Oxford, Barnett said, "Please go home, and I say this with great emphasis."

It was Barnett's third statement in 24 hours. Late yesterday, Barnett said Mississippi was surrounded and overpowered. His "calm judgment" abhorred any ensuing bloodshed, he said.

Many believed it a statement of concession. The Justice Dept. said it had okayed Meredith's campus trip yesterday after Barnett telephoned assurance of police protection.

Late last night, Barnett issued a second statement saying reports he had yielded were untrue. "We will never surrender," he had said.

In addition to two dead in the night-long campus rioting 20 were injured. In Washington, the Justice Department reported no one had been killed or hurt from gunfire from the weapons of federal troops.

On the campus and in Oxford, military police and infantrymen—with rifles and bayonets—arrested 176 persons, about one-third students. Some lived as much as 500 miles away.

A79NU

Meredith's enrollment brought dismay at Ole Miss. Many students were seen leaving with packed suitcases. A reliable source in the student housing office said more than half the students in the dormitories had check out.

In New Orleans, Jack Greenburg, attorney for the National Association for the Advancement of Colored People, told the New Orleans States-Item a second Negro—a girl —is in the process of applying for entrance into the University of Mississippi.

Meredith, 29-year-old x x x 8th graf, eliminating 12th graf: "The justice x x x unfounded."

RK/AS443PCS

[fol. 1894]

PLAINTIFF'S EXHIBIT No. 3H

A162

URGENT

FOURTH NIGHT LEAD MEREDITH ROUNDUP (240)

OXFORD, MISS., Oct. 1 (AP)—Hoards of combat-ready troops clamped rigid control on this seething southern town tonight after James H. Meredith, a Negro, ended segregation at the University of Mississippi.

Bent on smothering continued riots that took two lives last night and led to today's arrest of former Maj. Gen. Edwin A. Walker, helmeted troops patroled with loaded rifles and fixed bayonets.

The Army named Lt. Gen. Hamilton Howze of Ft. Bragg, N.C., to head the massive buildup of nearly 10,000 Army troops. Observers said appointment of the 3-Star General may mean there will be more soldiers in the state than were ever assembled in peacetime.

Military police and infantrymen patroled Oxford with loaded rifles and fixed bayonets. They imposed tight security measures on the Ole Miss campus.

A163

Soldiers permitted no outsiders on the grounds. They searched everyone entering the gates. They kept the numbers of milling students under 100—scattering them.

Scattered arrests persisted into the night. Soldiers broke out tear gas to quash one demonstration of about 30 brick-throwing students near a fraternity house. Troops caught a man wearing a white-hooded garment to his waist and carrying a home-made gas mask.

Federal forces arrested at least 39 persons tonight—most of them youths taken in custody at campus roadblocks. The total brought the arrest number to 215 since the rioting began last night. Many have since been turned loose.

For the most part, quiet settled over Oxford as night fell. The darkness ended a day marred by a downtown riot quelled by rifle fire into the air and tear gas.

Walker, who x x x 4th graf 3rd night lead (A120NU).

UM957PCS NM

A164 (AGYS & RADIO OUT)

ADVANCE FOR AMS OF SUNDAY, OCT. 7—FROM AP NEWSFEATURES

(ADVANCE) VATICAN CITY—First add Vatican II (A161) x x x Church itself.

The meeting of Catholic leaders from over the world that opens Oct. 11 is called the Second Vatican Ecumenical Council. It is only the second such held by the Roman Catholic Church since the Reformation.

It comes at a time of stress and strain in a fast-changing world that has exerted its own forces against the hierarchy and theology of the Church.

Yet it is with quiet excitement, not anxiety, that the biggest Church Council of all time is meeting.

After three years of preparation the Council is just a few days away.

Throughout the Eternal City, hotels are filling up with bishops and theologians. Pontifical colleges that dot the Seven Hills are hosts to high-ranking clerical guests from distant continents.

Banks of green upholstered seats yawn the length of St. Peter's and, flanking them, galleries hung in red damask.

Marble workers before the Basilica's 30-foot bronze doors are machine-polishing a new pavement in which the coat of arms of Pope John XXIII has been imbedded. At least half a million dollars has been spent to put the Basilica in readiness.

The religious goods shops along the broad Roman Avenue that stretches away from St. Peter's Square are stocked with newly struck commemorative medals bearing the image of Pope John and the words "Vatican II."

The last such worldwide meeting was in 1870, when the first Council ever held at the Vatican proclaimed the doctrine of Papal Infallibility—that a Pope is without error when speaking "Ex Cathedra," that is, as Pope, to the Whole Church, on a matter of faith or morals.

[fol. 1895]

PLAINTIFF'S EXHIBIT No. 3I

A149KX

CORRECTION

SAN FRANCISCO—Nixon-Brown A131 ninth graf "Nixon said x x x the loan" read it x x x had no part of and no interest in. (Rephrasing)

THE AP

VX903PCS

A150KX

WITH OXFORD (140)

DALLAS, TEX., Oct. 1 (AP)—A 22-year-old man transporting a small arsenal, was arrested yesterday en route to Mississippi to join former Maj. Gen. Edwin A. Walker, police said today. Officers said the man had been a worker in Walker's unsuccessful campaign to become Governor of Texas.

Dallas police charged the man, Ashland F. Burchwell of Dallas, with carrying prohibitive weapons. The FBI charged him with interstate transportation of a switch blade knife.

Burchwell was quoted by police as saying he served under Walker in Germany and helped compile the former general's "Pro-Blue" program for which Walker was reprimanded by the Army.

Police seized the following arms and ammunition: 1 37-magnum pistol, fully loaded; 1 303 Army-style rifle, fully loaded; 2,000 rounds of 30-06 ammunition; 3 22-caliber pistols; 1,000 rounds of 22-caliber ammunition; 14 rounds of 303 ammunition; 1 switchblade knife; blankets and changes of clothing.

VX906PCS

A151KX

INSERT

SAN FRANCISCO—Landsberg's Nixon-Brown A131 insert after 7th graf "the loan x x x statements."

The questioner was one of the delegates to the 62nd Annual Convention of the United Press International Editors and Publishers before whom the two candidates made their face to face appearance.

The questioner etc. 8th graf.

GC908PCS

A152KX

(140)

WIT

A152AX (COURT)

A152

EDITORS:

NEW YORK—Lord Home speech (A140) delivered. Delete "In a prepared speech" in 3rd graf.

THE AP, OCT. 1

FV1110PED

[fol. 1896]

PLAINTIFF'S EXHIBIT No. 3J

A132

URGENT

Springfield, Mo.—Second add precede Walker (A116, 122) x x x with Walker.

When officers took Walker into custory on the outskirts of Oxford, Walker told them, "I guess I'm in custody."

Walker, as a Major General x x x 7th graf under Oxford dateline.

FV10PED

A133WX

(130) INSERT

Washington—NL Meredith A50WX insert after 6th graf:

A White House spokesman etc. x x x x Justice Department.

About 4 P. M. (EDT) Salinger told newsmen they could expect nothing further from the White House today. He said if there were any announcements of new developments they would be made by the Pentagon or the Justice Department.

Asked if martial law would be declared in Oxford to prevent further violent disorders, Salinger replied that "the commander on the scene • • •

Salinger did not deny that the President had talked by telep violent disorders, Salinger replied that "The commander on the scene has the authority to do what needs doing to maintain law and order."

Salinger did not deny that the President had talked by telephone during the day with Gov. Ross Barnett of Mississippi.

"I cannot comment on that," he said.

Kennedy remained in etc., 8th graf (eliminating 7th graf; Salinger withheld x x x last night).

SR1004PED

A134WX

With Meredith (150)

Washington, Oct. 1 (AP)—Defense Department officials shrugged their shoulders and replied, "We haven't figured it out yet," when asked today about the cost of keeping some 6,000 troops and U. S. Marshals in Mississippi.

The force has been assembled to enforce court orders that Negro James H. Meredith be enrolled as a student at the University of Mississippi.

In the past, in similar cases, the department has been reluctant to estimate such costs. They point out that regular army troops would be on duty anyway and would be using up food and supplies somewhere else.

Official estimates say some 500 U. S. Marshals, about 2,600 regular troops and 2,900 National Guardsmen are assigned to the operation in Oxford, Miss.

The Justice Department said it had no figures yet but the cost for Marshals would be only overtime pay, plus transportation outlays subsistence allowances.

At the time of the desegregation operation in Little Rock, Ark., public schools the army figured its cost at $4.7 million, which included about $95,000 a day for pay and other costs of the Federalized National Guard.

SR1008PED

A135WX

Lemnitzer—Taylor (100)

Washington, Oct. 1 (AP)—The nation's new commander in Europe, Gen. Lyman L. Lemnitzer, was decorated by President Kennedy today for his services as Chairman of the Joint Chiefs of Staff. A few minutes later his successor on the Joint Chiefs, Gen. Maxwell D. Taylor, was sworn into office.

Both ceremonies were in the White House garden before an assemblage of distinguished military officers, former Chairman of the Joint Chiefs, and high government officials.

Atty. Gen. Robert F. Kennedy gave the oath to Taylor. The occasion coincided with the start of Lemnitzer's duty as Commander of U. S. Forces in Europe. He has been named to become Supreme Commander of the North Atlantic Treaty Organization • • •

[fol. 1897]

PLAINTIFF'S EXHIBIT No. 3K

A120NU

Third night lead Meredith wrapup

By the Associated Press

Oxford, Miss., Oct. 1 (AP)—Thousands of helmeted troops poured into this embattled college town tonight, hours after James H. Meredith, a Negro, smashed the University of Mississippi's segregation barrier.

Determined to prevent further rioting that took two lives last night, soldiers arrested 38 persons. Most of them were youths caught at roadblocks set up around the campus.

For the most part, quiet settled over Oxford as night fell. The darkness ended a day highlighted by the arrest of former Gen. Edwin A. Walker and marred by a down-

town demonstration which was quelled by rifle fire in the air and by tear gas.

Walker, who last night lead a charge of students against Federal Marshals on the Ole Miss campus, was arrested on four counts including insurrection against the United States.

He was flown to the Federal Medical Center at Springfield, Mo., when he failed to post $100,000 bond. The hospital has facilities for the systematic psychiatric care of prisoners.

Walker also was present during skirmishing at the courthouse square today in Oxford. The controversial Texan, who led the troops in the Little Rock school desegregation crisis in Little Rock in 1957 and said later he was on the wrong side then, was taken into custody at noon at a roadblock.

At the Capital in Jackson, Gov. Ross Barnett, who once vowed to go to jail rather than see Ole Miss integrated, blamed the disorder on the Marshals. He said they were "inexperienced, nervous and trigger happy."

In remarks prepared for a television statement tonight, Barnett said the Marshals fired tear gas point blank at State Highway Patrolmen who he said were successfully moving back a crowd of students. Someone tossed a pop bottle. The Marshals opened up, Barnett said, adding that five patrolmen were treated for effects of the gas.

"This was the direct cause of violence on the campus," he charged.

Earlier, Barnett, under an 11 A.M. (CST) Tuesday deadline to purge himself of contempt of court charges, called for an end to violence. Law and order must prevail, he said in a broadcast, "even though our state has been invaded by federal forces."

All day long, caravans of military vehicles roared into Oxford. They carried crack units of the 82nd and 101st Airborne Divisions. Fresh troops of the 1st Airborne Battle Group of the 328th Infantry landed at Columbus from Ft. Campbell, Ky., to augment the Mississippi contingent.

A121NU

Wearing battle fatiques and equipped with bayonets and gas masks, the soldiers sealed off the campus and courthouse square. Jeeps patrolled the streets.

Federal forces arrested 176 persons, about one-third students. Edwin Guthman, a Justice Department spokesman, said all but about 25 of those in custody were released. The government has the best evidence against them and charges were being prepared, he said.

Guthman said they were being kept in confinement, but declined to say where. Oxford has no jail.

Charges will deal with conspiracy to obstruct justice and to interfere by force with the performance of a court, Guthman said.

Some of those picked up lived as far as 500 miles away.

In Washington, Sen. James O. Eastland, D-Miss., directed the Senate Judiciary Committee to investigate the Ole Miss situation. Eastland, Committee Chairman, and other Mississippi members of Congress aid the Justice Department and the Marshals ignited the mob violence.

In addition to the two killed in the night-long campus rioting, 20 persons were hurt. The Justice Department reported no one had been killed or hurt from gunfire from the weapons of federal troops.

Meredith's x x x pick up in 2nd NL Meredith Roundup, at A79NU.

A8734PCS

EQ

A122KX'

BULLETIN MATTER

SPRINGFIELD, MO.—First add Walker (A116) which make precede Oxford x x x Springfield tonight.

[fol. 1898]

PLAINTIFF'S EXHIBIT No. 3L

A97T

A97NU
NU

URGENT

OXFORD, MISS.—First add 2nd hl Walker (A82NU) (which may carry the byline by Relman Morin) x x x in custody."

Walker, as a Major General, commanded federal troops sent into Little Rock, Ark., in 1957 to enforce court ordered public school desegregation. He resigned from the army after a controversy over a troop indoctrination program in Europe.

Charges against Walker were:

(1) Assaulting, resisting, or impeding U.S. Marshals.

(2) Conspiring to prevent discharge of duties.

(3) Inciting, assisting and engaging in insurrection against the authority of the U.S.

(4) Conspiring to oppose by force the execution of any law of the U.S.

Conviction on the fourth count alone could bring a maximum find of $20,000 and a prison sentence of 20 years.

Walker walked x x x pick up 5th graf with Meredith: Walker W61NU) (Eliminating 12th and 13th grafs: "In Washington x x x $5,000 Fine."

A98
INSERT

Washington—Cuba conference A86 insert after third graf "the declaration x x x last week."

In Havana, the Castro regime announced Cuba's President Osvaldo Dorticos plans to make a speech to the U.N. General Assembly in which he will accuse the United States of aggression against Cuba. He will fly to New York this week.

Just what the x x x 4th graf.

A99WX (TOP)

A99

Newspage playoffs (210)

San Francisco, Oct. 1 (AP)—The San Francisco Giants defeated the Los Angeles Dodgers today, 8-0, in the first game of their best-of-three playoff series to determine the winner of the National League Pennant. The two teams finished in a tie for first place at the end of the regular season yesterday.

The winner of the playoffs will meet the New York Yankees in the World Series starting Thursday at the park of the playoff winner.

Willie Mays of the Giants hit two home runs to extend his season total of 49, high for the Major Leagues. Billy Pierce, a 35-year-old left-hander, pitched for the Giants and held the Dodgers to three hits.

The Dodgers have been in a bad batting slump and now have gone 30 straight innings without scoring a run. They were shut out by the St. Louis Cardinals in their final two regular-season games.

Jim Davenport and Orlando Cepeda also hit home runs for the Giants. The Dodgers used six pitchers in an effort to stem the Giants' hitting barrage, but were unsuccessful. Dodger ace Sandy Koufax, who had been bothered with an injured finger for more than two months, started for the Dodgers and lasted less than two innings.

The playoffs now switch to Los Angeles for tomorrow's and, if necessary, Wednesday's game. Jack Sanford, who won 24 games and lost seven during the season, will pitch for the Giants. Stan Williams, whose record is 13 victories and 12 defeats, will pitch for the Dodgers.

FV817PED

[fol. 1899]

PLAINTIFF'S EXHIBIT No. 3M

Shed to a tree-lined campus normally wrapped in quiet and peace.

The rioting began soon after dusk. Students had milled about on the campus for several hours, but the effronteries they hurled at Federal Marshals arrayed shoulder to shoulder around the administration building had been more in fun and frustration than in maliciousness.

Even the Marshals, their tear gas ready, smiled at the students jests and jeers.

Confederate flags—romantic symbols of a lost cause of a century ago—were waved by laughing and cheering students, as if they were on parade.

But as time went by, the talk became louder and rougher.

Several students smashed a photographer's camera; others smashed the windows of a car. Still others turned on an army truck and sought to set it afire.

When this took place, the strong contingent of Marshals moved quickly into action. They put on their gas masks and began firing tear gas—indiscriminately, in the words of several persons who got the first strong whiff of it.

The ringleaders and their followers scattered.

Many soon regrouped, however, and followed former Maj. Gen. Edwin Walker in a charge against the Marshals ringing the administration building.

The students, and outsiders in their ranks, hurled bricks and pop bottles at the Marshals, who laid down a heavy tear gas barrage.

The charge faltered and familed. Walker then stood on the Confederate monument not far from the administration building and addressed his followers.

"If you can't win, go home," he declared. "Don't stay at the University. But let's not quit; we can win."

The tear gas fumes and smoke eddied about the campus. Students and outsiders and onlookers alike clasped hands or handkerchiefs to smarting eyes and nose. The smoke carried an eirie sheen against the dark night.

Shots rang out. There was the surge and flow of those uncertain which way to turn. Taunts were spat. Ugly words were used.

A detachment of the mob, peopled by both students and outsiders, used a bulldozer in an effort to smash through the line of Marshals. Tear gas beat back the sally, and the bulldozer was abandoned.

A fire truck that had followed the bulldozer was put out of action and Marshals dragged four persons from the vehicle and roughed them up. One of the men who had driven the bulldozer was arrested. So were others.

Irregular firing cut through the night.

Many of the Marshals and troops went inside the administration building.

Some members of the mob used home-made zip guns triggered by strong rubber bands. Screws, bolts, nuts and rocks were the ammunition for these weapons.

The firing of another kind kept up.

"They've got something that sounds like a high-powered rifle out there," one Marshal said. "And somebody's emptied a pistol—pow, pow, pow—as fast as he could pull the trigger.

He said the person with the pistol was firing at the Marshals. "I could hear the bullets bouncing off the building."

Neither the Marshals nor the troops returned the fire.

A group described as teen-agers raided the science building and made off with various chemicals.

"Molotov cocktails"—an inflammable liquid primed with a burning wick—were hurled. Three cars were burned.

L. L. Love, Dean of Students at the school, described the violence as far beyond anything officials at the University had expected.

Reinforcements continued to reach each side well after midnight. Bayonets gleaned.

Those in the mob yelled their taunts at Marshal and soldier alike.

O[illegible] yelled: "Why don't you go to Cuba?" Some one else screamed the word "Nazi." And another: "Come on out and fight like a man."

Above the babble and clamor and sharp through the sheeting of tear gas smoke a young student called out: "You're treating us like

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[fol. 1900]

PLAINTIFF'S EXHIBIT No. 3N

A169WX (JUSTICE DECN)

(800) Mississippi—Justice

Washington, Oct. 1 (AP)—The decision to move James H. Meredith onto the University of Mississippi campus last night was made after Gov. Ross Barnett telephoned the Justice Department a message of capitulation and assurances of police protection, a Department spokesman said today.

The spokesman also said that charges of insurrection—punishable by up to 20 years in prison and a $20,000 fine—were being considered against some of those arrested in the bloody rioting on the campus.

It was understood that former army Maj. Gen. Edwin Walker was among those who might be arrested.

Jack Rosenthal, Assistant Information Officer at the Justice Department, told reporters that Barnett telephoned Atty. Gen. Robert F. Kennedy three or four times yesterday morning and agreed:

1. That he would see that U.S. Marshals and Meredith would be admitted to the campus without opposition.

2. He would "guarantee to preserve law and order with state police or in cooperation with U.S. Marshals" against any violence which might erupt after the 29-year-old Negro arrived at the campus.

Rosenthal said that by mid-morning today about 35 persons had been arrested in connection with the violence and more were being taken into custody.

He said several thousand troops were in the area and "more are available."

"Things in the town are in control," he said.

Attorney General Kennedy was at the White House from 9:45 P.M. until early today. He spent the rest of the night at his Justice Department headquarters, receiving additional reports from Mississippi and planning the government's next move to endorce court orders that Meredith be enrolled.

The enrollment was accomplished today.

Still ahead is court disposition of the cases of Barnett and Lt. Gov. Paul Johnson, who were found in civil contempt of court for disobeying the orders that Meredith be enrolled.

A Justice Department chronology of events on the riot-torn campus yesterday was, in effect, an accusation that Barnett's public statements to Mississippi citizens were sharply at variance with those he made in private conversations with Kennedy.

The chronology, which Rosenthal said was pieced together from Department officials in Washington and at the riot scene, ran like this:

At 10:45 A.M. (EDT) Barnett, in his last morning telephone call to the Attorney General, agreed to send state police chief T. B. Birdsong to Oxford to confer with a Justice Department representative to work out specific arrangements before Meredith's entry to the campus.

A170WX

President Kennedy was advised of this plan.

Birdsong met late in the afternoon with Joseph Dolan, Assistant Deputy Attorney General.

Asked whether additional help would be needed from the Federal Government to control crowds at the University campus, Birdsong replied:

"No, we can take care of it ourselves."

Shortly after 6:30 P.M. (EDT) Birdsong and other state police escorted the first group of Marshals to the campus.

Meredith, arriving by plane at Oxford from Memphis, Tenn., was transported from the airport to the campus in a state police car along roads patrolled by Mississippi officers.

Shortly thereafter Barnett issue a statement that Meredith had been landed on the campus by helicopter.

"That's inaccurate and the Governor knew it was inaccurate when he

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[fol. 1901]

PLAINTIFF'S EXHIBIT No. 4-A

(HERE'S A NEW TOP ON THE RIOT STORY)

(OXFORD, MISSISSIPPI)—Rifle fire echoed in the streets of Oxford today as a Negro, James M. Meredith, ended 114 years of segregation at the University of Mississippi.

(In the midst of the shooting, troops arrested former Major General Edwin A. Walker—the man who led the troops in the 1957 Little Rock integration disturbance. Since then Walker has decided he was on the wrong side.

(Walker led students in futile charges against law lauchers in the hands of U-S Marshals during night-long rioting. Two persons were killed and 20 injured.

[fol. 1902]

PLAINTIFF'S EXHIBIT No. 4B

APR NU '17

BULLETIN

HERE'S A BULLETIN FROM THE ASSOCIATED PRESS:

(MORE TROOPS)

(OXFORD, MISSISSIPPI)—Units of the crack 82nd and 101st Airborne Division began landing at the Oxford

Airport today (Monday) to move onto the strife-torn University of Mississippi campus.

The paratroopers were in at least regimental strength. Giant air force transport planes were landing almost continuously at the airport on split second timing, under direction of an air force mobile control tower set up on the runway.

Troops from the 101st "Screaming Eagle" Division from Ft. Campbell, Ky., had their own transports. The 82nd Division from Ft. Bragg, were being loaded in 3rd Army trucks already at Oxford.

—0—

RK408PCS 10/1

Attorney General Kennedy had announced earlier HT Walker would be charged with inciting rebellion or insurrection. Conviction for that carries a penalty of 20 years imprisonment and a fine of $20,000.

SPORTS

MORE PLAYOFF RUNNING

The Dodgers failed to score again in the seventh inning as Pierce set them down in order. When the zero went up on the scoreboard, the Dodger streak of scoreless innings was extended to 28.

The only Giant activity in the seventh was a two out single by Hiller.

Units of the crack 82 and 101st Airborne Divisions have begun landing at the airport in Oxford, Mississippi. They are set to move onto the campus of the University of Mississippi.

(BARNETT CALLS FOR PEACE . . .)

Mississippi Governor Ross Barnett has called for an end to violence in the University case. He says law and order must prevail. And he urged people who traveled to the Oxford area from other states to please go home.

(MEREDITH IS ENROLLED . . .)

The important issue was settled quickly and quietly in the morning . . . Negro James Meredith was enrolled at the University of Mississippi, breaking more than 100 years of segregation at the school. He paid his $230 cash for tuition and asked about class routine. He was assigned to a campus apartment. And it was said U-S Marshals will live with him and escort him to class as long as he is in any danger.

An attorney for the National Association for the Advancement of Colored People says a second Negro is in process of applying for

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[fol. 1903]

PLAINTIFF'S EXHIBIT No. 4C

APRNU21

HERE IS THE NIGHT OWL FINAL NEWS OF LOUISIANA AND MISSISSIPPI:

(FIVE STAR FINAL FORECAST)

Louisiana, South Mississippi: Clear to Partly Cloudy and Cool Tuesday and Wednesday. High Tuesday 72-80.

Extreme Southwest Alabama: Partly Cloudy and Cool Tuesday and Wednesday. High Tuesday 76-80.

New Orleans and Vicinity: Partly Cloudy and Cool Tuesday and Wednesday. Low tonight 64-68. High Tuesday 76-79.

(Coastal)

Port Arthur, Texas, to Pensacola, Florida; Northerly winds 10-20 knots (11-23 mph) and Partly Cloudy weather Tuesday and Wednesday.

—0—

(BRANTON)

(Baton Rouge)—State Rep. Parey Branton of Webster Parish says the Kennedys and the National Democrats will attempt to use the University of Mississippi case to encourage registration of every eligible Negro.

Branton led a delegation to Mississippi yesterday (Sunday) to offer aid to Governor Ross Barnett in his battle against integration of Ole Miss.

Branton said today that with the "Fall of Mississippi, the last vestiges of hope for the individual states is gone. Socialist federalism as advocated by Kennedy and his supporters will now run rampant," he added.

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(WITH OXFORD)

(Memphis)—The Federal Aviation Agency today issued a special regulation to control air traffic at the overtaxed Oxford, Mississippi Airport.

It required all planes flying under 5,000 feet within a 10-mile radius of the airport to obtain special permission from the Traffic Control Center at Memphis Municipal Airport.

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(WITH OXFORD)

(Dallas, Texas)—Police of Dallas, Texas, say a 22-year-old man transporting a small arsenal, was arrested yesterday en route to Mississippi to join former Maj. Gen. Edwin Walker.

Officers said the man had been a worker in Walker's unsuccessful campaign to become Governor of Texas.

Dallas police charged the man, Ashland Burchwell of Dallas, with carrying prohibitive weapons. The FBI charged him with interstate transportation of a switch blade knife.

Burchwell was quoted by police as saying he served under Walker in Germany and helped compile the former General's "pro-blue" program for which Walker was reprimanded by the Army.

Police seized arms and ammunition, including one 37-mangum pistol, fully loaded; one 303 Army-style rifle, fully loaded; 2,000 rounds of 30-06 ammunition; three 22-caliber pistols; and 1,000 rounds of 22-caliber ammunition.

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(COURT)

(Jackson, Mississippi)—The Mississippi Supreme Court today (Monday) upheld the manslaughter conviction of Sharkey County Negro Henry Shields in the shooting of his sister-in-law.

Shields appealed his conviction and 20-year sentence in the June, 1961 death of Inez Gibson.

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(CLAYTON-GUARD)

(Washington)—The Defense Department today released Brig. Gen. Claude Clayton of the Mississippi National Guard from active duty in the integration crisis so he can go back to the federal bench.

Clayton is U.S. District Judge for Northern Mississippi. He was called up with the rest of the Mississippi guardsmen when President Kennedy federalized the state guard in the integration crisis at the University of Mississippi.

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(XGR)

(Atlanta)—A resolution offered in the Georgia Senate to commend Mississippi Gov. Ross Barnett for defiance of court-ordered

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[fol. 1904]

PLAINTIFF'S EXHIBIT No. 4D

Confederate flags—Romantic symbols of a lost cause of a century ago—were waved by laughing and cheering students, as if they were on parade.

But as time went by, the talk became louder and rougher.

Several students smashed a photographer's camera; others smashed the windows of a car. Still others turned on an Army truck and sought to set it afire.

When this took place, the strong contingent of marshals moved quickly into action. They put on their gas masks and began firing tear gas—indiscriminately, in the words of several persons who got the first strong whiff of it.

The ringleaders and their followers scattered.

Many soon regrouped, however, and followed former Maj. Gen. Edwin Walker in a charge against the marshals ringing the Administration Building.

The students, and outsiders in their ranks, hurled bricks and pop bottles at the marshals, who laid down a heavy tear gas barrage.

The charge faltered and familed. Walker then stood on the Confederate monument not far from the Administration Building and addressed his followers.

"If you can't win, go home," he declared. "Don't stay at the University. But let's not quit; we can win."

The tear gas fumes and smoke eddied about the campus. Students and outsiders and onlookers alike clasped hands or handkerchiefs to smarting eyes and nose. The smoke carried an eerie sheen against the dark night.

[fol. 1905]

PLAINTIFF'S EXHIBIT No. 4E

AP7

FIRST FIVE MINUTE SUMMARY

Here is the latest news from the Associated Press:

All indications are that the Federal Government is gaining the upper hand in its battle to enforce court orders for admission of a Negro, James Meredith, to the University of Mississippi.

President Kennedy notes that Meredith tonight is in residence on the University campus, although not enrolled

in the school. The President says this has been accomplished without the use of U-S troops. And he expresses hope troops will not have to be used.

Kennedy says federal court orders in the case are beginning to be called out. He stresses that laws of the U-S must be obyed and that includes court rulings.

The President's remarks came in a radio and T-V address to. the nation.

Governor Ross Barnett does not flatly state he's yielding in his dispute with the Federal Government. But he does say "we are now completely surrounded by Armed Forces and we are physically overpowered." He adds: "Surrounded on all sides by the Armed Forces and oppressive power of the U-S, my courage and my convictions do not waiver. My heart still says 'never,' but my calm judgment abhors the bloodshed that will flow."

The Mississippi Governor says the state will continue to fight the Meredith case and similar cases through the courts. And he says federal officials are destroying the U-S Constitution, trampling on Mississippi sovereignty and stripping the state of honor and respect.

Federal Marshals have put down two riots by students on the University of Mississippi campus. They used tear gas both times.

The second riot was led by former Major General Edwin Walker, who directed a charge of brick-throwing students against the marshals. Walker said his student force would regroup and charge again.

Meredith, under heavy guard of U-S Marshals, flew to Oxford and went by car to the University campus. School officials reported he was given an apartment on the campus but was not enrolled Sunday night because it was the Sabbath. U-S Marshals—some 288—were lined up around the University's Administration Building.

A number of U-S Senators of both parties express approval of President Kennedy's speech. And one southerner, Senator Allen Allender of Louisiana said the law must be obyed whether good or bad.

But a number of Mississippi congressman attack the speech. And Democratic Senator James Eastland of Mississippi said he disagrees entirely with the President's position.

Senate Democratic leader Mike Mansfield said, "Thank God that reason, understanding and law seem to have prevailed.

HERE IS A BULLETIN FROM NEW YORK

Some 75,000 longshoremen quit work at midnight in east and gulf coast ports from Maine to Texas. Formal announcement of the work stoppage was made by the President of the International Longshoremen's Association, Captain William Bradley.

The chief U-S delegate to the U-N, Adlai Stevenson, said the Mississippi integration case has no doubt impaired the image of the U-S overseas. On his T-V show (over ABC), Stevenson said the (Illegible)

[fol. 1906]

PLAINTIFF'S EXHIBIT NO. 4F

The federal action to register a Negro student James Meredith at the all-white University has touched off violence that even tear gas has been unable to control. Another newsmen—Bill Crider of the Associated Pres—has been wounded in the rioting. Crider says three or four other persons also have been shot. Crider reports seeing seven or eight teenagers shooting guns.

More than 1,700 troops are standing by in Memphis, Tennessee to move to the aid of the riot-battling Federal Marshals in Oxford. The Memphis Naval Air Station says they are ready to move to the University—70 miles to the south—if called for by the Justice Department.

Mississippi National Guard Headquarters said Sunday night the 108th Armored Calvary Regiment at Tupelo, Mississippi has been ordered to move immediately into

Oxford where students are rioting on the University of Mississippi campus.

One of those injured in shotgun blasts fired during the rioting is a U-S Marshal. He is described as in critical condition in the University infirmary.

He was shot in the throat.

The Infirmary is situated in the campus area under siege and infirmary attendants say they are unable to get an ambulance to take the wounded man to the hospital. Efforts to summon a doctor for the marshal also were futile.

One of the riots Sunday night in Oxford was a charge of brick-throwing students led by former Major-General Edwin Walker. Walker resigned from the Army after being reprimanded for trying to influence the votes of soldiers.

Meredith—protected by a large force of Federal Marshals—had earlier been moved onto the Mississippi campus where he has been assigned a room. Indications are that he probably will be enrolled at the University Monday.

The Oxford violence erupted almost at the very moment that President Kennedy was speaking to the nation and urging the Mississippi students to maintain order. The President's nine-minute, nationwide address stressed that Americans have the right to disagree with the law—but not to break it.

The rioting Sunday night followed shortly after Mississippi Governor Ross Barnett indirectly admitted defeat in his efforts to prevent integration at the University. The Governor said state forces are surrounded and overpowered.

Longshoremen along the east coast from Maine to Texas have gone on a work stoppage. The International Longshoremen's Association says picketing will start at once at piers in the New York-New Jersey area. Leaders of the 75,000-member union say the walkout is the result of a lockout involving the lack of a union contract.

American and Continental Can Companies have signed two-year strike-free contracts with the United Steelworkers of America. The contracts provide for improvements in benefits, but no wage increase.

A tropical storm 420 miles east of Puerto Rico may cause a delay in the six-orbit flight of astronaut Walter Schirra —scheduled now for Wednesday between 8 A.M. and 10 A.M. (EDT). The surprise storm is packing winds up to 54 miles-an-hour and may cross the impact area for Schirra's third orbit. A weather bureau advisory says the disturbance is expected to become a hurricane during the next few hours.

[fol. 1907]

PLAINTIFF'S EXHIBIT No. 4G

was heard frequently and, at one point, [four illegible words] and federalized National Guardsmen pinned down in the Administration Building.

(MEREDITH)

The shooting and throwing of bottles, bricks and stones began while President Kennedy was explaining to the nation over Radio and T-V why he took the action he did in Mississippi. Before this, Mississippi Governor Ross Barnett indirectly had conceded that the State could not cope with Federal forces to prevent enrollment of Negro James Meredith. It is indicated that Meredith will enroll today.

(TROOPS)

As the situation grew worse, Federal troops were ordered to the riot scene from a number of points. The shooting stopped abruptly around the Administration Building as 200 military policemen marched onto the campus. But later, the rioters threw rocks at the military police. The army order called for some 1,400 soldiers to move out of a staging area near Memphis and head for Oxford. Another 1,100 combat troops from Fort Benning, Georgia were ordered to by-pass Memphis and go directly to Oxford. About 500 were summoned from Fort Hood, Texas.

—DASH—

(One newsman was killed and another newsmen and several officers were wounded in the campus rioting. One

U-S Marshall was wounded critically as shooting broke out at several places on the campus. Killed was a reporter for the French Press Agency and London Daily Sketch, Paul Guihard. Associated Press newsman Bill Crider of Memphis was wounded by shotgun pellets, but not severely.

(In Washington, President Kennedy huddled with top aides through most of the early morning hours at the White House.

(In his nationwide speech last night, President Kennedy declared it to be his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the University. At the time, he said he hoped it would not be necessary to use troops even though conciliation and persuasion has failed. The President noted that students had been admitted—regardless of race—to universities in nine other southern states.

(Congressional reaction to Kennedy's address generally split along sectional lines. All but one of the Mississippi Congressional delegation attacked it sharply. Senators from the north and west praised Kennedy's remarks as being an expression of the public will. Somewhere in between was Louisiana Senator Allen Ellender. He said he did not like the decision of the court, but since it is the law he did not see how it could be bypassed.

(Grim-faced southern governors, who are meeting at Hollywood, Florida, reacted with a wide range of comment on the President's speech. Governor Ernest Hollings of South Carolina said the people of his State are 100 per cent in sympathy with the people of Mississippi. But Governor Terry Sanford of North Carolina called the President's speech an example of good will at its best. Virginia's Governor Albertis Harrison says the question ultimately will have to be resolved by the people of Mississippi.

(For a time, at least, the rioters were led by retired Major General Edwin Walker. The former General had said before that he did not advocate violence. Walker resigned from the army after being reprimanded for instructing his troops how to vote.

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(The 29-year-old Meredith had arrived at the Oxford Airport in a small border patrol plane and went to the campus in a car. He was assigned an apartment on the campus, but was told he could not enroll because it was Sunday. As word of Meredith's arrival spread, crowds suddenly appeared on the campus. Marshals standing shoulder-to-shoulder choked off entrance to the Administration Building.

(At first there was no outward sign of trouble, but it began to develop bit-by-bit and authorities soon had a full-scale riot on their hands.)

(DOCKERS)

[fol. 1908]

PLAINTIFF'S EXHIBIT No. 4H

One newsman and a bystander were killed, and a newsman and several lawmen were wounded, before the first of more than 3,000 Federal troops began pouring onto the campus. Even then, the violence continued. Finally, the army commander ordered his troops to take whatever action necessary to end the disorder. Almost methodically the M-P's moved out with fixed bayonets. And the mob backtracked and broke, some heading for dormitories—others into adjacent woods.

The leader of the student mob, in its initial stages at least, was former army Major General Edwin Walker

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[fol. 1909]

PLAINTIFF'S EXHIBIT No. 4I

[first line illegible] of the savage riots that killed two persons and injured at least 20 others.

—DASH—

(The violence that exploded even as President Kennedy was appealing for peace and observance of the law went on for nine hours. A French newsman and a local Oxford,

Mississippi, bystander were killed—the newsman by a bullet in the back. At least one Federal Marshal was critically wounded. Tear gas spread over the campus. Seven cars were burned. An estimated one thousand regular army troops now patrol the 640-acre campus.)

(ARRESTS)

Military Police arrested 93 persons in the rioting. They could get up to 20 years in prison and fines of $20,000.

(MEREDITH)

29-year-old Negro student James Meredith is slated for another attempt today to register for classes at the University. And this time, there seems no doubt that whatever Federal power is needed to get him enrolled will be used.

—DASH—

(It was Meredith's arrival last night on the campus that sparked the wild rioting. The Negro student spent the night in a student apartment on the campus.)

(Students at Ole Miss say this morning that the riots were caused mostly by outsiders. One such outsider was former Major General Edwin Walker, who was on hand to lead the charge against Federal Marshals at the University's Administration Building.

(The rioting started not long after Governor Barnett appealed for an avoidance of violence. He said: "We are surrounded." The violence exploded during President Kennedy's nationwide broadcast in which he said—"Americans are free to disagree with the law but not to disobey it." In calling out the troops, the President said—"My responsibility as President was inescapable. All other avenues and alternatives had been tried and exhausted.")

(STRIKE)

Here is a bulletin from Washington

President Kennedy has invoked the Taft-Hartley Law in an attempt to end the dock strike on the east and gulf

coasts. The White House says Kennedy will name a Board to report to him by Thursday on the walkout. This is the first step in machinery that could bring an 80-day cooling off period.

—DASH—

(The strike of some 75,000 members of the International Longshoremen's Union isn't expected to produce hardship for the general public right away.

(It might, however, affect dockside operations of passenger liners arriving in this country, including the unloading of baggage. The strike came at the expiration of the I-L-A's contract with 145 shipping firms. And I-L-A President William Bradley says—"No work until a favorable contract is signed.")

(News directors: Sub following for third intro item, strike):

President Kennedy has invoked the Taft-Hartley Law in the east and gulf coast dock strike and this could bring an 80-day cooling off period.

(CUBA)

New York Senator Jacob Javits has called on President Kennedy to make a broadcast report to the nation on the Cuban situation, and to ask for an emergency meeting of the Organization of American States. The New York Republican says the President should recognize the urgency of what Javits terms the Cuban crisis.

—DASH—

(Javits says that as he sees it, the heart of the Cuban problem

[fol. 1910]

PLAINTIFF'S EXHIBIT No. 4J

(LOUISIANA)

In Louisiana, there have been showers this morning (Monday), mainly in the south portion of the State, and there is considerable cloudiness over most of the State. Mild temperatures prevail, and indications are that temperatures will be below normal most of the week, but noon temperatures today climbed into the 80's. Lake Charles had 83 at noon, Alexandria 81; Lake Charles 83; Baton Rouge and Monroe 77; Shreveport 76, and New Orleans 71.

—O—

(SENATOR STENNIS)

(Washington)—U-S Senator John Stennis of Mississippi has called on the Justice Department to withdraw James H. Meredith from the University of Mississippi.

Stennis said the Negro should be withdrawn permanently to prevent further bloodshed and to make it possible for classes to continue.

—O—

(DEMOS)

(Baton Rouge)—Representative Parey Branton of Webster Parish says he feels use of Federal troops at Oxford, Mississippi, would set off a southwide revolt against the national Democratic party in 1964.

Branton, who supported the unsuccessful states' rights presidential slate in Louisiana last time, led a delegation of several Louisiana legislators who had called on Mississippi Governor Ross Barnett yesterday (Sunday).

—O—

(LIVESTOCK)

(Memphis)—Hogs: U. S. 1 and 2 190-240 lb Barrows and Gilts 17.85-18.10. Good and choice 60-140 lb Feeder Pigs 12.00-15.00.

Monday's Cattle Market: Good and low choice 980-1,070 lb Slaughter Steers 26.50-28.00. Utility and Standard Slaughter Heifers 600-800 lb 17.00-21.00; Good and choice 250-500 lb Steer calves 23.00-30.00.

—0—

(WATER PROJECTS)

(Washington)—The House Public Works Committee has approved an Omnibus Bill to authorize 167 flood control, navigation and beach erosion projects throughout the nation.

—0—

(HERE'S A NEW TOP ON THE RIOT STORY)

(Oxford, Mississippi)—Rifle fire echoed in the streets of Oxford today as a Negro, James H. Meredith, ended 114 years of segregation at the University of Mississippi.

(In the midst of the shooting, troops arrested former Major General Edwin A. Walker—the man who led the troops in the 1957 Little Rock integration disturbance. Since then Walker has decided he was on the wrong side.

(Walker led students in futile charges against gas launchers in the hands of U-S Marshals during night-long rioting. Two persons were killed and 20 injured.

—0—

EV (Little Rock, Arkansas)—U-S Senator J. William Fulbright in a news conference today termed events in Mississippi "very tragic and unfortunate."

Fulbright, Arkansas Democrat, said he felt that the most "original and serious mistake the U. S. Supreme Court" had made was "usurping the legislature."

The Senator, who has a Republican opponent in the November 6th general election, said, "I still feel that this (desegregation question) would have been worked out with less trouble and less violence if let to the legislature—that is, the Congress—to deal with," he added.

Fulbright said that several years before the 1954 decision of the U.S. Supreme Court, "Officials of Arkansas solved the question at the University of Arkansas without violence" by admitting a Negro.

TS140PCS 1

[fol. 1911]

PLAINTIFF'S EXHIBIT NO. 4K

AP173

WALKER (NEW TOP)

(Oxford, Mississippi)—Former Major General Edwin Walker has waived preliminary hearing in Oxford, Mississippi, on a charge of attempting to impede justice. Bon was set at $100,000, and Walker had not posted it by mid-afternoon.

Walker's arrest came about noon at a military roadblock on the outskirts of stife-torn Oxford.

At one time during the day he marched at the vanguard of file of soldiers as though he were their inspecting officer. He refused to move after an officer ordered him to do so, then finally did move when soldiers held their bayonets within inches of his body.

In addition to attempting to impede justice charges against him include conspiracy to incite a rebellion or insurrection and assaulting a federal officer. The former general led students in an assault on Federal Marshals on the University of Mississippi campus lat night and showed up today during rioting in the Town of Oxford.

Walker resigned from the Army last year after being reprimanded for attempting to influence votes of his troops in Germany. He commanded troops in the integration troubles in Little Rock, Arkansas, in 1957.

RE5PED 1

[fol. 1912]

PLAINTIFF'S EXHIBIT No. 4L

AP193

TH FIVE-MINUTE SUMMARY

(BRACKETED LINES OPTIONAL)

Here is the latest news from the Associated Press:

(First, the Mississippi Story . . .)

Federal troops—now being reinforced by crack paratroopers—have been rounding up trouble-makers to prevent another clash over the enrollment of a Negro in the University of Mississippi. Tempers turned to violence for the second time today, leading Governor Ross Barnett to plea for law and order. And there is word a second Negro—a girl—is preparing to apply for admission to the school.

Among those arrested was former Army Major General Edwin Walker—the commander of federal troops in Little Rock in 1957—who tried to command forces of the other side during a wild charge on U-S Marshals last night. Walker, wearing a ten-gallon hat, showed up again at the scene of disorders today. He waived a preliminary hearing on a charge of attempting to obstruct justice. If convicted, he could receive five years in prison and a $5,000 fine.

Units of the 82nd and 101st Airborne divisions have begun landing at the airport in Oxford, Mississippi, to move onto the campus. They will back up hundreds of troops and guardsmen already in the town. National guardsmen from Mississippi today fired shots into the air, hurled tear gas and advanced with fixed bayonets to break up an angry mob—many of them fellow Mississippians—on downtown streets. Some 150 persons were arrested.

The rioting flared only moments after the federal government achieved what it had sought to do all along—register Negro James Meredith in the University. Mere-

dith's presence on the campus touched off eleven hours of rioting earlier that left two persons dead.

(MORE)

LU657PED 1

~~AP195~~

MORE AP193 (14TH 5 MIN SMRY) X X X DEAD.

There is word in New Orleans that a Negro girl's application for admission to the University of Mississippi is being processed. The report comes from a lawyer for the National Association for the Advancement of Colored People, Jack Greenberg. He says the unidentified girl is having no trouble so far.

The N-A-A-C-P has sent a telegram to President Kennedy, applauding him for what it terms the "firm action" of the federal government in the Meredith case.

(KENNEDY STEPS INTO A LABOR DISPUTE . . .)

President Kennedy has invoked the Taft-Hartley law in an attempt to seek an early halt to a strike by 75,000 longshoremen at ports from Maine to Texas. An official of the AFL-CIO longshoremen's union says seven other maritime unions have agreed to respect picket lines and walk off all American ships docking in struck ports. The strike affects 145 shipping firms.

(AN UNCONGENIAL COUPLE: A SPACEMAN AND A STORM NAMED DAISY . . .)

Weathermen say tropical storm "Daisy"—considered the main threat of the space flight by Walter Schirra Junior—has weakened. If all goes well, the Astronaut will make his six-orbit flight on Wednesday. The storm has been regarded as a threat because it would affect the Atlantic

recovery area to be used if the flight is cut short at the end of three orbits.

(DAISY'S LOCATION . . .)

Reconnaissance airplanes have been keeping a watchful eye on

[fol. 1913]

PLAINTIFF'S EXHIBIT No. 4M

AP198

(400)

MISSISSIPPI (NEW TOP)

(Oxord, Mississippi)—The U-S Government flew crack army combat troops into Oxford, Mississippi, today—apparently to show it means business and will tolerate no further outbreaks of violence.

Units of the 82nd and 101st Airborne Divisions from Fort Campbell, Kentucky and Fort Bragg, North Carolina, being landed at the Oxford Airport to move onto the riot-torn University of Mississippi campus. The paratroopers began arriving in at least regimental strength aboard giant Air Force transport planes.

Reinforcement of the Government's position came as federal troops stood occupation duty in downtown Oxford and on the campus proper, after putting down a night-long battle precipitated by the quartering of Negro student James Meredith on the Ole Miss campus.

Former Army Major General Edwin Walker was among some 150 persons arrested as federal officers rounded up troublemakers in an effort to maintain the peace.

The federal force sealed off the main courthouse square in downtown Oxford. Army troops secured the University campus where a French news agency reporter and an Oxford man were shot to death last night.

Jeering, shouting students appeared again as Meredith emerged from his campus apartment this morning, but they were driven off by Federal Marshals.

Former General Walker was arrested for leading a charge of students against the Marshals last night.

He waived preliminary hearing before a U-S Commissioner on a charge of attempting to obstruct justice. Bond was set at $100,000 and the controversial Texan had not posted it by mid-afternoon.

[fol. 1914]

PLAINTIFF'S EXHIBIT No. 4N

AP204

BULLETIN'

Here is a Bulletin from the Associated Press:

(Oxford, Mississippi)—The Government is sending former Major General Edwin Walker from Oxford, Mississippi, to a U-S Medical Center in Missouri. Walker was arrested after leading a charge of students against U-S Marshals at the University of Mississippi.

G756PED 1

[fol. 1915]

PLAINTIFF'S EXHIBIT No. 4O

(WALKER)

The government decided late today to send former Major General Edwin Walker, who led a charge of students against Federal Marshals last night on the University campus, to a hospital instead of to jail. Walker failed to post $100,000 bail at his arraignment today. But instead of sending him to some Federal House of Detention, the Justice Department flew him off to the U-S Medical Center in Springfield, Missouri.

—DASH—

(Democratic Senator Wayne Morse of Oregon had said earlier in Congress that Walker appeared to be a sick man and added, if this is so, "he ought to be committed."

(Walker, as a Major General, commanded federal troops sent into Little Rock, Arkansas, in 1957 to enforce court-ordered public school integration. He resigned from the Army after being reprimanded for trying to give troops in Germany political indoctrination.

(Attorney General Robert Kennedy said earlier today that Walker would be charged with inciting to insurrection, a serious charge carrying penalties up to 20 years in prison and $20,000 fine. However, in Oxford, he had been arranged only on a charge of attempting to obstruct justice—a lesser charge—before the decision was made to send him to a hospital.

(He was arrested today at a roadblock outside strife-torn Oxford. Earlier, at one point, he had marched in front of troops as if he were their Inspector General and agreed to leave only [illegible words] a bayonet point.)

(ROUNDUP)

Some 200 have been arrested so far in the clash over integration of the University of Mississippi—described as the most serious federal-state conflict since the Civil War. He are some of the other developments in the many-sided situation:

Mississippi Governor Ross Barnett, in a broadcast this afternoon, called for an end to violence. He said law and order must prevail "even though our state has been invaded by federal forces."

In New Orleans, it's announced a second Negro—a girl this time—is applying for admission to the University of Mississippi. The word is from Jack Greenberg, Attorney for the National Association for the Advancement of Colored People.

Democratic Senator James Eastland of Mississippi said the Justice Department and U-S Marshals provoked the campus riot. Eastland, who heads the Senate Judiciary Committee, said the committee and the entire Mississippi Congressional Delegation have been invited to Oxford to investigate.

(BLAME)

Attorney General Robert Kennedy issued a statement clearly indicating that the outbreak of violence should be attributed to failure of Governor Barnett and other state officials to maintain promised police details. President Kennedy, as well as his brother, the Attorney General, are reported to feel that Barnett did not carry out a promise to provide police protection for Meredith.

—DASH—

(In the center of the storm, the 29-year-old Air Force Veteran, James Meredith, appeared outwardly calm. He paid his $230 cash for tution and asked about class routine. He was assigned to a two-room apartment with a kitchenette in a residence hall. Meredith's subjects will include history, political science and English.

(A Justice Department spokesman said marshals will live with Meredith and escort him to class "as long as he is in any danger."

(As Meredith left the registrar's office smiling, he said to reporters he is in the University for purely academic reasons. He said he would not participate in extra-curricular activities.

(Newsmen asked if he was happy that the long struggle had met with success. He replied, "No. This is not a happy occasion."

(Hundreds of jeering students followed him to his first class.)

[fol. 1916]

PLAINTIFF'S EXHIBIT No. 4P

H207

WITH WALKER

(Springfield, Missouri)—The hospital to which Major General Edwin Walker is being flown from Oxford, Mississippi—the U-S Medical Center at Springfield, Missouri—has facilities for complete psychiatric care of prisoners.

HB842PED 1

AP208

EASTLAND (NEW TOP)

(Washington)—Mississippi Democratic U-S Senator James Eastland has directed the Senate Judiciary Committee to make a complete investigation of all events at the University of Mississippi since U-S Marshals and army troops moved in. Eastland had said earlier that the committee—of which he is chairman—had been invited to make such an investigation.

HB844PED 1

[fol. 1917]

PLAINTIFF'S EXHIBIT No. 4Q

AP214

FIFTEENTH FIVE-MINUTE SUMMARY

(BRACKETED LINES OPTIONAL)

Here is the latest news from the Associated Press:

(FIRST, THE SITUATION AT OXFORD . . .)

Oxford, Mississippi, was quiet late today as several thousand more U-S troops moved into the city by truck and plane to maintain order.

This morning soldiers fired into the air and used tear gas to break the riots in the downtown area.

There were no disturbances at the University of Mississippi campus as Negro James Meredith registered and went to class at the formerly all-white school. He was guarded by Federal Marshals.

There have been these other developments in the wake of last night's bloody disorders in Oxford. . . .

In Washington—The Justice Department issued a statement saying violence broke out on the campus because Governor Ross Barnett and other Mississippi officials did not keep their promise to provide the police details needed to keep order.

In Jackson, Mississippi—Barnett took issue with the Justice Department. He blamed the violence on what he called "inexperienced, nervous and trigger-happy" Federal Marshals.

In Oxford—Former Major General Edwin Walker was arrested by U-S troops and removed to the Federal Medical Center in Springfield, Missouri. Charges against him included insurrection against the government for his part in leading an attack on Marshals last night. But instead of jailing him when he failed to post $100,000 bail, the Justice Department sent him to the Missouri Hospital, which has facilities for mental care.

In New Orleans—The National Association for the Advancement of Colored People said a Negro girl is in the process of applying for admission to the University of Mississippi.

In Washington—Mississippi Senator James Eastland said his Judiciary Committee will make a complete investigation of the events in Oxford.

(VOTES IN THE SENATE . . .)

An attempt was made in the Senate today to slash nearly 800 (M) million dollars from the Foreig d Bill, but it was defeated. The Senate also voted to permit President Kennedy to continue aid to Communist Yugoslavia and Poland if he wishes.

[fol. 1918]

PLAINTIFF'S EXHIBIT No. 4R

SPLIT

REST RED 940APED 1

AP220

WALKER (NEW TOP)

(Springfield, Missouri)—A plane carrying former Major General Edwin Walker has landed at Springfield, Missouri. Walker was taken at once to the U-S Medical Center for federal prisoners, which has facilities for psychiatric care. Walker was arrested in Oxford, Mississippi, earlier on charges including insurrection against the United States, for his part in rioting at the University of Mississippi.

The Medical Center is maintained by the Federal Bureau of Prisons to treat prisoners with either physical or mental ills. Federal judges often send accused persons to the center for psychiatric study to determine whether they are sane enough to stand trial.

JP942PED 1

[fol. 1919]

PLAINTIFF'S EXHIBIT No. 4S

AP235

SIXTEENTH FIVE-MINUTE SUMMARY

Here is the latest news from the Associated Press:

Thousands of battle-ready troops have been poured into Oxford, Mississippi, following the dramatic ending of more than a century of segregation at the state university. The concentration of troops is taken as a sign of Washington's determination to prevent any more of the rioting that took two lives last night on the university campus.

Quiet has settled over the University of Mississippi after a day which saw a Negro, 29-year-old James Meredith, attending classes, accompanied by Federal marshals. Jeering students followed Meredith, but there were no incidents.

In the town of Oxford, however, a demonstration against U-S troops was quelled by tear gas and rifles fired over the heads of the crowd.

Former Major General Edwin Walker, who last night led a charge of students against Federal marshals, was arrested today on four counts, including insurrection against the United States. He failed to post $100,000 bond and was flown to the Federal Medical Center at Springfield, Missouri. The center has facilities for psychiatric care, and judges often ask it to determine if prisoners are sane enough to stand trial.

Soldiers arrested 33 persons in Oxford tonight—most of them youths caught at campus roadblocks. This brought the total arrested since the rioting began to 214. Most of them have been released. Charges of conspiracy to obstruct justice and to interfere by force with performance of a court are being prepared against 25.

At the State capital in Jackson, Governor Ross Barnett blamed the disorders of the last 24 hours on the Marshals. He said they were—in his words—"inexperienced, nervous and trigger-happy." In remarks prepared for a broadcast statement tonight, he said Marshals fired tear gas point blank at Highway Patrolmen who were successfully moving back a crowd of students.

President Kennedy and his brother, Attorney General Robert Kennedy, are reported to feel that Governor Barnett let them down by not keeping a promise to provide police protection for Meredith. The Attorney General put out a statement blaming the violence on failure of Barnett and other Mississippi officials to maintain promised police details.

Democratic Senator James Eastland of Mississippi has directed the Senate Judiciary Committee to investigate the situation at the university. Eastland is Committee Chairman. He and other Mississippi members of Congress claim the Justice Department and Marshals were responsible for the mob violence.

The Senate has rejected attempts to cut President Kennedy's Four (B) Billion, 422 (M) Million Dollar Foreign Aid Money bill. It put

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[fol. 1920]

PLAINTIFF'S EXHIBIT No. 5A

Louisiana: Clear to partly cloudy today, tonight and Wednesday, highest today 78 to 84, cooler southeast portion tonight, lowest tonight 54 to 64.

South Half of Mississippi: A few showers mainly near the coast today, otherwise clear to partly cloudy through Wednesday, highest today 78 to 84, somewhat cooler tonight with lowest 54 to 64.

New Orleans and vicinity: Clear to partly cloudy today, tonight and Wednesday, cooler tonight, northerly winds 8 to 16 miles per hour, highest temperature today 80 to 84, lowest tonight 60 to 64. The temperature in downtown New Orleans at 4 A-M was 73 degrees, relative humidity 90 per cent and winds 2 miles per hour from the north.

—0—

(WITH OLE MISS-RIOTERS)

(Oxford, Mississippi)—A Federal Commissioner at Oxford, Mississippi has set bonds ranging up to $25,000 for 12 persons arrested in connection with Sunday night rioting at the University of Mississippi.

The Commissioner last (Monday) night ordered the 12 bound over to the Federal Grand Jury on charges ranging from resisting Marshals to insurrection. None of the 12 are Ole Miss students.

Commissioner O. D. Craig, in a special preliminary hearing in the Ole Miss Lyceum Building where Federal forces have set up headquarters, set the highest bond at $25,000 for Melvin Bruce of Decatur, Georgia. Officers said Bruce was arrested on the campus with a rifle in his possession.

—DASH—

(Bruce told Federal Marshals he went to the Ole Miss campus to "help Gen. Walker."

(Former Major General Edwin Walker was arraigned earlier before Craig, held under a $100,000 bond, and then whisked to a medical center for federal prisoners at Springfield, Missouri.

(Held on $5,000 bonds were Joseph E. Cutrer of Kentwood, Louisiana, Frank L. Ott, also of Kentwood; Philip L. Myles of Prichard, Alabama; Clyde May, also of Prichard; and R. H. Hinton of Lucedale, Mississippi.

(Craig set $2,500 bonds for William Gilbert Marr Junior of Memphis; Robert W. Blackard of Olive Branch, Mississippi; William David Marlow the 4th of Ruleville, Mississippi; Edward L. Shade Senior of Picayune, Mississippi; Johnny McCormick, of Grenada, Mississippi; and David Richards of Canton, Mississippi.

(They all face the same charges lodged against Walker: (1) assaulting, resisting, or impeding U-S Marshals. (2) conspiring to prevent discharge of duties; (3) inciting, assisting and engaging in insurrection against the authority of the United States; and (4), conspiring to oppose the execution by force of any law of the United States.)

—O—

(NIGHT CLUBS)

(New Orleans)—A special New Orleans City Committee says one of its first projects will be an investigation of vice in nightclubs.

The special Mayor's Committee met for the first time yesterday (Monday). Then it said it planned a probe of b-drinking, lewd dancing and other offenses in New Orleans nightclubs.

—O—

(WITH OLE MISS-LINDSEY)

(Memphis)—One of the troops on duty in Mississippi is a Medal of Honor winner from Waynesboro, Mississippi. He is Staff Sgt. Jake Lindsey.

He is one of the medal winners mentioned Sunday night by President Kennedy in his television speech.

Lindsey arrived at the Memphis Naval Air Station from Ft. Campbell, Kentucky, yesterday (Monday) and was sent to Oxford a short time later. He is with the 101st Airborne Dvision.

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[fol. 1921]

PLAINTIFF'S EXHIBIT No. 5B

Coolest spot in the state was Greenwood, which recorded a low of 55. Other minimum readings included: Jackson 58, Tupelo 60, McComb 63, Meridian 68, and Biloxi 69.

Biloxi had the highest reading during the past 24 hours with an 81. Jackson and Meridian were a shade behind at 80, McComb had a 79, Greenwood 78 and Tupelo 72.

—0—

Here's the University of Mississippi desegregation case in a capsule:

Armed federal troops are keeping vigil over an uneasy truce in Oxford, the college hamlet turned into a battleground as a Negro entered the University of Mississippi.

—0—

James H. Meredith, the grandson of a Negro slave, spent the first night as a University of Mississippi student under heavy security guard.

—0—

Mississippi Gov. Ross Barnett is near the deadline to purge himself of contempt of federal court citation.

—0—

Former Major General Edwin A. Walker, Commandant of troops during the Little Rock school integration fight,

has been committed to Missouri Prison Center for psychiatric examination.

—0—

Mississippi Senator James Eastland has called for a probe in the segregation fight at Ole Miss. Eastland blames the Kennedy administration for the bloody dispute.

—0—

(New York)—An attorney for the Reverend Martin Luther King is calling for a nationwide economic boycott of the State of Mississippi.

William M. Kunstler—an associate law professor at New York University and Special Legal Counsel for King—said that—in addition—Mississippi should be subject to—as he put it—social ostracism and outspoken criticism for its handling of the James H. Meredith case.

—0—

(WITH MEREDITH)

(New Orleans)—An attorney for the National Association for the Advancement of Colored People says the application of a Negro girl for admission to the University of Mississippi is apparently being processed.

Jack Greenberg, Chief Counsel for the NAACP, would not identify the girl when he made the announcement yesterday.

Greenberg said—in these words—"She is getting communications from the book store and the dress shop and they know she is a Negro."

—0—

(HOUSTON-MISS)

(Oxford, Mississippi)—The University of Houston—not the helmeted soldiers who keep a cautious vigil over the campus—was the big question on Mississippi football coach John Vaught's mind today.

Vaught's charges, ranked seventh in this week's Associated Press poll, meet Houston at the University field Saturday.

Or at least the rebels are scheduled to play Houston. There's been some concern the game may be cancelled because of the riots surrounding the admittance of a Negro to Ole Miss.

Vaught, however, said his team was working hard in practice sessions for the Houston game and the one-time Texas Christian All America lineman added—in these words:

"There is nothing I have discovered to change our plans about playing Houston here Saturday."

—0—

UT/TS740ACS 2

[fol. 1922]

PLAINTIFF'S EXHIBIT No. 5C

APRNU5

More special Sunday service of the Associated Press for Louisiana and Mississippi:

5 (REACTION)

(Jackson, Mississippi)—Some Mississippi lawmakers are disappointed and concerned about President Kennedy's action federalizing Mississippi National Guard units.

Senator Slavous Lambert of Belmont said he doubted such troops would be used to force the entrance of Negro James H. Meredith into the University of Mississippi.

Senator Frank Barber of Hattiesburg said "I am much disturbed, disappointed and disheartened."

Senator Billy Mitts of Enterprise—who retired as a National Guard officer September 1452—said the federalization of Mississippi National Guard units for possible use in their own state puts these men in a "very, very difficult position."

Senator Campbell of Jackson said "While the Kennedy administration is pitting brother against brother in a sovereign state and acting as an errand boy for the NAACP,

the administration has done nothing toward enforcing the requirement that all Communists must register."

—O—

(VOLUNTEERS)

(Jackson, Mississippi)—Besieged with offers of volunteers to help his fight to retain segregation at the University of Mississippi, Governor Ross Barnett has apparently decided against inviting any large number of out-of-staters.

But former Major General Edwin A. Walker, in Mississippi to lead "A national protest to the conspiracy within," says "tens of thousands from Florida to California will come to support Governor Barnett."

Segregationist groups throughout the South have offered volunteers to Barnett. Barnett aides were reported turning down such offers.

Louisiana segregation leader Willie Rainach, who offered 10,000 Louisianans to Barnett, said yesterday (Saturday) that the Governor and other state officials opposed inviting them.

—DASH—

(Speaking to several thousand persons in a rally at Shreveport, Louisiana, Rainach said Mississippi authorities did not want "large groups of undisciplined people at Oxford interfering with their preconceived plan to deal with James Meredith and the federal authorities."

(Rainach, who conferred earlier in the day with Barnett at Jackson, said he offered the volunteers but Barnett "didn't say for them to come."

(Rainach added: "Then again he didn't say for them not to come."

Gen. Walker, who said he was in Jackson "to stand with Governor Barnett shoulder to shoulder," admitted he had "not talked with Gov. Barnett personally."

(Walker's call for volunteers was denounced in Dallas, Texas by the National Association for the Advancement of Colored People.

(Clarence Laws, NAACP Southwest regional secretary, said it was "Irresponsible and dangerous and could lead to dreadful consequences."

(Offers of volunteers to back Barnett have come from citizens councils, the National States Rights Party, units of the Ku Klux Klan and individuals sheriffs and other citizens.

(Fred Hockett of Miami, Executive Secretary of the Florida White Citizens Council, said he had pledged from 1,500 men to move with arms into Mississippi.

(In St. Petersburg, Florida, the national organizer of the National States Rights Party offered Barnett "Any help he needs, whether it is armed or unarmed."

(The Rev. Oren F. Potito, a minister of the Church of Jesus Christ, Christian, said all Barnett has to do is ask and party leaders in 30 states will be contacted.

In Selma, Ala., Sheriff James Clark of Dallas County said he and Sheriff Hugh Champion of neighboring Chilton County were ready to go to Mississippi with posses of up to 500 men to aid in "preserving the public order and in traffic control."

(Clark said the men were prepared to move by car on a few hours notice.

(A group of more than 50 Montgomery, Alabama men planned to leave

[fol. 1923] RADIO-TV BUSINESS

PLAINTIFF'S EXHIBIT No. 5D

APRNU6

Cotton futures opened 15 cents a bale higher to 35 cents lower.

	Prev Close	Open
Oct	33.05N	33.08N
Dec	33. B	33.65B
Mar	34.18B	34.18B
May	34.32B	34.29B
Jul	33.13B	33.10B
Oct	30.94B	30.87B
Dec	31.00B	30.97B
Mar	31.19B	31.22B

N-Nominal; B-Bid.

UM

—0—

(WITH MEREDITH-WALKER)

(New Orleans)—The U-S Attorney's Office in New Orleans says conviction on all the counts against former Major General Edwin A. Walker could result in a total of 37 years imprisonment and more than 35-thousand dollars in fines. Walker led one of the charges of students against Federal Marshals during rioting at the University of Mississippi Sunday night.

—0—

GA JA FW

[fol. 1924]

PLAINTIFF'S EXHIBIT No. 5E

A146KX

MEREDITH (190)

Austin, Tex., Oct. 2 (AP)—About 150 University of Texas students paused en route to classes today for three-minutes of silence because of Mississippi integration troubles.

Student Association President Marion Sanford Jr. called for the action to "demonstrate our sadness that this should have to come to pass and to further show our support of the authority of the Constitution."

The University has 20,000 students.

The student assembly sent telegrams yesterday to James Meredith and to the student assembly at Ole Miss favoring integration.

The University of Texas student newspaper, the Daily Texan, said today in a news story that "student opinion is sharply divided on the question of whether the student assembly was right "in sending the telegrams.

A daily Texan editorial today said Mississippi State officials "Must take the blame for the legal resistance to federal court orders. The students—aided and abetted by former Maj. Gen. Edwin A. Walker—are responsible for most of the violence. But the entire state—with its anachronistic values and traditions—must share the blame for the mental and sociological degeneracy which has characterized the Mississippi reaction."

VX/GC747PCS

[fol. 1925]

PLAINTIFF'S EXHIBIT No. 5F

Former Major General Edwin Walker—in custody of U-S authorities—has been taken to the U-S Medical Center for federal prisoners in Springfield, Missouri. Accused persons are often sent there for psychiatric examination to determine if they're sane enough to stand trial.

Walker was arrested for his part in riots in Oxford, Mississippi, Sunday night. There are several charges against him, including insurrection against the U-S.

He was unable to raise the $100,000 bond, but the warden at Springfield says Walker told him it will be raised.

EXHIBIT NO. 5g:

Former Major General Edwin Walker has been flown from Oxford to the federal medical center in Springfield, Missouri. The controversial Texan led a charge of students against marshals at the University Sunday night. Accused persons are often sent to the center for psychiatric study to determine whether they are sane enough to stand trial.

EXHIBIT NO. 5h:

Former Major General Edwin Walker—charged with insurrection against the United States for his part in the Oxford rioting—was taken Monday night to the U-S Medical Center for federal prisoners in Springfield, Missouri. The center is maintained to treat prisoners either with physical or mental ills. Walker says he expects friends to raise the $100,000 bond set for his release from U-S custody.

EXHIBIT NO. 5i:

Former Major General Edwin Walker was arraigned earlier before Craig, held under a $100,000 bond, and then whisked to a medical center for federal prisoners at Springfield, Missouri, late in the day.

EXHIBIT NO. 5j:

(In the meantime, a war hero—former Major General Edwin Walker has been held under $100,000, charged with insurrection against the United States. The 53-year-old Texan led one student charge Sunday night against Federal Marshals at the University and, later, appeared in the midst of rioting in downtown Oxford. He was confined last night in the U-S Medical Center for federal prisoners at Springfield, Missouri—a center maintained for the treatment of prisoners with either physical or mental ills.

[fol. 1926]

PLAINTIFF'S EXHIBIT No. 6-A

AiiAX (AMS IN) (250)

Oxford, Miss., Oct. 2 (AP)—U.S. Commissioner Omar D. Craig ordered 12 persons arrested in rioting at the University of Mississippi bound over to the federal grand jury late last night.

Charges ranged from resisting marshals to insurrection.

Craig, in a special preliminary hearing in the Ole Miss Lyceum Building, where federal forces have set up headquarters, set a $25,000 bond for Melvin Bruce of Decatur, Ga., who federal officers said was arrested on the campus with a rifle in his possession.

Bruce, not a student, told the marshals he came to the campus from Georgia to "help Gen. Walker."

Former Maj. Gen. Edwin Walker was arraigned earlier before Craig, held under a $100,000 bond, and then whisked to a medical center for federal prisoners at Springfield, Mo., late in the day.

[fol. 1927]

PLAINTIFF'S EXHIBIT No. 6B

A17WX

(470) PMS BUDGET

PERSONALITY IN THE NEWS; WALKER

BY HARRY KELLY

Washington, Oct. 2 (AP)—Five years ago Maj. Gen. Edwin A. Walker, a tough spit and polish soldier, told students at Little Rock, Ark., that the Supreme Court's school integration decision was "binding on all citizens."

"If it were otherwise," he said, "we would not be a strong nation but a mere unruly mob."

At the time Walker commanded troops enforcing desegregation of Little Rock schools.

Sunday night, the tall ex-General who led troops in combat in Europe and Korea led a mob of students in a charge on U. S. Marshals trying to enforce desegregation of the University of Mississippi.

A sergeant who served under Walker in Germany once said of him: "He could develop more esprit d' corps in one month than other officers I've served under could in a career."

He used this talent during the violence of Sunday, leaping upon a Confederate Memorial and shouting to the milling students:

"If you can't win, go home. Don't stay at the University. But let's not quit; we can win."

But tear gas broke the charge. The skirmish was lost.

And today the 53-year-old Texan was in a U. S. Medical Center at Springfield, Mo., where federal prisoners are treated and examined for physical or mental ills.

He is charged with conspiracy to incite rebellion or insurrection.

What brought the change from the man at Little Rock to the one at Oxford, Miss.? Says Walker: "I was on the wrong side . . . this time I am on the right side."

[fol. 1928]

PLAINTIFF'S EXHIBIT No. 6C

A24NU

PMS BJT (900)

MEREDITH ROUNDUP

Oxford, Miss., Oct. 2 (AP)—A swelling tide of federal troops, bayonets fixed and rifles ready, enforced a grim, uneasy truce today at the University of Mississippi.

Under tightest security guard, James H. Meredith spent his first night on the campus as a forcibly enrolled student. Floodlights played on Baxter Hall where the 29-year-old Negro had a two-room apartment with a kitchenette.

In New Orleans, Mississippi Gov. Ross Barnett had a date in federal court (at 11 A.M., CST) on a contempt citation, harvested from his vain effort to thwart Meredith's entrance as the 114-year-old University's first knowingly admitted Negro student.

"I call on the President to put a stop to further violence by immediate removal of Meredith and the withdrawal of federal troops and marshals from Mississippi soil," the 64-year-old Governor said in a speech telecast across the nation last night.

Barnett blamed federal intervention for the weekend segregation riots and the deaths of a French newsman and an Oxford repairman.

Washington's rebuttal was a mounting building of nearly 12,000 soldiers including the crack 101st Airborne, the paratroop outfit that quelled the 1957 school integration violence at Little Rock.

Troops streamed into Oxford, outnumbering the college hamlet's citizenry 2-1 in the most naked display of federal might since the end of the Civil War nearly a century ago. The armed troops arrested more than 200 persons since Sunday night. About one-third of them students. Most of them went free, but more than a dozen stayed in custody to face various charges, including former Maj. Gen. Edwin Walker.

The military's mission was to protect the slightly-built, 29-year-old Meredith's court-ordered status as a student at the University, and to forestall further rioting on campus or in Oxford.

[fol. 1929]

PLAINTIFF'S EXHIBIT No. 6D

Jeeps rattled through inky blackness on inspection of armed footsoldiers who dug foxholes beneath a softly falling rain. The campus was sealed off, to anyone the federal government wished barred. So was the town square of Oxford, where short-lived skirmishes occurred yesterday between civilians and helmeted troops.

A25NU

There was no indication whether Barnett would meet an 11 A.M. (CST) deadline set by the 5th U.S. Circuit Court of Appeals in New Orleans. He was given until that hour to purge himself of contempt, incurred last week when he personally blocked initial federal efforts to register Meredith at the University of Mississippi.

Barnett faces a $10,000 a day fine and imprisonment if the contempt sentence was carried through. Mississippi Lt. Gov. Paul M. Johnson faces a $5,000 a day fine for his defiance.

The highlight of yesterday's kaleidoscopic segregation drama was the arrest of Walker, the spit-and-polish former army general who led the 101st Airborne at Central High School during the Little Rock segregation crisis.

Walker, 53, resigned from the army after a dispute over his indoctrination program for overseas American troops. He came here from his home in Dallas, Tex., after urging the massing of tens of thousands of volunteers to resist Meredith's registration.

On Sunday, Walker rallied rioting students on the Mississippi campus. He was arrested yesterday after he shouted encouragement to rioters who hurled bottles and bricks at federal troops in Oxford's Central Square.

Walker failed to make $100,000 bond on charges that included engaging in insurrection against the American flag he once served. Maximum penalty upon conviction would be 20 years in prison and a $20,000 fine.

[fol. 1930]

PLAINTIFF'S EXHIBIT NO. 6E

A31NU

MEREDITH AT A GLANCE

BY THE ASSOCIATED PRESS

Armed federal troops keep vigil over uneasy truce in Oxford. The college hamlet turned into a battleground as a Negro enters the University of Mississippi.

—0—

James H. Meredith, grandson of a Negro slave, spends first night as a University of Mississippi student under heavy security guard.

—O—

Mississippi Gov. Ross Barnett nears deadline to purge himself of contempt of federal court citation.

—O—

Former Maj. Gen. Edwin A. Walker, commandant of troops during the Little Rock School integration fight, committed to Missouri Prison Center for Psychiatric Examination.

—O—

Mississippi Sen. James Eastland calls for probe in segregation fight at Ole Miss and blames the Kennedy administration for the bloody dispute.

UM237ACS

[fol. 1931]

PLAINTIFF'S EXHIBIT No. 6F

A38NU

MTBL IN

A38NU

In their tightening grip of the oak-encircled Oxford campus, troops during Monday night arrested two dozen persons for carrying weapons, including a man and his 14-year-old son. Also seized was a shotgun toting woman, first of her sex to be arrested in the great Mississippi integration crisis.

Since rioting broke out Sunday evening, to be continued spasmodically on Monday, more than 200 arrests have been made, including that of Maj. Gen. Edwin A. Walker, who commanded the troops at the 1957 integration crisis in Little Rock, Ark.

A dozen of those arrested were awaiting Grand Jury action. Many others were freed.

Walker, 53-year-old retired officer, led one student charge against Federal Marshals during Sunday's disorders, and was arrested at bayonet point yesterday during downtown rioting. He had come to Oxford from his Texas home as an avowed opponent of integration.

Walker failed to post $100,000 bond and was taken to a Springfield, Mo., federal prison which specializes in psychiatric diagnosis and care. However, in Washington, Atty. Gen. Robert F. Kennedy said Walker was confined in a prison section and not in the hospital.

Charges against Walker include insurrection against the United States. Maximum penalty on this and three accompanying counts would total 37 years in prison and fines of $35,300 upon conviction.

The Justice Department was engaged in an intensive investigation to find the slayer of two men, shot down during Sunday's violent clash on the Ole Miss campus.

"We will probably get the fellow or fellows who pulled the trigger," said Guthman, who is Press Secretary to Atty. Gen. Kennedy.

Slain were a French newsman, Paul Guihard, 30, sent to Oxford from New York to cover the integration crisis for French and British news media, and Walter Ray Gunter, 23, an Oxford juke box operator. Guihard was shot in the back, Gunter in the head.

AS109PCS

[fol. 1932]

PLAINTIFF'S EXHIBIT No. 6G

AP1NU

AMS BJT (600)

ARRESTS

By Tom Pendergast

Oxford, Miss., Oct. 2 (AP)—Armed with bayonets and loaded rifles, U.S. troops today guarded a stockade holding 75 men arrested by federal agents.

Nine of the men held in the stockade put up at the airport faced serious sedition charges arising out of riots at the University of Mississippi. Three others booked on sedition charges were released on bond.

One of the 12, identified as Melvin Bruce, 36, (2937 Westbury Drive) Decatur, Ga., was held in lieu of $25,000 bond.

Justice Department spokesman Edwin Guthman said Bruce, who had a rifle in

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DDWMN, was taken into a few minutes after

DGAD BEEO

Justice Department spokesman Edwin Guthman said Bruce, who had a rifle in his possession, was taken into custody a few minutes after "our people had been fired on by rifles."

Guthman would not say whether Bruce had any connection with any of the deaths or injuries resulting from the riots.

The other 8 men formally charged were held in lieu of $2500 bond.

Guthman said four serious charges were filed against the 12. He said the charges were:

Interfering by force with U.S. Marshals, carrying a maximum sentence of $5,000 fine and three years in jail. 35

3) 3, '0

[fol. 1933]

PLAINTIFF'S EXHIBIT No. 6H

A43

SUB

Oxford, Miss.—Meredith roundup BJT (A24NU) sub following for 6th through 8th grafs, "Washington's rebuttal X X X Edwin Walker."

Washington authorities countered that Barnett's failure to provide adequate police protection caused the strife.

There was a mounting buildup of nearly 12,000 soldiers including the crack 101st Airborne, the paratroop outfit that quelled the 1957 school integration violence at Little Rock.

Troops streamed into Oxford, outnumbering the college town's citizenry 2-1 in the strongest display of federal might in this state since the end of the Civil War nearly a century ago.

Armed troops arrested more than 200 persons, about one-third of them students. Most went free, but more than a dozen stayed in custody to face various charges, including former Maj. Gen. Edwin Walker.

The military's, 9th Graf.

ZR514AED

A44

CORRECTION

Oxford, Miss—Meredith roundup BJT (A24-26) in 3rd Graf A26NU, starting "the Students' reference" make it X X X his back. Ray Gunter, 23, an Oxford X X X (fixing name).

THE AP

ZR515AED

[fol. 1934]

PLAINTIFF'S EXHIBIT No. 6I

A54MU (OPTIONAL)
OPTIONAL LEAD
WITH MEREDITH: WALKER (A21MU)

Oxford, Miss., Oct. 2 (AP)—Former Maj. Gen. Edwin A. Walker, who barked commands to federal troops during one school integration crisis, awaited possible psychiatric examination today from his cell a prison at Springfield, Mo.

U.S. Atty. Gen. Robert Kennedy announced the arrest of the one-time Army Field Commander yesterday. Deputy

Atty. Gen. Nicholas Katzenback, the top-ranking Justice Department officer in Oxford, ordered Walker's arrest for taking part in the integration disputes at the University of Mississippi.

The 53-year-old Texan led one student charge against Federal Marshals on the Mississippi campus, and later appeared in the midst of rioting in downtown Oxford.

Shortly after X X X 5th GRAF A21MU.

UN346ACS MM ASKT

[fol. 1935]

PLAINTIFF'S EXHIBIT No. 7-A

LQBThere are unconfirmed reports that Walker has arranged to post the $100,000 bond set by a U-S Commissioner in Mississippi in his case.

(A number of Mississippi newspapers have blamed outsiders in large part for the violence on the University campus. As one—the Hattiesburg American—put it: "If there had been no one on the Ole Miss campus but students, the highway patrolmen and Federal Marshals, it is extremely unlikely that serious trouble would have developed."

[fol. 1936]

PLAINTIFF'S EXHIBIT No. 7B

A204NU

URGENT

Oxford, Miss.—1st add riot separate A202NU XX with rocks. Guihard was identified by authorities at the Oxford Hospital. The rioting started shortly after sundown when about 2,500—jeering and jok

The rioting started shortly after sundwon when about 2,500 students—jeering and joking—gathered at the Administration Building where the marshals held their tight guard.

In the early stages, much of the shouting at the marshals sounded more like jest than maliciousness.

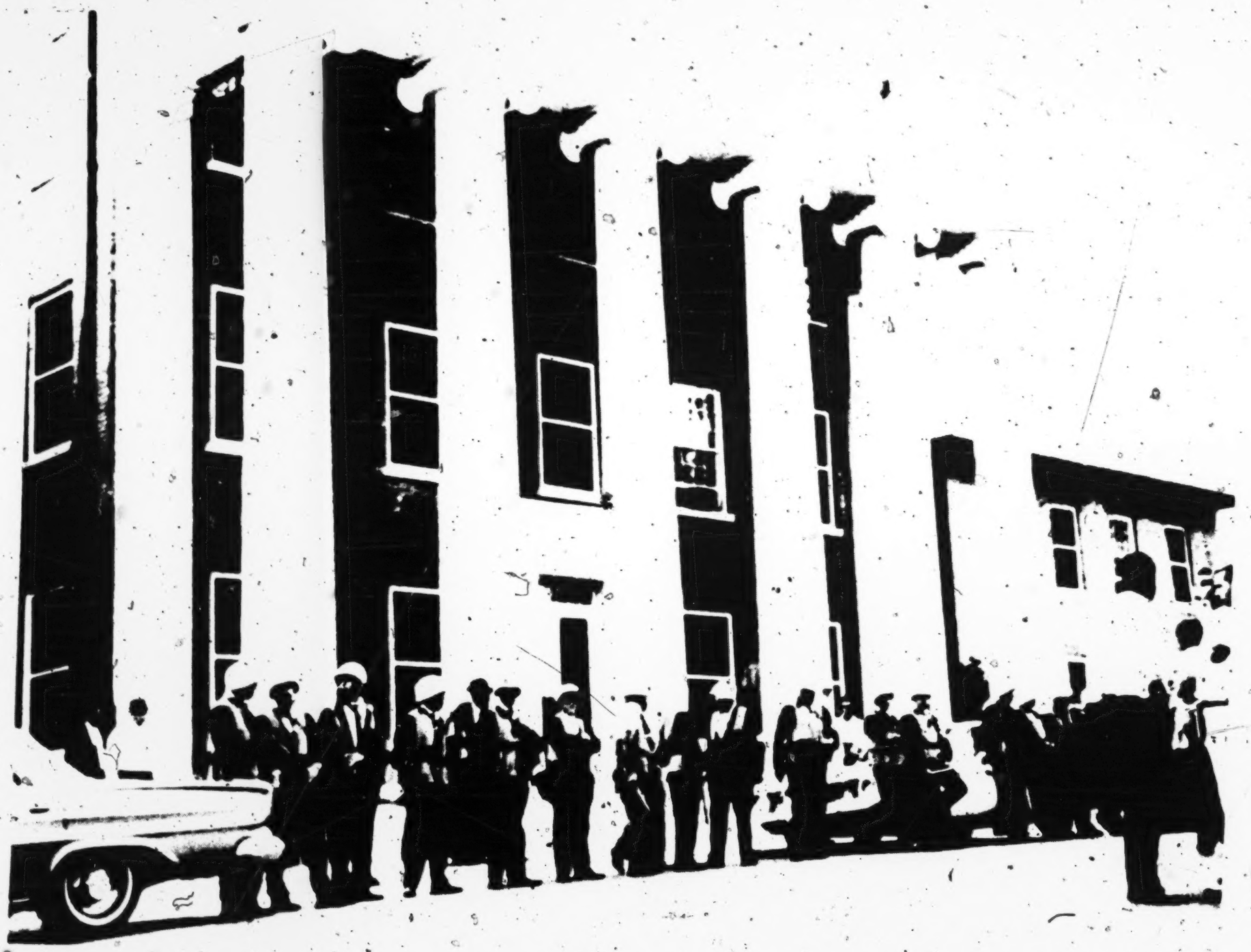
From time to time, even the grim-faced marshals would break into a slight grin.

But as the evening wore on the talk got rougher and the students started rampaging. They tore away a photographers' camera and smashed it. They smashed the windows in a car, sending a man and woman fleeing.

Then they moved against one of the Army trucks standing by with the marshals. They got the cap off the auxiliary gasoline tank and threw a flaming piece of newspaper at the fumes, trying to set fire to the truck.

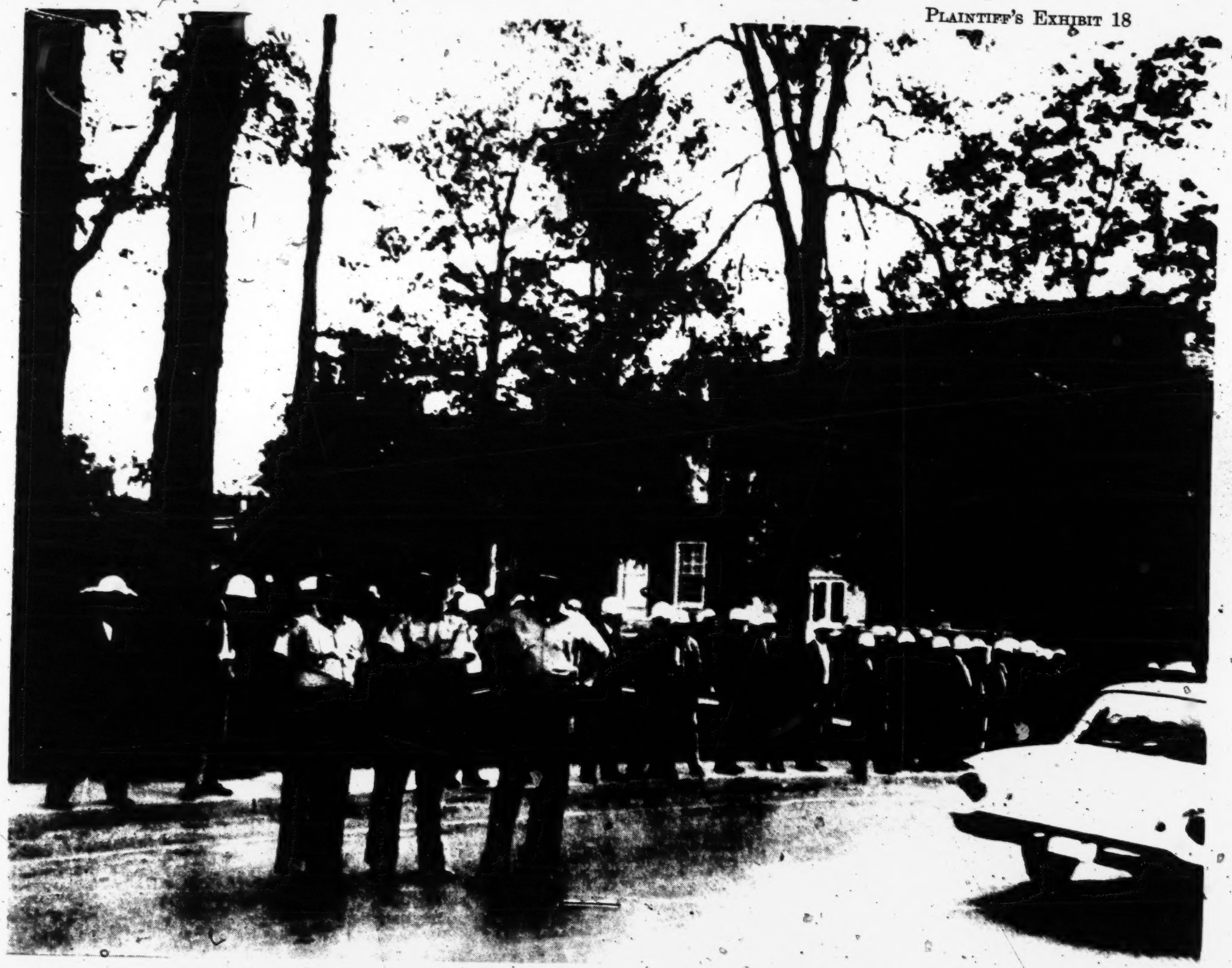
(MORE)

RT 1055PCS NM



[fol. 1938]

PLAINTIFF'S EXHIBIT 18



PLAINTIFF'S EXHIBIT 20

fol. 1940]

DEFENDANT'S EXHIBIT 14

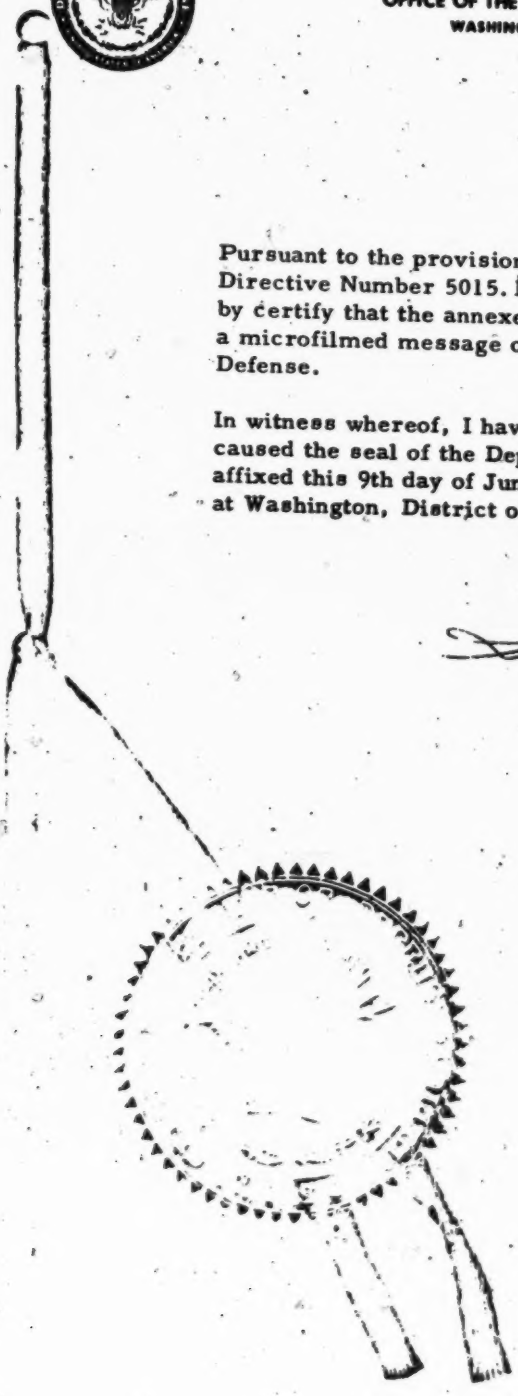
(See opposite) ☞

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

Pursuant to the provisions of Department of Defense Directive Number 5015.1 dated July 31, 1952, I hereby certify that the annexed document is a true copy of a microfilmed message on file in the Department of Defense.

In witness whereof, I have hereunto set my hand and caused the seal of the Department of Defense to be affixed this 9th day of June in the year of 1964, A.D. at Washington, District of Columbia.

Shirley E. Meyer
Executive Assistant
Office of Administrative Services



SCAGE

DEPARTMENT OF THE ARMY
STAFF COMMUNICATIONS DIVISION

ROUTINE

FROM: PIO US ARMY MILITARY DISTRICT LITTLE ROCK ARK

TO: CINFO DEPTAR WASH DC

NR: 251500Z SEP 57

Speech by Major General Edwin A Walker to students of Little Rock Central High School 0900 hrs 25 Sep 57.

Young ladies and gentlemen of Central High School. Mr Blossom, your superintendent of schools, has asked me to come to your school this morning and discuss with you the situation in Little Rock and what it means to you students. I welcome this opportunity to do so.

As you know, the Fourteenth Amendment to the Constitution of the United States guarantees to all citizens the equal protection of the laws. Since the adoption of this amendment, many states have provided separate schools for their children on the basis of color. The laws establishing such schools have, however, been challenged in the courts, and about three years ago, the Supreme Court of the United States determined that such laws are contrary to the provisions of the Fourteenth Amendment and consequently invalid. This decision by the highest court in the land is, of course, an authoritative interpretation of our Constitution, is binding on all citizens and government officers, both state and Federal, and may not, under our law, be changed except by an amendment to the Constitution.

Because of the Supreme Courts decision, it became necessary for those states maintaining separate schools to revise their systems to eliminate distinctions on the basis of color. The nature of these plans was left to the states and local communities, subject to approval by the local Federal District Courts. The Little Rock School District prepared such a plan which was approved by both the District Court and Circuit Court of Appeals. This plan provides for a very gradual abandonment of the separate schools system starting this year.

Subsequent to the approval of this plan, attempts were made in the courts to prevent the school authorities from putting it into effect.

I need not go into the details of this litigation,

SSAGE

DEPARTMENT OF THE ARMY
STAFF COMMUNICATIONS DIVISION

NR: 251500Z PAGE 2

sufficient to say it was unsuccessful, and that the plan as originally approved remains unchanged and is full force and effect.

During the past few weeks, as you are well aware, the situation in Little Rock has been such as to prevent the entrance of a few students into your high school. Therefore, to see that the laws of the land be faithfully executed, the President has found it necessary to call the National Guard of Arkansas into the Federal Service and has directed that this force and each other armed forces as may be made available be used to enforce the orders of the Court, as an officer of the United States Army, I have been chosen to command these forces and to execute the Presidents orders.

What does all this mean to you students. You have often heard it said, no doubt, that the United States is a nation under law and not under men. This means that we are governed by laws, properly decided upon by duly constituted authority, and not by the decrees of one man or one class of men. Since this is true, it means that we are all subject to all the laws whether we approve of them personally or not and as law-abiding citizens have an obligation in conscience to obey them. There can be no exceptions, if it were otherwise, we would not be a strong nation but a mere unruly mob.

I believe that you are well-intentioned, law-abiding citizens, who understand the necessity of obeying the laws and are determined to do so. You have nothing to fear from my soldiers, and no one will interfere with your coming, going or your peaceful pursuit of your studies. However, I would be less than honest if I failed to tell you that I intend to use all means necessary to prevent any interference with the execution of your school boards plan. This is what I have been ordered to do, and I intend to carry out my orders. Those who interfere or disrupt the proper administration of the school will be removed by the soldiers on duty and turned over to the local police for disposition in accordance with the laws of your community.

One last word about my soldiers. They are here because they have been ordered to be here. They are seasoned, well-trained soldiers, many of them combat veterans. Being soldiers

DA IN 86395] (25 SEP 57)

35

SSAGE

DEPARTMENT OF THE ARMY
STAFF COMMUNICATIONS DIVISION

NR: 251500Z PAGE 3

they are as determined as I to carry out their orders. However, as I stated before, the law-abiding people have nothing to fear from them. They have been carefully instructed not to molest any law-abiding citizen in his person or property, and they will obey these orders. Since a peaceful atmosphere must be maintained in the school and its vicinity, it may be necessary for them to issue instructions concerning such things as loitering, assembling in large groups, and otherwise making it difficult for them to perform their duties. I earnestly ask that you cooperate, for your own benefit and ours.

I wish you all success in your school year and Mr. Matthews, I thank your for the opportunity to talk to the student body.

NOTE: Advance copies have been delivered to DCSOP, OCS, OSA

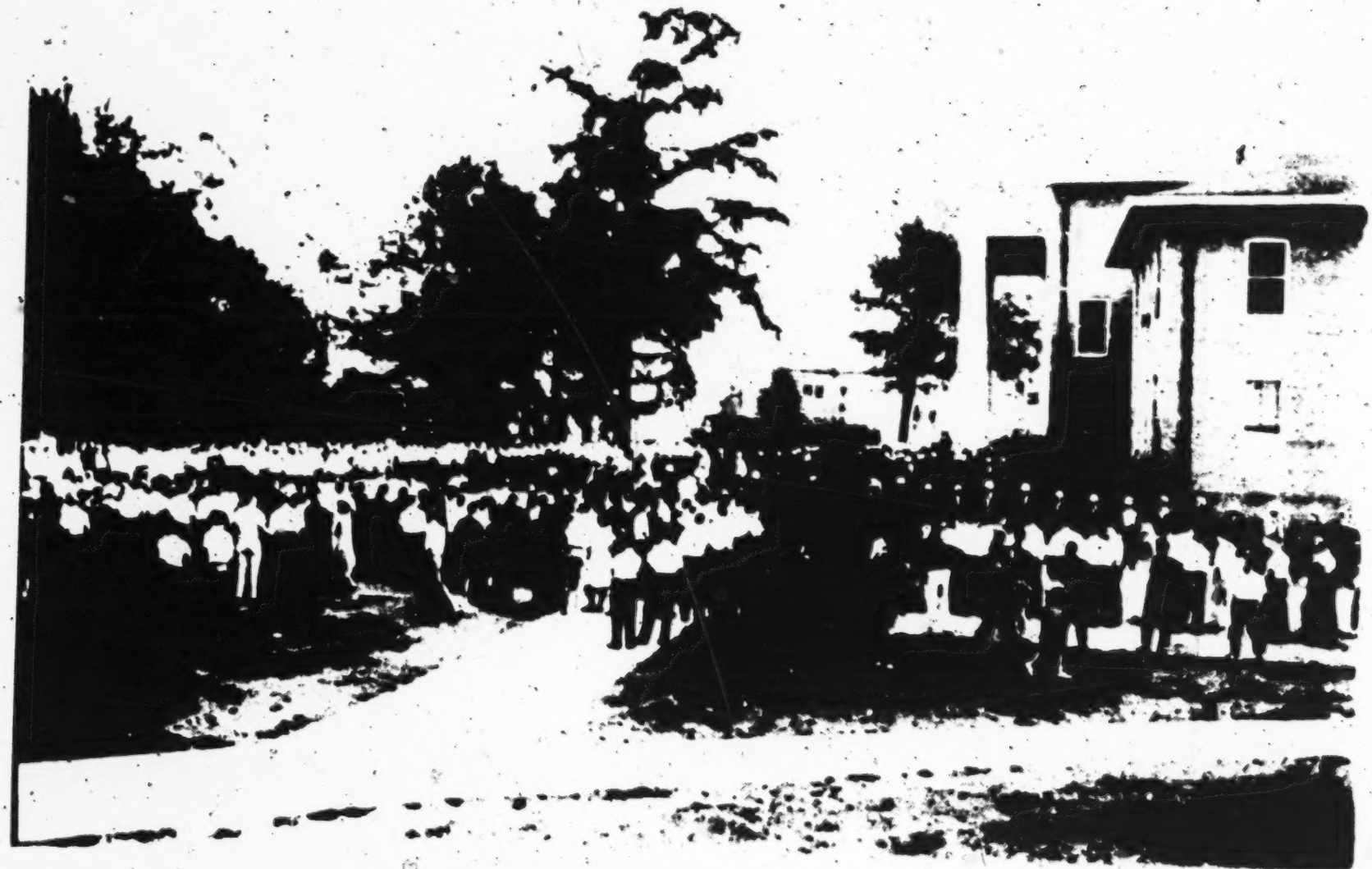
ACTION: DCSOP

INFO: OCS, OSA, CI, JAG, DCSLOG, ACSI, OSD, DCSPER

DA IN 863951 (25 SEP 57) rwt/2

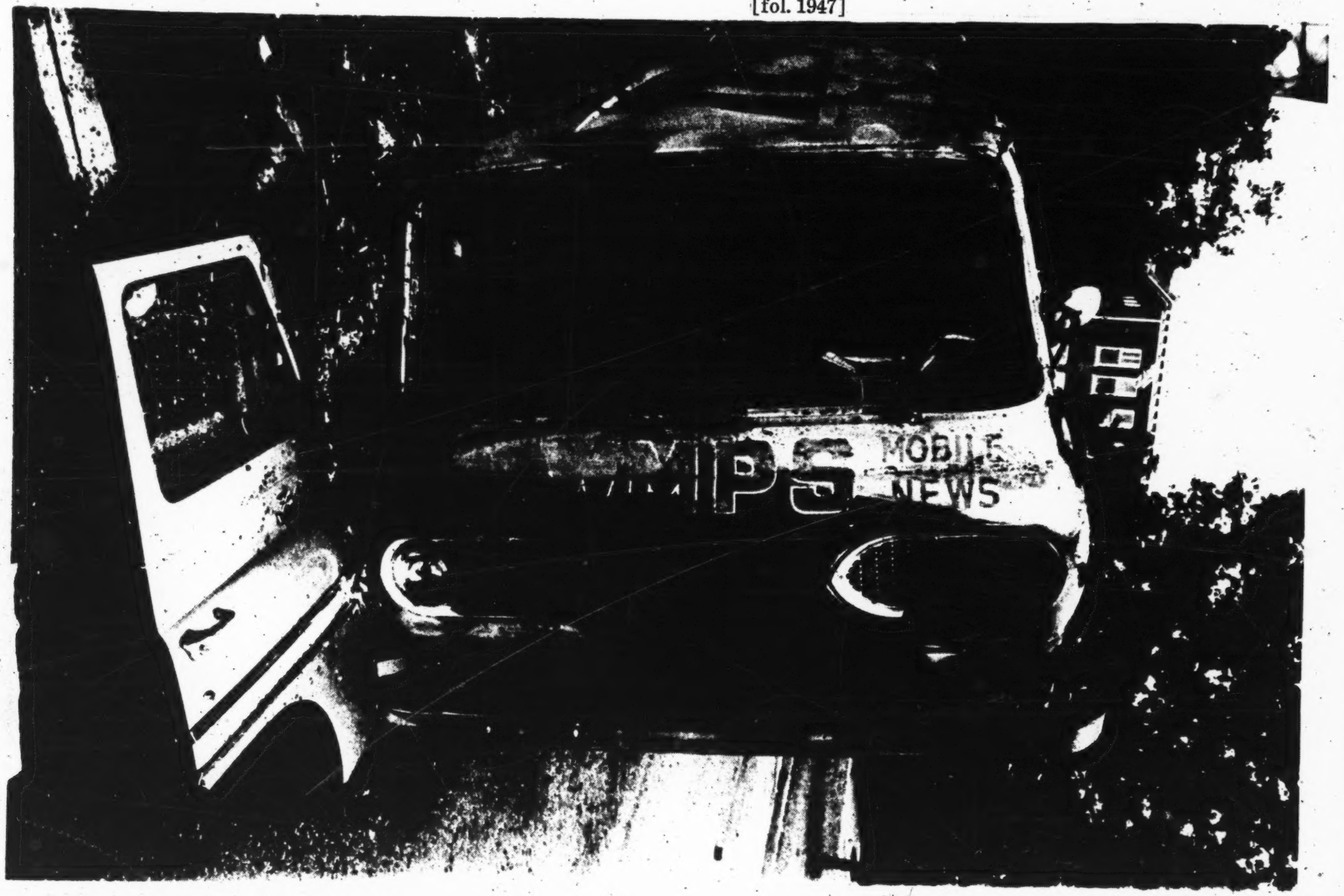
DEFENDANT'S EXHIBIT 20

[fol. 1944]



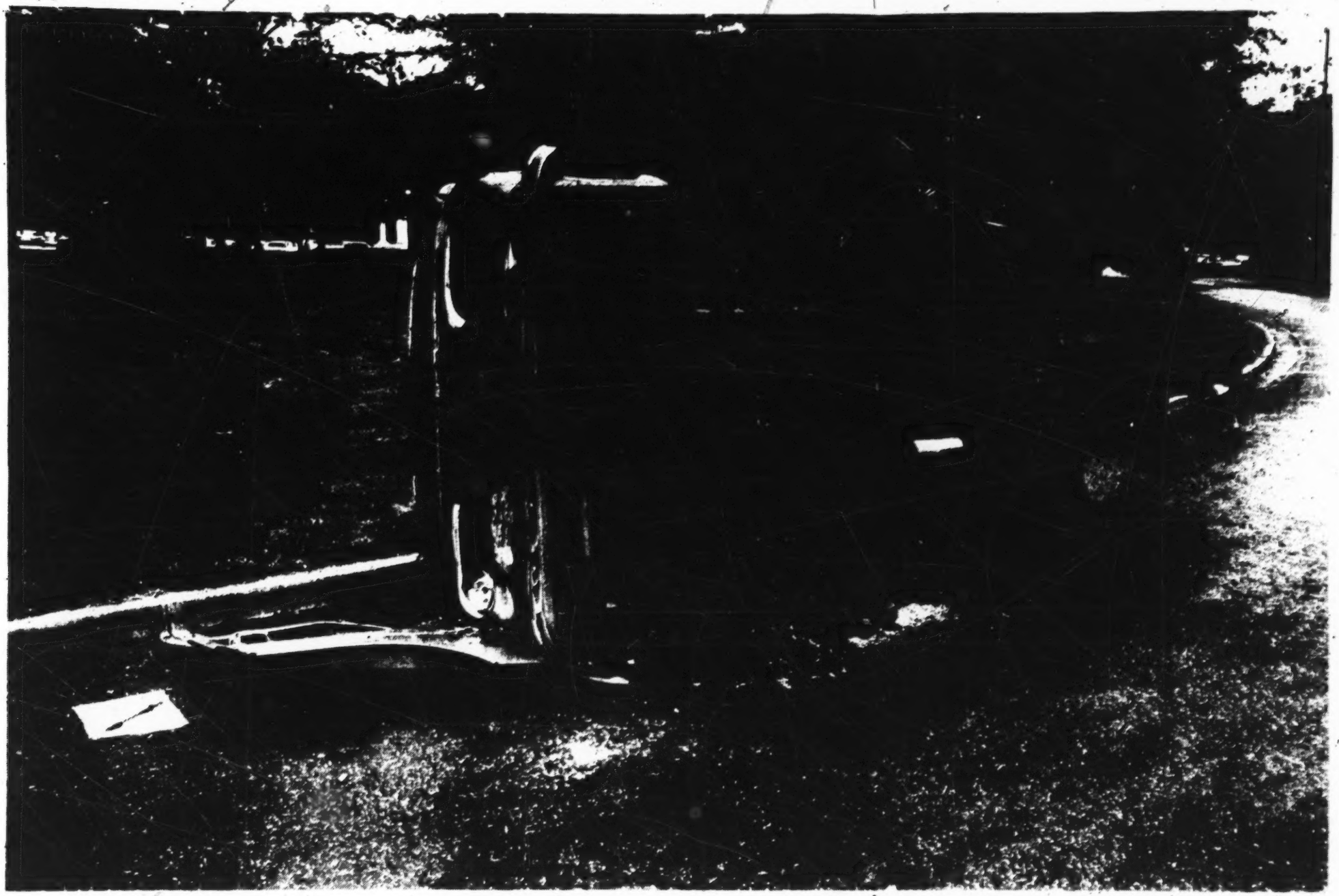
DEFENDANT'S EXHIBIT 23

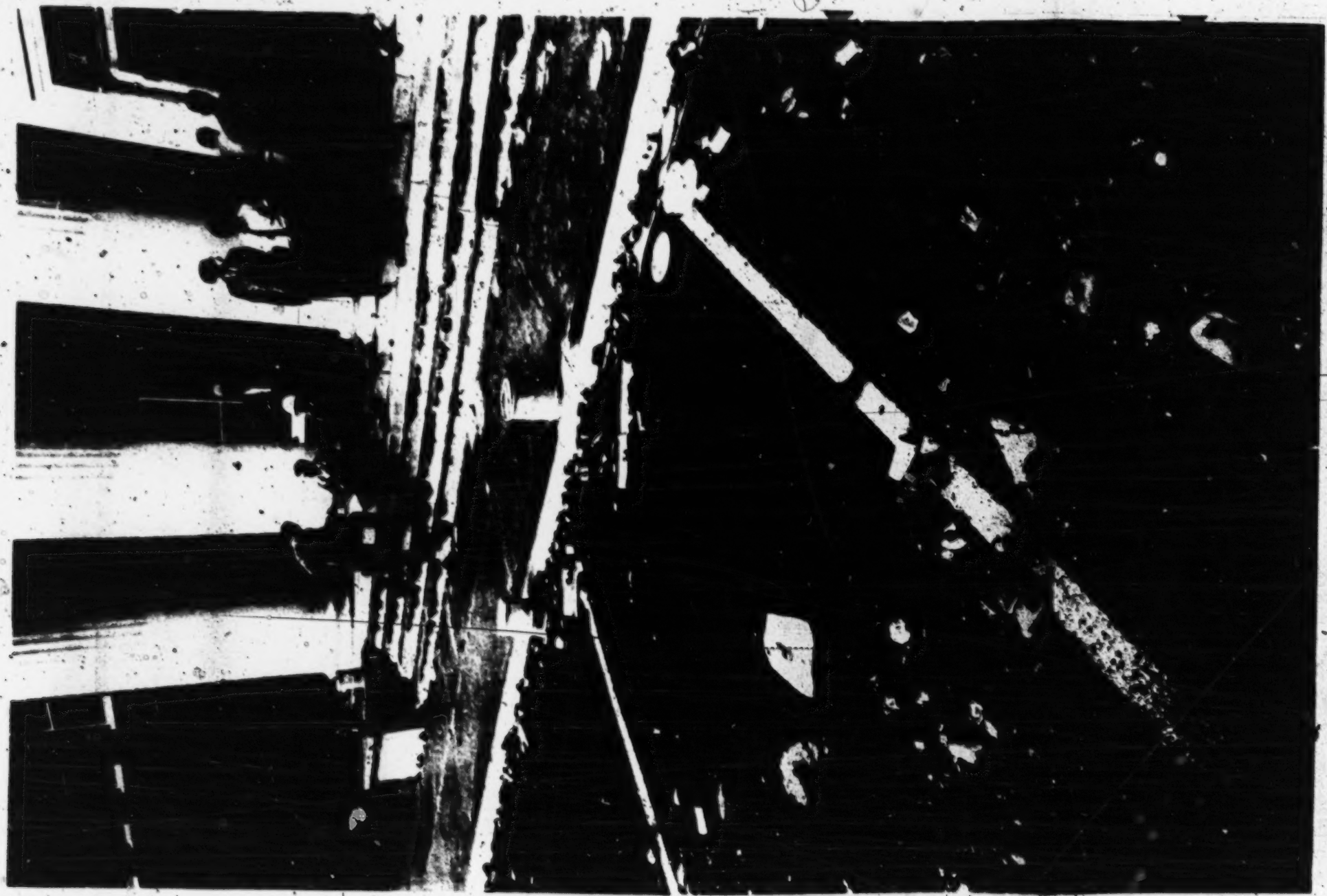
[fol. 1947]

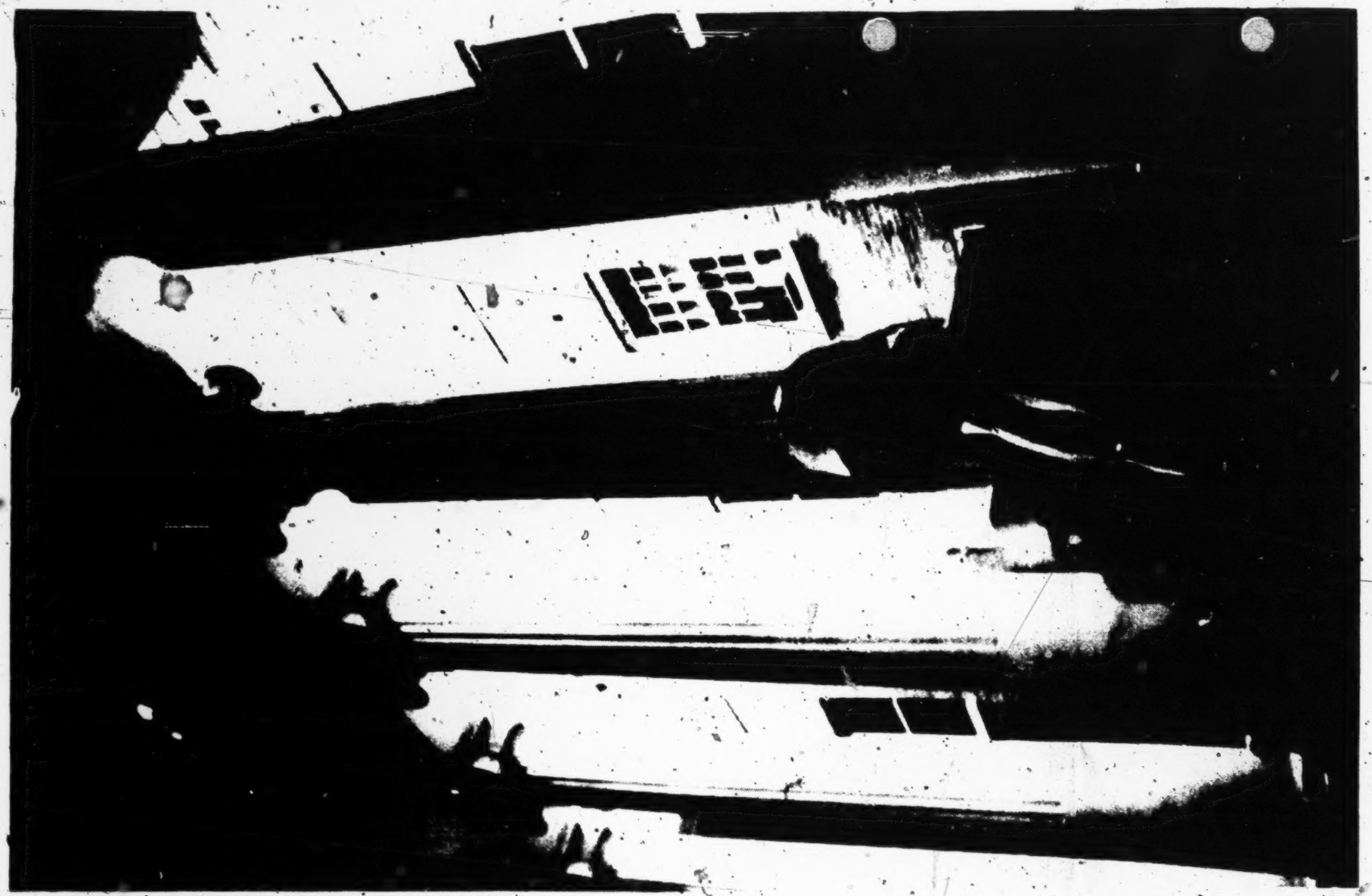


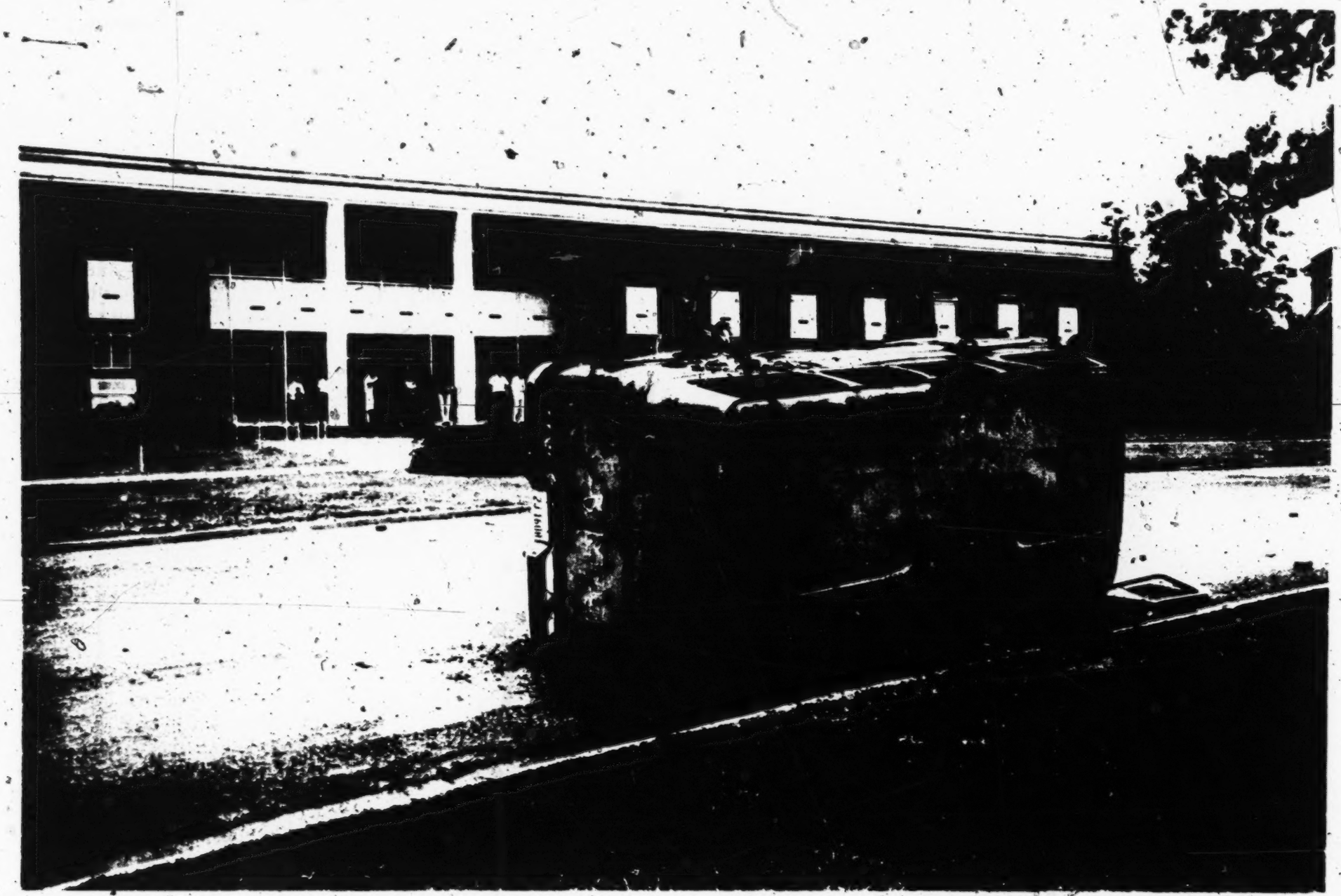
DEFENDANT'S EXHIBIT 24

[fol. 1948]









fol. 1953]

PLAINTIFF'S EXHIBIT 8

Handwritten notation—Thurs. 10-4-62—Night Report—
'runk Copy]

fol. 1954] A171

(ADVANCE FOR MORNING PAPERS
OF SUNDAY, OCT. 7)

Meredith—Ole Miss (2,150)

3y the Associated Press

(ADVANCE) Oxford, Miss., Oct. 6 (AP)—James H. Meredith probably doesn't know the exact moment himself. But the moment surely was there—the moment when he made up his mind, the moment he decided to enroll at the University of Mississippi.

Because Meredith is a Negro, his decision on that unknown day marks a turn—a sharp turn—in American history.

Today, James H. Meredith, Negro, is a student at the University of Mississippi—the first of his race ever registered knowingly at proud, historic Ole Miss.

But because the question was settled, the Federal Government and the State of Mississippi collided in a test of strength that shook the very roots of the union.

It was sometimes physical, sometimes legalistic, always packed with every ingredient of tragedy.

It was the biggest clash of State vs. Federal Power since the Civil War.

It reached a climax with two dead and scores injured in a riot at the University, a Governor, Lieutenant Governor and a former Major General all facing the possibility of jail, federal troops occupying this small college town—and Meredith registered.

The violence on the campus has ended—that awful nightmare of tear gas and buckshot, rifle bullets and flying

bricks, screaming hordes of people gone wild, and blood and death.

The litter of the battle is gone—the bricks and broken glass swept away, the bullets pried out of the walls of the Administration Building, the wounded healing.

In the student union, the juke box blares and the students dance in a gay atmosphere.

[fol. 1955] They talk and kid with the soldiers occupying their campus.

At a roadblock outside the campus, two soldiers stopped two attractive blondes in a car to check identification.

"Anything else you want of me?" one of the blondes asked the soldier.

"Not just now," one of the soldiers replied with a smile.

"Well, call me later," she said.

Youth was back to acting youthful.

Outwardly, there was an air of easing tensions on the campus. The Federal Marshals cut their force accompanying Meredith to his classes from six to three. The soldiers waved cars by the roadblocks with less fuss and bother.

But a feeling of foreboding lies beneath the surface—smouldering, as any cotton-country boy knows a fire might smoulder unseen in stored cotton, ready at any time to burst into the raging flame.

In the midst of the seeming serenity late in the week, developments illustrated the fear of the smouldering.

The Defense Department forbade the University to stage its homecoming football game here Saturday as scheduled. Fearful of the risks involved in trying to handle 20,000 or 30,000 visitors, most of them deadset against seeing a Negro in Ole Miss, the government told the University: Shift the site or cancel the game. The University moved the game to Jackson, 170 miles to the south.

The marshals, although reduced in number, did continue to accompany Meredith—and will continue, for a length of time nobody tries to guess.

And, of course, the Army still is here.

A172

So is Meredith, living in a dormitory room with three iron cots—one for himself, one for the Justice Department man charged with his overnight protection, and one remaining unused.

He leads a strange and lonely life. He's a free agent, says the government, but marshals guard his every step. He's a college boy, according to his registration papers, but he won't be taking part in many activities. He's a student on a campus that prides itself on friendliness, but he counts no companions in the student body.

He's been through an ordeal—a long trail of court hearings, jeering crowds that shouted "Nigger, Nigger," people who wanted only to get their hands on him.

[fol. 1956] Once the (Illegible) Mississippi and the fear of violence were so great that (Illegible) Gen. Robert F. Kennedy called Meredith and his escort of (Illegible) back just short of the Ole Miss campus. An Army of 500 Sheri (Illegible) ities, highway patrolmen and city police was waiting at the gates of Ole Miss to turn them back.

And the threat of violence is not over. Witness the troops and the marshals.

The question arises: Who is James Meredith? And also: Why does he want to do this?

Meredith summed it up only this week when students at the University of Alberta in Canada invited him to enroll in their University with all expenses paid.

He declined, and told them:

"We, all of my people, have hoped and prayed and fought for a long time for the right to have a decent education. Do you think they all could go to the University of Calgary?"

And earlier, many times, he's said: "I live in Mississippi, and I want to go to school in Mississippi."

The 5th U.S. Circuit Court of Appeals in New Orleans, in ruling last summer that he must be admitted at Ole Miss, cited an Air Force psychiatrist's report saying

Meredith was a man inclined to "start a crusade to get existing rules and regulations changed."

The grandson of a slave, Meredith was born on a cotton and corn farm near Kosciusko, a small town in central Mississippi, 29 years ago. He was one of 10 children.

His father, Moses (Cap) Meredith, never got past the fourth grade. But he was determined his children would do better. All ten finished high school, and seven went to college.

James was graduated from high school in 1950 and enlisted in the Air Force—the start of a ten-year tour that saw him gather his first college credits.

He began his college work by taking extension courses at the University of Kansas in 1953. He took courses in speech, composition and literature, making C's.

After that, as he traveled with the Air Force, he picked up credits from Washburn University in Kansas and the Far East Division of the University of Maryland.

At Maryland, Stanley Drazek, associate dean of the University College, said Meredith was a "very excellent student" while attending classes in the school's far-flung centers in the Orient.

A civilian again in 1960, he enrolled at Jackson State College, a Negro school in the Mississippi capital.

It wasn't long before he applied at Ole Miss, but he continued his studies at Jackson state. When he enrolled at Ole Miss last week, he needed only six hours to take his degree in political science at the Negro school. In transferring, he lost a year or more.

(MORE)

TB1224AED

[fol. 1957] A25NU (RDUP)

AMS BUDGET

NIGHT LEAD MEREDITH ROUNDUP (580)

BY RELMAN MORIN

Oxford, Miss., Oct. 4 (AP)—The University of Mississipp's gala homecoming football game was switched 170 miles away to Jackson today, to avoid any renewed violence over Negro James H. Meredith's forced integration into the student body.

The Defense Department ordered the transfer "on the basis of information . . . which indicated it would be unwise for the game to go ahead at Oxford and the fact that minor incidents continue to occur."

The Government ultimatum put a damper on a festival weekend for 4,800 Ole Miss students, who had planned to play host to nearly 30,000 visitors. A big Friday night dance was called off. Soheeuoutdoor bonfire rallies and other homecoming events.

As the 29-year-old Meredith, an Air Force veteran, went through his fourth day of scholastic activity, ERT VISITORS. A big Friday night dance was called off. So were outdoor bonfire rallies and other homecoming events.

As the 29-year-old Meredith, an Air Force veteran, went through his fourth day of scholastic activity, his escort of U.S. Marshals was cut in half, from six to three. And plans were announced for the withdrawal of 380 Marshals from among 450 on duty here since campus rioting last weekend claimed two lives.

In Washington, however, an official said the situation at Oxford still was considered "fairly tense."

[fol. 1958] During relatively quiet night campus, only 11 persons were picked up for questioning, and all were released. There have been more than 250 arrests during the week, but only a handful of persons have been charged with crimes.

Meredith, slightly-built, quiet-spoken center of the greatest integration crisis yet in the South, arrived on the campus last Sunday. He was the first Negro ever knowingly enrolled in the 114-year history of the school.

With the rioting, some 12,000 armed Federal troops were rushed into Oxford to restore order. About 8,000 still are on duty.

Nicholas Katzenbach, Deputy U.S. Attorney General, told newsmen here that while there was some relaxation in Meredith's security guard, he did not know when further reductions in the troops might come.

At some point, he added, local authorities may have to assume responsibility for Meredith's safety. However, Lt. Gov. Paul B. Johnson Jr. said earlier in the week he didn't think it ever would be possible for Mereditt to attend the University without Federal protection. Johnson said he could not imagine state forces being used as a substitute for Federal troops.

Katzenbach, asked when he thought it might be possible for the Federal Government to relinquish its tight grip on the University campus, replied that "My crystal ball isn't good enough for that."

[fol. 1959] AS26NU

In Washington, an official who declined to be quoted by name, said he could see no possibility of removing Meredith's escort entirely, and that he probably would need federal protection for as long as he stays at the University —which may be 18 months or longer.

Katzenbach did say:

"I have great confidence in the students and their good behavior . . . I don't think Mr. Meredith will be assaulted on the campus."

As for the football game, Katzenbach said no federal troops or marshals will be detailed to Jackson.

Meredith already had made weekend plans that did not include the game or other homecoming events. He is expected to leave the campus, and may visit his wife, who is a student at Jackson State (Negro) College.

Even in Meredith's absence, federal officials decided against leeting the football game with the University of Houston go on here as scheduled. Federal Marshals had predicted trouble.

"There was some feeling," said Katzenbach, "that Homecoming Day came on us a little fast."

The game will be played at Jackson's Memorial Stadium at 2 P.M. CST. The announcement from Mississippi University Chancellor J. D. Williams said:

"The Ole Miss campus is secure and a condition of near normalcy under the circumstances is rapidly returning. Less than 60 students have formally withdrawn and some of them may return by Monday. . . .

"We have been advised by Robert S. McNamara, Secretary of Defense, and Cyrus R. Vance, Secretary of the Army, from Washington, concerning our homecoming game —that it be played in Houston or Jackson, or that the game be cancelled."

Students reacted in varying ways to the game's transfer. One complained that the student body might as well be under martial law. But another said:

"We've had enough trouble around here without inviting the red-necks in for a football game."

Sarcasm was expressed by State Legislators at Jackson. Rep. Russell Davis, referring to Atty. Gen. Robert F. Kennedy, said in the House Chamber:

"I understand (MORE)—WX

235PED

[fol. 1960] A30NU

Oxford, Miss—1st add NL Meredith roundup (A25-26NU) XXXX House Chamber:

"I understand Bobby Kennedy will referee the game."

"If he does referee the game," replied Speaker Walter Sillers, "Ole Miss is beaten before it starts."

During the night, five carloads of U.S. Marshals assigned to Oxford were halted at Holly Springs, Miss. They were not held but Sheriff Sol Cox claimed four of them were "intoxicated, extremely arrogant and resisted arrest."

Katzenbach said the convoy was permitted to continue within a short time and added:

"There had been no drinking among the men and none was arrested."

Gov. Ross Barnett of Mississippi, and Sen. James O. Eastland, D-Miss., have blamed U.S. Marshals for last weekend's rioting at Oxford. However, a minority group of professors at the University of Mississippi adopted a resolution in defense of the marshals. The campus chapter of the American Association of University Professors added:

"We have evidence that the attempt of men in prominent positions to place all the blame for the riot on the United States Marshals is not only unfair and reprehensible, but is almost completely false. We encourage an investigation by the proper authorities."

The Club's Chairman, Barton Milligan, declined to say whether the resolution specifically was in reply to Barnett or Eastland. Only 50 of 250 professors belong to the Club and Milligan said:

"We are a definite minority among the faculty. I like to think our opinion represents the majority. But I'm not in a position to say that it does."

[fol. 1961] In another statement, ministers of all Oxford churches save one called upon Mississippians, in the aftermath of last weekend's rioting, to observe the coming Sunday as "A specific time for repentence for our collective and individual guilt."

The statement lacked only the backing of the Church of Christ, but that group does not participate in interdenominational actions.

Meredith, meanwhile, turned down an invitation to transfer with all expenses paid to the University of Alberta, Canada. And a denial was made in Washington of a recurrent report that Meredith would transfer to the integrated University of Miami in Florida.

Gov. Barnett, Mississippi's 64-year-old Democratic Chief Executive, who tried in vain to personally block Meredith's integration, made a brief television appearance last night and said deep anger and resentment still are felt by Mississippians over the dispatch of U.S. troops to Oxford. But he added:

"Let's by all means avoid violence. Let's maintain law and order."

AS1247PCS NM ASKT

[fol. 1962] A82NU (MORIN)

WITH MEREDITH ROUNDUP (450)

By Relman Morin

Oxford, Miss., Oct. 4 (AP)—Dr. John D. Williams, Chancellor of the University of Mississippi, said today that the students are "very confused and torn" over the fact that James H. Meredith, a Negro, has been enrolled on the campus.

"Your guess is as good as mine," he replied when asked how long he thought it would be before Meredith could move around the campus without escort.

Dr. Williams said there "is no doubt" that the prestige of the university has been damaged. But he said that the alumni and many, if not most, of the citizens of Mississippi want to recover whatever losses have been sustained.

He was asked to assess the attitude of the majority of the students today, the fourth day of Meredith's attendance at classes. He replied:

"Most of them are not indifferent. I would say they are very confused, very torn between their loyalty to the state and to the nation.

"They came here under the influence of their communities and their homes with many preconceived attitudes. It is the duty of the university to bring them truth and knowledge."

Asked what would happen if the federal government ordered other Negro students to be enrolled on the campus, he replied, "We will follow court orders."

There have been reports that a Negro woman has applied for registration at Ole Miss.

The officials present at the news conference said all they knew was what they had seen in the newspapers, and such information could come only from the registrar. He was not present at the news conference.

[fol. 1963] Dr. Williams said he believed the attendance was approaching normal in the classes. He referred questions on this to Dr. Charles F. Haywood, the provost.

Dr. Haywood said the attendance as of Wednesday was between 50 and 65 per cent. He said he estimated that today it is at 75 to 85 per cent. And he added that in some senior classes and graduate classes it was 100 per cent.

A83NU

Referring to events of last Sunday night when rioting on the campus took the lives of two persons and injured some 75 others, he said, "I can't figure any way we could have prevented it."

Dr. Haywood said there have been about 60 student withdrawals since Sunday. But he said this is "almost normal" for the first semester at this stage.

Dr. Williams said a notice has been posted asking students possessing weapons to surrender them. Newspapermen said they have not seen any such notices. Dr. Williams said he had been informed they had been posted.

He said some students have approached university officials and asked if they could turn over their guns to the university for the time being. He pointed out that many of them go hunting for squirrels and doves at this time of year.

They have been encouraged to turn in their arms, Williams said.

Regarding reports of a special train to take students to Jackson for Saturday's football game with the University of Houston, the chancellor read a telegram from Gov. Ross Barnett.

It said in part, "I will be responsible for round-trip transportation for students who wish to attend the game."

AS415PCS NM ASKT

[fol. 1964] A107NU

WITH MEREDITH

BY ED LEBRETON

Oxford, Miss., Sept. 4 (AP)—The Justive Department revealed today eight deputy U. S. Marshals were injured at the University of Mississippi riots Sunday night before tear gas was used against demonstrators.

And, Deputy Atty. Gen. Nicholas Katzenbach said, the force of 538 Marshals suffered 38 percent casualties—including 29 cases of gunshot wounds and some acid burns. A total of 166 Marshals, including specially deputized border patrolmen and Bureau of Prisons personnel, were wounded.

Katzenbach told a news conference the high rate of injuries by Marshals during the night-long riots that followed the arrival of Negro James H. Meredith under Federal guard at the Ole Miss campus included one wounded seriously. But that man, Graham Same of Indianapolis, was recovering from bullet wounds in the throat.

Most of the injured were hit by bottles, bricks and other flying objects, Katzenbach said.

However, one of the men burned by acid was present at the news conference. John Cameron, Deputy Chief of the special Marshals force, told newsmen he was burned over an area of about four square inches at the base of his neck by acid.

"It could have been worse," Cameron said. "I probably would have received the acid in my face, except that I'd just turned to aid another Marshal who had just been burned."

It was the first report acid had been used by demonstrators during the bloody riots that killed two persons and injured hundreds.

Katzenbach said he expects the force of Marshals in Oxford to be reduced to about 25 by early next week. The military has assured the general security of the area, he said, and the Marshals' remaining job will be to guard Meredith personally.

He declined to say whether Meredith will be accompanied by Marshals when he leaves the campus for the weekend.

RK605PCS

[fol. 1965]

A11ONU

WITH MEREDITH LIBRARY (350)

BY BILL CRIDER

Oxford, Miss., Oct. 4 (AP)—James H. Meredith, first Negro ever enrolled at the University of Mississippi, entered the University's library today, walked from room to room, and checked out a book without incident.

This was Meredith's fourth day attending classes. At the end of his afternoon class, he walked part of the way from Peabody Hall to the library, a distance of about 300 yards.

He entered the library while two U.S. Marshals in civilian clothes loitered unobtrusively in the hall. One was Chief Marshal James P. McShane.

Meredith first was introduced to an assistant librarian who showed him the card file. She was courteous but unsmiling.

After looking at the file, he went into two reading rooms.

Then, he was escorted to the basement where there is another large reading room. Two women librarians there took him around. Again, there were courteous but unsmiling.

While he was in the room, a white student entered. As soon as he saw Meredith, he left.

Another student came out of a small reading room where smoking is permitted.

He spoke to U.S. Marshal Albert Taylor, of Chula Vista, Calif.

"Tell him he can study in here if he wants to smoke," he said.

One youth seeing Meredith examining a card file, called to another. "Come here and look at this," he said.

The second youth, seeing Meredith, said, "Well, I'll be damned."

Another student watching Meredith walk past murmured, "just like a fraternity brother."

[fol. 1966] Some of these in the library stared straight ahead. The expressions of others plainly registered dismay.

During the day, Meredith attended four classes and walked into each with his guards lagging about 20 to 30 feet away.

Encouraged by the relatively quiet reception during the morning, officials decided Meredith could walk from his final afternoon class to the library in the same manner.

It's a distance of about 300 yards.

Watchful Marshals, apparently sensing growing hostility, waved Meredith to a car before he had covered a third of the way. The move came after a pretty co-ed among the students exclaimed, "Why doesn't somebody kill him."

Meredith was driven to the library and entered through a side entrance.

RK629PCS

A112NU

MEREDITH—LEGISLATURE

BY JIM SAGGUS

Jackson, Miss., Oct. 4 (AP)—Sarcasm flooded the chamber of the House of Representatives today after it was announced that the University of Mississippi homecoming football game against Houston would be played in Jackson Saturday.

"I understand Bobby Kennedy (Atty. Gen. Robert F. Kennedy) will referee the game," Rep. Russell Davis of Hinds County said on the floor.

"I hope he will come down," Rep. Thompson McClellan of Clay replied.

"If he does referee the game," speaker Walter Sillers of Bolivar added, "Ole Miss is beaten before it starts."

Gov. Ross Barnett announced today the game had been shifted from the Oxford campus to Jackson in the wake of desegregation violence at Oxford.

SILLERS NOTEDLV

(MORE)

WX RZ836PED

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SILLERS NOTEDLV

(MORE)

WX RZ836PED

[fol. 1967]

A117NU

Jackson, Miss.—1st add Meredith-Legislature (A112NU) X X X at Oxford.

Sillers noted that Federal Marshals, Armed Forces and the Justice Department were all involved in tight controls imposed on the campus and asked "Which has the authority to let them play."

A voice in the back yelled "Bobby."

Rep. Jesse Chaffin of Prentiss asked, "I wonder if the NAACP has given its approval?"

Sillers responded, "They have to get permission from lawyer Motley to have the game."

Attorney for Negro James H. Meredith in his successful University desegration suit was Constance Baker Motley, a Negro New York Attorney for the National Association for the Advancement of Colored People.

RK647PCS NM

A111NU

INSERT (120)

Oxford, Miss., NL Meredith roundup, A25NU, insert after 3rd graf: "The Government X X X homecoming events."

Gov. Ross Barnett guaranteed transportation to Jackson for all students who wanted to see the game. He said the money would not come from the State treasury but would be provided from private sources.

Meanwhile the Justice Department disclosed a total of 166 Marshals, including specially deputized border patrolmen and Bureau of Prison personnel, were wounded during the rioting at Oxford. The force of 358 Marshals suffered 39 per cent casualties. Including 29 cases of gunshot wounds and some acid burns, the Department said.

The Department said eight Deputy Marshals were hurt at the campus riots before tear gas was used against demonstrators.

Meredith paid his first visit to the University library today and checked out a book without incident. Two Marshals remained in the hall.

As the X X X 4th graf.

RK634PCS

[fol. 1968] A147NU

INSERT

OXFORD, Miss.—NL Meredith roundup, A25NU, insert after 4th graf: "Gov. Ross x x x private sources."

At Washington, the Army said it will release some 3,500 Mississippi National Guardsmen from federal service at midnight tomorrow. They were called into active service following Sunday's campus riots.

The remaining 4,500 guardsmen were being authorized to return to their homes and jobs—without change in their status on active federal duty, the Army said. Personnel in major Army units in the Oxford area are not affected by the release order.

Meanwhile, the x x x 5th graf.

AS821PCS NM

A161

CORRECTION

OXFORD, Miss., NL Meredith roundup, A25NU, read in 7th graf: "Meanwhile, the x x x Department said."

"x x x the force of 538 Marshals suffered 30 per cent x x x" (correcting figure and percentage)

THE AP

—DASH—

CORRECTION

OXFORD, Miss., with Meredith, A107NU, read in 2nd graf: x x x "and deputy x x x were wounded."

"x x x suffered 30 per cent casualties x x x" (correcting percentage).

THE AP

AS917PCS

[fol. 1969] S42NU

WITH MEREDITH (120)

OXFORD, Miss., Sept. 4 (AP)—Army ROTC students in civilian clothes, saying they volunteered, today began a sweeping cleanup of the University of Mississippi campus.

The students, using brooms and burlap sacks, went after every scrap on the beautiful tree-lined campus where Sunday night's riots killed two and injured 75 persons. They collected tear gas shells, broken glass, sticks, rocks, bricks—even cigaret butts.

"When we're finished," one said, "there won't be a scrap left."

But, there will remain some evidence of the bloody rioting—the bullet marks on the Lyceum building and angry black burns in the green campus grass where the teargas shells exploded.

Some ashes from six burned vehicles remain on the winding blacktop road encircling the area.

AS551PCS

A176NU (AX FW)

INSERT

OXFORD, Miss.—Night lead Meredith roundup (A25 NU), previously inserted in A111NU, insert following after

9th graf (in insert A111NU), "Meredith paid x x x the Hall."

Meredith also ate his first meal in the university cafeteria tonight. Accompanied by three U.S. Marshals, he went through the serving line shortly before 7 P.M.

Some 150 students were in the cafeteria. Four girls two tables away got up and left, apparently without finishing their meals.

Meredith drank a glass of milk and toyed with his meat and three vegetables.

As he left, a small crowd of students jeered and cursed as Meredith and the Marshals got into a car and drove off.

As the x x x etc 10th graf, A25-111NU

HM1054PCS NM

[fol. 1970] PLAINTIFF'S EXHIBIT 9

Thursday, October 4, 1962

DAY RECORD

[fol. 1971] A2NU (INSERT AND LD RDP)
2ND LEAD MEREDITH ROUNDUP (250-UP)

By Van Savell

OXFORD, Miss., Oct. 4 (AP)—The Defense Department today forced the University of Mississippi to cancel its formal homecoming festivities, and transfer Saturday's football game away from the troubled campus. The game will be played in the state capital of Jackson, 170 miles away.

The ultimatum resulted from official fears that an influx of 30,000 football fans might spark new disorders over the forcible integration into Ole Miss of Negro James H. Meredith.

A traditional Friday night homecoming dance, a parade, outdoor pep rallies and bonfires—all were cancelled.

However, one sign of an increasing return toward normal on the campus was the announcement that more than 300 of 400 U.S. Marshals were being withdrawn from duty here. Meredith's escort of Marshals to take him to and from classes was cut in half, from six to three. There have been no disorders of significance since rioting claimed two lives last weekend.

Nevertheless, from Washington came an assessment of the situation on the campus as still "fairly tense." An official there could see no possibility of removing Meredith's escort entirely, and said he probably would need federal protection as long as he stays in the university—which may be 18 months or longer.

Mississippi University Chancellor J. D. Williams said of the decision to transfer the football game with the University of Houston:

[fol. 1972] "The Ole Miss campus is secure and a condition of near normalcy under the circumstances is rapidly returning. Less than 60 students have formally withdrawn and some of them may return by Monday . . . .

"We have been advised by Robert S. McNamara, Secretary of Defense, and Cyrus R. Vance, Secretary of the Army, from Washington, concerning our homecoming game—that it be played in Houston or Jackson, or that the game be cancelled."

One disgruntled student said of federal officials:

"If they want to tell us every little thing we can do, they ought to put us under martial law."

However, another student expressed relief over transfer of the game and added:

"We've had enough trouble here without inviting the Red-Necks in for a football game."

Meredith, 29, the first Negro knowingly admitted to the university in its history, had already planned to leave the campus for the weekend.

Meanwhile, Mississippi Gov. Ross Barnett and a group of Oxford clergymen made separate pleas for obedience to law and order in the integration crisis.

Barnett, who x x x 10th graf original roundup A8.

AS1114ACS

[fol. 1973] A8NU (BJT)

PMS BUDGET

MEREDITH ROUNDUP (700)

BY VAN SAVELL

Oxford, Miss., Oct. 4 (AP)—Gov. Ross Barnett of Mississippi and Oxford clergymen made separate pleas today for obedience to law and order as Federal marshals grimly predicted new incidents at the University of Mississippi.

The fear of new violence in an area where two men died hinges around the football game Saturday between Ole Miss and the University of Houston. About 30,000 are expected for the game, the focal point of homecoming celebrations.

James H. Meredith, the first Negro knowingly admitted to Ole Miss, is not expected to be in Oxford this weekend. The 29-year-old Meredith, officials said, has plans which will take him off the campus.

University officials insisted the game was on.

Justice Department officials were not so definite.

Edwin Guthman, the Justice Department's top agent on the scene, took this view:

"We realize how important this weekend is to the college and to the alumni. On the other hand, we don't want any more riots or violence. We must make an assessment. There has been a major disturbance here, two people killed, and numerous others injured."

Guthman conferred at McClean, Va., with Atty. Gen. Robert F. Kennedy last night. Guthman said the game

can be shifted to another site, "if the facts warrant it in the judgment of the military and the Department of Justice."

Guthman said the Attorney General wanted a full run-down on the Oxford situation, including last Sunday JS RI

Oxford situation, including last Sunday's riots.

Barnett, who defied the Federal court order to admit Meredith, appeared on a Jackson television station and urged Mississippians to "be calm, be patient.

"Let's by all means avoid violence. Let's maintain law and order."

[fol. 1974] The clergy of Oxford, all but one denomination, asked the people for a "time of repentance Sunday." A joint statement asked for "acceptance of the actions of the court and whole-hearted compliance with these as individuals and as a state."

—The military garrison, which at one time totaled 12,000, reduced its strength by nearly 4,000 yesterday. But the redeployed troops were not beyond recallable distance.

In other developments:

—Sheriff Sol Cox at Holly Springs, Miss., said he stopped a convoy of five car loads of U.S. Marshals and said four of them were "intoxicated, extremely arrogant and resisted arrest."

A9NU

Chief U.S. Marshal James McShane at Oxford said he knew nothing of the incident. And in Washington, a Justice Department spokesman said an investigation "shows that no one in these cars haem been drinking." The spokesman said the cars were stopped and searched without authorization.

—A group of Ole Miss professors said they had evidence that efforts to place the blame for last weekend's rioting on Federal Marshals was unfair and almost completely

false. The University's chapter of the American Association of University Professors approved a resolution calling for an investigation by proper authorities.

—Alfanette Bracy, a 21-year-old Negro student at Jackson State (Negro) College, told newsmen she had received "just a receipt" in answer to her application for a transfer to Ole Miss. She said she applied last July.

[fol. 1975] —The FBI said it would make ballistics and other tests to try and solve the slaying of French newsman Paul Guihard, 30, and Ray Gunter, 23-year-old Oxford handyman. Both were killed by gunfire last Sunday night on the college campus.

—The four Mississippi National Guard units called into active service during the peak of the University crisis drew "the highest praise" from Army Secretary Cyrus R. Vance. He said he considered the Mississippians' actions as exemplifying "the finest soldierly qualities of discipline, devotion to duty and royalty."

—The Orlando, Fla., Sentinal said last night it had learned from "a source close to the White House" that Meredith would transfer to the University of Miami. The newspaper did not amplify the report. Miami has been desegregated for some time.

The Justice Department said there was "absolutely nothing" to the report Meredith planned a transfer.

In his 5-minute TV appearance, Gov. Barnett said "deep anger and resentment" still dwelt among Mississippians since troops were called in.

"I am informed that citizens have been detained and pushed around at the point of a bayonet and searched without a warrant," the 64-year-old Governor said. "This will in no way weaken our courage or deter our cause."

He urged the people to leave the matter to the state and local government.

UM110ACS NM BJT

[fol. 1976] A57 (WX FW)

MARSHALS (190)

Holly Springs, Miss., Oct. 4 (AP)—A convoy of five car loads of U.S. Marshals was stopped here last night after Sheriff Sol Cox said he received an anonymous call from Memphis "that a group of drunken Marshals were headed toward Oxford."

Cox said four of the occupants, none of whom was driving, were "intoxicated, extremely arrogant and resisted arrest." He said he took a quart of wine from one of the four.

The sheriff identified the four as border patrolmen deputized as Marshals. He said all four were armed.

In Washington, Edwin O. Guthman, Justice Department Public Information Officer, said "Our investigation shows that no one in these cars had been drinking."

"If there was someone intoxicated," the sheriff should have made an arrest," Guthman said.

Cox said he turned the four over to the officer in charge of the convoy after notifying Tycer Young, Chief Deputy in charge of U.S. Marshals at Oxford, site of the University of Mississippi.

Guthman said the Marshals and border patrolmen were returning from Memphis with five automobiles which had been repaired after Sunday night's rioting.

"They were stopped and searched without authorization," Guthman said.

HL620AED

[fol. 1977] A142NU

URGENT

FIRST LEAD MEREDITH—FOOTBALL (A135NU)

Oxford, Miss., Oct. 4 (AP)—The University of Mississippi today skirted the possibility of trouble at Saturday's

homecoming football game with Houston by switching the game site to Jackson.

The announcement came from the University Athletic Department but Assistant U.S. Atty. Gen. Nicholas Katzenback said he believed the decision was made by the Department of Defense.

The switch came several hours after Federal Marshals had grimly predicted incidents at the game in the wake of the University's admitting a Negro student. Riots swept across the Oxford campus last weekend and two men died from gunshot wounds.

Jackson's new Municipal Stadium will host the game at 2 P.M. (CST), and is expected to attract about 30,000 fans.

A143NU

Mississippi Gov. Ross Barnett, who defied the Federal Court order to admit James H. Meredith, a 29-year-old Negro from Kosciusko, Miss., offered free transportation for the game to all Mississippi students. Jackson is about 170 miles south of Oxford.

The swap brought this comment from Ole Miss halfback Louis Guy:

"I wish they'd make up their mind once and for all. We'll probably dress out in Jackson Saturday and they'll tell us the game is set for Memphis."

A144NU

Today's announcement came after a conference in McClean, Va., last night between Atty. Gen. Robert F. Kennedy and Justice Department Public Information Officer Edwin Guthman. Guthman has been in Oxford several days and said while the Justice Department did not want to interfere with the game, "We don't want any more riots or violence."

Guthman said X X X 9th Graf Meredith roundup (A8NU).

UM943ACS NM

[fol. 1978]

PLAINTIFF'S EXHIBIT 10

B1XF

URGENT

2nd LEAD WALKER (200)

Oxford, Miss., Nov. 21 (AP)—Former Army Maj. Gen. Edwin A. Walker today testified he felt he did not receive fair treatment during service with the U.S. Army.

Walker resigned from the Army and refused retirement pay when he was relieved of command of the 24th Division in Germany. His testimony came on the second day of a hearing in which he seeks to erase from court record a mental examination requested by the Government.

The text wa ordered in connection with Federal charges of seditious conspiracy and inciting insurrection filed after rioting which killed two men on the University of Mississippi campus following the arrival of Negro James H. Meredith.

Walker said that he was relieved of command without investigation after a brush with the Army newspaper "Overseas Weekly." Atty. Clyde J. Watts of Oklahoma City, Okla., described the paper as a "Scandal Sheet."

Walker said the Overseas Weekly had quoted him falsely as having described former President Harry S. Truman and others as Communists.

Walker also described details of his arrest on Oct. 1, the day after the campus riot. He said he was confident that he would have made $100,000 but was flown to a Federal Prison Hospital in Springfield, Mo., in a border patrol plane.

The questioning, conducted by Watts, made no reference to his activities on the Ole Miss campus.

Dr. Manfred S. Guttmacher of Baltimore, one of the nation's best psychiatrists, said his studey of WXX documents, newspaper clippings and medical records of Walker

indicated that he had shown evidence of grandiosity, and defective judgment.

Referring to a press conference held by Walker in Dallas, Tex., last Sept. 27, Dr. Guttmacher said, "I felt that Mr. Walker's replies were unusually slow and there seemed to be some confusion as to the meaning of the questions.

"There was the element of grandiosity in 'There are thousands going to Mississippi, not only because of my interest.'"

Dr. Guttmacher said he felt Walker had shown defective judgment in blacklisting certain books from camp libraries when he had not read the books.

After brief statements by Robert Morris of Dallas, another Walker attorney, the hearing recessed until 2:30 P.M. (CST).

(PICKUP AVBL COPY)

LM/VHS

[fol. 1979] NU

Upcoming first take on Walker-McShane. Still unable find D2JX and no prospects

XF

LM1122PCS B N

(Advance for PMS of Thursday, November 22)

WALKER (RPP UP)
WALKER (500)

(ADVANCE) . . . Oxford, Miss., Nov 22—(AP—Former Army Maj. Gen. Edwin A. Walker is competent to stand trial "on such criminal charges as may be presented," U. S. Dist. Judge Claude Clayton ruled late yesterday.

The ruling ended a two-day hearing to determine whether there was reasonable cause of
was reasonable cause for a mental examination of the 53-year-old Walker.

The two main issues were a defense motion to erase from Walker's record an examination ordered by the court after his arrest here Oct. 1 and a Government motion opposing such an elimination.

Judge Clayton studied the evidence during a brief recess and then (1) overruled the defense motion, (2) said he found that "reasonable cause does exist for psychiatric examination" and (3) said he was willing to accept the report on the mental test which had already been made.

Then court recessed again while Government and defense attorneys conferred. Then they said they were willing to accept the report of the examination mde Nov. 8-10 by Dr. Robert L. Stubblefield, Professor at the Southwestern Medical School at Dallas, Tex.

[fol. 1980] B16XF (CO)

When the hearing resumed a few minutes later, Judge Clayton announced the report had been opened and read for the first time.

"It was essentially negative," the judge said of the Stubblefield Report. "No opinion was expressed. It did not say whether he was sane or insane".
whether he was sane or insane."

However, the judge added tht from his observation of Walker's behavior while on the witness stand he had he had "found that this man is competent" to aid in his defense in such criminal charges as may be presented.

"This, so far as I am concerned, brings to an end this hearing."

Walker was arrested on charges of seditious conspiracy and inciting insurrection in connection with the rioting in which two men died and scores were injured on the University of Mississippi campus AFE
of Mississippi campus on Sept. 30 after Negro James H. Meredith arrived.

While the Walker hearing was nearing an end, Chief U. S.

Marshal James P. McShane of Washington surrendered to LA Marshal James P. McShane of Washington surrendered and was arrested on charges of inciting a riot and breach of the peace during the Ole Miss rioting. He turned himself in to Sheriff Joe Ford of Lafayette County and then was held in custody in the Federal Courthouse for three hours.

[fol. 1981] B17XF

Judge Clayton released McShane on a writ of habeas corpus in which the Department of Justice claimed he had acted as a Federal Official. He will be given a hearing in late January.

The Lafayette County Grand Jury last Friday indicted McShane and another person who has not been identified other than being a non-resident of Mississippi.

Clyde J. Watts of Oklahoma City, Oklan one of Walker's four attorneys said Judge Clayton's decision would be appealed—assuming that it can be appealed—on grounds that Walker's constitutional rights had been violated.

Wakjer saud after TGE G

Wakjer saud after TGE GEARURG

Walker said after the hearing he feld he had been subjected to a "great injustice." In an interview taped for television broadcast he added that he felt that he now had a criminal record because of his stay for a few days in the U. S. Medical Center at Springfield, Mo.

In a summation of the issues, Judge Clayton told the court that the legality of Walker's arrest was not before the court at this time.

[fol. 1982]

"If and when an indictment is returned stemming from the charges," the judge said, "that will be the time and place for the question to be SXXX
the question to be explored."

Walter's attorneys had contended that the examination was illegally ordered because Walker had not been faced

with a bill of information nor had he been indicted by a Federa Grand Jury.

Because there are no facilities to house Federal prisoners in Oxford, Walker was foxx flown in a border patrol XXXXX plane to Springfield on Oct. 2. He was rleased on Oct. 6 after making bond of $50,000—half the amount originally set.

MORE

LM1139PCS D NM NOH

B18XF

OXFORD, MISS

B18XF

(380)

OXFORD, MISS—FIRST ADD WALKER (B14.:1 C1

B18XF

(380)

Oxford, Miss-First add Walker (B14 CQ-17XF) X X X originally set.

When Judge Clayton said he had decided that Walker needed a mental examination, he had been "especially impressed with the testimony" of Dr. Manfred S. Guttmacher, Baltimore, Md., psychiatrist who was the fourth and final government witness.

"To my mind," the judge continued, "he impressed me as being highly intelligent, exceptionally objective, extremely cooperative, a man obviously greatly experienced in the fields with which we are concerned."

Judge Clayton also said he knew more of Walker's career as a soldier and officer than had been presented in evidence.

"I have long admired his service in that capacity," the judge continued. "I have the greatest respect—that, too, goes outside the record."

Dr. Guttmacher, whose testimony opened the final days, said that on the basis of evidence supplied him by the government he had detected gradiosity, confusion and defective judgment on Walker's part.

[fol. 1983]

"There is a possibility that [illegible] has been a deterioration in the mental processes of General Walker in the last year or two," he said.

He repeatedly said he believed a full mental test was needed. At one point he said there is "sufficient smoke to see if there is any fire". Later he said "There are suspicions to warrant further exploration."

Walker was questioned only by his attorneys. He told of arriving in Oxford and details surrounding his arrest and overseas service when he was Commander of the 24th Division in Germany.

He was reliv

He was relieved of the post and reprimancded for p

He was relieved of the post and reprimanded for political indoctrination of troops. Later he resigned from the army.

".878 586)M

"Did you come into contact with a scandal sheet known as the Overseas Weekly," he was asked.

Walker said he had. He described it as a scurrilous publication.

B19XF

In reply to another question, Walker said he had been relieved of his command without an investigation, that he had not—as had been alleged—described President Harry S. Truman or anyone else as a communist.

No mention was made of details of the Ole Miss rioting, but Walker said the charges against him "Are for forcibax Walker said the charges agiinst him "Are for forcible assault, resistance, intimidation, impeding and interfering with Marshals in performance in their duties, insurrection and seditious conspiracy."

LM1230ACS B MN

[fol. 1984]

SHREVEPORT

NY CALLS YOUR ATTN TO A184, INSERT SARK SPOTLIGHTER, U ASKED.

NU

NOV 22 UT1232ACS BC

LO UT

NU

HOW MUCH MOE

NU

HOW MUCH MORE WALKER YOU WANT;?

XF

LM1233ACS B NM

XF

[Illegible] ENUF THANKS

NU

[fol. 1985] B1.1JA

(FLYING FARMER)

At dawn skies will be clear to scattered above 10,000 feet with unlimited visibility.

Surface winds northwest 7-14 mph strongest over northern portion of the mid-South.

JHALL834PCS 11/21/62

BI BA

BATON ROUGE, Nov. 20 (AP)—Rupert Malta filed suit in U. S. District Court Wed. asking for $108,680 for injuries he claimed he received in a house explosion last April.

Rupert named a construction and utilities company and the insurors of the construction firm as defendants.

Malta charged negligence on the part of the construction company for "in some manner disturbing high pressure lines causing the lines to rupture and escape gas into the home of Marie Heatly."

The suit CC TAINL 7A

INL

The suit claims "While Malta was staying in th Heatly house wth the permission of the owner, he investigated a noise, and while doing so, was blown from thehouse in an explosion which blew out the wall of th bathroom.

MMalta was taken to Charity Hopx x x Hsx x x Hspital F with burns over 80 per cent of T his body, thesuit contends.

EM835 PCS

DM

[fol. 1986] B2BA

BATON ROUGE, Nov. 20 (AP)—Dist. Judge Fred S. Leblanc administered a five-year sentence to Dr. Malcom Gray Pierson Wed. on condition the physician enter a hospital for treatment.

The 38-year-old doctor pleaded guilty to being a drug addict.

Pierson was arrested earlier in the week on 125 counts of illegally obtaining narcotics.

EM906 PCS

B14XF

OXFORD, MISS—NIGHT LEAD WALKER INSERT WHERE APPLICABLE

Commenting on the hearing, Walker said tonight in an interview taped for television broadcast that he feld "xxx felt "a great injustice" had been done to him.

He also said he had been harassed by federal psychiatrists xxxxxxxxxx

Walker

xxx psychiatrists.

Walker said he had been given a criminal record through his stay in the federal instituion at Springfield, Mo.

LM905PCS

[fol. 1987] NU

Suggest Dallas might want following on CCC re Walker report

XF

LM710PCS B

BZ

B7XFV

CF

YR B6XF, what NY is asking are quotes re the Truman-Communist comments. AVBL?

NU

NOV 21 RT 712PCS B NM C

NU

Re YR 712PCS only reference find is that Walker was asked if he had described Truman and any others as Communists.

"I had not mentioned President Truman or called anyone a Communist," Walker replied

(End of all reference to Truman)

XF

LM713PCS D

[fol. 1988] B7XF

WITH

WALK

ER (1,200)

OXFORD, Miss., Nov. 21 (AP)—Following is the psychiatric report of Dr. Robert L. Stubblefield, Professor and Chairman of the Department of Psychiatry of the Southwestern Medical Schoolsxx School, Dallas, Tex., on Edwin A. Walker and entered today at a federal hearing for the former Army major general:

PSYCHIATRIC REPORT

EDWIN A. WALKER

This report is written to inform you on the psychiatric evaluation of Edwin A. Walker conducted pursuant to order No. W-C-29-62. After a conference which was attended by Mr. Walker' attorneys (MMr. Watts, Mr. Matthews, Mr. Morris) and Professor Charles Webster and myself, I requested that Mr. Walker appear for the psychiatric evaluation. My purpose was to obtain material which would aid you in your decision about his competence to stand trial in your court. You wanted material in order to deal with three questions: (1) Whether or not the defendant is presently insane, (2) whether or not the defendant is sufficiently competent to uncder stand the the defendant is sufficiently competent to understand the KLLLEGT
allegations pending against him, as shown by the complaint now pending against him in the Northern District of Mississippi, and (3) whether or not the defendant is sufficiently competent to properly assist in his own defense.

Mr. Walker pe

[fol. 1989] Mr. Walker presented himself to me on Thursday, November 8, 1962 at 2:00 P. M. After a 1½ hour psychiatric interview, I recommended that he enter the psychi-

atric ward at Parkland Memorial Hospital as an inpatient for further observation and study. He was admitted at 4:00 P. M. and was cooperative throughout the examinations and procedures. He was released on a pass on his 53rd birthday on Saturday morning. He returned in the evening and was tentatively discharged from the hospital on November 10, 1962 at 10:00 P. M.
B8XF

Summary of findings is as follows:

1. Physical health—essentially normal.

   A. Physical examination—no abnormal findings except a slight deafness in the right ear and marked astigmatism, which is corrected by glasses (examination by A. W. Deloach, M. D., a member of my staff)

   B. Laboratory examinations—normal ranges for blood and urine studies

   C. X-rays of skull—normal

   D. Electrocardiogram—normal

2. Additional special procedures

   A. Electroencephalogram—normal

   B. Urine studies—no evidence of current use of tranquilizing drugs

3. Psychological tests—the report by Irwin Jay Knopf, Ph. D., a diplomate of the American Board of Examiners in professional psychology, and a member of my staff, states that Mr. Walker is functioning currently at the superior level of intelligence. On the Wechsler adult intelligence scale his reasoning, judgment, vocabulary, fund of information, and organizational ability were all above average for his age group.

4. Psychiatric interviews were conducted on:

A. Thursday, November 8, 1962 2:00 P. M.

B. Friday, November 9, 1962 2:00 P. M.

C. Saturday, November 10, 1962 10:00 A. M.

D. Saturday, November 10, 1962 8:00 P. M.

(Jointly with Andrew Watson, M. D., University of Michigan School of Medicine and School of Law)

[fol. 1990]

B9XF

IMPRESSIONS:

Mr. Edwin A. Walker is a 53 yaer old single, white male, who is alert, friendly, and cooperative. He was born at Center Point, Texas and was reared on his parents' far. He received his education in the local grammar school, attended Schreiner Military Institute. Upon completion of high school, he entered the Military Academy at West Point in 1927, and graduated in 1931. He has had a long and distinguished military career, and has received additional education and training in the Services Special War College. He participated in the Kiska, the Italian, the Southern France invasions of World War II, in the Korean War, in the Little Rock crisis and the German occupation. He resigned from the Army and refused his retirement privileges in order to be free to express his opinions about certain governmental policies re the procedures for indoctrination of troops concerning communism.

The following elicited replies point out the awareness of Mr. Walker concerning the nature and the gravity of the charges against him.

When I read the specific charges which were presented in the northern district of Mississippi Federal Court, Mr. Walker replied:

1) "That means forcibly assaulting, resisting, and impeding the United States Government, which means you forcibly intend to stop them and did use force to stop them. I feel I can relate the events in a precise way."

2) "It means you inspire others and make an effort to overthrow the government."

3) "It means that you join with others to conspire against the authority of the U. S. Government and attempt to delay and prevent their action. These are severe charges and they carry a severe penalty with them."

[fol. 1991]

B10XF

After discussion with my counsel, I directed various questions to Mr. Walker concerning the nature of the procdsses of criminal trial. In my opinion, he revealed his awareness in his discussion of the procesures in a military investigation which occurred in Germany.

"When a soldier committed an act against another soldier, y role was to notify the civilian authorities, our own military police, the judge advocate, and the investigating tea. Evidence was gathered and turned over to the civilian authorities if that was indicated by the nature of the crime." Mr. Walker continued and described in detail and correctly the usual procedures of a military court.

The following factual material would indicate that Mr. Walker has an intact, recent, and remote memory system. His specific responses to questions were satisfactory in many AE

SPC

Specific responses to questions were satisfactory in many areas, for example:

1. Events in the Italian Campaign.

2. Events in the Korean War.

3. Ability to calculate, recall numbers, knowledge of current information.

4. Performance in the intelligence tests.

[fol. 1992]

B11B

B11XF

Mr. Walker has led an active life physically; currently, he states he eats well, sleeps well, and exercises moderately. He denies specific symptoms, hallucinations, delusions, addiction to drugs or alcohol, use of tranquilizing drugs. There is no clinical or laboratory evidence which would indicate any physical or toxic condition which would affect adversely his ability to perceive his environment, to evaluate his environment, and to develop effective and appropriate actions in dealing with problems.

In the psychiatric examinations, no effort was made to elaborate a fully detailed picture of (U/L) why (U/L) Mr. Walker functions in his present state, nor whether or not there has been any particular change in his mode of psychological operation, since this was not judged by my staff and me to be relevant to the questions of his (U/L) present (U/L) mental operations. Rather we set out to evaluate (U/L) how (U/L) he thinks, regulates, executes, and deals with his present thoughts, values, and impulses, especially as they relate to the present charges. We felt able to arrive at some very specific answers to these questions, and fond no difficulty in eliciting the full cooperation and assistance of Mr. Walker during the examination.

[fol. 1993]

B12XF

All psychiatric and psychological tests indicate that Mr. Walker appears to be able to deal freely and accurately with his recollections of the incidents leading up to his

arrest and present charges. e can discuss them accurately, and without distortion noticeable to the examiners. He was able to describe fully his opinions on the charges, what they meant, what kinds of defensive tactics he intends to employ, how his lawyers are working with him and the unfolding of the events which led to the present charges. However, in regard to the questions of the (U/L) reasons (U/L) for his involvement, he did no feel that whether or not there were emotional forces of which he is not fully aware (and that might possibly relate to the legal question of specific intent and motivation) were properly a part of this report. It is our impression that the court in this case at this time is (U/L) not (U/L) concerned about Mr. Walker's ability to understand fully, the more complex and subtle aspects of his motivation in regard to the acts for which he is charge. If it were, and if we were asked to evaluate these kinds of questions, it would be necessary to conduct a much more penetrating exploration of Mr. Walker's psychological operations.

[fol. 1994]

B13XF

It may be that some of Mr. Walker's attitudes and feelings about specific events in Mississippi are such that if he were pressed hard to deal with them (as for example in a cross-examination) this might have a definite effect on his composure on the stand. Since we assume that the court does not deal with this possibility in its standard of competence, we have therefore made no effort to explore in detail their nature or possibility.

/s/ Robert L. Stubblefield
Robert L. Stubblefield, M. D.
Professor and Chairman
Department of Psychiatry
Southwestern Medical School

LM803PCS

[fol. 1995] B6XF

(WALKER QUOTES ASKD)

Oxford, Miss.—insert night lead x x x Walker x x x

After Walker was put on the stand he went through the formalities of giving his name, age and hometown. Then he spoke in short sentences when asked to tell of his arrival in x x x Oxford last September.

"Upon arriving went one-quarter mile for breakfast," he began. There one hour. Then went to the Ole Miss school grounds and made a circle. Came to town of Oxford. Came to Chourthouse and

A circle. Came to town of Oxford. Came to Courthouse and conversed with Sheriff (Joe) Ford. Went to lunch at Mansion Cafe. It was very late. Had many conferences with press."

The testimony skipped over the time in which the Sept. 30 rioting took place. Walker resumed the account of his activities with the details of his arrest the following day and his trip to the airport to be taken to a fedeaxx federal institution in Springfield, Mo. There were no facilities here to house federal prisoners.

"At the door of the plane I asked where I was to be taken," Walker recalled. "As I mounted the first step I heard a man say 'Springfield.'

"'The plane took off and when we were in the air I asked: 'Illinois?'

"We are going to Springfield, Mo.," he sadxx said someone replied.

Upon arriving at Springfield he said that he was kept as a prisoner in the maximum security house until Oct. 6 on that day his bond of $100,000 was cut to $50,PPP, he made bond and was released.

(END INSERT)

LM648PCS B NNM

[fol. 1996] D24DX

NIGHT LEAD TOLEDOBEND

Baton Rouge, Nov. 21 (AP)—The Sabine River Authority of Louisiana has accepted the low bid of English Electric Corp., Chairman Claude Kirkpatrick said Wednesday, to build twin hydraulic turbines in the Toledo Bend Dam Power Project.

The English firm's bid was approved at a meeting here Tuesday of the Louisiana Authority, Kirkpatrick said, and also has been accepted by the Sabine River Authority of Texas.

The Executive Committee of the Joint Sabine River Authority, he said, will accept the bid formally in Dallas Monday.

Kirkpatrick said the English firm's bid amounted to an overall savings of $383,000 over the next lowest bidder, Allis-Chalmers.

The English Electric base bid was $1,292,017, re-evaluated to $1,677,400. Five firms bid on the project for the $60 million dam on the Louisiana-Texas border. Kirkpatrick said each was evaluated a against a seven-point check list.

JO644PCS 11/21/62

[fol. 1997] B5XF

(NU-INSERT WHERE THEY WILL FIT:)

—0—

Oxford, Miss.—night lead Walker ( ) insert after GRAF

When the two-day hearing finally ended, Walker strode away unsmiling from the courthouse. A newsman who caught up with him asked Walker how he felt the hearing went.

"Fine, Z was Walker's only comment

—0—

Clyde Watts of Oklahoma City, Okla., one of Walker's four attorneys, said Judge DXX Clayton's decision would

be appealed—"If it is appealable." Watts said he felt that Walker's constitutional FXX rights had been violated by the October order to undergo mental examination.

END INSERTS

LM612PCS B

XF

PLS GIVE GRAF EXPLAINING HABEAS CORPUS IN RELATION MCSHANE CASE.

NU

Nov. 21 RK622PCS BC

BINU

HOOFBEATS SELECTIONS—FOR THE FAIR GROUNDS . . .

1....Second Light, Sir Hawley, Tulsa Bee

2....LIL RI,

2....Lil Rix, Eight of Hearts, Coushatta Tribe.

3....Giovanni, Pici-A-A Toria, Bill Me.

4....Fleeting Toni, Dixieland King, Royal Woo.

5....Everett's Son, Be Bee Time, Midway Myorxx Mayor.

6....Air Stride, Missiixx Mission Missions, Elfin.

7....SE

7....Steve Valenti, Shoot Luke, Magic Realm.

8....Bull Story, Toxx Troa, Grand Wizard.

9....Blonde Ruler, Clergyman, Picmar.

BEST BET—AIR STRIDE (6).

RK624PCS NM

[fol. 1997a] CLERK'S NOTE:

Plaintiff's Exhibit 11—University of Mississippi Plot Plan appears in POCKET to Exhibit Volume.

FORT WORTH STAR-TELEGRAM

MORNING

FRIDAY, SEPTEMBER 28, 1962 • • • • • 82ND YEAR, NUMBER 240

40 Pages in 3 Sections

PRICE FIVE CENTS

were guarding against another attempt to enroll James Meredith, a Negro. U. S. marshals escorting Meredith were recalled 20 miles from Oxford.

BARNETT AT ROADBLOCK—After being in seclusion all day, Mississippi Gov. Ross Barnett arrives at a roadblock near university entrance Thursday night.

—Associated Press Wirephotos

BOBBY EXPLAINS ORDER—Attorney General Robert Kennedy, as he leaves Washington office, tells newsmen danger of bloodshed prompted postponement at Oxford.

Troops Called to Support US Marshals at Ole Miss

[fol. 1999]

PLAINTIFF'S EXHIBIT 14

A148NU

1ST LEAD WALKER (110)

Oxford, Miss., Nov. 21 (AP)—A pscychiatrist said today he considered that former army Maj. Gen. Edwin A. Walker had shown signs of grandiosity.

Dr. Manfred S. Guttmacher of Baltimore testified as a hearing resumed into the effort of Walker's attorneys to erase a Federal court order for a mental examination.

Dr. Guttmacher said his study of Walker's records also had disclosed confusion and examples of defective judgment.

"There is a possibility that there has been a deterioration in the mental processes of Gen. Walker in the last year or two," Dr. Guttmacher said.

Dr. Guttmacher said he felt that Walker, 53, needed a full examination for his own good.

Walker's attorneys, 2nd GRAF PRVS (A74AX).

RK1105ACS NM.

A149
A149WX

(120) INSERT

Washn—Kennedy-Housing (A13WX) Insert After 13th Graph "But Kennedy" X X X Anti-Bias Laws:

In a statement today, Leonard L. Frank, President of the National Association of Home Builders, said builders feel that "The health of the home building industry now may be sapped by the executive order."

Builders will do their best to fulfill their responsibilities under the order, he said, but the Federal Government also must use its full resources "to lessen the impact on our nation's economy."

Frank said the survey his organization made before the order "reflected the opinion of many builders throughout the country that such an order would cause a cutback in housing production, have an adverse effect on the entire economy, and consequently on jobs and incomes."

Americans for Democratic Action (ADA) applauded the order and said in a statement: "We call for its vigorous enforcement in the interest of an integrated America."

The White House Order etc. 14th Graph

JK1208PES

A150WK

OZONE STUDY (330)

Washington, Nov. 21 (AP)—The Air Force announced plans today for what it called the most thorough study of atmospheric ozone ever made.

The one-year research program, starting next January, will involve the launching of more than 700 balloons.

Simultaneously every Wednesday noon, Greenwich time, 11 stations will launch balloons carrying a new measuring device, called the Regener Ozonemeter, and radio telemetry equipment to send back the measurements.

The balloons will inflate to a diameter of 25 feet at their maximum altitude of 100,000 feet.

In addition, each station will conduct daily launches for a 15-day period next spring when ozone concentrations in the atmosphere are most intense.

Ozone is oxygen that has been electrically charged. Carrying the faint odor of chlorine, it is poisonous to human beings and can harm materials such as rubber if concentrated.

"Although ozone is a minor constituent of O

(MORE)

RK1211PES

[fol. 2000]

A64

PRECEDE KEY WEST ECONOMIC A25

Havana, Nov. 21 (AP)—The

BUST HITS

A'64NU

URGENT

NIGHT LEAD WALKER

Oxford, Miss., Nov. 21 (AP)—U.S. District Judge Claude F. Clayton ruled today that a court order for a mental examination of former Maj. Gen. Edwin A. Walker must stand.

He offered, however, to accept the results of a mental examination given Walker recently in Dallas, Tex.

(MORE)

RK420PCS NM

A65

PRECEDE KEY WEST ECONOMIC A25

Havana, Nov. 21 (AP)—The Government labeled as totally false today reports that Cuba had signed a new three-year economic aid treaty with the Soviet Union.

Responsible diplomatic sources said yesterday Soviet Deputy Premier Anastas I. Mikoyan and Ernesto (Che) Guevara, Cuba's Industries Minister, signed the agreement last week.

As broadcast on a television program, the communique said:

"The Revolutionary X X Fourth Graf Key West Dateline A25.

RK522PES

A66

NIGHT LEAD U.N.—CUBAN (220)

BY MILTON BESSER

United Nations, N.Y., Nov. 21 (AP)—The United States said today it will resume negotiations here soon with the Soviet Union on unresolved issues in the Cuban crisis.

These involve mainly arrangements for on-site inspection demanded by the United States as a guarantee against any new buildup of offensive weapons in Cuba.

U.S. Ambassador Adlai E. Stevenson said in a statement that there has been progress toward conclusion of negotiations with the Soviet Union, as President Kennedy noted yesterday.

"However," Stevenson added, "Other issues remain unsettled and negotiations will soon be resumed with the Soviet representatives.

"We hope they will proceed smoothly and that the matter can be concluded in the Security Council before long. Our next meeting with the Soviet representatives has yet been set."

Informed sources said they did not expect any new round of U.S.-Soviet negotiations before next week.

John J. McCloy, Special Adviser to Stevenson on Cuba and head of Kennedy's Coordinating Committee, is expected to remain in New York for the negotiations.

Vasily V. Kuznetsov, Soviet Deputy Foreign Minister, is here as Premier Khrushchev's Special Negotiator on Cuba. There was no word on the plans of Anastas I. Mikoyan, Soviet Deputy Premier who has been talking to Cuban Prime Minister Fidel Castro in Havana.

Castro is still objecting to on-site inspection and threatening to shoot down U.S. reconnaissance planes.

RK527PES

A67

Lille, France, Nov. 21 (AP)—Jacques Vasseur today left his mother's house in a suburb of Lille for the first time in 17 years.

Now 42 years old, Vasseur went into hiding at the end of World War II rather than face charges of collaboration with the enemy. He was condemned to death in abstentia.

From then until now Vasseur remained inside, hiding in the attic every time the doorbell rang.

But Monday Vasseur was too slow and he was spotted. Officers today returned with a warrant.

RK528PES

[fol. 2001] A71

WITH NL CUBANS-SABOTAGE

NEW YORK, Nov. 21 (AP)—The International Longshoremen's Association, AFL-CIO, appealed to President Kennedy today to tighten security on the nation's waterfronts against the possibility of sabotage.

Capt. William V. Bradley, longshoremen's president, told a news conference the recent arrest of pro-Castro Cubans here on sabotage conspiracy charges prompted his telegram to Kennedy.

The port of New York, he asserted, could be "put out of business" in less than 20 minutes by saboteurs.

The telegram included a warning that a Cuban saboteur could come to the United States and be working on the waterfront within a few days.

"Undoubtedly there are some working on our waterfronts at the present time," it said.

SF543PES

A72NU
(500)

OXFORD, Miss—1st add night lead Walker (A64NU) x x x in Dallas, Tex.

Clayton, recently named commander of the 31st National Guard Division of Mississippi and Alabama troops, expressed the "greatest respect" for Walker's military career.

But he added that the weight of the evidence led him to believe that "reasonable cause does exist for a psychiatric examination."

The ruling came at the end of a two-day hearing on Walker's motion to have the court's order for a mental test stricken from the record.

Shortly before the judge took the motion under consideration, Walker took the stand himself, answering questions put to him by his attorney.

He gave details of his arrest by federal troops on charges of seidtious conspiracy and inciting insurrection in the bloody, night-long desegregation riot on the University of Mississippi campus almost two months ago.

But neither he nor his attorney made any mention of his actions the night of the riot.

Walker also discussed his controversial reprimand and loss of command over a troop indoctrination program in Germany. He said the Army treated him unfairly, taking away his command of the 24th Division without investigating the circumstances. Later he resigned from the Army.

Wearing a dark grey suit and a white shirt, Walker spoke in slow, deliberate tones, clearly audible throughout the court room in this tiny north Mississippi town.

Earlier, a psychiatrist, Dr. Manfred S. Guttmacher of Baltimore, described Walker as showing signs of grandiosity, confusion and poor judgment.

Guttmacher said he based his remarks on a study of documents, newspaper clippings and medical records involving Walker.

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Guttmacher said he based his remarks on a study of documents, newspaper clippings and medical records involving Walker.

Referring to a news conference held by Walker in Dallas, Tex., last Sept. 27, Guttmacher said: "I felt that Mr. Walker's replies were unusually slow and there seemed to be some confusion as to the meaning of the questions."

In reference to one of Walker's remarks, Guttmacher said: "There was the element of grandiosity in 'there are thousands going to Mississippi, not only because of my interest.'"

Guttmacher sadded:

[fol. 2002] A73NU

Zthere is a possibility that there has been a deterioration in the mental processes of Gen. Walker in the last year or two."

Guttmacher added that his study of Walker's records led him to believe that Walker needed a full examination for his own good.

Walker, 53, faces charges of seditious conspiracy and inciting insurrection in connection with his actions in the riot that erupted on the Ole Miss campus after the arrival of Negro James H. Meredith the night of Sept. 30.

The riot killed two and left scores of students and federal Marshals injured.

Federal troops arrested Walker the next day. Federal authorities released him later on $50,000 bond with the stipulation that he undergo a mental examination.

Walker's attorneys contended the court order for a mental test violated his constitutional rights. They said no Grand Jury had indicted him, and no U.S. attorney had presented a bill of information when the court ordered the test.

Government attorneys countered that mental tests were legal when ordered after an arrest and before sentence is passed.

Meantime, Walker has undergone the mental test. Results of the test have not been revealed.

The Government contended that his motion to erase the court order was aimed primarily at giving the record the appearance that he submitted to the test voluntarily.

RKTT455PCS

A74

WIREPHOTO ADVISOREZIN

A74'NU

BULLETIN

OXFORD, Miss., Nov. 21 (AP)—Chief U.S. Marshal James D. McShane gave himself up for arrest here today on charges of inciting to riot and breach of the peace growing out of the University of Mississippi desegregation riots.

RK457PCS NM

AAO

A75CX

UNDATED THANKSGIVING DAY HOLIDAY DEATH LOG

By the Associated Press

6 P.M. EST, the log of deaths in traffic accidents, fires and from miscellaneous causes over the Thanksgiving Day weekend begins.

WZ457PCS NM

TN

A76WX

CORRECTION

WASHINGTON—NL Housing (A62WX) 2nd graf "From other quarters x x x demanding." Read it x x x Civil Rights groups have been demanding. (Inserting groups).

THE AP

PE558PES

A77

WIREPHOTO ADVISORY

Upcoming: three pictures on attempted rescue of sign worker electrocuted at Chicago installation.

AP-Nov. 21

JS558PES

A78KX (MINISTER AND MISSILE WARN)

(300) NIGHT LEAD (SEE WIREPHOTO WE1)

WICHITA, Kan., Nov. 21 (AP)—A married Baptist minister and a 16-year-old girl, missing from their homes in Tatum, Tex., since Nov. 2, were found today living together in Wichita.

The Rev. LeRoy (Caps. L, R) Daniels, 27, pastor of the Christal Farms Baptist Church in Tatum, was arrested on a Texas charge of contributing to the delinquency of a minor.

Flora Jean Cole, who had been the lead singer in his choir and an honor student in high school, was taken to a Home for Girls.

Daniels agreed to waive extradition to Texas. He declined comment but police quoted him as saying, when asked why he and Flora Jean had left Tatum: "It's rather obvious, isn't it?"

V Flora Jean is a brown-eyed blngfeet-2,awly 90 P

(MORE)

MU/RK502PCS

[fol. 2003] A79'NU

BULLETIN MATTER

OXFORD, Miss—1st lead McShane (A74NU) x x x riots.

District Attorney Jesse Yancy Jr. said McShane, who was indicted last Friday by a County Grand Jury, was ex-

pected to seek release on a writ of habeas corpus momentarily before U.S. District Judge Claude F. Clayton.

McShane was being held in the Federal Court Building here, Yancy said.

The District Attorney said McShane appeared unexpectedly after learning of the indictment.

RK503CS NM

A80NX

It?"

FIRST ADD NIGHT LEAD (A78KX) X X X ISN'T A80KX

(200) WICHITA, Kan.—1st add nite lead enamored couple (A73KX) xx it?"

Flora Jean is a brown-eyed blonde who stands 5-feet-2 and weighs only 90 pounds.

Police said that when they confronted her in a one-room basement apartment she shared with Daniels she readily agreed to go with them but said firmly:

"I do not want to go home. I won't stay home. I'll run off."

Police said Daniels had been married four months when he disappeared.

They said Flora Jean told them she and Daniels had seen each other secretly for some time. She said they decided to run away because they thought someone had been following them.

They left following a football game at which Flora Jean marched with her high school band.

The couple told officers they arrived in Wichita Nov. 3, stayed the first night in a motel and the next two nights with friends, whom they declined to identify. They moved into the apartment Nov. 6.

Daniels had been working at a liquor wholesale house, as an order-filling clerk, since Nov. 9.

At Tatum, Mrs. Roy Cole, the girl's mother, was quoted as saying the girl never had dated. Mrs. Cole said she had known of no association the girl had with the minister except through the choir.

VX508PCS

A81NU

URGENT

(150)

OXFORD, Miss—2nd add McShane (A74-79)NU) x x x the indictment.

The Lafayette County Grand Jury, following an investigation of the bloody desegregation riot on the Ole Miss campus the night of Sept. 30, returned two indictments in the case.

Under Mississippi law, the names of persons indicted, and the charges against them, cannot be made public until they are in custody.

McShane was in charge of a team of about 300 Federal Marshals accompanying Negro James H. Meredith onto the Ole Miss campus.

The Marshals, after taking Meredith to a dormitory, set up a circle of men, standing shoulder to shoulder, around the Lyceum Building, where the registrar's office is located.

A crowd gathered and violence broke out. During the night of rioting, two persons were killed and scores more—students, Marshals and others—were injured.

The next morning, as federal troops moved in to restore order, the university enrolled Meredith—the first of his race ever knowingly admitted in the 114-year history of the university.

RK512PCS NM

A82

A82KX

PEARL HARBOR, Hawaii, Nov. 21 (AP)—The Navy has warned mariners to keep out of a 22,500 square mile area of the Pacific south of Johnston Island, presumably because of practice firing of missiles.

The warning covered a period from midnight to 6 A.M. Hawaii time (5 A.M.-11 A.M. EST) today and tomorrow.

The notice was published by the Navy Oceanographic Office in Honolulu.

Spokesmen for the Pacific Missile Range Headquarters at Point Mugu, Calif., and at Kaneohe, Hawaii, declined comment.

VX514PCS

[fol. 2004] A96NU

URGENT

INSERT

OXFORD, Miss.—Night lead Walker (A64-72NU), insert after 2nd graf, he offered x x x Dallas, Tex.

Following a conference with attorneys, Clayton opened a copy of the report on Walker's mental test in Dallas.

He described the report as "essentially negative"—that is, it expressed no opinion on the sanity of Walker. Dr. Robert Stubblefield of Dallas examined Walker.

The judge then added that his personal opinion, after hearing Walker testify earlier today, was that Walker was competent to aid in his defense against federal charges filed against him in connection with his actions in the University of Mississippi desegregation riots.

Clayton, 3rd graf night lead (A64-79NU).

RK604PCS

A97NU

URGENT

FIRST LEAD MCSHANE

OXFORD, Miss., Nov. 21 (AP)—Chief U.S. Marshal James McShane surrendered today on an indictment that charged he incited the Sept. 30 desegregation riot at the University of Mississippi. He was released three hours later on a writ of habeas corpus.

U.S. Dist. Judge Claude F. Clayton released McShane after the Justice Department claimed he was "doing duties as a federal official" on the Ole Miss campus.

The burley, ex-New York policeman was indicted last Friday by a Lafayette County Grand Jury that investigated the campus riot that followed the arrival of Negro student James H. Meredith.

Dist. Atty. Jesse Yancy Jr. said after McShane's release that "The case now rests in the hands of the Federal Court. The Justice Department says he was doing his duty and can not be charged.

"However, the State contends McShane made unlawful acts and should be prosecuted in State Court."

Judge Clayton set a hearing for late January. Yancy said it would "probably last a week and bring out all the testimony of the normal trial.

McShane faces up to 10 years and a $500 fine if convicted on the State charges of inciting a riot and breach of the peace.

He was held in the Lafayette County Courthouse under custody of Sheriff Joe Fod during the three hours b Sheriff Joe Ford during the three hours before Judge Clayton released him.

The district x x x etc. 4th graf A74-79NU.

RK606PCS NM

A98

A98KX

CORRECTION

SAN FRANCISCO—Sino-Russian interpretive (A53-54), penultimate graf starting "Particularly from," etc., make second sentence read: The Chinese took Tibet in 1955 x x x (took instead invaded and 1955 inste 1950).

THE AP

VX609PCS

[fol. 2005]

A101WX

SUB

0

A101SX

(See wirephotos CX4, 5, 6)

MOUNT PROSPECT, Ill., Nov. 21 (AP)—George F. Tadin Jr., 26, of Chicago, was electrocuted Wednesday as he removed a 10-foot metal overhead sign at a hardware store in Mount Prospect.

Tadin's leg apparently came into contact with a metal wire carrying 7,200 volts. He was killed instantly.

Tadin's father, George Sr., waited on the sidewalk while Tadin worked 25 feet above him.

Both his father and Mount Prospect firemen tried to revive Tadin.

Dr. Michael Ruance, who pronounced Tadin dead, said the victim was burned badly around the face, neck and leg.

The Tadins operated a south suburban Chicago sign erecting firm. They were working on a sign at a Mount Prospect shopping development.

Mount Prospect is a northwest Chicago suburb.

EC627PCS NM

A102KX

A102NU

URGENT

(This second lead McShane combines the McShane-Walker developments for members desiring one story)

Second lead McShane

Oxford, Miss., Nov. 21 (AP)—Chief U.S. Marshal James McShane gave himself up to Mississippi authorities today on charges he incited the desegregation riot at the University of Mississippi Sept. 30.

The Justice Department obtained McShane's release three hours later on a writ of habeas corpus, claiming the charges against him resulted from his actions "Doing duties as a Federal official."

The Lafayette County Grand Jury indicted two persons last week in connection with the bloody riot that killed two and injured scores of students and Marshals.

McShane was in charge of Federal Marshals on the University campus the night of the riot.

Under Mississippi law, the names of persons indicted, and the charges against them, are held secret until they are taken into custody.

U. S. Dist. Judge Claude F. Clayton ordered McShane's release and set a hearing for late January.

At the same time McShane was entering the Sheriff's Office to give himself up, Clayton was winding up a hearing involving another of the major figures in the riot—former Maj. Gen. Edwin A. Walker.

Clayton ruled that a court order for a mental test of Walker must stand.

Walker, facing charges of seditious conspiracy and inciting insurrection in connection with his actions the night of the riot, had asked the court to eliminate the order, contending it violated his constitutional rights.

A103NU

Clayton, in ruling that the order for a test must remain in effect, offered to accept the results of a mental examination taken by Walker at Dallas, Tex., earlier this month.

After opposing attorneys agreed, Clayton opened the report from Dr. Robert Stubblefield of Dallas, the Psychiatrist who examined Walker.

Clayton said the report expressed no definite opinion on the sanity of Walker.

The judge added, however, that he felt after hearing Walker testify earlier today that the former Major General was competent to aid in his defense against the Federal charges.

Walker himself testified near the end of the two-day hearing on his motion to strike the court order for a sanity test.

He made no mention of his actions the night of the riot.

He said he thought the army treated him unfairly during his military service, and relieved him of command of the 24th Division in Germany without investigation. The army relieved Walker of command during a controversy over troop indoctrination.

Walker also said he had been quoted falsely in reports saying he described former President Harry S. Truman and others as communists.

McShane, a burly ex-New York Policeman was indicted last Friday by a Lafayette County Grand Jury investigating the campus riot that followed the arrival of Negro James H. Meredith.

Dist. Atty., 4th graf first lead McShane (A97NU)

RT639PCS NM

[fol. 2006] A139

Boston, Nov. 21 (AP)—Republican Gov. John A. Volpe formally asked today for a recount of the Nov. 6 election in which he was defeated in the official tally by 3,091 votes.

Endicott Peabody, the Democrat who was victorious in the official tally, expressed confidence that the result would be unchanged "and I will be inaugurated on Jan. 3."

The recount is expected to start next Tuesday and take at least a week.

The official tally gave Peabody 1,051,653 and Volpe 1,048,562 votes.

LU942PES

ABLBUFFA

A139NU

URVNT

A140NU

URGENT

SECOND NIGHT LEAD WALKER (A64-72NU)

Oxford, Miss., Nov. 21 (AP)—U.S. Dist. Judge Claude F. Clayton ruled today that former Maj. Gen. Edwin A. Walker was mentally competent to stand trial and aid in his defense on Federal charges of insurrection.

No trial date was set for Walker, arrested Oct. 1 after a night of rioting at the University of Mississippi following the arrival of James H. Meredith, the school's first known Negro student.

Judge Clayton accepted a Dallas, Tex., mental test given Walker earlier this month, after attorneys for both Walker and the Federal Government agreed that this test could be used.

A few minutes earlier, Judge Clayton had ruled against a motion by Walker's attorneys to throw out his order for a psychiatric test.

Following a conference XX etc., 3rd GRAF Night Lead Walker, A64-72-96NU

RT845PCS NM

A141

Buffalo, N.Y., Nov. 21 (AP)—About 900 students and 50 teachers evacuated a Junior High School in three minutes today when fire broke out on the stage of the school auditorium.

No one was injured. The blaze caused about $15,000 damage, firemen said.

"The children heard the alarm, thought it was a fire drill, and the school was emptied in three minutes," said Thomas J. Connors, Principal of Clinton Junior High School.

LU947PES

A142WX

A142NU

URGENT

SUB

Oxford, Miss.—Second Lead McShane (A102-103NU), sub folowing for 8th GRAF (including PVS insert A112 NU), "at the same X X X Edwin A. Walker."

Clayton also ruled that one of the major figures of the riot—former Maj. Gen. Edwin A. Walker was mentally competent to stand trial and aid in his defense on Federal insurrection charges.

Clayton made the ruling after blocking an attempt by Walker's attorneys to keep the question of Walker's mental competence out of the court records.

Clayton ruled XX etc., 9th GRAF PVS (9th GRAF A102NU)

RT850PCS NM

[fol. 2007] A74AX

(550)

WALKER-MEREDITH

Oxford, Miss., Nov. 21 (AP)—The Government continues today its fight against an attempt to blot out a

court-ordered mental examination for former Army Maj. Gen. Edwin A. Walker.

Walker's attorneys contended yesterday the circumstances under which the order was issued violated his constitutional rights. They said Walker had not been indicted by a Federal Grand Jury nor had a U. S. Attorney presented a bill of information when the test was ordered.

The Government denied any infringement of rights. It said mental tests were legal when ordered after an arrest and before sentence is passed.

A Federal Judge ordered the examination Oct. 2, the day after Walker was arrested on charges of seditious conspiracy and inciting insurrection in connection with a bloody desegregation riot on the University of Mississippi campus. Two men died and scores were injured.

The riot occurred when U. S. Marshals ringed the Ole Miss Administration Building shortly after bringing Negro James H. Meredith to the campus for enrollment.

Meredith's name went unmentioned and the riot itself was not brought up until the first of seven witnesses subpoenaed by the Government testified.

University Police Chief Burns Tatum testified he was about 10 to 15 feet from Walker when the former Major General addressed a group of students in front of the Lyceum Building, the University's Administration Building and scene of the heaviest fighting.

Tatum said he was standing with a group of students, one of whom pointed out Walker to him.

He said he heard Walker, who held a paper cup in his hand, tell the students:

"Col. (T. D.) Birdsong has let you down. Gov. (Ross) Barnett is your guard. Charge!"

Birdsong is head of the Mississippi Highway Patrol which had many units stationed in the campus area.

Other opening day witnesses were Cal Marlin of Miami, Fla., television newsreel cameraman for the National Broadcasting Co., and two psychiatrists—Dr. Charles E.

Smith of Washington, D. C., medical director of the Federal Bureau of Prisons and chief psychiatrist of the Justice Department; and Dr. Manford Guttmacher of Baltimore, Md.

A75AX

A75AX

Marlin's testimony consisted of the filmed report of a statement read by Walker in Jackson Sept. 29, the day before rioting.

"I am in Mississippi beside Gov. Ross Barnett," the statement said. "I call for a national protest rally to the cause of freedom."

The defense objected to the film presentation as irrelevant and immaterial. Judge Claude F. Clayton reserved his ruling on the motion.

The defense hammered at length at a memorandum from Dr. Smith which subsequently was named as a basis for the Government's request to have Walker examined. Smith sent the memo to James V. Bennett, Federal Prisons Director, who sent it by telegram to U. S. Atty. H. M. Ray.

Smith said he based his memorandum on medical records, news stories and a hearing before the Special Preparedness Subcommittee of the Senate Armed Services Committee last April.

Meanwhile, Meredith ate supper last night with an unidentified student and professor at the Ole Miss cafeteria. They were under heavy campus and U. S. Marshal surveillance, apparently because the room of two students was ransacked Friday after they ate lunch with Meredith.

The University Senate took up a resolution to censure the editor of the campus newspaper, The Daily Mississippian, for editorials against student demonstrations and in support of students who have joined Meredith at meal times. The resolution aimed at editor Sidna Brower of Memphis, Tenn., was referred to committee.

XW728AES

AFTER 740AES-AX

[fol. 2008]

PLAINTIFF'S EXHIBIT 14A

A139

INSERT

Guantanamo Bay, Cuba—Korth-Thanksgiving A88 Insert After 4th GRAF: Been Made.

He added that he will talk tomorrow with Defense Secretary Robert S. McNamara about the return of the 2,800 dependents "and see whether I can't expedite that as much as possible."

"I do not X X X 5th GRAF.

UK938PES

CLR?

CLR.... A140 NEXT.... 949PES

A140KX (WALKER)

(160)

Gainesville, Tex., Nov. 22 (AP)—Former Maj. Gen. Edwin A. Walker of Dallas directed two fire-fighting units today and was credited with a major effort in keeping a farm home from being destroyed by fire.

Loys R. Dugger said Walker, driving alone along U. S. 77, fourteen miles south of Gainesville, noted the woodshed in the rear of the Dugger farm home ablaze. The ex-general and occupants of the house fought the blaze, which spread to the two-story residence, until fire units from Gainesville and Sanger arrived. Dugger and Charles McSpadden of Denton, who owns the residence where Dugger lives, said Walker then took charge of the fire fighting and assisted in carrying out furniture and personal belongings from the home.

The two-story house was heavily damaged. There was no injuries.

Those at the scene said Walker told them he was returning home from Mississippi. Walker appeared yesterday at a hearing before U. S. Dist. Judge Claude F. Clayton in Oxford. The judge ruled the former general mentally competent to stand trial on charges of seditious conspiracy and inciting an insurrection in connection with Walker's action on the campus at the University of Mississippi during the enrollment of James Meredith, first Negro to attend the school.

GC858PCS NM

AV

A141CX

ADD DEATH LOG

10 R.M. EST: Traffic 134, Fire 8, Miscellaneous 9. Total 151.

WZ858PCS NM

[fol. 2009] A20

CORRECTION

New York—Longshoremen (A17) 2nd GRAF Make It X X X Fidel Castro. (Not Castor)

THE AP

KS325AES

A21

URGENT

Seoul, Korea, Nov. 22 (AP)—An American soldier was killed and another injured in a hand grenade attack by North Korean Communist soldiers Tuesday night, U.N. command spokesman said today.

The soldiers were manning a U.N. observation post in the demilitarized zone on the Western Korean front. They

were members of the First Cavalry Division but their names were withheld.

The spokesman said this was the first known attack by North Korea soldiers on an observation post manned by Americans since the Korean Armistice of 1953.

He described it as an "unprovoked, vicious and speedy attack."

The incident occurred near the western end of the 150-mile long demilitarized zone, some 25 miles north of Seoul.

Both American casualities were enlisted men. The injured soldier received wounds in both feet from grenade fragments.

The attackers tossed five Russian grenades. One exploded inside the observation post, 350 yards south of the demarcation line. The spokesman said. Three others exploded on the outside, and one unexploded grenade was found outside the post.

Several U.S. soldiers were in the area, but made no attempt to stage a counterattack. The attackers apparently fled from the scene.

KS328AES

A22AX

PMS BUDGET (570)

WALKER-McSHANE

BY THE ASSOCIATED PRESS

Oxford, Miss., Nov. 22 (AP)—Edwin A. Walker, the controversial former Army Major General, has been ruled mentally competent to stand trial on charges of seditious conspiracy and inciting an insurrection.

U. S. Dist. Judge Claude F. Clayton, who is an Army National Guard Brigadier General, handed down the ruling yesterday at the end of a two-day hearing to determine whether there was reasonable cause for a mental examination of the 53-year-old Walker.

The lean Texan was arrested here Oct. 1 following the desegregation rioting at the University of Mississippi which killed two persons.

Shortly before Clayton ruled in the Walker case, he ordere sons.

Shortly before Clayton ruled in the Walker case, he ordered Chief U. S. Marshal James McShane released from the Lafayette County Jail. McShane had surrendered to Sheriff Joe Ford on state charges of inciting a riot and breach of peace during the rioting.

McShane and one other person—who has not yet been identified—were indicted last week by the County Grand Jury after it probed the rioting which followed the arrival of Negro James H. Meredith on the University campus.

The judge set no date for Walker's trial. He accepted a mental test given Walker earlier this month at Dallas, Tex.

The judge said the examination made by Dr. Robert L. Stubblefield, Professor at the Southwestern Medical School in Dallas, "was essentially negative. No opinion was expressed. It did not say whether he was sane or insane."

Clayton added that from his observation of Walker's behavior while testifying yesterday he "found that this man is competent" to aid in his defense of such criminal charges as may be presented.

Clyde J. Watts of Oklahoma City, Okla., one of Wlker's four

Clyde J. Watts of Oklahoma City, Okla., one of Walker's four attorneys, said Clayton's decision in placing the mental test in the case record would be appealed. Walker said afterward he felt he had been subjected to a great injustice.

Clayton, recently chosen to command the 31st (Dixie) Division of Mississippi and Alabama National Guardsmen, expressed the greatest respect for Walker's military career.

[fol. 2010] A23AX

Walker was questioned by his attorneys during the hearing and gave details of his arrest by Federal troops. Neither

he nor his attorneys mentioned his actions the night of the rioting.

Walker also discussed his controversial reprimand and loss of command of the 24th Division over a troop indoctrination program in Germany. He later resigned his Army commission.

During his testimony, Walker said he had been misquoted in reports saying he described former President Harry S. Truman and others as Communists.

"I had not mentioned President Truman or called anyone a Communist," said Walker.

Clayton said he would hold a hearing for McShane late in January. The Justice Department claimed McShane was "doing duties as a Federal Official" on the University campus.

After the release on a writ of habeas corpus of the husky former New York Policeman, County Dist. Atty. Jesse Yancy Jr., said "the case now rests in the hands of the Federal Court . . . However, the State contends McShane made unlawful acts and should be prosecuted in State Court."

McShane was in charge of a team of some 300 Federal Marshals accompanying Meredith onto the campus.

In other developments:

The Mississippi Senate approved a resolution which blamed rioting at the University on the "ruthless and corrupted administration in Washington headed by the Kennedy Klan (CQ)." The measure drew 12 dissenting votes and faces House action. The resolution also expressed defiance "and utter contempt for the Kennedy Administration."

Meredith left the campus for Memphis to spend the Thanksgiving holidays with his family.

XW342AES NM

A24AQ

(1SO)

Albuquerque, N.M., Nov. 22 (AP)—Sen. Dennis Chavez, was buried yesterday following services attended by thousands of persons whose votes kept him in Congress for more than a quarter of a century. He was 74.

The Democratic Senator died Sunday at Washington of a heart attack after a long battle with cancer.

Vice-President Lyndon B. Johnson, one among many national dignitaries at graveside, called Chavez "the Champion of the least among us."

"We're here today not to say good-bye, but to say 'until we meet again,'" Vice President Johnson said.

"Sen. Chavez was concerned with unity of the hemisphere. . . . and he became the outstanding spokesman for unity an progress in the Western Hemisphere," Johnson said.

The sorrowing Chavez family exhibited controlled composure throughout the ceremonies at the church and at the graveside.

Mexican Senate Leader Manual Moreno Sanchez sent personal messages to Mrs. Chavez, and to the U.S. Senate expressing the sorrow of the Mexican Senate over the death of Chavez.

Mexican senators said Chavez consistently defended Mexico in disputes and that his help was deeply appreciated there.

Among those attending the services were New Mexico Gov. Edwin L. Mechem and his successor Gov.-Elect Jack Campbell. They stood shoulder to shoulder as they paid their last respects to the colorful Democrat who had played such a leading role in the State's political story.

Gov. Mechem will name a successor for Chavez.

JD145AMS

A25CX

ADD DEATH LOG

4 A.M. EST: 28 FTraffic, 0 Fires, 1 Miscellaneous. Total 29.

AB245ACS

X

A26

New York, Nov. 22 (AP)—Funeral services for John Shubert were held as he planned it—on the stage of Broadway's Majestic Theater.

As his widow sat beside the coffin yesterday, friends and business associates read passages from the Bible. No clergyman participated.

Shubert, 53, Managing Director of his family's vast theatrical real estate holdings, died Saturday during a train trip to Florida.

Among those paying their final respects were personal friends, Shubert employes, and stage performers. Interment was at Morristown, N.J.

KS348AES

[fol. 2011]

PLAINTIFF'S EXHIBIT 15

B9XF

IMPE

IMPRESSIONS:

Mr. Edwin A. Walker is a 53 yaer old single, white male, who is alert, friendly, and cooperative. He was born at Center Point, Texas and was reared on his parents' far. He received his education in the local grammar school, attended Schreiner Military Institute. Upon completion of high school, he entered the military academy at West Point in 1927, and graduated in 1931. He has had a long

and distinguished military career, and has received additional education a id training in the services special war college. He pat

special war college. He participated in the Kiska, the Italian, the southern France invasions of World War IIN the southern France invasions of World War II, in the Korean War, in the Little Rock crisis and the German occupation. He resigned from the army and refused his retirement privileges in order to be free to express his opinions about certain governmental policies re the procedures for indoctrination of troops concerning communism.

The following elicited replies point out the awareness of Mr. Walker concerning the nature and the gravity of the charges against him.

When I reead

When I read the specific charges which were presented in the Northern District of Mississippi Federal Court, Mr. Walker replied:

1) "Ta

1) "That means forcibly assaulting, resisting, and impeding the United States Government, which means you forcibly intend to stop them and did use force to stop them. I feel I can relate the events in a precise way."

2) "It means you inspire others and make an effort to overthrow the government."

3) "It means that you join with others to conspire against the authority of the U. S. Government and attempt to delay ana

and prevent their action. These are severe charges and they carry a severe penalty with them."

B10XF

After discussion with my counsel, I r

After discussion with my counsel, I directed various questions to Mr. Walker concerning the nature of the

procdsses of criminal trial. In my opinion, he revel
trial. In my opinion, he revealed his awareness in his discussion of the procesures in a military investigation which occurred in Germany.

"When a soldier committed an act against another soldier, y role was to notify the civilxx civilian authorities, our own military police, the Judge Advocate, and the investigating police, the Judge Advocate, and the investigating tea. Evidence was gathered and turned over to the vivili
gathered and turned over to the civilian authorities if that was indicatd
indicated by the nature of the crime." Mr. Walker continued and described in detail and correctly the usual procedures of a ilitary trx
military court.

The following factual material would indicate that Mr. Walker has an intact, recent, and remote memory system. His specific responses to questions were satisfactory in many ae spc
specific responses to questions were satisfactory in many areas, for example:

1. Events in the Italian campaign.
2. Events in the Korean War.
3. Ability to calculate, recall numbers, knowledge of current information.
4. Pr
4. Performance in the intelligence tests.

[fol. 2012]

B11B

B11XF

MR. WALKR

B11XF

MR. WAKKER HAS H

B11XF

Mr. Walker has led an active life physically; currently, he states he eats well, sleeps well, and exercises moderatelz

V

STATES HE EATS WEL

BP

STT BH

???

B11XF

Mr. Walker has led an active life physically; currently, he states he eats well, sleeps exx well, and exc
t
he staes he eats well, sleeps well, and exercises moderately. He denies specific symptoms, hallucinations, delusions, addiction to drugs or alcohol, use of tranquilizing drugs. There is no clinical or laboratory evidence which would incixxx indicate any py
physical or toxic condition which would affect adversely his ability to perceive his envitonmrnyzn
ability to perceive his environment, to evaluate his environment, and to develop effective and appropriate actions in dealing with and to develop effective and appropriate actions in dealing with problems.

In the psychiatric examinations, no effort was made to elaborate a fully detailed picture of (U/L) Why (U/L) Mr. Walker functions in his present stae, nor

functions in his present state, nor whether or not there has been any particular change in his mode of psychological operation, since this was not judged by my staff and me to be relevn
this was not judged by my staff and me to be relevant to the questions of his (U/L) present (U/L) mental operations. Rather we set out to evaluate (U/L) how (U/L) he thinks, regulates, executes, and deals with his present thoughts, values, and impulses, especially as they relate to the present charges. We felt able to arrive at some very specific answers to these questions, and fond no difficulty in eliciting the full cooperation and assistance of Mr. Walker during the examination.

[fol. 2013]

B6XF

WALKER QUOTES ASKD)

Oxford, Miss—insert night lead Walker x x x

After Walker was put on the stand he went through the formalities of giving his name, age and hometown. Then he spoke in short sentences when asked to tell of his arrival in Oxofrd last September.

"Upon arriving went one-quarter mile for breakfast," he began. There one hour. Then went to the Ole Miss school grounds and made a circle. Came to town of Oxford. Came to chourthouse and a circle. Came to town of Oxford. Came to courthouse and conversed with Sheriff (Joe) Ford. Went to lunch at Mansion Cafe. It was very late. Had many conferences with press."

The testimony skipped over the time in which the Sept. 30 rioting took place. Walker resumed the account of his activities with the details of his arrest the following day andhis trip to the airport to be taken to a Fedeaxx Federal institution in Springfield, Mo. There were no facilities here to house Federal prisoners.

"At the door of the plane I asked where I was to be taken," Walker recalled. "As I mounted the first step I heard a man say 'Springfield.'

"The plane took off and when we were in the air I asked: 'Illinois?'

"We are going to Springfield, Mo.," he sadxx said someone replied.

Upon arriving at Spring field he said that he was kept as a prisoner in the maximum security house until Oct. 6 on that day his bond of $100,000 was cut to $50,ppp, he made bond and was released.

(END INSERT)

LM648PCS B NNM

B24DX

NIGHT LEAD TOLEDOBEND

Baton Rouge, Nov.21(AP)—The Sabine River Authority of Louisiana has accepted the low bid of English Electric Corp., Chairman Claude Kirkpatrick said Wednesday, to build twin hydraulic turbines in the Toledo Bend Dam Power Project.

The English firm's bid was approved at a meeting here Tuesday of the Louisiana authority, Kirkpatrick said, and also has been accepted by the Sabine River Authority of Texas.

The executive committee of the joint Sabine River Authority, he said, will accept the bid formally in Dallas Monday.

Kirkpatrick said the English firm's bid amounted to an overall savings of $383,000 over the next lowest bidder, Allis-Chalmers.

The English Electric base bid was $1,292,017; re-evaluated to $1,677,400. Five firms bid on the project for the $60 million dam on the Louisiana-Texas border. Kirkpatrick said each was evaluated a against a seven-point check list.

JO644PCS 11/21/62

[fol. 2014] B7XF

WITH

WALK

ER (1,200)

OXFORD, Miss., Nov. 21 (AP)—Following is the psychiatric report of Dr. Robert L. Stubblefield, Professor and Chairman of the Department of Psychiatry of the Southwestern Medical Schoolsxx School, Dallas, Tex., on Edwin A. Walker and entered today at a federal hearing for the former Army major general:

PSYCHIATRIC REPORT

Edwin A. Walker

This report is written to inform you on the psychiatric evaluation of Edwin A. Walker conducted pursuant to order No. W-C-29-62. After a conference which was attended by Mr. Walker' attorneys (MMr. Watts, Mr. Matthews, Mr. Morris) and Professor Charles Webster and myself, I requested that Mr. Walker appear for the psychiatric evaluation. My purpose was to obtain material which would aid you in your decision about his competence to stand trial in your court. You wanted material in order to deal with three questions: (1) Whether or not the defendant is presently insane, (2) whether or not the defendant is sufficiently competent to uncder stand the the defendant is sufficiently competent to understand the klflegt allegations pending against him, as shown by the complaint now pending against him in the Northern District of Mississippi, and (3) whether or not the defendant is sufficiently competent to properly assist in his own defense.

Mr. Walker pe

[fol. 2015] B12XF

All psychiatric and psychologica ndicate that Mr.. Walker appears to be able o

Walker appears to be able to deal freely and accurately with his recollections of the incidents leading up to his arrest and present charges. E can discuss them accurately, and without distortion noticeable to the examiners. He ass able
distortion noticeable to the examiners. He was able to describe fully his opinions on the charges, what they meant, what kinds of defensive tactics he exx
ofrdefensive tactics he intends to employ, how his lawyers are
of defensive tactics he intends to employ, how his lawyers are working withhim and the
working with him and the unfolding of the events which led to the present charges. However, in recor
the present charges. However, in regard to the questions of the (U/L) reasons (U/L) for his involvement, he did no feel that whether or not there were emotional forces of which he is not fully aware (and that
fully aware (and that might possibly relate to the legal question of specific intent and motivation) were properly a part of this report. It is our impression that the Court in this case at this time is (U/L) not (U/L) concerned about Mr. Walker's ability to undersa
ability to undersa
ability to understand fully, the more complex and subtle aspects of his motivation in regard to the acts for which he is charge. If it were, and if we were asked to evaluate these kinds of questions, it wol
wo
it would be necessary to conduct a mou
it would be necessary to conduct a much more penetrt
it would be necessary to conduct a much more penetrating exploration of Mr. Walker's psychological operations.

B13XF

It may be tnt
It may be that some of Mr. Walker's attitudes and feelings aboutspecific events in Mississippi are such atxx tha

about specific events in Mississippi are such that if he were pressed hard to deal with them (as for examplx
pressed hard to deal with them (as for example in a cross-examination) this might have a definite effect on his composure on the stand. Since we assume that the Court does not deal with this possibility in its ta
ths
this possibility in its standard of competence, we have therefore made no effort to explore in detail their nature or possibility.

/s/ ROBERT L. STUBBLEFIELD
Robert L. Stubblefield, M. D.
Professor and Chairman
Department of Psychiatry
Southwestern Medical School

LM803PCS

[fol. 2016] Mr. Walker presented himself to me on Thursday, November 8, 1962 at 2:00 P.M. after a 1 1/3//// 1//// 1962 at 2:00 P. M. after a 1½ hour psychiatric interview, I recommended that he enter the psychiatric ward at Parkland Memorial Hospital as an inpatient for further observation and study. He was admitted at 4:00 P. M. and was cooperative throughout the examinations and procedures. He was released on ap
on a pass on his 53rd birthday on Saturday morning. He returned in the evening and was tentatively discharged from the hospital on November 10, 1962 at 10:00 P. M.

B8XF

Summary of findings is as follows:

1. Physical Health—Essentially normal.

   A. Physical Examination—No abnormal findings except a slight deafness in the right ear and marked astigmatism, which is corrected by glasses (examination by A. W. Beloach, M. D., a member of my staff)

B. Laboratory Examinations—Normal ranges for blood and urine studies

C. X-rays of skull—Normal

D. Electrocardiogram—Normal

2. Additional Special Procedures

A. Electroencephalogram—Normal

B. Urine Studies—No evidence of current use of tranquilizing drugs

3. Psychological Tests—The report by Irwin Jay Knopf, Ph. D., a diplomate of the American Board of Examiners in Professional Psychology, and a member of my staff, states that Mr. Walker is functioning currently at the superior level of intelligence, on the Wechsler Adult Intelligence Scale his res
reasoning, judgment, vocabulary, fund of information, and organizational ability were all above average for his age group.

4. Psychiatric interviews were conducted on:

A. Thursday November 8, 1962 2:00 P..

B. Friday, November 9, 1962 2:00 P. M.

C. Saturday, November 10, 1962 10:00 A. M.

D. Saturday, November 10, 1962 8:00 P. M.

(Jointly with Andrew Watson, M. D., University of Michigan School of Medicine and School of Law)

[fol. 2017] B5XF

(NU-INSERT WHERE THEY WILL FIT:)

—0—

OXFORD, Miss.—Night lead Walker ( ) insert after graf

When the two-day hearing finally ended, Walker strode away unsmiling from the courthouse. A newsman who caught up with him asked Walker how he felt the hearing went.

"Fine,Z was Walker's only comment

—0—

Clyde Watts of Oklahoma City, Okla., one of Walker's four attorneys, said Judge Dxx Clayton's decision would be appealled—"If it is appealable." Watts said he felt that Walker's constitutional fxx rights had been violated by the October order to undergo mental examination

END INSERTS

LM612PCS B

XF

Pls give graf explaining habeas corpus in relation McShane case.

NU

Nov 21 RK622PCS BC

B1NU

HOOFBEATS SELECTIONS—FOR THE FAIRGROUNDS...

1.. Second Light, Sir Hawley, Tulsa Bee

2.. Lil Ri,

2.. Lil Rix, Eight of Hearts, Coushatta Tribe.

3.. Giovanni, Pici-A-A Toria, Bill me.

4.. Fleeting Toni, Dixieland King, Royal Woo.

5.. Everett's Son, Be Bee Time, Midway MayorxxMayor.

6.. Air Stride, Missiixxx Mission Missions, Elfin.

7.. Se

7.. Steve Valenti, Shoot Luke, Magic Realm.

8.. Bull Story, Toxx Troa, Grand Wizard.

9.. Blonde Ruler, Clergyman, Picmar.

Best Bet—Air Stride (6).

RK624PCS NM

[fol. 2018]

PLAINTIFF'S EXHIBIT 16

A3;450) AMS BU 1/21/63

A32

(280)

ADVANCE HOLD FOR RELEASE EXPECTED MOMENTARILY

(Advance) Liverpool, England, Jan. 21 (AP)—Prime Minister Macmillan warned tonight that no free country can dominate "other equally free states. Nor can any country in these days stand entirely on its own. Alliances are essential to security."

The British leader spoke in reply to President De Gaulle's news conference statement a week ago that Britain is not ready to join Europe by becoming a member of the Common Market.

"Just as the French have themselves retained special links with their former overseas territories, so we in Britain believe that we too can be loyal Europeans without disloyalty to our great commonwealth tradition and duty," he said.

Then he reminded the French leader that the movement for European unity was founded "by the greatest English patriot of his or any other time, Sir Winston Churchill."

This movement, he said, is "based on partnership, not on domination."

When the last round of negotiations for Britain's entry into the European Common Market began in Brussels last week, the Prime Minister said, "it was recognized on all

sides that the few outstanding problems were capable of solution. This was the general view—and for good reasons."

"We had made it abundantly clear that we accpeted the Treaty of Rome and aligned ourselves with the political implications as well as the economic content of the treaty. In particular, we had accepted a common agricultural policy and the common tariff.

"We have reached agreed solutions on a very large part of the field. We still believe that given the will the remaining difficulties can be surmounted."

The postponement at France's demand of the Brussels talks (until Jan. 28), he said, "has been a setback, I trust and pray not a fatal setback."

MC321PES

A33AX (OLE MISS)

(270)

Oxford, Miss., Jan. 21 (AP)—A Federal Grand Jury investigating the University of Mississippi desegregation riots adjourned today, apparently without indicting former Maj. Gen. Edwin A. Walker.

Walker was one of 13 persons charged by the Justice Department in connection with rioting that swept the university following the arrival on campus last Sept. 30 of James H. Meredith, a Negro student.

Charges against three persons were dismissed before the Grand Jury went into session two weeks ago.

Last week, the 23-member Grand Jury returned two true bills indicting four persons for interfering with the Federal Marshals enforcing court orders for Meredith's admission.

Indicted were Melvin Bruce, 35, of Decatur, Ga., Philip Lloyd Miles and Kline Lamar May, both of Prichard, Ala., and Richard Hays Hinton of Lucedale, Miss.

TM(MORE)

NY/MC325PES

A34'

BULETIN

LIVERPOOL—RELEASE MACMILLAN A32.

THE AP JAN. 21

MC325PES

A35AX

OXFORD—FIRST ADD GRAND JURY (A33) X X X

MISS.

The panel also returned two no true bills—which means the jury did not believe the complaint warranted an indictment.

The no true bills are never disclosed.

The charges against Walker remain pending even though the Grand Jury apparently either declined to consider the case or returned a no true bill.

He will remain under $50,000 bond unless his attorneys succeed in having U. S. District Court set it aside.

Even if Walker obtains such an order, the government may try to obtain an indictment and prosecute him any time within the next five years, when the statute of limitations expires.

Walker, who was in Oxford the night of the rioting that left two dead and hundreds injured, was charged the following day with insurrection, seditious conspiracy, conspiracy to impede and injure officers of the United States, and assaulting, resisting and impeding officers.

Walker has denied the charges.

BE229PES NM

[fol. 2019]

A57WX

CORRECTION

Washington—Night Lead Gantt (A55WX) 4th Graf "South Carolina" Read X X X Never Admitted a Negro to Its All-White Public Schools or Colleges.

The Appellate Court etc (Inserting "All-White" and Changing "and" to "or").

The AP

JC532PES

A58WX

ADVANCE FOR 6:30 P.M. EST TODAY

(220) FOOD FOR PEACE

BUST IT

BUST IT NY

A58WX (KATANGA)

M

A58WX

(200) KENNEDY—CONGO

Washington, Jan. 21 (AP)—President Kennedy personally hailed today the end of Katanga's secession, and said the people of the Congo "now have a unique opportunity to rally behind their national and provincial leadership" in a unity drive.

In a 400-word statement, Kennedy said the peaceful entry of United Nations forces into the Katangese stronghold of Kolwezi had confirmed the end of the secession movement led by Katanga's leader, Moise Tshombe.

The President said this development "is warmly welcomed by the United States and all who are concerned with the future of the Congo and the whole of Africa."

Throwing a bouquet at former President Dwight D. Eisenhower, Kennedy said "the previous administration determined wisely" that the U.S. objective of seeking conditions allowing the Congolese people to peacefully work out their own future could best be pursued through the United Nations.

Kennedy said his administration has vigorously supported the U.N. efforts and said the American people are deeply indebted to U.N. Secretary General U Thant and his predecessor, Dag Hammarskjold, "who gave his life in the quest for peace" in the Congo.

JC537PES

A59

PHNOM PEN

A-59'NU

BULLETIN

Oxford, Miss., Jan. 21 (AP)—The Justice Department today dismissed charges against former Maj. Gen. Edwin A. Walker and six other persons arrested in connection with desegregation riots at the University of Mississippi last fall.

RK440PCS

A60'NU

BULLETIN MATTER

Oxford, Miss—First add Grand Jury (A59NU) X X X Last Fall.

U.S. Atty. H. M. Ray of Oxford asked for the dismissals several hours after a Federal Grand Jury adjourned without indicting the seven.

The Grand Jury earlier indicted four persons in connection with the rioting Sept. 30, which killed two persons and injured hundreds.

U.S. Dist. Judge Claude F. Clayton of Tupelo, Miss., granted the dismissal "without prejudice" under federal rules of criminal procedure.

The dismissal "without prejudice" means that the charges against Walker and the six others may be reinstated at any time before the statute of limitations expires in five years.

RK443PCS NM

A61

Phnom Penh, Cambodia, Jan. 21 (AP)—President Antonin Novotny of Czechoslovakia and Prince Norodom Sihanouk issued a communique today saying Cambodia will get further Czech technical and economic aid.

The communique was signed at the end of a four-day visit by the communist leader and Mrs. Novotny to this neutral southeast Asian nation.

The Cambodian kingdom looks to Czechoslovakia for mechanical

[fol. 2020]

A62

WITH PARIS ADENAUER—DE GAULLE A13
LUXEMBOU

BUST THIS

A62NU

URGENT

Oxford, Miss.—Second Add Grand Jury (A60NU) (Which Should Be Slugged First Lead) X X X Five Year.

Walker was charged with insurrectin, seditious conspiracy, conspiracy to impede and injure officers of the United States, and assaulting, resisting and impeding officers.

Walker denied the charges.

The other six were Frank Lamar Ott, 29, of Kentwood, La., Joseph Cutrer, 42, of Kentwood, Edward Louis Shade, 28, of Atlayum, Miss., Robert Blackard, 18, of Memphis,

William Gilbert Marr, 20, of Olive Branch, Miss., and Charles Clark, address unavailable.

RK444PCS NM

A63

Luxembourg, Jan. 21 (AP)—France boycotted a meeting of Common Market experts called today to prepare for negotiations with Britain Feb. 4-5 on a British application to join the European coal-steel pool.

The coal-steel pool, made up of the six Common Market members, has its headquarters in Luxembourg. Experts of the five other nations—West Germany, Italy, Belgium, the Netherlands and Luxembourg—got to work after expressing regret at the absence of their French colleagues.

The boycott was in keeping with President De Gaulle's opposition to British membership in the continental union.

ML449PES

A64

W

O

A64NU

URGENT

Oxford, Miss—Third Add First Lead Grand Jury (A62NU) X X X Address Unavailable.

On the campus, meanwhile, Negro James H. Meredith neared the end of his first semester at the university by skipping a final examination in algebra.

He gave no reason for cutting the examination. Instead of appearing for the test, he remained in his dormitory.

His last final exam of the fall semester is due tomorrow, a test in English literature.

The rioting broke out on the campus shortly after Meredith arrived late on the afternoon of Sept. 30. The university enrolled him the next day, the first of his race ever knowingly admitted by the school.

Since then, he has attended classes under a guard of military policemen and federal marshals.

Despite this, he's been the target of frequent harrassment—shouted threats, catcalls, and occasional flying bottle, and one seige of fireworks outside his dormitory.

He recently said he didn't plan to return to the university unless his situation became more conducive to study. He didn't detail the changes he wanted.

His plans remain a mystery. He told newsmen he would announce his decision at the end of the present semester, next Monday.

Walker was one of 13 persons charged by the Justice Department in connection with the rioting.

Charges against, 3rd Graf PRVS (A33AX).

RK454PCS NM

A65

WIREPHOTO ADVISORY:

Upcoming: Radiophoto, Chinese Delegate to East Berlin Communist Congress Sits at Desk as Other Communists Stand and Applaud Khrushchev, A24; Transmitted; Redecorated Blue Room of the White House, A150; Paul J. Tierney, Appointed by President to the ICC, A142.

AP—Jan. 21

ML554PES

[fol. 2021]

A66

NIGHT LEAD EUROPEAN WEATHER (310)

BY RAYMOND E. PALMER

London, Jan. 21 (AP)—Tidal rivers iced over and some British sheep were reported frozen to death where they stood as Europe's little ice age entered its second month today.

The human death toll of the cold spell soared above 100.

Five deaths were reported today in Britain. The victims included two members of a climbing club who were buried by an avalanche in Yorkshire.

The white death count in Yugoslavia rose to 20 with the discovery of the body of a farmer frozen in a drift.

Snow fell for the third consecutive day in northern Greece. Icy winds built road-blocking drifts up to nine feet.

In Britain, high winds caused cancellation of helicopter food drops for herds on the moors, but royal marine trucks were attempting to carry in fodder.

Belgian hospitals arranged extra beds to cope with an influx of patients. At least a dozen Belgians have died from the effects of the cold.

As fuel supplies dwindled, Belgian authorities cancelled many passenger runs and switched locomotives to transporting coal.

Many villages in northern Holland were isolated by huge snowdrifts heaped up by weekend gales. Temperatures were around 17 degrees.

A freeze-up in the Baltic Sea brought traffic between West Germany and Scandinavia almost to standstill. The North Sea Island of Heligoland was surrounded by ice. West German army helicopters ferried essential supplies to some isolated islanders.

Police in Bavaria reported three more deaths during the weekend, which brought the Bavarian toll to at least 10.

Thirty icebreaker tugs toiled to keep open the Scheldt River mouth, main entry point into Belgium.

In Germany, special trains went into operation to deliver urgently needed heating oil from North German refineries to cities in the snowbound south.

Lake Zurich froze over for the first time in 34 years. In the Eastern Swiss Alps temperatures of two below zero were reported.

In Britain the river Thames froze from bank to bank at Kingston for the first time in 68 years.

ML601PES

A67KX (PARAPLEGIC&KETCH)

M (AND INSERT)

E

A67NU

URGENT

SECOND LEAD GRAND JURY

Oxford, Miss., Jan. 21 (AP)—Charges were dismissed today against former Maj. Gen. Edwin A. Walker and six other persons avgksted in connection with desegregation riots at the University of Mississippi last fall.

U.S. Atty. H. M. Ray of Oxford asked for the dismissals several hours after a Federal Grand Jury adjourned without indicting the seven.

U.S. District Judge Claude F. Clayton of Tupelo, Miss., granted the dismissal "without prejudice"—meaning that the charges could be reinstated at any time before the statute of limitations expires in five years.

Walker Was X X X 6th Graf First Lead (A59NU Et Seq).

RK506PCS NM

A68KX

(SEE WIREFOTO GO1)

San Diego, Calif., Jan. 21 (AP)—The boat which is bothering some of Frank Keillor's San Diego neighbors is going to be moved, Keillor said today.

It is a 55-foot ketch which he has all but finished in the yard of his home.

Keillor said he would complete it closer to the ocean and then take his family to Hawaii in it. He is a professional ship builder. The complaining neighbors said the boat was unsightly in a residential district and a nuisance.

B(A B507PCS

[fol. 2022]

A83AX (MEREDITH)

A83NU (MEREDITH)

NIGHT LEAD GRAND JURY—MEREDITH (580)

Oxford, Miss., Jan. 21 (AP)—The Federal Government withdrew today the charges against former Maj. Gen. Edwin A. Walker and six other persons arrested in connection with desegregation riots at the University of Mississippi last fall.

U.S. Attorney H. M. Ray went before U.S. District Judge Claude F. Clayton and asked for the dismissals several hours after a Federal Grand Jury adjourned without indicting the seven.

The judge granted the dismissals "without prejudice"—meaning the charges could be reinstated at any time before the statute of limitations expires in five years.

At Dallas, Walker said he would have no comment on the action until he receives formal notification.

The rioting erupted the night of Sept. 30 after Negro James H. Meredith appared on the campus in the company of a heavy force of Federal Marshals.

The night of violence—gunshots, tear gas, flying bricks and bottles—killed two and injured hundreds.

In the last hours of the rioting, the university enrolled Meredith on the morning of Oct. 1—first of his race ever knowingly accepted as a student.

A84NU

Meredith, nearing the end of the semester, skipped a final examination in algebra this afternoon.

Staying in his dormitory, he refused to see newsmen and gave no reason for failing to appear for the examination.

He reportedly has been having difficulty with his grades in algebra. None of his grades has been made public.

Meredith's last final examination is tomorrow, a test in English literature.

His plans after the current semester remain in question —at least publicly.

The 29-year-old Negro, target of numerous taunts and threats despite a constant guard of military policemen and Federal Marshals, said earlier this month he would not return for the second semester unless his siteuation became more conducive to study.

He didn't, however, detail what changes he wanted.

He said he would announce his decision at the end of the present semester, next Monday.

In Washington, U.S. Atty. Gen. Robert F. Kennedy said in a copyrighted interview in U.S. News and World Report that "The chances at the present time" are that Meredith will pull out of the university.

Asked if he thought Meredith would stay, Kennedy said:

"I hope he does, but I have some serious questions as to whether he will or not. The changes at the present time are that he will leave."

Addressing a meeting of Washington area Episcopal Church ministers, Kennedy followed up his interview statements by saying Meredith's withdrawal "would be a backward step" for integration in the South. But he added, "It wouldn't be a total loss" because his enrollment demonstrated that federal law will be enforced.

The Grand Jury Panel of 23, all white, indicted four persons earlier in connection with the campus riot. They were Melvin Bruce, 35, of Decatur, Ga., Philip Lloyd Miles and Kline Lamar May, both of Prichard, Ala., and Richard Hays Hinton of Lucedale, Miss.

Along with Walker, charges against these six were dismissed today: Frank Lamar Ott, 29, and Joseph Cutrer, 42, both of Kentwood, La., Edward Louis Shade, 28, at Atlayum, Miss., Robert Blackard, 18, of Memphis, William Gilbert Marr, 20, of Olive Branch, Miss., and Charles Clark, Prentiss, Miss.

The federal government arrested Walker in Oxford the day after the riot on charges of insurrection, seditious conspiracy, conspiracy to impede and injure officers of the United States, and assaulting, resisting and impeding officers.

Walker denied the charges.

As an army officer, Walker directed federal forces in Little Rock during the desegregation crisis there in 1957.

He resigned from the army after a controversy over a troop indoctrination program in Europe.

RK628PGS NM

A85

[fol. 2023]

A106NU

SUB

Oxford, Miss.—Night lead Grand Jury (A83NU) sub fourth graph "at Dallas, x x x formal notification."

At Dallas, Tex., Walker at first declined to comment on the dismissal until we received official notification but later said:

"I am glad to be vindicated by a Mississippi Grand Jury. Today my hopes return to those of Cubans and millions of others who want to return to their homes after haaving escaped from the jails and boundaries of a police state."

The rioting x x x fifth graf.

RK756PCS NM

A107

AGENCIES OUT

(340)

New York, Jan. 21 (AP)—The plight of children forcibly taken from Siberian Evangelical Christians, who sought but were refused refuge in the U.S. Embassy in Moscow

last month, was revealed today in a Newsweek Magazine story.

Soviet authorities issued a report that the Christians were "religious fanatics" who cruelly mistreated their children, crippled 30 with beatings, confined them in cellars, and made some of them "mentally ill for life."

Newsweek said: "The Christians left 29 letters at the American Embassy. Many were from their children, who had been forcibly taken away from their parents and lodged in internats (Boarding schools) hundreds of miles away from their families.

"Typical of the letters," said Newsweek, "were letters from Valya Vashchenko, who wrote her father: 'Dear Papa, when I feel said and bitter I write to you and sing Psalms. When we go to eat everybody stands around me and won't let me say Grace. I tell them I won't eat until I ask God's Blessing. If they don't let us emigrate, then let them kill us.'"

Valya wrote her mother: "Mamochka, the director shouts at us—and that is good. The deeper the grief, the closer we are to God . . . Pray that we should stand firm."

The magazine said when the school director tried to force Valya into taking the Communist Young Pioneer's oath, she asked her parents to petition Premier Khrushchev.

"Tell him," said Alya, "I don't want to live any more in the Soviet Union. I tell you I won't study in a Godless school."

Her sister, Tanya, and brother, Petya, also in the same school wrote letters, the magazine said.

Tanya, 8, wrote: "I cry at night. The boys here beat me. But don't worry . . . God still keeps us." Petya, 7, said: "Mama, the boys here beat me. But I bear everything. Mama, I beg them to let me go home, but they won't let me."

Newsweek said "The Evangelical controversy pinpoints a particularly sensitive area of Russia's Anti-Religious Policy: youth education often content to allow Churches

of various faiths to continue services for elder members, Soviet authorities seem determined to prevent religious education of the youth, hoping that the Church problem will simply age itself into the grave."

RA904PES

[fol. 2024]

PLAINTIFF'S EXHIBIT No. 16A

RACIAL

Oxford, Miss.—Federal Government drops charges against former Gen. Walker; Meredith takes last exam at Ole Miss with future still in doubt—roundup by Ben Thomas (should stand)

Columbia, S.C.—Supreme Court Justice Warren refuses to delay court order admitting Gantt, Negro student, to Clemson; school trustees to meet to consider action (fresh material, may stand; no fresh pictures available)

— — —

FRENCH-GERMANS

Paris—De Gaulle and Adenauer face broad-ranging discussions of European and Allied policy after agreeing on treaty of close cooperation; MacMillan warns De Gaulle against trying to dictate future of free Europe—roundup (lead and picture prospects uncertain; no pictures permitted at last night's dinner)

— — —

CONGO

Elisabethville—What makes 20th Century Mercenary tick? AP correspondent interviews one in Katanga (fresh, should stand; no pictures presently available)

Washington—Kennedy hails end of Katanga secession, declares Congolese now have opportunity to rally behind national and provincial leadership (A7, should stand)

— — —

STRIKES

New York—Newspaper Guild urges increased efforts to settle printers' strike (lead uncertain)

New York—Shipping industry meets today to act on dock strike settlement terms proposed by Presidential board (meeting at 2 P.M. EST)

Philadelphia—Negotiators in eight-day transit strike report no break in sight (may be topped around noon EST)

— — —

REPUBLICANS

Washington—GOP colleagues arranging dinner salute to Goldwater they hope will produce $500,000 to help bail out financially strapped party—by Jack Bell (A6, fresh, should stand)

[fol. 2025]

A17 1/20/63

PMS BUDGET (300)

TOVARICH

BY JAMES E. WALTERS

Philadelphia, Jan. 22 (AP)—The modern theory of nonsinging stars in musical comedy was tested anew last night as "Tovarich" had its premiere here.

Vivien Leigh, making her bow as a singer and dancer, was enchanting as the Russian Grand Duchess Tatiana who becomes a housemaid so she can have food and shelter in the Paris of 1927.

Her voice—probably more an alto than anything—met the demands of her role, but her acting carried it off.

For her leading man she had Jean Pierre Aumont, also unknown hitherto as a singer. His voice—a creditable baritone—was an unexpected bonus to his performance as her handsome husband, the Prince Consort Mikhail, who becomes a butler.

The musical is in two acts. There are several tuneful moments, and it is pleasant enough entertainment. The first act—running nearly an hour and a half—will need cutting before Tovarich finishes its three-week run here and goes on to Boston and then Broadway. The second is faster-paced.

The plot is almost identical with of the popular Broadway play of the same name in 1936-37 and a later movie starring Claudette Colbert and Charles Boyer.

Miss Leigh retains the beauty and charm she displayed as Scarlett O'Hara in the 1939 movie, "Gone With the Wind." Her dancing of the Charleston, in "Wilkes-Barre, Pa." is a show-stopper.

She does a pleasing job on her two solos—"The Only One" and "I Know That Feeling"—and duets with Aumont; "Her Highness and Her Husband" and the lilting, "All of You."

The supporting cast is first-rate: Bryon Mitchell as the youthful son and Margery Gray as the daughter of the American couple who employ the Prince and Grand Duchess; Taina Elg as a sexy Russian refugee, and George S. Irving and Louise Kirtland as the mother and father. Mitchell and Miss Gray seem to have a real hit in "Uh-Oh."

Music is by Lee Pockriss and lyrics by Anne Croswell.

BN356AES

A18AX (BJT)

PMS BUDGET (460)

WALKER-MEREDITH RDP

BY BEN THOMAS

Oxford, Miss., Jan. 22 (AP)—The Federal Government has dropped charges against former Army Maj. Gen. Edwin A. Walker and six others arrested after the University of Mississippi desegregation riots last Fall.

U. S. Atty. H. M. Ray asked for the dismissal yesterday several hours after a Federal Grand Jury quit without indicting Walker.

Meanwhile, James H. Meredith—the Negro whose arrival at the University Sept. 30 ignited the riot—takes his final semester test today.

A question mark hangs over the future of the 29-year-old former Air Force Sergeant. He has threatened to withdraw from the University after this semester unless campus conditions change. He has been the target of frequent harassment.

The charges against Walker were dismissed by U. S. Dist. Judge Claude F. Clayton "without prejudice." This means the Federal Government may reconsider them before the statute of limitations expires in five years.

The white grand jury panel indicted four persons last week in connection with the riots which killed two and injured scores.

They were Melvin Bruce of Decatur, Ga., Philip Lloyd Miles and Kline Lamar May, both of Prichard, Ala., and Richard Hays Hinton of Lucedale, Miss.

They were charged with interfering with Federal Marshals in the performance of duties and impeding them in the execution of court orders directing Meredith's enrollment.

Besides Walker, charges were dropped against Frank Lamar Ott and Joseph Cutrer, both of Kentwood, La., Edward Louis Shade of Atlayum, Miss., Robert Blackard of Memphis, Tenn., William Gilbert Marr of Olive Branch, Miss., and Charles Clark, Prentiss, Miss.

Walker, who commanded Federal troops at Little Rock during the 1957 desegregation crisis, was arrested in Oxford the day after the riot.

He was charged with insurrection, seditious conspiracy, conspiracy to impede and injure officers of the United States and assaulting, resisting and impeding officers. He denied the charges.

The 53-year-old Texan, who resigned his commission in a dispute over troop indoctrination policies, said at Dallas, Tex., he was glad to be vindicated.

"My hopes return to those of Cubans and missions of others who want to return to their home after having escaped from the jails and boundaries of a police state," Walker said.

[fol. 2026] A19AX

Although U. S. Atty. Gen. Robert F. Kennedy—in a copyright interview with U. S. News and World Report—said the chances were that Meredith would quit school, there is strong sentiment now on campus that the Negro will be back next semester.

He skipped an examination yesterday in Algebra—a course with which he reportedly has been having difficulty. He declined to comment on reasons for missing the test.

Meredith said he would leave Jackson to see his wife and son "as soon as possible" after completing today's test in English Literature. He has promised to reveal his future plans sometime after the official end of this semester next Monday.

XW408AES

A20

PMS BUDGET

ADENAUER-DE GAULLE (400)

BY JOSEPH E. DYNAN

Paris, Jan. 22 (AP)—West German Chancellor Konrad Adenauer and French President Charles De Gaulle faced Atlantic and European issues dividing them today after agreeing on a treaty of close diplomatic cooperation between their countries—traditional enemies.

Adenauer is under heavy pressure from his public to play a mediating role in the crisis which erupted last week when

De Gaulle rejected the American Plan for a NATO nuclear force and slammed the door on British membership in the European Common Market.

West Germany favtrs British membership in the Common Market and has endorsed the American project for a multinational nuclear NATO force. Adenauer was expected to press De Gaulle to modify his position at a meeting today with only interpreters present.

British bitterness over De Gaulle's position welled up last night in a sharp speech by Prime Minister MacMillan, warning the French President against trying to dictate the future of free Europe. MacMillan told a political rally in Liverpool that no country "in these days can stand entirely on its own. Alliances are essential to security."

A21

MacMillan accused De Gaulle of opposing Britain's bid to enter the Common Market for political reasons. He rejected French claims that he had been insincere with De Gaulle in agreeing to President Kennedy's proposals to scrap the Skybolt missile in favor of Polaris missiles that would be controlled by the North Atlantic Alliance.

The British leader also reminded De Gaulle that the movement for European unity was founded "by the greatest English patriot of this or any other time, Sir Winston Churchill."

De Gaulle and Adenauer agreed yesterday on a treaty of close cooperation in diplomacy, defense and culture, open to other states of Europe, which they hope will repair their differences in foreign policy.

West Germany backed away from an exclusive inner alliance with France inside the European and Atlantic communities. This apparently doomed the French concept of a continental "third force" dominated by France and West Germany.

The treaty provides for regular meetings between th chiefs of state or governments, and between their foreign, defense, education and youth ministers to noordinate action in thev

education and youth ministrs to coordinate action in these fields. The heads of state or government will meet at least twice a year, and the ministers on a quarterly basis.

The treaty also calls for more student exchanges, joint studies on military strategy, joint military maneuvers and officer exchanges.

Spokesmen specified that the treaty would be subject to Parliamentry ratification in West Germany—if not in France as well. This was considered important since an overwhelming majority of the West German Bundestag favors British entry into the European Economic Community and endorses participation in the NATO nuclear force.

The talks between De Gaulle and Adenauer are to end tomorrow.

BJ417AES

A22

Taipei, Formosa, Jan. 22 (AP)—A Chinese Communist gunboat was hit and "disappeared from sight" in an encounter with three Nationalist Chinese Warships Sunday near the Nationalist-held Matsu Island, the Defense Ministry said today.

BJ418AES

[fol. 2027]

PLAINTIFF'S EXHIBIT No. 21

I'm sad for
you go
make your
spiel some
where else

CK NW

You are doing
allright
Riot Riot
You are getting
news all
over the
country
You got
casualties

I want to
compliment
you all
on your
protest

and the
agencies
thereof
I have
just
been
informed

at order
of certain
official
Birdsong

[fol. 2028]
This is
a long
route to
Cuba

escorted
off
You can
continue
protesting
as you
are

You have
a right
Did not
come to
see violence

by reps
of Governor
that this
fact that
these
people
are on
campus

I am
only
telling
you what
has been
reported
by official
rep of gov.

Sorry
an Epi
copal
church

There is
no stopping
point.
Many
heading
toward
Oxford

Any blood
you see
tonight
is on hands
of fed
govt

due to
sell out
def. orders
that marsh
not be
allowed
on campus

Do not
expect
violence
and
protest
until
Meredith
not
admitted

Duncan
Gray
says
stop it
you
can

1963 Beginning On Priest Dam Assur

By FRANK VAN DER LINDEN
Chief of the Banner's Washington Bureau

Washington — The Senate today assured that construction of the J. Percy Priest Dam on Stones River can begin sometime in 1963.

Senate approval of the $5 billion public works bill marked final approval of $1 million to commence construction of the $32 million project in Nashville.

The Senate approval for the money for the Priest Dam marked a final victory for U.S. Rep. J. Carlton Loser of Nashville who has been working hard for the project since he came to Congress six years ago as successor to the late Rep. Priest.

Since the House previously had granted the same amount there is no difference to be settled in conference between the two houses.

Money to Begin Job

Therefore, the final bill which will go to President Kennedy soon is certain to include the money to start the projects as well as $1 million to begin the Cordell Hull Dam on the Cumberland River at Carthage.

President Kennedy's budget for 1963 originally included $604,000 for the Army Engineers to finish planning the Priest reservoir and $300,000 to finish planning the Hull project.

Originally named the Stewarts Ferry Dam, the project was originally authorized by Congress in 1938, but little was done about starting it until Loser took charge of the effort.

Rep. Joe L. Evins of Smithville, whose district will touch both the Priest and Hull projects, used his influence on the House Appropriations Committee to have the fund approved this year.

Col. James Newman III, Nashville district engineer, indicated the Priest project could be started in the spring or summer of 1963. It will provide flood control for Nashville in addition to 30,000 kilowatts of hydro-electric power and a large lake area for recreational facilities.

13 Miles Upriver

The reservoir will cover 7,420 acres and will extend 13 miles up the river.

Also in the final Senate bill is $311-million to continue building the Barkley Dam on the lower Cumberland River in Kentucky.

The Senate added $725,000 to begin the controversial Tennessee-Tombigbee waterway to connect the Ohio River and the Gulf of Mexico at Mobile. Since the House has granted no money for this item, the conference will finally decide whether it will stay in the bill.

Ellington

(From Page One)

...sion taken during the conference on the Mississippi situation.

Federal-State Matter

"I do not think that there is any doubt in any of our minds about what the outcome will be in Mississippi because no state is stronger than the federal government," Ellington added. "But still it is a matter for the federal government and the state of Mississippi to work out."

There has been speculation for several days that resolutions will be introduced during the four-day conference either favoring Barnett's action or seeking a vote of censure.

Michigan Gov. John B. Swainson last week asked that the executive committee of the National Governors' Conference censure Barnett for his action in the Meredith case.

The executive committee of the National Governors' Conference will meet here Thursday, the final day of the meeting of the Southern governors.

So far, there has been no word from Washington Gov. Albert D. Rosellini, chairman of the national group, on whether any action will be taken on Swainson's request.

Not in Sympathy

Rosellini has stated that he is not in sympathy with Gov. Barnett's action.

"I think the authority of the U.S. Constitution and Supreme Court decisions must be upheld," Rosellini added.

Commenting on Swainson's request, Ellington told reporters that he did not "think it appropriate for one governor to try to tell another one what to do about a situation in his home state."

In his opening remarks to the conference, Ellington pointed out to the governors that "we can have a repetition of the chaotic situation which occurred at the last national meeting in Hershey, Pa., in which certain individuals indulged in the old game of headline hunting and almost overshadowed the accomplishments of an otherwise informative and constructive conference."

Ellington was referring to an effort by Swainson and New York Gov. Nelson Rockefeller to adopt a civil rights resolution at the Hershey meeting. The move was defeated by a filibuster by several Southern governors.

Statement Echoed

Although Barnett has reservations here at the diplomat hotel, conference headquarters, there was growing speculation today that the Mississippi chief executive would not attend the conference.

Ellington's statement that the Meredith case was a "Mississippi problem" was echoed by several other governors.

Host Gov. Farris Bryant of Florida, Gov. Ernest Vandiver of Georgia, and Gov. Terry Sanford of North Carolina agreed that the other Southern governors should not attempt, by resolution, to comment on Barnett's actions.

Vandiver said he did "not favor the use of armed troops to enforce the orders of the federal courts.

The same end and here I am in compliance with the court orders can be accomplished peacefully and without the danger of bloodshed through the use of a sufficient

Barnett

(From Page One)

...tempt. He faces a $5,000 daily fine.

Barnett issued his statement after being informed Meredith was on the campus. He called on state officers "under my command to do everything in their power to preserve peace and to avoid violence, in any form."

"I know that our principles remain true, but we must at all times preserve the peace and avoid bloodshed," he said.

"Surrounded on all sides by the armed forces and oppressive power of the United States of America, my courage and my convictions do not waiver.

'I Love Mississippi'

"My heart still says 'never' but my calm judgement abhors the bloodshed that will follow.

"I love Mississippi. I love her people. I love those 10,000 good Mississippians in the National Guard who have now been federalized and requested to oppose me and their own people."

Barnett's son and son-in-law were among Guardsmen called to active duty by the President.

In his closing remarks, directed to federal officials Barnett said:

"You are destroying the Constitution of this great nation. May God have mercy on your souls. Mississippi will continue to fight the Meredith case and all similar cases through the courts to restore the sovereignty of the state and constitutional government."

Heavy Blow

This statement had struck a heavy blow to the citizens of Mississippi. The townspeople were in a fighting mood. The streets were alive with United State Flags and some men even were complete Confederate uniforms.

Somebody played a phonograph record of "Dixie," the crowd let out a mighty cheer and surged toward the white pillars of the Governor's Mansion. They formed a ring around it that at one time was four deep. There were men, women, teenagers and even a few women carrying babies.

Despite the fact that there was no truth in the rumor that Barnett was going to be arrested, the crowd did not disperse until it got word that the governor would be safe.

Johnson said in his statement that President Kennedy called on the state to preserve law and order and then federalized the National Guard—"the only adequately instrumentality capable of preserving law and order should an emergency arise."

The lieutenant governor said the Administration had raised "the false issue of integration" throughout the entire situation.

Nearly 2,000 persons milled outside the Governor's Mansion Sunday after a Citizens Council leader called for a meeting to protest the use of federal troops.

Meredith Attends Classes At Ole Miss

AP Wirephoto

Federal marshals wearing gas masks stand guard as students demonstrate on the campus of Ole Miss at Oxford in protest of court ordered enrollment of James Meredith, Negro Air Force veteran.

(Continued From Page One)

...handed him a stack of forms. The historic occasion was concluded quietly.

Meredith, who caught a whiff of the tear gas that clouded the campus early today, rubbed his eyes occasionally.

President Kennedy, who...ught only four hours sleep during the troubled night, was in close touch with the situation. His radio-television appeal to the students Sunday night failed to quell rioting that broke out when the campus and town learned that Meredith, turned away three times, had been brought onto the campus.

Campus Littered

The campus, littered today with burned out automobiles, spent tear gas grenades, broken glass and other assorted rubble, was under virtual martial law. An estimated 400 U. S. marshals and 1,000 federal troops kept a firm grip on the order.

The Justice Department in Washington announced about noon that at least 100 persons had been arrested.

Those included a Decatur, Ga., man, Melvin Bruce, 24, identified as a frequent companion of members of the American Nazi Party. He was accused by military authorities of sniping at the marshals Sunday night with a powerful rifle.

The dead were identified as Paul Guihard, correspondent for the French News Agency, who was found dead of a bullet wound in the back, and Ray Gunter, 23, an Oxford resident.

Maj. Gen. Edwin Walker, who resigned his Army commission under fire for his rightist viewpoints, was seen during the rioting congratulating the students. He reappeared downtown this morning in a big, White Texas that and began shaking hands...out was ushered out of courthouse square at bayonet point.

Walker, who commanded federal troops that former President Eisenhower sent to Little Rock during the school integration crisis in 1957, said he came here to take the other side and protest the use of federal force.

More Than Eight Hours

The campus rioting lasted more than eight hours and reached almost unbelievable heights. Many of the rioters were believed to be self-appointed vigilantes from the nearby countryside and from other parts of Mississippi and neighboring states.

Many were armed and bullets and shot whizzed across the campus much of the night.

One group of men tied down the accelerator of an automobile, jumped out and let it go in an attempt to mow down a group of marshals. It crashed into a tree before anyone was harmed.

The rioting in downtown Oxford this morning threatened for a time to become as violent and bloody but sufficient numbers of troops rushed in and, using time-honored riot control techniques, boxed the troublemakers into courthouse square.

Troops set up a skirmish line between downtown Oxford and the campus area and began moving in battle position along the line clearing it of anyone who seemed to be a troublemaker.

Troops in squad-sized groups moved outward from the skirmish line, clearing a wide area. Three soldiers jumped the hedge at the First Presbyterian Church and skirted across the lawn in the familiar stooped couch of a soldier in an enemy town.

Presently troops began moving back in the square with young teenagers marching reluctantly ahead of them. Eight were placed under arrest within 15 minutes.

Under Patrol

Soldiers with their guns at the ready patrolled the many narrow streets and alleys in the downtown Oxford area.

Trouble started forming in downtown Oxford early in the day.

Roving bands of young toughs, some of them beneath college age and some above, walked the streets, many of them carried rocks and clubs. There was no effort by local police, the sheriff's office or the state patrol to stop them although several patrol cars were observed passing by the groups.

The youths usually travelled in groups of about eight or 10 and walked the wide sidewalks of the downtown area in a bel...

Troops fired ... shots over ... group of youths.

Before the ... gas was ... truck's windshie... to a large ro... roped on a ba... piling timber on ...

Tear gas flowed ... house Square, ... lines of troops ... rioters, and the ... gas seeped into ...

Women staggered ... their eyes gu... midmorning the ... campus, appeare... virtual martial l... there was no of... tion.

Truckload afte... troops poured ... Square. Ten A... arrived, overload...

Rioters ...

Stubborn rioters ... the cover of pre... rained rocks, M... and gunfire on ... formed in pocke... campus and had ... by soldiers.

In the downtown ... containing two ... stoned this morn... carloads of high... and police set a...

The cat-and-mouse ... tation and the ... jumped out and ...

Knocking ...

Street lights ... the campus were ... the demonstrators ... area was broken ... flash of gunfire ... splash of flaming ... sprayed from the ... tov cocktails."

Demonstrators ... wide use of fire ... downtown area a... ing. One group of ... were seen carrying ... case filled with ... which are wrapped ... set aflame and h...

One was thrown ... Army truck, but ... missed on without ... apparent serious ...

Another boy w... federate cap race... a truck and pla... bottle in its pa... truck stopped and ... ed a bottle at the ... not, immediately ... whether the drive...

A car with an ... woman inside also ... set for a turn, ... the vehicle man... time on through.

Many of the citi... players turned up ... the downtown are... their employers h...

Most of them w... frightened and in... the area.

Army troops ... onto the campus a... three hours after ... but it was not ... that the last stub... tionists were rou... arrested.

More violence ... in less than four ... the six-month per... unwitroopers force... of Central High S... Rock five years a...

Twelve marshal... wounded or inju... them seriously, an... were hurt.

Most of the ... caused by bricks a... lengths of pipe. ... some gunshot wou...

Many of the ri... parently students ... sippi State College...

A massive demo... conducted there ... noon including ma... the Negro section ... and the burning ... President Kennedy...

Meredith, 29, a ... of the Korean W... had been denied ... campus by Gov... and Lt. Gov. Pa... was escorted sec... university by a ... U. S. marshals ... down for the nig... military which w... heavy guard.

Neither Barnett ... was in Oxford w... broke out between ... civilians and the ... shals.

Barnett ordered ... Highway Patrol n... to stop the fede... Both he and Ke...

Oxford Victim 'Loved Life's Good Things'

New York (UPI) — Paul Guihard, who was killed in the integration riot on the University of Mississippi campus Sunday night had been a member of the New York office of the French News Agency-Agence France Presse for the past three years.

Guihard, assigned to cover the government's attempt to enroll Negro James H. Meredith in the all-white university, died of a bullet wound in his back.

The newsman also worked as a stringer part-time correspondent for the Daily Sketch of London.

His acquaintances describe the stocky, red-haired Guihard as a man with a great sense of humor, one of like Peter Ustinov and a man who loved good food and the other good things of life.

Guihard was 30. He was born in London of French parents and enjoyed dual citizenship.

Guihard stopped to talk to newsmen at the press room at International Airport in New York before taking off for Oxford at 9 a.m. CST Sunday.

"I'm going to pose as a Kentucky colonel and cover this thing with a mint julep in my hand," the bearded Britisher told them. Newsmen who told him to be careful said Guihard laughed off the warning.

Guihard earned the nickname "Flash" for the energy and drive with which he plunged into stories.

He was a fun loving man with a red beard.

Among previous tough assignments for Guihard were the ill-fated anti-Castro landings on Cuba's Bay of Pigs and the flood disaster in British Honduras.

He was the author of a one-act play called "The Deck Chair," which had been performed in a Greenwich Village cabaret theater.

His acquaintances said Guihard spoke Spanish and French as well as English.

He served in the British army and went to work for AFP after

AP Wirephoto

PAUL GUIHARD

he was discharged. He worked for six years in London AFP office before going to Paris and then to New York.

In another incident at the scene at Oxford yesterday, a member of the press, Gaston Yodet of Telenews, came down from Dallas, Tex., was beaten up by the campus mob.

Yodet, who pulled from a burning wagon by the ... which tipped over, ... from his neck and ... then they began beating him.

The mob took every window in Yodet's car, rifled through his belongings and equipment, ripped everything to shreds and left the engine and battery on the fenders.

Yodet's wife was with him but apparently was not hurt.

Son Of Knoxville Newsman Held

Oxford, Miss. (UPI) — Joseph J. Levitt Jr., son of the city editor of the Knoxville News-Sentinel, was arrested or detained in the administration building on the University of Mississippi campus early today.

Levitt said he was taken into custody while working as a newsman on the scene.

Levitt, who was able to telephone United Press International in another building on campus, said he was being held in a room in the administration building. He said he was not under guard but at least 10 other persons were.

Walker

Paradoxes In Integration Crisis

Oxford, Miss. (UPI) — Paradoxes in the Mississippi integration crisis:

Ross Barnett, Jr., son of Mississippi's anti-integration governor was inducted into federal service to take action against his father's stand in the case of James H. Meredith. Young Barnett is a lieutenant in headquarters company of the Mississippi National Guard at Jackson. The unit was federalized Sunday.

John Stennis, a Jackson attorney and son of Sen. John C. Stennis, also was called to active duty. The Fiery Stennis has supported the governor in his fight to keep Meredith from enrolling at all-white Ole Miss.

Edwin A. Walker, who as a U.S. Army major general commanded the federal troops which integrated Central High School at Little Rock, and now a civilian, appeared on the Ole Miss campus in support of Barnett.

Col. T. P. Birdsong, head of the Mississippi State Police which had been ordered by Barnett to prevent Meredith's admittance to the campus, rode with U.S. marshals in the lead car escorting the Negro applicant onto university property.

Student Rioting Brings 'Dishonor' Says Campus Editor

Oxford, Miss. (UPI) — Editor of the University of Mississippi student newspaper told his fellow students today they are bringing "dishonor and disgrace" to their university and to the state by participating in riots.

An editorial was made in a regular edition of the Mississippian which contained students that not today as usual despite the sounds of gunfire and exploding ... the south which rang in ... the night as the newsmen worked.

Many of the newsmen covering the riot used the journalism building as a command post. It is near the edge of the campus.

John Bhowar, editor of the Mississippian, wrote this editorial for the riot issue of her paper.

The riot is unjust to the entire student body and to anyone concerned with the present situation. Not only do the students chance forfeiting their education by participating in riots, but they are bringing dishonor and shame to the university and to the state of Mississippi.

"When students hurl rocks bottles and eggs, the federal marshals are forced to resort to tear gas to back off the crowds.

"When outsiders show their objections in the form of violence, they are seriously injuring the students in their attempt to continue their education. As a student I beg you to return to your homes.

"This is a battle between the

The 100 years ago over almost the same issues and the United States of America prevailed. The federal government is once again showing its strength and power to uphold the laws of our country.

"No matter what your convictions you should follow the advice of Gov. Ross Barnett in not taking any action for violence. Blood has already been shed and will continue to flow unless people realize the seriousness of the situation.

"Whatever your beliefs you are a citizen of the United States of America and of the state of Mississippi and should preserve peace and harmony of both governments."

Mississippi Case 'Disgraceful': Sen. Kefauver

Beverly Hills, Calif. (UPI) — U.S. Sen. Estes Kefauver today branded as "sad and disgraceful" the integration crisis at the University of Mississippi but praised President Kennedy's handling of the affair.

Kefauver told a political meeting he was aboard for Gov. Ross Barnett and other Mississippi officials to have thwarted until

63 Beginning On Priest Dam Assured

By FRANK VAN DER LINDEN
Chief of the Banner's Washington Bureau

...n — The Senate today assured that ... the J. Percy Priest Dam on Stones ... sometime in 1963.

...proval of the $5 billion public works ...al approval of $1 million to commence ... the $32 million project in Nashville.

...proval for the ... Priest Dam ...ctory for U.S. ...ower of Nash... working hard ...ore he came to ...rs ago as suc... Rep. Priest. ...ed previously ... same amount ...ference to be ...ference between

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...has been no ...ington Gov. Al... ...n, chairman of ...on, on whether ...ll be taken on ...ion.

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...stated that he ...athy with Gov. ...

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...and here I ...ree with the ...can be accom... ...and without ...bloodshed ... ...of a sufficient ...

(From Page One)

...to finish planning the Priest ...reservoir and $500,000 to finish ...planning the Hull project.

Originally named the Stewarts Ferry Dam, the project was originally authorized by Congress in 1938, but little was done about starting it until Lower took charge of the effort.

Rep. Joe L. Evins of Smithville, whose district will touch both the Priest and Hull projects, used his influence on the House Appropriations Committee to have the fund approved this year.

Col. James Newman III, Nashville district engineer, dedicated the Priest project could be started in the spring or summer of 1963. It will provide flood control for Nashville in addition to 28,000 kilowatts of hydro-electric power and a large lake area for recreational facilities.

13 Miles Upriver

The reservoir will cover 1,420 acres and will extend 13 miles up the river.

Also in the final Senate bill is $31 1-million to continue building the Barkley Dam on the lower Cumberland River in Kentucky.

The Senate added $725,000 to begin the controversial Tennessee-Tombigbee waterway to connect the Ohio River and the Gulf of Mexico at Mobile. Since the House has granted no money for this item, the conference will finally decide whether it will stay in the bill.

Barnett

(From Page One)

...tempt. He faces a $5,000 daily fine.

Barnett issued his statement after being informed Meredith was on the campus. He called on state officers "under my command" to do everything in their power to preserve peace and to avoid violence in any form.

"I know that our principles remain true, but we must at all odds preserve the peace and avoid bloodshed," he said.

"Surrounded on all sides by the armed forces and oppressive power of the United States of America, my courage and my convictions do not waver.

'I Love Mississippi'

"My heart still says 'never' but my calm judgment abhors the bloodshed that will follow.

"I love Mississippi. I love its people. I love those 40,000 good Mississippians in the National Guard who have now been federalized and requested to oppose me and their own people.

Barnett's son and son-in-law were among Guardsmen called to active duty by the President.

In his closing remarks, directed to federal officials Barnett said:

"You are destroying the Constitution of this great nation. May God have mercy on your souls. Mississippi will continue to take the Meredith case and all similar cases through the courts to restore the sovereignty of the state and constitutional government."

Heavy Blow

This statement had struck a heavy blow to the people of Mississippi. The long-suffering citizens were alive with United State Flags and some men even wore complete Confederate uniforms.

Immediately played a phonograph record of "Dixie," the crowd let out a mighty cheer and surged toward the white pillars of the Governor's Mansion. They formed a ring around it that at one time was four deep. There were men, women, teenagers and even a few women carrying babies.

Despite the fact that there was no truth in the rumor that Barnett was going to be arrested, the crowd did not disperse until it got word that the governor would be safe.

Johnson said in his statement that President Kennedy called on the state to preserve law and order and then federalized the National Guard—"the only adequate instrumentality capable of preserving law and order should an emergency arise."

The lieutenant governor said the Administration and raised "the false issue of integration" throughout the entire situation.

Nearly 2000 persons milled outside the Governor's Mansion Sunday after a Citizens Council leader called [illegible]

Meredith Attends Classes At Ole Miss

AP Wirephoto

Federal marshals wearing gas masks stand guard as students demonstrate on the campus of Ole Miss at Oxford in protest of court ordered enrollment of James Meredith, Negro Air Force veteran.

(Continued From Page One)

handed him a stack of forms. The historic occasion was concluded, quietly.

Meredith, who caught a whiff of the tear gas that clouded the campus early today, rubbed his eyes occasionally.

President Kennedy, who caught only four hours sleep during the troubled night, was in close touch with the situation. His radio-television appeal to the students Sunday night failed to quell rioting that broke out when the campus and town learned that Meredith, turned away three times, had been brought onto the campus.

Campus Littered

The campus, littered today with burned out automobiles, spent tear gas grenades, broken glass and other assorted rubble, was under virtual martial law. An estimated 400 U. S. marshals and 1,000 federal troops kept a firm grip on the order.

The Justice Department in Washington announced about noon that at least 108 persons had been arrested.

Those included a Decatur, Ga., man, Melvin Bruce, 24, identified as a frequent companion of members of the American Nazi Party. He was accused by military authorities of sniping at the marshals Sunday night with a powerful rifle.

The dead were identified as Paul Guihard, correspondent for the French News Agency, who was found dead of a bullet wound in the back, and Ray Gunter, 23, an Oxford resident.

Maj. Gen. Edwin Walker, who resigned his Army commission under fire for his rightist viewpoints, was seen during the rioting congratulating the students. He reappeared downtown this morning in a big, White Texas limousine and began shaking hands but was ushered out of courthouse square at bayonet point.

Walker, who commanded federal troops that former President Eisenhower sent to Little Rock during the school integration crisis in 1957, said he came here to take the other side and protest the use of federal force.

More Than Eight Hours

The campus rioting lasted more than eight hours and reached almost unbelievable heights. Many of the rioters were believed to be self-appointed vigilantes from the nearby countryside and from other parts of Mississippi and neighboring states.

Many were armed and bullets and shot whizzed across the campus much of the night.

One group of men tied down the accelerator of an automobile, jumped out and let it go in an attempt to mow down a group of marshals. It crashed into a tree before anyone was harmed.

The rioting in downtown Oxford this morning threatened for a time to become as violent and bloody but sufficient numbers of troops rushed in and, using time-honored riot control techniques, boxed the troublemakers into courthouse square.

Troops set up a skirmish line between downtown Oxford and the campus area and began moving in battle position along the line clearing it of anyone who seemed to be a troublemaker.

Troops in squad-sized groups moved outward from the skirmish line, clearing a wide area. Three soldiers jumped the hedge at the First Presbyterian Church and skirted across the lawn in the familiar stooped crouch of a soldier in an enemy town.

Presently troops began moving back to the square with young teenagers marching reluctantly ahead of them. Eight were placed under arrest within 15 minutes.

Under Patrol

Soldiers with their guns at the ready patrolled the many narrow streets and alleys in the downtown Oxford area.

Trouble started forming in downtown Oxford early in the day.

Roving bands of young toughs, some of them beneath college age and some above, walked the streets, many of them carried rocks and clubs. There was no effort by local police, the sheriff's office or the state patrol to stop them although several patrol cars were observed passing by the groups.

The youths usually travelled in groups of about eight or 10 and walked the wide sidewalks of the downtown area in a belligerent manner.

It was after this had gone on

Troops fired about a half-dozen shots over the heads of one group of youthful rock throwers.

Before the order to fire the tear gas was given an Army truck's windshield was shattered by a large rock and a man leaped on a balcony to drop a falling timber on a passing truck.

Tear gas flowed across Courthouse Square, where advancing lines of troops had pinned the rioters, and choking clouds of gas seeped into stores.

Women staggered from stores, their eyes gushing tear. By midmorning the town, as the campus, appeared to be under virtual martial law although there was no official proclamation.

Truckload after truckload of troops poured into Courthouse Square. Ten Army helicopters circled overhead.

Routed Out

Stubborn rioters — who under the cover of pre-dawn darkness rained rocks, Molotov cocktails and gunfire on federal forces formed in pockets all over the campus and had to be routed out by soldiers.

In the downtown area a car containing two Negroes was stoned this morning while four carloads of highway patrolmen and police sat and watched.

The car swerved into a gas station and the two Negroes jumped out and fled inside.

Knocked Out

Street lights in and around the campus were knocked out by the demonstrators and the darkness was broken only by the flash of gunfire and the ugly splash of flaming gasoline that sprayed from the rioters' "Molotov cocktails."

Demonstrators were making wide use of fire bombs in the downtown area again this morning. One group of about six boys were seen carrying a wooden case filled with bottles of gas, which are wrapped in paper, set aflame and hurled.

One was thrown at a passing Army truck, but the truck continued on without suffering any apparent serious damage.

Another boy wearing a Confederate cap raced in front of a truck and placed a broken bottle in its path. When the truck stopped another boy hurled a bottle at the driver. It was not immediately determined whether the driver was hurt.

A car with an elderly Negro woman inside also was the target for a rain of bottles, but the vehicle managed to continue on through the barrage.

Many of the city's Negro employes turned up for work in the downtown area, only to find their employers had not arrived. Most of them were obviously frightened and immediately left the area.

Army troops began moving onto the campus at 10 p.m. CST, three hours after the riot began, but it was not until 4 a.m. that the last stubborn segregationists were routed and some arrested.

More violence was uncovered in less than four hours than in the six-month period when U.S. paratroopers forced integration of Central High School in Little Rock five years ago.

Twelve marshals were either wounded or injured, three of them seriously, and five soldiers were hurt.

Most of the wounds were caused by bricks and bows with lengths of pipe. But there were some gunshot wounds.

Many of the rioters were apparently students from Mississippi State College at Starkville. A massive demonstration was conducted there Sunday afternoon including marches through the Negro section of Starkville and the burning of an effigy of President Kennedy.

Meredith, 29, a Negro veteran of the Korean War who twice had been denied entry to the campus by Gov. Barnett and Lt. Gov. Paul B. Johnson was escorted secretly into the university by a motorcade of U. S. marshals and bedded down for the night at a dormitory which was put under heavy guard.

Neither Barnett nor Johnson was in Oxford when the riots broke out between gun-wielding civilians and the federal marshals.

Barnett ordered the State Highway Patrol not to attempt to stop the federal marshals. Both he and Kennedy advised the students not to resort to

Oxford Victim 'Loved Life's Good Things'

New York (UPI) — Paul Guihard, who was killed in the integration riot on the University of Mississippi campus Sunday night had been a member of the New York office of the French News Agency (Agence France Presse) for the past three years.

Guihard, assigned to cover the government's attempt to enroll Negro James H. Meredith in the all-white university, died of a bullet wound in his back.

The newsman also worked as a stringer (part-time correspondent) for the Daily Sketch of London.

His colleagues described the stocky, red-haired Guihard as a man with a great sense of humor, one of the Paris Latins, and a man who loved good food and the other good things of life.

Guihard was 36. He was born in London of French parents and enjoyed dual citizenship.

Guihard stopped to talk to newsmen at the press room at International Airport in New York before taking off for Oxford at 9:45 a.m. CST Sunday.

"I'm going to pose as a Kentucky colonel and cover this thing with a mint julep in my hand," the bearded Britisher told them. Newsmen who told him to be careful said Guihard laughed off the warning.

Guihard earned the nickname "Flash" for the energy and drive with which he plunged into stories.

He was a fun loving man with a red beard.

Among perhaps tough assignments for Guihard were the ill-fated anti-Castro landings on Cuba's Bay of Pigs and the flood disaster in British Honduras.

He was the author of a one-act play called "The Dock Chair," which had been performed in a Greenwich Village cabaret theater.

His acquaintances said Guihard spoke Spanish and French as well as English.

He served in the British army and went to work for AFP after

AP Wirephoto

PAUL GUIHARD

he was discharged. He worked for six years in London AFP office before going to Paris and then to New York.

In another incident of violence in Oxford involving a member of the press Gaston Yoder, a Telescope correspondent from Dallas, Tex., was beaten up by the campus mob.

Yoder was pulled from a car and was dragged by the crowd which ripped his shirt from his neck and ripped the buttons off it. He finally escaped by running into the courthouse and locking himself in a room.

Yoder's car was also badly damaged.

Patterson

(From Page One)

...mously to waive the rules to allow consideration of special resolutions.

Action will be taken at the final conference session Thursday.

Patterson who said he is considering offering a resolution was named to a five-man resolutions committee, headed by [illegible] of Texas.

Paradoxes In Integration Crisis

Oxford, Miss. (UPI) — Paradoxes in the Mississippi integration crisis:

Ross Barnett, Jr., son of Mississippi's anti-integration governor was inducted into federal service to take action against his father's stand in the case of James H. Meredith. Young Barnett is a lieutenant in headquarters company of the Mississippi National Guard at Jackson. The unit was federalized Sunday.

John Stennis, a Jackson attorney and son of Sen. John C. Stennis, also was called to active duty. The elder Stennis has supported the governor in his fight to keep Meredith from enrolling at all-white Ole Miss.

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Col. T. P. Birdsong, head of the Mississippi State Police which had been ordered by Barnett to prevent Meredith's admittance to the campus, rode with U.S. marshals in the lead car escorting the Negro applicant onto university property.

Student Rioting Brings 'Dishonor' Says Campus Editor

Oxford, Miss. (UPI) — The editor of the University of Mississippi student newspaper told his fellow students today they are bringing "dishonor and shame to the university and to the state of Mississippi."

An editorial was made in a special edition of the Mississippian which mentioned students not by name but as dual despite the sounds of gunfire and exploding tear gas shells which rang in [illegible]

Many of the persons covering the riot used the journalism building as a command post. It is near the edge of the campus.

Billie Brewer, editor of the Mississippian, wrote this editorial for the riot issue of his paper.

"This is an appeal to the entire student body and to anyone concerned with the present situation. Not only do the students change, forfeiting their education by participating in riots, but they are bringing dishonor and shame to the university and to the state of Mississippi.

"When students hurl rocks, bottles and eggs, the federal marshals are forced to resort to tear gas to back off the crowds.

"When outsiders show their objections in the form of violence, they are seriously injuring the students in their attempt to continue their education. As a student I beg you to return to your homes.

"This is a battle between the state of Mississippi and the [illegible] The 100 years ago over almost the same issues and the United States of America prevailed. The federal government is once again showing its strength and power to uphold the laws of our country.

"No matter what your convictions you should follow the advice of Gov. Ross Barnett by not taking any action for violence. Blood has already been shed and will continue to flow unless people realize the seriousness of the situation.

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Walker

Mississippi Case 'Disgraceful': Sen. Kefauver

Beverly Hills, Calif. (UPI) — Sen. Estes Kefauver today branded as "sad and disgraceful" the integration crisis at the University of Mississippi but praised President Kennedy's handling of the affair.

Kefauver told a political meeting it was absurd for Gov. Ross Barnett and other Mississippi officials to have thwarted until Sunday night a court order compelling enrollment of Negro stu[illegible]

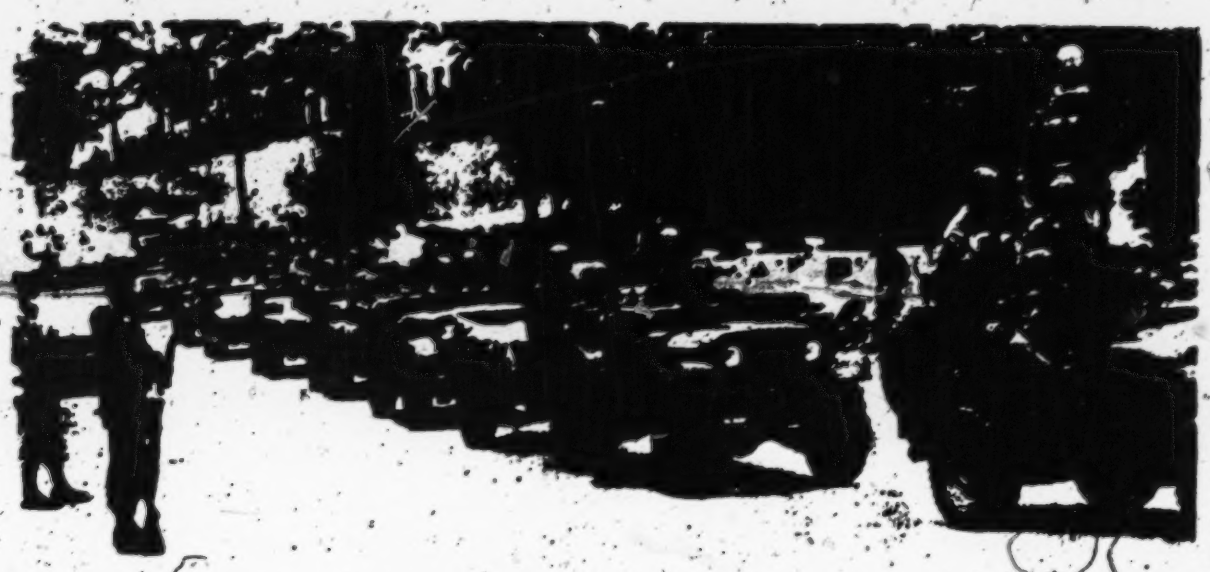
[fol. 2030]

Nashville Banner

Nashville's Oldest Newspaper — LONG MAY OUR LAND BE BRIGHT WITH FREEDOM'S HOLY LIGHT; PROTECT US BY THY MIGHT, GREAT GOD, OUR KING — Founded 1

VOL. LXXXVI, NO. 249 — NASHVILLE, TENN., MONDAY AFTERNOON, OCT. 1, 1962 — 34 PAGES — PRICE

MEREDITH ATTENDS CLASSE
AS GIs BATTLE RIOTERS



A long line of jeep borne Army troops leaves the main gate of the University of Mississippi at Oxford after patrolling the riot torn campus.

Oxford, Miss. (UPI)—Negro James Meredith registered today at the University of Mississippi and began attending classes on a campus littered with the debris of a major riot that took two lives and injured at least 75 persons.

"It is not a happy occasion," he said.

About 100 U.S. deputy marshals and 1,000 federal troops guarded the campus as the 29-year-old Negro cracked the segregation barriers of the 114-year-old school.

The campus was brought under military control early today but the rioting spread to downtown Oxford and at least one soldier was hurt in a barrage of rocks, timbers and pop bottles before the crowd was dispersed with tear gas and reinforcements were brought in.

Witnesses said several shots were fired at the troops at one point downtown. The troops, identified as Mississippi National Guardsmen, immediately rushed forward and fired rifle shots over the heads of the crowd.

At least 20 rioters were rounded up. Most of them were young boys. They were ordered to place their hands over their heads and were marched at bayonet point to the courthouse.

In Jackson, Gov. Ross Barnett was in seclusion but his office issued a statement saying "there has been an invasion of our state resulting in bloodshed of our citizens and threatened bloodshed of others." The Capitol building's Mississippi state flag flew at half-staff.

Walks Amid Shouts

Meredith, whose determination to desegregate "Ole Miss" brought about a conflict that threatened to rock the federal union, walked solemnly to an American colonial history class at 9 a.m. CST to shouts of "nigger, nigger" and "was it worth two deaths?"

He was accompanied, to the classes by three deputy marshals and U.S. Department of Justice Representative Ed Guthman.

The Negro was met at the registrar's office by University Registrar Robert B. Ellis who

(Turn to Page 12, Column 7)

Deputy U.S. Marshals Jack Evins and James Kemp, both of Nashville, were among the Federal marshals flown to Oxford, Miss., from Millington Naval Air Base near Memphis. They arrived in Oxford about 2:30 p.m. Sunday.

Walker Arrested In Oxford

Washington — Former Army Gen. Edwin Walker was ordered today on charges of "rebellion, insurrection and seditious conspiracy." Atty. Gen. Robert F. Kennedy announced.

The Attorney General told women that Walker had been arrested and would be arraigned in court today at Oxford, Miss. No further details were immediately available.

Earlier today Mrs. Wayne Morse [illegible] for unwarranted [illegible] said it was particularly reprehensible [illegible] Walker sought to [illegible] campus of this great university [illegible] "the rantings of violent segregationists or psychopathic such as Gen. Edwin A. Walker."

Young said if Walker made the statements attributed to him, "I am glad he is an ex-general and a private citizen instead of in command of any youth in this country."

"I hold him in utmost contempt for his appearance on the campus of this great university [illegible] 'Ole Miss' and for attempting to lead a charge of some 1,500 unruly rioters against United States marshals," Young said.

Disturbing reports from Oxford, Miss., said Walker sought to lead a charge by rioters against U.S. marshals and quoted him as saying to students: "If you can't win, go home. Don't stay at the university. But let's not quit. We can win."

In another Senate speech Rep. Thomas G. Abernethy, D-Miss., said today "An inexperienced U.S. marshal" fired the shot in the rioting at the University of Mississippi campus against "a group of kids who were doing nothing."

Abernethy said the marshal "got excited" and fired a tear gas shell into the crowd. He said it hit a state policeman "who is either dead or at the point of death."

"So help me, God, that's what happened," Abernethy told the House.

The Mississippian, in an emotion-filled speech, said university authorities pleaded with the Justice Department to wait until Monday morning to bring Negro student James H. Meredith to the campus, promising to publish and broadcast "appeals for calm.

"But the Justice Department was not to be denied," he said.

Sen. James O. Eastland, told the Senate that information reported by university officials indicated that "Amateurism by untrained marshals" in firing tear gas shells caused Sunday night's bloody campus riot.

The other, Sen. John C. Stennis, said in a statement that the mere presence of Negro James H. Meredith on the campus was the cause of what he called a "frightful night."

"To avoid further bloodshed and loss of life," Stennis said.

(Turn to Page 12, Column 4)

Ellington Aim: Avoid Issue At Conference

By NEIL CUNNINGHAM
Banner Staff Writer

Hollywood, Fla.—Gov. Buford Ellington today implied he will accept any effort to resolve the Southern Governors' Conference on the integration struggle between Mississippi and the federal government.

Ellington, chairman of the 17-state organization, opened the conference here this morning stating, "We can use these events as a spotlighted platform from which to round off an image of an emotional or political nature and thus gain in the game of demagoguery, providing words where action is needed and confusion where understanding is necessary.

"On the other hand, we can and I hope that we will, use these problems in politics and use these conferences as a forum for constructive discussion of the University of Mississippi problem and the Southern Governors' Conference is not in position to offer any advice."

He added that it would be his guess that these would not be

(Turn to Page 12, Column 1)

Barnett Plans To Send Lawyers To U.S. Court

Jackson, Miss. (UPI)—Gov. Ross Barnett planned to send his attorneys to the 5th U.S. Circuit Court of Appeals today—perhaps to seek removal of the Meredith, a Negro, in the University of Mississippi.

Part of the purge may have come Sunday night when Barnett, in an emotional message to Mississippi citizens, indirectly

In the statement, issued before the rioting began on the Ole Miss campus at Oxford, 180

Court Opens Mixing Bar Hearings

By LARRY BRINTON and BRAD CARLISLE

The first of 16 petitioning to [illegible] against downtown [illegible] bars got under way to-

By Reason—Not Temper—

Mississippi Tragedy Have Been Averted

(An Editorial)

BLIND, BLUNDERING, BLUDGEONING

respective of which "side" it is on—can the tragedy of Mississippi; antagonizing fu troversy that could and should have been recourse to either military invasion or in lence.

Foresight should have noted that as clear now discerns it, for a restraining effect on federal authorities, on whom a joint responsi ed—and each of which, again, has contribut seemly spectacle of breakdown in law and

Let it be said once more that this tolerate chaos and anarchy, from any caus

Regardless of personal feeling, or co political advantage on either side, this ca been settled far short of the present calamit and would have been had calm judgment pr see its way to a solution. Instead, free rei tempers.

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MISSISSIPPI COULD HAVE resolved thi

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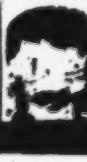
'Round The Clock

WITH RED O'DONNELL

MONDAY'S MESSAGE

Pinckney Kori gave some State Fair tickets to Jean (7), Billy (5) & Becky (11) Martin, 1360 25th Ave. S.



Jean's letter of thanks read:

"I enjoyed the Fair. Thank You. P.S.—Becky & Billy enjoyed it to but they're to

...reservoir will cover 1,420 acres and will extend 13 miles up the river.

Also in the final Senate bill is $31 1-million to continue building the Barkley Dam on the lower Cumberland River in Kentucky.

The Senate added $725,000 to begin the controversial Tennessee-Tombigbee waterway to connect the Ohio River and the Gulf of Mexico at Mobile. Since the House has granted no money for this item, the conference will finally decide whether it will stay in the bill.

Barnett

(From Page One)

tempt. He faces a $5,000 daily fine.

Barnett issued his statement after being informed Meredith was on the campus. He called on state officers "under my command to do everything in their power to preserve peace and to avoid violence in any form."

"I know that our principles remain true, but we must at all odds preserve the peace and avoid bloodshed," he said.

"Surrounded on all sides by the armed forces and oppressive power of the United States of America, my courage and my convictions do not waiver."

'I Love Mississippi'

"My heart still says 'never,' but my calm judgment abhors the bloodshed that will follow.

"I love Mississippi. I love its people. I love those 10,000 good Mississippians in the National Guard who have now been federalized and requested to oppose me and their own people.

Barnett's son and son-in-law were among Guardsmen called to active duty by the President.

In his closing remarks, directed to federal officials, Barnett said:

"You are destroying the Constitution of this great nation. May God have mercy on your souls. Mississippi will continue to fight the Meredith case and all similar cases through the courts to restore the sovereignty of the state and constitutional government."

Heavy Blow

This statement had struck a heavy blow to the capital of Mississippi. The townspeople of New were in a fighting mood. The streets were alive with Confederate flags and some men even were complete Confederate uniforms.

Somebody played a phonograph record of "Dixie" the crowd let out a mighty cheer and surged toward the white pillars of the Governor's Mansion. They formed a ring around it that at one time was four deep. There were men, women, teenagers and even a few women carrying babies.

Despite the fact that there was no truth in the rumor that Barnett was going to be arrested, the crowd did not disperse until it got word that the governor would be safe.

Johnson said in his statement that President Kennedy called on the state to preserve law and order and then federalized the National Guard—"the only adequate instrumentality capable of preserving law and order should an emergency arise."

The lieutenant governor said the Administration and Council "the false issue of integration" throughout the entire situation.

Nearly 2,000 persons milled outside the Governor's Mansion Sunday after a Citizens Council leader called for volunteers to prevent any attempt to arrest Barnett.

Barnett who received many offers from volunteers throughout the day, conferred with segregation leaders, including former state Sen. Willie Rainach of Louisiana.

Gets Marshall County Post

Lewisburg Miss Martha Sue McCain of Waverly will assume duties here as home demonstration agent Oct. 15.

Miss McCain has served as assistant home agent in Humphrey's County three years. Her duties here will include both adult and 4-H club work. She is a graduate of David Lipscomb College, Nashville.

AP Wirephoto

Federal marshals wearing gas masks stand guard as students demonstrate on the campus of Ole Miss at Oxford in protest of court ordered enrollment of James Meredith, Negro Air Force veteran.

Oxford Victim 'Loved Life's Good Things'

New York (UPI)—Paul Guihard, who was killed in the integration riot on the University of Mississippi campus Sunday night had been a member of the New York office of the French News Agency (Agence France Presse) for the past three years.

Guihard, assigned to cover the government's attempt to enroll Negro James H Meredith in the all-white university, died of a bullet wound in his back.

The newsman also worked as a stringer (part-time correspondent) for The Daily Sketch of London.

His acquaintances described the stocky, redhaired Guihard as a man with a great sense of humor, out of the Peter Ustinov mold, a man who loved good food and the other good things of life.

Guihard was 36. He was born in London of French parents and enjoyed dual citizenship.

Guihard stopped to talk to newsmen at the press room at International Airport in New York before taking off for Oxford at 9 a.m. CST Sunday.

"I'm going to pose as a Kentucky colonel and cover this thing with a mint julep in my hand," the bearded Britisher told them. Newsmen who told him to be careful said Guihard laughed off the warning.

Guihard earned the nickname "Flash" for the energy and drive with which he plunged into stories.

He was a fun loving man with a red beard.

Among perilous tough assignments for Guihard were the ill-fated anti-Castro landings on Cuba's Bay of Pigs and the flood disaster in British Honduras.

He was the author of a one-act play called "The Rock Chair," which had been performed in a Greenwich Village cabaret theater.

His acquaintances said Guihard spoke Spanish and French as well as English.

He served in the British army and went to work for AFP after he was discharged. He worked for its offices in London and Paris before going to Paris and then to New York.

In another move of importance at Oxford involving a number of the press, Gordon Yoder of Tuscaloosa, chief of the United Press International bureau in Jackson, Miss., was headed up for the campus post.

Yoder was pulled from a station wagon by the crowd which roped him around his neck and dragged him. Then they began beating him.

The mob took every opportunity to vent its hatred for newsmen. Cameras were smashed, cars overturned, presumably in search of the cameras and packed in the fenders.

Yoder's wife was with him but apparently was not hurt.

AP Wirephoto

PAUL GUIHARD

Son Of Knoxville Newsman Held

Oxford, Miss. (UPI)—Joseph J. Levitt Jr., son of the city editor of the Knoxville News-Sentinel, was arrested or detained in the administration building on the University of Mississippi campus early today.

Levitt said he was taken into custody while working as a newsman on the scene.

Levitt, who was able to telephone United Press International in another building on campus, said he was being held in a room in the administration building. He said he was not under guard but at least 10 other persons were.

Patterson

(From Page One)

mouse to waive the rules to allow consideration of special resolution.

Action will be taken at the final conference session Thursday.

Patterson who said he is considering offering a resolution was named to a five-man resolutions committee headed by Gov. Price Daniel of Texas.

Under the regular procedure resolutions must be filed three weeks in advance of a session. None had come in within that time.

The Southern governors generally had expressed sympathy for Barnett's position but the majority said the basic issue involved was preserving law and order and that court decisions must be obeyed.

In opening remarks, Gov. Buford Ellington of Tennessee, conference chairman, and Gov. Farris Bryant of Florida, host governor, expressed hopes that a peaceful and rightful solution to the Mississippi problem would be found.

Ellington appealed to his fellow governors to resist headline grabbing on the emotional racial subject, and to concentrate on regular work of the conference.

Walker

(From Page One)

it is abundantly clear that Meredith should promptly be withdrawn from the campus and all efforts to enter him at the University of Mississippi be permanently abandoned."

"There is no way that Meredith can go to school at the University of Mississippi," he said. "The United States government should remove him."

Sen Herman E. Talmadge, D-Ga., said he deeply regretted the Mississippi situation. He commented that he was repeatedly and unsuccessfully sponsored legislation which would, he said, end encroachment by federal courts and "re-establish state and local control over public education."

Talmadge said the current situation results from "judicial usurpation" which, he said, was bolstered by the application of the federal power. He called it detrimental to the federal government process and said it will "serve" to divide the American people at a time when they should be united against the threat of Communism.

Sen Sam J. Ervin Jr. D-N.C. said those "fomenting" litigation which has such tragic results should remember St Paul's injunction that all which is lawful is not necessarily expedient.

Miss Lela Pearl Rogers

Clarksville—Funeral services for Miss Lela Pearl Rogers, 76, will be held Tuesday at 3 p.m. at Tarpley Funeral Home with burial in Greenwood Cemetery. Miss Rogers died Sunday in a Clarksville infirmary.

Paradoxes In Integration Crisis

Oxford, Miss. (UPI)—Paradoxes in the Mississippi integration crisis:

Ross Barnett, Jr., son of Mississippi's anti-integration governor was inducted into federal service to take action against his father's stand in the case of James H. Meredith. Young Barnett is a lieutenant in headquarters company of the Mississippi National Guard at Jackson. The unit was federalized Sunday.

John Stennis, a Jackson attorney and son of Sen. John C. Stennis, also was called to active duty. The elder Stennis has supported the governor in his fight to keep Meredith from enrolling at all-white Ole Miss.

Edwin A. Walker, who is a U.S. Army major general commanded the federal troops which integrated Central High School at Little Rock, and now a civilian, appeared on the Ole Miss campus in support of Barnett.

Col T. P. Birdsong, head of the Mississippi State Patrol which had been ordered by Barnett to prevent Meredith's admittance to the campus, rode with U.S. marshals in the lead car escorting the Negro applicant onto university property.

Student Rioting Brings 'Dishonor' Says Campus Editor

Oxford, Miss. (UPI)—The editor of the University of Mississippi student newspaper told his fellow students today they are bringing "dishonor and shame to the university and to the state of Mississippi" by participating in riots.

An open letter was made in a regular column of the Mississippian which "condemn" students not for their usual disdain for the comforts of campus and concentrating instead on the ways they worked.

Many of the newsmen covering the riot used the journalism building as a command post. It is on the edge of the campus.

John Brower, editor of the Mississippian, wrote this editorial for the riot issue of her paper:

"Try to be neutral to the entire student body and to anyone concerned with the present situation. Not only do the students chance forfeiting their education by participating in riots, but they are bringing dishonor and shame to the university and to the state of Mississippi.

"When students hurl rocks, bottles and eggs, the federal marshals are forced to resort to tear gas to back off the crowds.

"When outsiders show their objections in the form of violence, they are seriously injuring the students in their attempt to continue their education. As a student I beg you to return to your homes.

"This is a battle between the state of Mississippi and the United States government. The University is caught in the middle. The Civil War was fought 100 years ago over almost the same issues and the United States of America prevailed. The federal government is once again showing its strength and power to uphold the laws of our country.

"No matter what your convictions you should follow the advice of Gov. Ross Barnett by not taking any action for violence. Blood has already been shed and will continue to flow unless people realize the seriousness of the situation.

"Whatever your beliefs you are a citizen of the United States of America and of the state of Mississippi and should preserve peace and harmony of both governments."

Mississippi Case 'Disgraceful': Sen. Kefauver

Beverly Hills, Calif. (UPI)—U.S. Sen. Estes Kefauver today branded as "sad and disgraceful" the integration crisis at the University of Mississippi but praised President Kennedy's handling of the affair.

Kefauver told a political meeting it was absurd for Gov. Ross Barnett and other Mississippi officials to have thwarted until Sunday night a court order compelling enrollment of Negro student James H. Meredith at the tax-supported campus.

Washington announced about noon that at least 108 persons had been arrested.

Those included a Decatur, Ga., man, Melvin Bruce, 26, identified as a frequent companion of members of the American Nazi Party. He was accused by military authorities of sniping at the marshals Sunday night with a powerful rifle.

The dead were identified as Paul Guihard, correspondent for the French News Agency, who was found dead of a bullet wound in the back, and Ray Gunter, 23, an Oxford resident.

Maj. Gen. Edwin Walker, who resigned his Army commission under fire for his rightist views points, was seen during the rioting congratulating the students. He reappeared downtown this morning in a big, White Texas hat and began shaking hands—not was ushered out of courthouse square at bayonet point.

Walker, who commanded federal troops that former President Eisenhower sent to Little Rock during the school integration crisis in 1957, said he came here to take the other side and protest the use of federal force.

More Than Eight Hours

The campus rioting lasted more than eight hours and reached almost unbelievable heights. Many of the rioters were believed to be selfappointed vigilantes from the nearby countryside and from other parts of Mississippi and neighboring states.

Many were armed and bullets and shot whizzed across the campus much of the night.

One group of men tied down the accelerator of an automobile, jumped out and let it go in an attempt to mow down a group of marshals. It crashed into a tree before anyone was harmed.

The rioting in downtown Oxford this morning threatened for a time to become as violent and bloody but sufficient numbers of troops rushed in and, using time-honored riot control techniques, boxed the troublemakers into courthouse square.

Troops set up a skirmish line between downtown Oxford and the campus area and began moving in battle position along the line clearing it of anyone who seemed to be a troublemaker.

Troops in squad-sized groups moved outward from the skirmish line, clearing a wide area. Three soldiers jumped the hedge at the First Presbyterian Church and skirted across the lawn in the familiar stooped crouch of a soldier in an enemy town.

Presently troops began moving back to the square with young teenagers marching reluctantly ahead of them. Eight were placed under arrest within 15 minutes.

Under Patrol

Soldiers with their guns at the ready patrolled the many narrow streets and alleys in the downtown Oxford area.

Trouble started forming in downtown Oxford early in the day.

Roving bands of young toughs, some of them beneath college age and some above, walked the streets, many of them carried rocks and clubs. There was no effort by local police, the sheriff's office or the state patrol to stop them although several patrol cars were observed passing by the groups.

The youths usually travelled in groups of about eight or 10 and walked the wide sidewalks of the downtown area in a belligerent manner.

It was after this had gone on for more than an hour that the first military units — a couple of squads of MPs — turned up.

The cops of the...ruined rocks, Molotov cocktails and gunfire on federal forces formed in pockets all over the campus and had to be routed out by soldiers.

In the downtown area a car containing two Negroes was stoned this morning while four carloads of highway patrolmen and police sat and watched.

The car swerved into a gas station and the two Negroes jumped out and fled inside.

Knocked Out

Street lights in and around the campus were knocked out by the demonstrators and the darkness was broken only by the flash of gunfire and the ugly splash of flaming gasoline that sprayed from the rioters' "Molotov cocktails."

Demonstrators were making wide use of fire bombs in the downtown area again this morning. One group of about six boys were seen carrying a wooden case filled with bottles of gas, which are wrapped in paper, set aflame and hurled.

One was thrown at a passing Army truck, but the truck continued on without suffering any apparent serious damage.

Another boy wearing a Confederate cap raced in front of a truck and placed a broken bottle in its path. When the truck stopped another boy hurled a bottle at the driver. It was not immediately determined whether the driver was hurt.

A car with an elderly Negro woman inside also was the target for a rain of bottles, but the vehicle managed to continue on through the barrage.

Many of the city's Negro employes turned up for work in the downtown area, only to find their employers had not arrived. Most of them were obviously frightened and immediately left the area.

Army troops began moving onto the campus at 10 p.m. CST, three hours after the riot began, but it was not until 4 a.m. that the last stubborn segregationists were routed and some arrested.

Mob violence was unleashed in less than four hours than in the six-month period when U.S. paratroopers forced integration of Central High School in Little Rock five years ago.

Twelve marshals were either wounded or injured, three of them seriously, and five soldiers were hurt.

Most of the wounds were caused by bricks and bows with lengths of pipe. But there were some gunshot wounds.

Many of the rioters were apparently students from Mississippi State College at Starkville. A massive demonstration was conducted there Sunday afternoon including marches through the Negro section of Starkville and the burning of an effigy of President Kennedy.

Meredith, 29, a Negro veteran of the Korean War who thrice had been denied entry to the campus by Gov. Barnett and Lt. Gov. Paul B. Johnson was escorted secretly into the university by a motorcade of U. S. marshals and bedded down for the night at a dormitory which was put under heavy guard.

Neither Barnett nor Johnson was in Oxford when the riots broke out between gun-wielding civilians and the federal marshals.

Barnett ordered the State Highway Patrol not to attempt to stop the federal marshals. Both he and Kennedy advised the students not to resort to violence.

But that was not to be.

Shortly before 8 p.m. CST, the word flashed around the campus that Meredith was th... And, even as Kennedy spoke, the riot began. A group of students threw lighted cigarets on the canvas top of a truck carrying U. S. marshals. The canvas caught fire and the marshals, in steel helmets painted white and wearing orange vests with tear gas grenades, jumped out.

First Barrage

Then they fired the first barrage of tear gas at the students.

The murky white fumes rose and all but obscured the first floor of the main administration building. Students, screaming and yelling, bolted away to get out of the stinging gas. Nose, tears streaming, went into YMCA building and stood on chairs to listen to Kennedy on TV. Afterwards, many of them went back out and rejoined the violence.

The riot grew even worse after Guihard and Gunter were killed. One group started an automobile full speed at a group of marshals and jumped out. The car hit a tree.

Newsmen were beaten. Cameras were destroyed. Radio station sound trucks had their insides ripped out. Other cars were set afire.

One youth fired a fire extinguisher into the face of one of the drivers of the trucks used to bring in the marshals. A state highway patrolman was struck in the face by a tear gas cartridge. A U.S. marshal was shot in the neck.

List Of Units In Oxford Or En Route To Scene

Washington (UPI)—Following is a Defense Department list of troop units either already in or around Oxford, Miss., or en route there:

The 70th Engineers, from Ft. Campbell, Ky.

The 503rd Military Police Battalion, Ft. Bragg, N. C.

From Ft. Dix, N. J., the 716th Military Police Battalion.

The 108th Cavalry Regiment, a Mississippi National Guard unit.

The 1st and 2nd Battle Groups of the Mississippi National Guard.

From Ft. Benning, Ga., the 2nd Battle Group of the 23rd Infantry.

The 720th Military Police from Ft. Hood, Tex.

AP Wirephoto

James Meredith is escorted onto the University of Mississippi campus at Oxford for court ordered enrollment.

Tashville Banner.

Newspaper — LONG MAY OUR LAND BE BRIGHT WITH FREEDOM'S HOLY LIGHT; PROTECT US BY THY MIGHT, GREAT GOD, OUR KING — Founded, April 10, 1876

149 — NASHVILLE, TENN., MONDAY AFTERNOON, OCT. 1, 1962 — 34 PAGES — PRICE: TEN CENTS

EREDITH ATTENDS CLASSES
S GIs BATTLE RIOTERS

AP Wirephoto

A jeep borne Army troops leaves the main gate of the University of Mississippi at Oxford after patrolling the riot torn campus.

lker Arrested In Oxford

Oxford, Miss. (UPI)—Negro James Meredith registered today at the University of Mississippi and began attending classes on a campus littered with the debris of a major riot that took two lives and injured at least 75 persons.

"It is not a happy occasion," he said.

About 100 U.S. deputy marshals and 1,000 federal troops guarded the campus as the 29-year-old Negro cracked the segregation barriers of the 114-year-old school.

The campus was brought under military control early today but the rioting spread to downtown Oxford and at least one soldier was hurt in a barrage of rocks, timbers and pop bottles before the crowd was dispersed with tear gas and reinforcements were brought in.

Witnesses said several shots were fired at the troops at one point downtown. The troops, identified as Mississippi National Guardsmen, immediately rushed forward and fired rifle shots over the heads of the crowd.

At least 30 rioters were rounded up. Most of them were young men. They were ordered to keep their hands over their heads and were marshaled at bayonet point to the courthouse.

In Jackson, Gov. Ross Barnett was in seclusion but his office issued a statement saying "there has been an invasion of our state resulting in bloodshed of our citizens and threatened bloodshed of others." The Capitol building's Mississippi state flag flew at half-staff.

Walks Amid Shouts

Meredith, whose determination to desegregate "Ole Miss" brought about a conflict that threatened to rock the federal union, walked solemnly to an American colonial history class at 9 a.m. CST to shouts of "nigger, nigger" and "was it worth two deaths?"

He was accompanied to the classes by three deputy marshals and U.S. Department of Justice Representative Ed Guthman.

The Negro was met at the registrar's office by University Registrar Robert B. Ellis who

(Turn to Page 12, Column 7)

Deputy U.S. Marshals Jack Evins and James Komp, both of Nashville, were among the Federal marshals flown to Oxford, Miss., from Millington Naval Air Base near Memphis. They arrived in Oxford about 2:30 p.m. Sunday.

'Round The Clock
WITH RED O'DONNELL

MONDAY'S MESSAGE

Pinckney Keel gave some State Fair tickets to Jean (7), Billy (9) & Becky (11) Martin, 1309 20th Ave. S.

Jean's letter of thanks read:

"I enjoyed the Fair. Thank You.

"P.S.—Becky & Billy enjoyed it too but they're in bed."

Ellington Aim: Avoid Issue At Conference

By NEIL CUNNINGHAM
Banner Staff Writer

Hollywood, Fla.—Gov. Buford Ellington today implied he will resist any effort to involve the Southern Governors' Conference in the integration struggle between Mississippi and the federal government.

Ellington, chairman of the 17-state organization, opened the conference here this morning stating, "We can use the governors' conference as a spotlighted platform from which to sound off on issues of an emotional or political nature and thus join in the game of demagoguery, preceding words where action is needed and confusion where understanding is necessary.

"On the other hand, we can and I hope that we will, rise above pettiness in politics and the rantings of violent segregationists or psychopaths such as retired Gen. Edwin A. Walker."

Young said if Walker made the statements attributed to him, "I am glad he is no longer and a private citizen instead of in command of any youth in this country."

"I hold him in utmost contempt for his appearance on the campus of this great university, 'Ole Miss,' and for attempting to lead a charge of some 1,000 unruly rioters against United States marshals," Young said.

Dispatches from Oxford, Miss., said Walker sought to lead a charge by rioters against U.S. marshals and quoted him as saying to students: "If you can't win, go home. Don't stay at the university. But let's not quit. We can win."

In another Senate speech Rep. Thomas G. Abernethy, D-Miss., said today: "An inexperienced U.S. marshal" fired the shot in the rioting at the University of Mississippi campus against "a gang of kids who were doing nothing."

Abernethy said the marshal "got excited" and fired a tear gas shell into the crowd. He said it hit a state policeman "who is either dead or at the point of death."

"So help me, God, that's what happened," Abernethy told the House.

The Mississippian, in an emotion-filled speech, said university authorities pleaded with the Justice Department to wait until Monday morning to bring Negro student James H. Meredith to the campus, promising to publish and broadcast appeals for calm.

"But the Justice Department was not to be denied," he said.

Sen. James O. Eastland, told the Senate that information reported by university officials indicated that "Amateurism by untrained marshals" in firing tear gas shells caused Sunday night's bloody campus riot.

The other Sen. John C. Stennis, said in a statement that the mere presence of Negro James H. Meredith on the campus was the cause of what he called a "frightful night."

"To avoid further bloodshed and loss of life," Stennis said,

(Turn to Page 12, Column 4)

(Turn to Page 12, Column 1)

state of the University of Mississippi problem and the Southern Governors' Conference is not in position to offer any advice."

He added that it would be his guess that there would not be

Barnett Plans To Send Lawyers To U.S. Court

Jackson, Miss. (AP)—Gov. Ross Barnett planned to send his attorneys to the 5th U.S. Circuit

Meredith, a Negro, in the University of Mississippi.

Part of the purge may have come Sunday night when Barnett issued from the Governor's Mansion where he spent the night.

In the statement, issued before the rioting began on the

By Reason—Not Temper—
Mississippi Tragedy Could Have Been Averted
(An Editorial)

BLIND, BLUNDERING, BLUDGEONING sectistry—irrespective of which "side" it is on—can only compound the tragedy of Mississippi; antagonizing further the controversy that could and should have been settled without recourse to either military invasion or insurrective violence.

Foresight should have noted that as clearly as hindsight now discerns it, today restraining effect on both state and federal authorities, on whom a joint responsibility has rested—and each of which, again, has contributed to the unseemly spectacle of breakdown in law and order.

Let it be said once more that this nation cannot tolerate chaos and anarchy, from any cause.

Regardless of personal feeling, or considerations of political advantage on either side, this case should have been settled far short of the present calamitous showdown; and would have been had calm judgment prevailed to reason its way to a solution. Instead, free rein was given to tempers.

* * *

MISSISSIPPI COULD HAVE resolved this issue, as have other states—including Tennessee—no less mindful of states' rights in policy determination, and opposing compulsory integration, but aware of the legal obstacles erected when turned back by every level of the federal judiciary. They bowed to the necessity for observance of the law, however much it incurred individual or mass resentment.

Throughout this ordeal, state by state and section-wide, there has been the incitation to hysteria, much of it cultivated by aggravating processes of various pressure groups. And the outrageous, fact is—to which these elements are indifferent—that the Negro as an individual or citizen group has been the pawn in all of this political hawhawing on the part of Democrats and Republicans alike—exploited by the parties in power.

The present is no exception.

* * *

PRESIDENT KENNEDY last night spoke to the point of peaceful solution via reason on both sides. His firm and temperate message, though late, was addressed to the mind and heart of a thinking people; and was respectful of such marking the vast constituency of Mississippi.

The Banner does not believe that it was either necessary or advantageous to send troops, as such, as they were almost immediately dispatched. The National Guard of Mississippi had been federalized, and was on the scene, along with hundreds of U.S. marshals—a force adequate to any task of law enforcement, or the purpose to which they were assigned.

As it did in the case of Little Rock, when it was President Eisenhower dispatching the 101st Airborne Division, this newspaper condemns no less the military invasion, on Mr. Kennedy's order, of a sovereign state.

Two factors there were present almost automatically calculated to touch off the student rioting that occurred: (1) the sight of federal forces, deemed a trespass; and (2) the presence of former Maj. Gen. Edwin Walker, whopping it up for a demonstration of resistance. The latter was no less out of place than the former, and a contributory circumstance to the turmoil erupting into tragedy.

* * *

LATE AS IT IS, all parties concerned must come to their senses—for the settlement, by law, that should have occurred days ago. It is Aristide's prayer, surely, that it will end here—by responsible address to the realities, chief of which is decency's paramount interest in orderly government under law.

It is about time, by the way, for the revered Confederate Flag—an honored symbol—to cease being misused for rabble-rousing appeals to rioters, old or young. The stain of such is on it no less than on Old Glory.

* * *

[fol. 2029]

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WITH RED O'DONNELL

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Jean's letter of thanks read:

"I enjoyed the Fair. Thank You.

"P.S.—Becky & Billy enjoyed it too but they're in bed."

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By NEIL CUNNINGHAM
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"On the other hand, we can and I hope that we will, rise above pettiness in politics and the rantings of violent segregationists or psychopaths such as retired Gen. Edwin A. Walker."

Young said if Walker made the statements attributed to him, "I am glad he is no longer and a private citizen instead of in command of any youth in this country."

"I hold him in utmost contempt for his appearance on the campus of this great university, 'Ole Miss,' and for attempting to lead a charge of some 1,000 unruly rioters against United States marshals," Young said.

Dispatches from Oxford, Miss., said Walker sought to lead a charge by rioters against U.S. marshals and quoted him as saying to students: "If you can't win, go home. Don't stay at the university. But let's not quit. We can win."

In another Senate speech Rep. Thomas G. Abernethy, D-Miss., said today: "An inexperienced U.S. marshal" fired the shot in the rioting at the University of Mississippi campus against "a gang of kids who were doing nothing."

Abernethy said the marshal "got excited" and fired a tear gas shell into the crowd. He said it hit a state policeman "who is either dead or at the point of death."

"So help me, God, that's what happened," Abernethy told the House.

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By Reason—Not Temper—
Mississippi Tragedy Could Have Been Averted
(An Editorial)

BLIND, BLUNDERING, BLUDGEONING sectistry—irrespective of which "side" it is on—can only compound the tragedy of Mississippi; antagonizing further the controversy that could and should have been settled without recourse to either military invasion or insurrective violence.

Foresight should have noted that as clearly as hindsight now discerns it, today restraining effect on both state and federal authorities, on whom a joint responsibility has rested—and each of which, again, has contributed to the unseemly spectacle of breakdown in law and order.

Let it be said once more that this nation cannot tolerate chaos and anarchy, from any cause.

Regardless of personal feeling, or considerations of political advantage on either side, this case should have been settled far short of the present calamitous showdown; and would have been had calm judgment prevailed to reason its way to a solution. Instead, free rein was given to tempers.

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MISSISSIPPI COULD HAVE resolved this issue, as have other states—including Tennessee—no less mindful of states' rights in policy determination, and opposing compulsory integration, but aware of the legal obstacles erected when turned back by every level of the federal judiciary. They bowed to the necessity for observance of the law, however much it incurred individual or mass resentment.

Throughout this ordeal, state by state and section-wide, there has been the incitation to hysteria, much of it cultivated by aggravating processes of various pressure groups. And the outrageous, fact is—to which these elements are indifferent—that the Negro as an individual or citizen group has been the pawn in all of this political hawhawing on the part of Democrats and Republicans alike—exploited by the parties in power.

The present is no exception.

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PRESIDENT KENNEDY last night spoke to the point of peaceful solution via reason on both sides. His firm and temperate message, though late, was addressed to the mind and heart of a thinking people; and was respectful of such marking the vast constituency of Mississippi.

The Banner does not believe that it was either necessary or advantageous to send troops, as such, as they were almost immediately dispatched. The National Guard of Mississippi had been federalized, and was on the scene, along with hundreds of U.S. marshals—a force adequate to any task of law enforcement, or the purpose to which they were assigned.

As it did in the case of Little Rock, when it was President Eisenhower dispatching the 101st Airborne Division, this newspaper condemns no less the military invasion, on Mr. Kennedy's order, of a sovereign state.

Two factors there were present almost automatically calculated to touch off the student rioting that occurred: (1) the sight of federal forces, deemed a trespass; and (2) the presence of former Maj. Gen. Edwin Walker, whopping it up for a demonstration of resistance. The latter was no less out of place than the former, and a contributory circumstance to the turmoil erupting into tragedy.

* * *

LATE AS IT IS, all parties concerned must come to their senses—for the settlement, by law, that should have occurred days ago. It is Aristide's prayer, surely, that it will end here—by responsible address to the realities, chief of which is decency's paramount interest in orderly government under law.

It is about time, by the way, for the revered Confederate Flag—an honored symbol—to cease being misused for rabble-rousing appeals to rioters, old or young. The stain of such is on it no less than on Old Glory.

* * *

[fol. 2029]

AP Wirephoto

A long line of jeep borne Army troops leaves the main gate of the University of Mississippi at Oxford after patrolling the riot torn campus.

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O'Donnell

CINEMA GIG — Movie theater marquee:

"Listen-Patterson Fight Films & Other Selected Shorts."

JETTY—Mel Barnes phoned the airlines office and asked "How long does it take to fly from Nashville to Phoenix, Ariz.?"

"Just a minute," said the reservationist.

"Thanks," replied Barnes and hung up.

OOPS—Didja hear about the

(Turn to Page 5, Column 3)

Market Trends

New York (UP) — The stock market took another fairly sharp loss in moderately active trading early this afternoon.

The Associated Press average of 60 stocks at noon was off 1.2 at 213.7 with industrials down 2.1 rails down .3, and utilities down .5.

Although losses of most key stocks ranged only from fractions to about a point, weakness in a scattering of pivotal issues brought them declines of more than that and weighted market averages more sharply to the downside.

Some of the "growth" issues also fell more sharply than the over-all list.

Weather Report

NASHVILLE FORECAST — Cloudy and mild with periods of rain this afternoon and Tuesday. High this afternoon in the 70s. Low tonight about 50 with the high Tuesday near 70. Outlook for Wednesday: Mostly cloudy and cool.

Temperatures

12 midnight	59	7 a.m.	56
1 a.m.	59	8 a.m.	63
2 a.m.	57	9 a.m.	66
3 a.m.	56	10 a.m.	70
4 a.m.	54	11 a.m.	72
5 a.m.	53	12 Noon	72
6 a.m.	52	1 p.m.	72

Court Opens Mixing Bar Hearings

By LARRY BRINTON and BRAD CARLISLE

The first of 14 policeblitz injunctions against downtown mixing bars got under way today in Criminal Court with Raymond Leathers hearing State's evidence against the Lido Club, a Printer's Alley bistro.

Hearings on two other mixing bars, the Zanzibar and Jolly Roger and a petition to cite their owner, A. J. (Mickey) Kreitner, with contempt of court, was scheduled to begin this afternoon before John L. Draper, judge of Div. II Criminal Court.

The injunctions sought against seven bars in Printer's Alley, the city's best known nightclub strip, and seven others in the area of Broadway, Commerce street and Sixth Avenue N., resulted from a series of whisky raids by sheriff's patrolmen and City police.

The bars are accused of illegally selling mixed drinks. State laws permit bars to mix drinks for customers who bring their own whisky.

Dist. Atty. Gen. Harry Nichol said approximately 100 witnesses, including police officers, missing

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Governors have been asked time and time again whether they favor or disapprove of Gov. Ross Barnett's action in attempting to prohibit the enrollment of James H. Meredith as the first Negro student in the history of the University of Mississippi.

At the first press conference of the session, Ellington established a theme followed by several other governors when he stated the Meredith case "is a problem of the University of Mississippi, not in position to offer any advice."

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His 'Duty To Call Ou Troops,' Says Kenne

Washington (AP) President Kennedy declared today it was his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the University of Mississippa.

Grim, yet conciliatory at times, the President said Sunday night in a short, radio-television address to the nation that he hoped it would be unnecessary to use troops, even though conciliation and persuasion had failed to obtain admission of James H. Meredith.

After his address Kennedy sat beside the telephone in his office getting up-to-the-minute reports on rioting, gunfire and tear gas sweeping across the university campus at Oxford and the arrival on the scene of federal military reinforcements.

Others Keep Vigil

Atty. Gen. Robert F. Kennedy and several members of the White House staff kept the vigil with the Chief Executive.

Courts of law, all the way up to the Supreme Court, Kennedy said in his speech, ordered Meredith's admission into the university. When the orders were defied and those who carry them out were with arrest and vi U.S. Court of Appe clear the fact that t ment of its order h an obligation of the States government."

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New Yemen Tightening G

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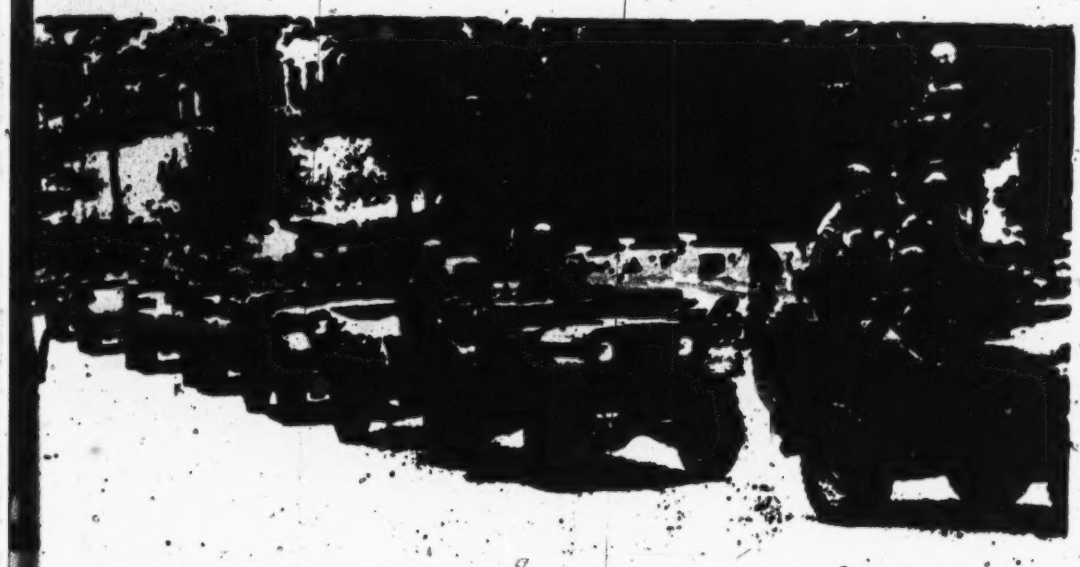
Unconfirmed repo various moves within try aimed at crushin olutionary regime an the monarchy.



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WITH
RED O'DONNELL

MONDAY'S MESSAGE

Pinckney Kerl gave some State Fair tickets to Jean (7), Billy (6) & Becky (11) Martin, 1309 25th Ave. S.

O'Donnell

Jean's letter of thanks read:

"I injoyed the Fair. Thank You.

"P.S.—Becky & Billy injoyed it to but they're to lasy to write.

"P.S.—I Love You."

CINEMA GIG — Movie theater marquee:

"Listen-Patterson Fight Films & Other Selected Shocks."

JETTY—Mrs Barnes phoned the airlines office and asked "How long does it take to fly from Nashville to Phoenix, Ariz.?"

"Just a minute," said the reservationist.

"Thanks," replied Barnes and hung up.

COPS—Didja hear about the

(Turn to Page 5, Column 3)

Market Trends

New York (AP) — The stock market took another fairly sharp loss in moderately active trading early this afternoon.

The Associated Press average of 60 stocks at noon was off 1.2 at 213.7 with industrials down 2.1 rails down .3, and utilities down .3.

Although losses of most key stocks ranged only from fractions to about a point, weakness in a scattering of pivotal issues brought them declines of more than that and weighted market averages more sharply to the downside.

Some of the "growth" issues also felt more sharply than the over-all list.

By Reason—Not Temper—

Mississippi Tragedy Could Have Been Averted

(An Editorial)

BLIND, BLUNDERING, BLUDGEONING zealotry—irrespective of which "side" it is on—can only compound the tragedy of Mississippi; antagonizing further the controversy that could and should have been settled without recourse to either military invasion or insurrective violence.

Foresight should have noted that as clearly as hindsight now discerns it, for a restraining effect on both state and federal authorities, on whom a joint responsibility has rested—and each of which, again, has contributed to the unseemly spectacle of breakdown in law and order.

Let it be said once more that this nation cannot tolerate chaos and anarchy, from any cause.

Regardless of personal feeling, or considerations of political advantage on either side, this case should have been settled far short of the present calamitous showdown; and would have been had calm judgment prevailed to reason its way to a solution. Instead, free rein was given to tempers.

★ ★ ★

MISSISSIPPI COULD HAVE resolved this issue, as have other states—including Tennessee—no less mindful of states' rights in policy determination, and opposing compulsory integration, but aware of the legal obstacles erected when turned back by every level of the federal judiciary. They bowed to the necessity for observance of the law, however much it incurred individual or mass resentment.

Throughout this ordeal, state by state and section-wide, there has been the incitation to hysteria, much of it cultivated by aggravating processes of various pressure groups. And the outrageous fact is—to which those elements are indifferent—that the Negro as an individual or citizen group has been the pawn in all of this political hoeheuling on the part of Democrats and Republicans alike—exploited by the parties in power.

The present is no exception.

★ ★ ★

PRESIDENT KENNEDY last night spoke to the point of peaceful solution via reason on both sides. His firm and temperate message, though late, was addressed to the mind and heart of a thinking people; and was respectful of such massing the vast constituency of Mississippi.

The Banner does not believe that it was either necessary or advantageous to send troops, as such, as they were almost immediately dispatched. The National Guard of Mississippi had been federalized, and was on the scene, along with hundreds of U.S. marshals—a force adequate to any task of law enforcement, or the purpose to which they were assigned.

As it did in the case of Little Rock, when it was President Eisenhower dispatching the 101st Airborne Division, this newspaper condemns no less the military invasion, on Mr. Kennedy's order, of a sovereign state.

Two factors there were present almost automatically calculated to touch off the student rioting that occurred: (1) the sight of federal forces, deemed a trespass; and (2) the presence of former Maj. Gen. Edwin Walker, whooping it up for a demonstration of resistance. The latter was no less out of place than the former, and a contributory circumstance to the turmoil erupting into tragedy.

★ ★ ★

LATE AS IT IS, all parties concerned must come to their senses—for the settlement, by law, that should have occurred days ago. It is America's prayer, surely, that it will end here—by responsible address to the realities, chief of which is decency's paramount interest in orderly government under law.

It is about time, by the way, for the revered Confederate Flag—an honored symbol—to cease being misused for rabble-rousing appeals to rioters, old or young. The stain of such is on it no less than on Old Glory.

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His 'Duty To Call Out Troops,' Says Kennedy

Washington (AP) President Kennedy declared today it was his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the University of Mississippi.

Grim, yet conciliatory at times, the President said Sunday night in a short radio-television address to the nation that he hoped it would be unnecessary to use troops, even though conciliation and persuasion had failed to obtain admission of James H. Meredith.

After his address Kennedy sat beside the telephone in his office getting up-to-the-minute reports on rioting, gunfire and tear gas sweeping across the university campus at Oxford and the arrival on the scene of federal military reinforcements.

Others Keep Vigil

Atty. Gen. Robert F. Kennedy and several members of the White House staff kept the vigil with the Chief Executive.

Courts of law, all the way up to the Supreme Court, Kennedy said in his speech, ordered Meredith's admission into the university. When the orders were defied and those who tried to carry them out were threatened with arrest and violence, the U.S. Court of Appeals "made clear the fact that the enforcement of its order had become an obligation of the United States government."

"Even though this government had not originally been a party to the case," the Chief Executive said, "my responsibility as President was therefore inescapable. I accept it.

"I deeply regret the fact that

(Turn to Page 12, Column 1)

New Yemen Rulers Tightening Grip

Aden (AP) The new military rulers of Yemen have announced more executions and arrests, apparently tightening of their grip on the little Red Sea country. They also claimed Soviet as well as United Arab Republic support for their regime.

Unconfirmed reports told of various moves within the country aimed at crushing the revolutionary regime and restoring the monarchy.

[fol. 2029]
PLAINTIFF'S EXHIBIT No. 22
1443

Weather Forecast

Full Report on Page B-6

The Evening Star

WITH SUNDAY MORNING EDITION

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Home Delivered: Daily and Sunday, per mon

Troops Fire Over Oxford M After Quelling Campus

Senate OKs $5.2 Billion Works Bill

Aid Funds Debate Is Next Big Item In Closing Rush

By J. A. O'LEARY
Star Staff Writer

The Senate today passed the $5.2 billion public works appropriation bill as Congress began what leaders hope will be the final week of the session.

The public works measure carries funds for numerous river, harbor and flood control projects, plus $500 million for the emergency program requested by President Kennedy to reduce unemployment. The vote on passage was 63 to 6.

It came after Senator Proxmire, Democrat of Wisconsin, was defeated 52 to 17, in an effort to knock out the Glen Elder reclamation project in Kansas, which he said would stimulate production of feed grains at a time when the Government is struggling to get rid of a feed grain surplus.

This leaves only three money bills remaining to pass one or both houses before Congress can adjourn. Also awaiting action this week are the conference reports on the President's foreign trade and tax revision bills.

Aid Bill Is Next

The Senate turned immediately to debate on the $4.2 billion foreign aid bill, which conservatives will try to cut.

Meanwhile, the House Appropriations Committee reported out the last supplemental appropriation bill, carrying $400 million for miscellaneous Government needs. The Senate Appropriations Committee was in session prepared to act on the other remaining money bill for the State, Justice and Commerce departments.

Smathers Plans Fight

But a comparatively minor bill, designed to let self-employed persons set up their own retirement plans, was the most serious threat to adjournment by Saturday.

Senator Smathers, Democrat of Florida, has given his colleagues notice he will try to delay adjournment to prevent President Kennedy from giving the pension bill a pocket veto.

The President has 10 days from last Saturday in which to pocket veto this bill. Senator Smathers is confident two-thirds in the House and Senate could pass the bill over a veto.

But if Congress adjourns while Mr. Kennedy is still considering the measure he could let it die without his signature.

Democratic leaders will try to get a decision from the President on the pension bill when they hold their weekly conference with him tomorrow morning.

Troops in battle gear move through a crowd of townspeople today at the square in Oxford, Miss., home of the embattled campus of the University of Mississippi.—AP Wirephoto.

Army troops escort a group of prisoners to the National Guard Armory following a disturbance today in downtown Oxford, Miss., site of riots protesting registration of a Negro at the University of Mississippi.—AP Wirephotos.

Meredith Two Die,

By C

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More Pictures on Pages A-

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Dock Workers Go on Strike

President Acts To End Walkout

NEW YORK, Oct. 1 (AP)—Longshoremen quit work on Atlantic and Gulf Coast ports today after their contract expired. Within 10 hours, President Kennedy invoked the Taft-Hartley Act in an attempt to end the work stoppage.

The presidential action, the first step in Taft-Hartley machinery, appeared to be the only immediate likelihood of bringing the unionized long[illegible] to uncontrolled riot-

Administration Sees Barnett As Breaking His Promise

By MIRIAM OTTENBERG
Star Staff Writer

Gov. Ross Barnett of Mississippi assured the President and the Attorney General that his State police would maintain order if Negro Student James H. Meredith was brought to the University of Mississippi campus—and then, in the administration's view, broke his promise.

The off-again-on-again role of the Governor came to light as his apparent capitulation and guarantees of safe passage generally agreed on a plan to put Mr. Meredith on the campus Sunday behind a Federal force.

Yesterday morning, Gov. Barnett called the Attorney General with something similar in mind. He asked for a show of force to justify his capitulation but promised that the Federal forces would run into no opposition.

Agreed on Two Points

The Attorney General and the Mississippi Governor consulted by telephone three or four times during the morning.

MEREDITH BEGINS FIRST DAY WITH COLONIAL STUDY

OXFORD, Miss. (AP)—Negro James Meredith's first scheduled class today as a student at the University of Mississippi was Colonial American history.

Other courses being taken by the first known Negro to enroll at the 114-year-old institution include English, political science, mathematics and Spanish.

Kennedy Say He Did Duty

Broadcast Gri But Conciliato

By the Associated Press

President Kennedy d[illegible] arres it was his inescapable d[illegible] to call out troops when [illegible]sissippi defied court orde[illegible] to enroll a Negro at the [illegible] University.

Grim, yet conciliatory [illegible]t times, the President said [illegible]t night in a short radio-tel[illegible]sion address to the Nation t[illegible] he hoped it would be unnec[illegible]sary to use troops, even though conciliation and persuasio[illegible] had failed to obtain admission

Ellington

(From Page One)

...ion was taken during the conference on the Mississippi situation.

Federal-State Matter

"I do not think that there is any doubt in any of our minds about what the outcome will be in Mississippi because no state is stronger than the federal government," Ellington added. "But still it is a matter for the federal government and the State of Mississippi to work out."

There has been speculation for several days that resolutions will be introduced during the four-day conference either favoring Barnett's action or seeking a vote of censure.

Michigan Gov. John B. Swainson last week asked that the executive committee of the National Governors' Conference censure Barnett for his action in the Meredith case.

The executive committee of the National Governors' Conference will meet here Thursday, the final day of the meeting of the Southern governors.

So far, there has been no word from Washington Gov. Albert D. Rosellini, chairman of the national group, on whether any action will be taken on Swainson's request.

Not In Sympathy

Rosellini has stated that he is not in sympathy with Gov. Barnett's action.

"I think the authority of the U.S. Constitution and Supreme Court decisions must be upheld," Rosellini added.

Commenting on Swainson's request, Ellington told reporters that he did not "think it appropriate for one governor to try to tell another one what to do about a situation in his home state."

In his opening remarks to the conference, Ellington pointed out to the governors that "we can have a repetition of the chaotic situation which originated at the last national meeting in Hershey, Pa., in which certain individuals indulged in the old game of headline hunting and almost overshadowed the accomplishments of an otherwise informative and constructive conference."

Ellington was referring to an attempt by Swainson and New York Gov. Nelson Rockefeller to adopt a civil rights resolution at the Hershey meeting. The move was defeated by a filibuster by several Southern governors.

Statement Echoed

Although Barnett has reservations here at the diplomat hotel, conference headquarters, there was growing speculation today that the Mississippi chief executive would not attend the conference.

Ellington's statement that the Meredith case was a "Mississippi problem" was echoed by several other governors.

Host Gov. Farris Bryant of Florida, Gov. Ernest Vandiver of Georgia, and Gov. Terry Sanford of North Carolina agreed that few other Southern governors should not attempt, by resolution, to comment on Barnett's actions.

Vandiver said he did "not favor the use of armed troops to enforce the orders of the federal courts."

The same end and here is how compliance with the court orders can be accomplished peacefully and without the danger of bloodshed through the use of a sufficient number of federal marshals," Vandiver added.

However, the Georgia chief executive did state that in his opinion, "as long as Mississippi is a state of the U.S. and does not secede from the Union, they, like every other state, must abide by the laws and the decisions of the courts which directly affect them."

Faced Some Decisions

"Speaking of one who has had to make the same hard decision that now faces the governor of Mississippi, I believe that Mississippi will eventually come to see that law and order is the only course open to them," Vandiver added.

Vandiver said he definitely would not support a resolution censuring Barnett.

Sanford said he had made it plain since he has been governor of North Carolina to solve his problems in other states is the governors of other states.

He said he thought the outcome in Mississippi would be that law and order would finally triumph.

Bryant stated that the problem should be left to Mississippi and the federal government.

He did point out that he was opposed to the 1954 segregation decision by the Supreme Court, but was faced with the fact that the federal government must uphold the law.

Bryant brought another controversial issue into the conference today.

Resolution Hinted

It appeared that he might introduce a resolution Thursday condemning the slaughter of Russian forces in Hungary.

The reservoir will cover 1,420 acres and will extend 13 miles up the river.

Also in the final Senate bill is $3.1-million to continue building the Berkley Dam on the lower Cumberland River in Kentucky.

The Senate added $725,000 to begin the controversial Tennessee-Tombigbee waterway to connect the Ohio River and the Gulf of Mexico at Mobile. Since the House has granted no money for this item, the conference will finally decide whether it will stay in the bill.

Barnett

(From Page One)

tempt. He faces a $5,000 daily fine.

Barnett issued his statement after being informed Meredith was on the campus. He called on state officers "under me command to do everything in their power to preserve peace and to avoid violence in any form."

"I know that our principles remain true, but we must at all odds preserve the peace and avoid bloodshed," he said.

"Surrounded on all sides by the armed forces and oppressive power of the United States of America, my courage and my convictions do not waiver.

'I Love Mississippi'

"My heart still says 'never,' but my calm judgment abhors the bloodshed that will follow.

"I love Mississippi. I love her people. I love those 10,000 good Mississippians in the National Guard who have now been federalized and requested to oppose me and their own people."

Barnett's son and son-in-law were among Guardsmen called to active duty by the President.

In his closing remarks, directed to federal officials, Barnett said:

"You are destroying the Constitution of this great nation. May God have mercy on your souls. Mississippi will continue to fight the Meredith case and all similar cases through the courts to restore the sovereignty of the state and constitutional government."

Heavy Blow

This statement had struck a heavy blow to the capital of Mississippi. The town was quiet. There were no signs of a fighting mood. The streets were alive with United State Flags and some men even wore complete Confederate uniforms.

Somebody played a phonograph record of "Dixie," the crowd let out a mighty cheer and surged toward the white pillars of the Governor's Mansion. They formed a ring around it that, at one time was four deep. There were men, women, teenagers and even a few women carrying babies.

Despite the fact that there was no truth in the rumor that Barnett was going to be arrested, the crowd did not disperse until it got word that the governor would be safe.

Johnson said in his statement that President Kennedy called on the state to preserve law and order and then federalized the National Guard--"the only adequately instrumentality capable of preserving law and order should an emergency arise."

The lieutenant governor said the Administration had raised "the false issue of integration" throughout the entire situation.

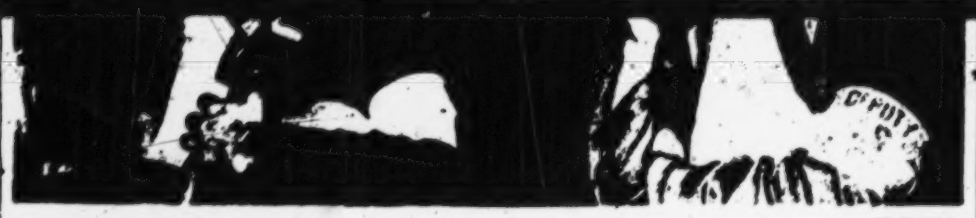
Nearly 2,000 persons milled outside the Governor's Mansion Sunday after a Citizens Council leader called for volunteers to prevent any attempt to arrest Barnett.

Barnett who received many offers from volunteers throughout the day, conferred with segregation leaders, including former state Sen. Willie Rainach of Louisiana.

Gets Marshall County Post

Lewisburg Miss Martha Sue McCain of Waverly will assume duties here as home demonstration agent Oct. 15.

Miss McCain has served as assistant home agent in Humphrey's County three years. Her duties here will include both adult and 4-H club work. She is a graduate of David Lipscomb College, Nashville.



AP Wirephoto

Federal marshals wearing gas masks stand guard as students demonstrate on the campus of Ole Miss at Oxford in protest of court ordered enrollment of James Meredith, Negro Air Force veteran.

Oxford Victim 'Loved Life's Good Things'

New York (UPI) — Paul Guihard, who was killed in the integration riot on the University of Mississippi campus Sunday night had been a member of the New York office of the French News Agency, Agence France Presse for the past three years.

Guihard, assigned to cover the government's attempt to enroll Negro James H. Meredith in the all-white university, died of a bullet wound in his back.

The newsman also worked as a stringer part-time correspondent for the Daily Sketch of London.

His acquaintances described the slender, dark Guihard as a man with a great sense of humor, one of the Paris Latin Quarter men who loved good food and the other good things of life.

Guihard was 31. He was born in London of French parents and enjoyed dual citizenship.

Guihard stopped to talk to newsmen at the press room at International Airport in New York before taking off for Oxford at 9 a.m. CST Sunday.

"I'm going to pose as a Kentucky colonel and cover this thing with a mint julep in my hand," the bearded Britisher told them. Newsmen who told him to be careful said Guihard laughed off the warning.

Guihard earned the nickname "Flash" for the energy and drive with which he plunged into stories.

He was a fun loving man with a red beard.

Among previous tough assignments for Guihard were the ill-fated anti-Castro landings on Cuba's Bay of Pigs and the flood disaster in British Honduras.

He was the author of a one-act play called "The Deck Chair," which had been performed in a Greenwich Village cabaret theater.

His acquaintances said Guihard spoke Spanish and French as well as English.

He served in the British army and went to work for AFP after

PAUL GUIHARD

he was discharged. He worked for six years in London AFP office before going to Paris and then to New York.

In another incident of violence at Oxford involving a member of the press, Hal Lyon Yoder, Television cameraman from Dallas, Tex., was beaten up by the campus mob.

Yoder was pulled from a television wagon by the mob which ripped his camera from his neck and pounded him. Then they began beating him.

The mob took every wooden fence post it could find and used it to beat Yoder with. Yoder's wife, who had accompanied her husband to Oxford, was not injured.

Son Of Knoxville Newsman Held

Oxford, Miss. (UPI) Joseph J. Levitt Jr., son of the editor of the Knoxville News-Sentinel was arrested or detained in the administration building on the University of Mississippi campus early today.

Levitt said he was taken into custody while working as a newsman on the scene.

Levitt, who was able to telephone United Press International in another building on campus, said he was being held in a room in the administration building. He said he was not under guard but at least 10 other persons were

Walker

(From Page One)

it is abundantly clear that Meredith should promptly be withdrawn from the campus and all efforts to enter him at the University of Mississippi be permanently abandoned."

"There is no way that Meredith can go to school at the University of Mississippi," he said. "The United States government should remove him."

Sen Herman E. Talmadge, D-Ga., said he deeply regretted the Mississippi situation. He commented that he was repeatedly and unsuccessfully sponsored legislation which would, he said, end encroachment by federal courts and "re-establish state and local control over public education."

Talmadge said the current situation results from "judicial usurpation" which, he said, was bolstered by the application of the federal power. He called it detrimental to the federal government process and said it will "serve to divide the American people" at a time when they should be united against the threat of Communism.

Sen Sam J. Ervin Jr., D-N.C. said those "tomenting" litigation which has such tragic results should remember St. Paul's injunction that all which is lawful is not necessarily expedient.

Miss Lela Pearl Rogers

Clarksville Funeral services for Miss Lela Pearl Rogers, 76, will be held Tuesday at 3 p.m. at Tarpley Funeral Home with burial in Greenwood Cemetery.

Miss Rogers died Sunday in a Nashville infirmary.

Paradoxes In Integration Crisis

Oxford, Miss. (UPI) Paradoxes in the Mississippi integration crisis:

Ross Barnett, Jr., son of Mississippi's anti-integration governor was inducted into federal service to take action against his father's stand in the case of James H. Meredith. Young Barnett is a lieutenant in headquarters company of the Mississippi National Guard at Jackson. The unit was federalized Sunday.

John Stennis, a Jackson attorney and son of Sen. John C. Stennis, also was called to active duty. The elder Stennis has supported the governor in his fight to keep Meredith from enrolling at all-white Ole Miss.

Edwin A. Walker, who as a U.S. Army major general commanded the federal troops which integrated Central High School at Little Rock, and now a civilian, appeared on the Ole Miss campus as a supporter of Barnett.

Col. T. B. Birdsong, head of the Mississippi State Police which had been ordered by Barnett to prevent Meredith's admittance to the campus, rode with U.S. marshals in the lead car escorting the Negro applicant onto university property.

Student Rioting Brings 'Dishonor' Says Campus Editor

Oxford, Miss. (UPI) — Editor of the University of Mississippi student newspaper told his fellow students today they are harming "dishonor and disgrace" to the university and to the state by participating in riots.

An open letter was made in regard to violation of the Mississippian which was taken to mean that today's issue would not be published as usual despite the efforts of faculty and students to get out a regular edition.

The 100 years ago over almost the same issues and the United States of America prevailed. The federal government is once again showing its strength and power to uphold the laws of our country.

"No matter what your convictions you should follow the advice of Gov. Ross Barnett by not taking any action for violence. Blood has already been shed and will continue to flow unless people realize the seriousness of the situation.

"Whatever your beliefs you are a citizen of the United States of America and of the state of Mississippi and should preserve peace and harmony of both governments."

Mississippi Case 'Disgraceful': Sen. Kefauver

Beverly Hills, Calif. (UPI) — U.S. Sen. Estes Kefauver today branded as "sad and disgraceful" the integration crisis at the University of Mississippi but praised President Kennedy's handling of the affair.

Kefauver told a political meeting it was absurd for Gov. Ross Barnett and other Mississippi officials to have thwarted until Sunday night a court order compelling enrollment of Negro student James H. Meredith of the tax-supported campus.

AP Wirephoto

James Meredith is escorted onto the University of Mississippi campus at Oxford for court ordered enrollment.

List Of Units In Oxford Or En Route To Scene

Washington (UPI)—Following is a Defense Department list of troop units either already in or around Oxford, Miss., or en route there:

The 70th Engineers, from Ft. Campbell, Ky.

The 545rd Military Police Battalion, Ft. Bragg, N. C.

From Ft. Dix, N. J., the 716th Military Police Battalion.

The 108th Cavalry Regiment, a Mississippi National Guard unit.

The 1st and 2nd Battle Groups of the Mississippi National Guard.

From Ft. Benning, Ga., the 2nd Battle Group of the 23rd Infantry.

The 720th Military Police from Ft. Hood, Tex.

s Fire Over Oxford Mob
er Quelling Campus Riot

ttle gear move through a crowd of townspeople square in Oxford, Miss., home of the embattled campus of the University of Mississippi.—AP Wirephoto.

escort a group of prisoners to the National ery following a disturbance today in downtown Oxford, Miss., site of riots protesting registration of a Negro at the University of Mississippi.—AP Wirephotos.

Meredith Registered; Two Die, Scores Hurt

BULLETIN

Former Maj. Gen. Edwin A. Walker was arrested today at a road block in Oxford, Miss., and charged on four offenses. Attorney General Robert F. Kennedy in Washington announced the charges, which included inciting to rebellion or insurrection, conspiring to commit this offense, conspiring to hinder Federal officers in their duties and assaulting a Federal officer.

By CECIL HOLLAND
Star Staff Writer

OXFORD, Miss., Oct. 1—Rifle fire cracked here today as Army troops moved in to clear marauding gangs out of the area around the town's public square.

Infantrymen with fixed bayonets methodically moved down streets leading from the square after a morning of disorders brought about by roving groups carrying on the battle over the enrollment of James H. Meredith in the University of Mississippi.

The 29-year-old Negro student was enrolled in the university this morning while Federal troops poured into Oxford after a night of wild and uncontrolled rioting on the nearby Ole Miss campus left two dead and scores injured.

More Pictures on Pages A-6, 7; Other Stories on Pages A-5, 6, 9.

Troops from the 2nd (Indianhead) Infantry Division moved systematically down streets leading from the town square and in thorough fashion drove all the troublemakers from the area.

They were using live bullets but seemed to be firing over the heads of those fleeing before them.

Many of the young men were rounded up and with their hands held high were collected at street corners and then hauled away in trucks.

The townspeople said they were strangers and apparently had come in from other places.

There were no immediate reports of casualties.

The university campus remained quiet after soldiers with fixed bayonets disbursed a mob which rioted there most of the night.

The Negro student was registered in the university this morning behind the massed might of the Federal Government and troops carrying rifles with fixed bayonets.

As this compliance with Federal court orders was being carried out, roving gangs wandered through the courthouse square and along adjoining streets pelting Army convoys and foot soldiers who occupied the square with rocks, bottles, sticks and even a garbage can.

The gangs were made up of both youths and older men and hurled a barrage of taunts at the soldiers whenever they appeared.

Tossed Tear Gas

The Army first moved infantrymen into the area around the courthouse. They marched around the square and across the courthouse lawn before taking up positions.

After enduring the jeers and missile barrages, the infantrymen suddenly tossed tear gas cannisters at those who had been tormenting them and cleared the square.

Some of the infantrymen were Negroes and this served to infuriate even more the people who were collected around the square.

Nearly all business establishments around the large square, in the heart of this Deep South town, closed and locked their doors.

About one block south of the square, many young men, who appeared not to be natives of Oxford, congregated at the intersections of State Routes 6 and 7, principal arteries through town.

They hurled bricks at nearly every car that tried to run the gauntlet.

Convoys Still Pelted

Even with increasing numbers of troops along the streets and in the square, groups of young men still bombarded passing convoys with bottles, rocks and other missiles.

As one convoy passed through the town's center, a heavy log was dropped from a second floor balcony on one of the passing vehicles.

The firing was attributed by the Associated Press to Mississippi National Guard troops from Tupelo.

The rioting in Oxford came after former Maj. Gen. Edwin Walker had appeared in the square—clad in a dark blue suit and wearing a 10-gallon hat, the Associated Press reported.

He stayed in the square briefly, spoke quietly to some of those in the crowd nearest the troops, and then backed off as military eyes watched him closely.

The Confederate flag hung at half staff in front of

See MEREDITH, Page A-6

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Page A-2

Administration Sees Barnett As Breaking His Promise

By MIRIAM OTTENBERG
Star Staff Writer

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The off-again-on-again role of the Governor came to light as his apparent capitulation and guarantees of safe passage gave way to uncontrolled rioting on the campus last night and early today.

What Happened

The behind-the-scenes story of the last 24 hours, explains why the President postponed his broadcast to the Nation, why the marshals at first went on the campus alone and why Federal troops were finally summoned to quell the rioters.

This is the story as the administration sees it, pieced together from reports reaching Washington:

On Saturday, Attorney General Robert F. Kennedy and Burke Marshall, his assistant attorney general in charge of the civil rights division, had generally agreed on a plan to put Mr Meredith on the campus Sunday behind a Federal force.

Yesterday morning, Gov. Barnett called the Attorney General with something similar in mind. He asked for a show of force to justify his capitulation but promised that the Federal forces would run into no opposition.

Agreed on Two Points

The Attorney General and the Mississippi Governor consulted by telephone three or four times during the morning. Finally, at about 10:45 a.m., the Governor agreed on two points.

He promised that the Federal marshals and Mr. Meredith would be admitted to the campus without resistance and he guaranteed that he would preserve law and order through the use of State police, either working alone or in co-operation with the marshals.

This guarantee was repeated

See PROMISE, Page A-2

MEREDITH BEGINS FIRST DAY WITH COLONIAL STUDY

OXFORD, Miss (AP)— Negro James Meredith's first scheduled class today as a student at the University of Mississippi was Colonial American history.

Other courses being taken by the first known Negro to enroll at the 114-year-old institution include English, political science, mathematics and Spanish.

Mr. Meredith is living in a two-room apartment in Baxter Hall. The apartment includes a kitchenette.

Kennedy Says He Did Duty

Broadcast Grim But Conciliatory

By the Associated Press

President Kennedy declares it was his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the State University.

Grim, yet conciliatory at times, the President said last night in a short radio-television address to the Nation that he hoped it would be unnecessary to use troops, even though conciliation and persuasion had failed to obtain admission of James H. Meredith.

After his address, Mr. Kennedy sat beside the telephone in his office getting up-to-the-minute reports on rioting, gunfire and tear gas sweeping across the university campus at Oxford—and the arrival on the scene of Federal military reinforcements.

Attorney General Robert F Kennedy and several members of the White House staff kept

See KENNEDY, Page A-6

1451

[fol. 2031] DEFENDANT'S EXHIBIT 1

STATEMENT OF TALMADGE WITT OF PONTOTOC, MISSISSIPPI

I am Talmadge Witt, 42 years old, I live in Pontotoc County, Mississippi, and I am a deputy sheriff under Sheriff John H. Moore of that county, and have been serving as such deputy since March 1, 1960. I was acting as such deputy on September 30, 1962, and was called by Sheriff Faulkner of Union County to come to Oxford, Mississippi, getting that call about 3 p.m. on the 30th day of September, 1962. Shortly after receiving this call I went to Oxford with Cecil Payne, another deputy from Pontotoc County. We went directly to the campus of the University of Mississippi and arrived there sometime around 4:30 o'clock p.m.

When I got on the campus of the University, the United States Marshals were already around the Lyceum Building, that is, a building with big white columns in front, facing in an easterly direction. There was a paved roadway in front of that building, and the marshals were lined up along the side of that roadway next to the building; on the other side of the roadway, and all out in front of the building, were some men and boys and girls, with the roadway between them and the marshals. The crowd out in front of the building was not as big then as it was later, but it gradually grew larger from then on. When I got to this place there were a number of highway patrolmen and other officers in the roadway, between the marshals and the crowd, keeping the crowd back from the marshals, and I joined them and helped to do this.

The crowd grew larger as time passed, and the lights were turned on, on the campus. At this time there was not as much disorder as there was later, there was some loud talk, and some of those in the crowd would throw or flip lighted cigarettes and matches towards the marshals and on the cloth top of some of the army trucks which were there. It is difficult to remember the exact time that events happened, but after I had been there about an hour and a half to two hours, and at a time when I was standing

across the road in front of said building, the marshals fired [fol. 2032] the first blasts of tear gas and the crowd scattered and ran away, and I, of course, went some distance away, also, but still stayed in the area down in front of the Lyceum Building. For some time, after the first tear gas was fired, the crowd simply milled around, many of them armed themselves with bricks or pieces of broken bricks, rocks, sticks, coca cola bottles and anything that they could get their hands on, and when they could get close enough, they would throw these things at and towards the marshals, and the tear gas would drive them back. The crowd did not seem to have any definite leadership at that time, and simply milled around, hollering, yelling, shouting and talking among themselves.

Somewhere along during this time it seemed that all of the State Highway Patrolmen left the campus, as did also some of the law officers, that is, sheriffs and deputy sheriffs, but I stayed on to render any assistance that I could. Sometime around 8 o'clock p.m., or a little later, I began to hear different ones say, "here comes General Walker." I did not know him prior to that time, and when I first saw him he was walking towards a Confederate monument which was several hundred yards in an easterly direction from the marshals at the Lyceum Building. People in the crowd around General Walker began to say different things. Several of them began to say, "we have got a leader now," or "here is our leader." I had on my deputy sheriff's badge, and shortly after General Walker arrived in the territory of the Confederate monument, he came up to me, shook hands and said: "I would like for you to deputize me to help in this matter." I told him that I did not have authority to do that, that I was a deputy sheriff and was not a deputy in that county.

I was close to General Walker all of the time, from the time when he first arrived, until a considerable time thereafter.

Some few minutes after this, various people were asking General Walker to lead them and to make them a speech

and tell them what to do, and after awhile he got up on the side of the Confederate monument and made a talk. [fol. 2033] I cannot recall all the things he said, but I do remember his saying these things: "Violence is not the answer, Cuba is that way," and pointed south. He said: "Protest, protest, all you want to, you have a right to protest, and they may run out of gas." He said: "Help is on the way, thousands are coming."

A preacher had been following General Walker around asking him not to lead the crowd, but to get them to stop what they were doing. This preacher said to Walker: "They will listen to you and do anything you say, please get them to stop and go home," and Walker said: "I am here to watch what happens—I am not interested in stopping it," and then Walker asked the preacher what denomination he was, and the preacher replied "Episcopalian," and Walker said: "You make me ashamed that I am an Episcopalian." About this time I heard some serious threats made against the preacher by people in the crowd, after Walker said what he did to him, and I was afraid the preacher was going to be hurt, so I took him by the arm and pulled him and carried him out of the crowd. Two men came up to the edge of the crowd and stated that they were friends of the preacher, and asked me what I was doing with him. I told them that someone was going to hurt him if he did not leave, and I suppose they left with him, as I never saw them any more.

After some in the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: "Keep protesting and see if we can get closer." He then started towards the marshals and the crowd of at least a thousand by that time, followed him. This crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was

with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them. At all times during this, I was near or in sight of General Walker and stayed in sight of him until about 5 a.m. the next morning.

[fol. 2034] On a number of occasions Walker would walk towards the marshals, or in that general direction, and whenever he did, a large crowd would fall in behind and follow him. In fact, wherever Walker went, the crowd followed. During the time after the first march towards the marshals with Walker in or near the lead, I heard different statements, many of which I cannot remember, but at one time, in talking with a group about the protest they were making, he said, "good, good, keep it up." I heard people asking how to snuff out or counteract the tear gas, and Walker told them to use water, and right after that they got a fire truck and hose and began to try to use that to stop the gas. I saw a group making Molotov cocktails. They were taking coca cola bottles and putting gasoline in them and putting some kind of wick in them, setting the wicks afire, and they would then throw this towards the marshals. I did not hear Walker say anything about the Molotov cocktails, but I did see him in the vicinity of where they were being made. During all of this time, when Walker was there, and at the time when he was telling them to continue to protest, the men and boys in the crowd were armed as I stated before, they were throwing the Molotov cocktails, they were setting automobiles afire, and I personally counted sixteen automobiles that were burned. There was a new building going up near the scene of the rioting, and the students and others would get bricks over there, I saw them roll wheelbarrows up loaded with bricks, and they would break them up and take them in their arms when they went towards the marshals. Many of the lights were broken out around the campus, especially around the flagpole that was between the (illegible).

In reading over the foregoing, I notice it appears that what the preacher first said to Walker about stopping the rioting, was said after he got on the monument, and this is not correct. It was before Walker got up on the monument that the preacher was urging him to try to stop the rioting and get them to go home, and it was before he got [fol. 2035] up on the monument that Walker replied, "I am here to watch what happens—I am not interested in stopping it." It was after he got on the monument or about the time he got on the monument to make the speech that he asked the preacher what denomination he was, and the preacher replied "an Episcopalian." I simply wanted to add this to my statement in order to clear it up.

This the 25th day of November, 1963.

/s/ TALMADGE WITT
Talmadge Witt

...s after Mr. Meredith and his escort circled the Lyceum and returned without finding the proper class building, Edward O. Guthman, spokesman for the Justice Department, said:

"Marshals will escort Meredith about the campus as long as necessary. They won't leave him as long as he is in any danger."

At least 40 marshals have been berthed at Baxter Hall, the campus apartment building where Mr. Meredith was housed last night.

The Government built up its strength during the night despite the lull in the disorder. An Army spokesman said 4,000 regular troops now are in Oxford. The town's population is 5,283.

The campus rioting, punctuated with gunfire from the rioters ranks, broke out last night as the students and many outsiders vented their anger over the entrance of Mr Meredith to the 114-year-old institution.

Raged Through The Night

The riot raged throughout the night as students and outsiders repeatedly attacked several hundred marshals who had brought the Negro student to the campus late in the afternoon.

Regular Army troops were ordered here from their staging area in Memphis, Tenn., when the situation rapidly got out of hand under the cover of darkness.

Mississippi's Lt Gov Paul B. Johnson, jr., visited the campus at the height of the rioting and warned Justice Department officials who are here to expect more violence and possibly bloodshed during the day.

The Lieutenant Governor was said to have expressed fears that many from outside Oxford were on the way here to join in the battle against integrating the university.

Newsman Killed

One of those killed in the campus rioting was a French newspaperman, Paul Guihard, representing the London Daily Sketch and a French news agency. After one of the early student forays he was found dead with a wound in the back.

A 23-year-old juke box repairman, Ray Gunter, of Oxford, also was fatally shot. He was taken from the university campus to Oxford Hospital, where he was pronounced dead on arrival.

A United States marshal, Graham Same was critically wounded by a gunshot in the neck and was flown to the hospital at the Memphis Naval Air Station for emergency treatment. Another marshal was wounded in the thigh by rifle fire.

Newsman Bill Crider of the Memphis staff of the Associated Press was wounded in the back by a burst of birdshot. Several members of the Mississippi State patrol also were wounded.

Mr Crider's wounds were not serious. He was treated and soon returned to the campus.

The troops arriving early this morning forced the rioters into dormitories and the wooded hills that make up the 640-acre Ole Miss campus. They left behind the litter of battle and the hulks of a half dozen burned out cars.

Military police arrested 93 as they swept back the rioters. Later arrests brought the total taken into custody to 112. Estimates put the strength of the troops on the campus at 1,800 men.

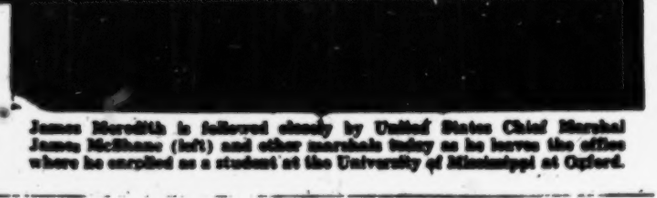
United States marshals, attired in riot jackets and helmet liners, earlier had turned back the attackers time after time in a battle they fought with tear gas and smoke bombs.

The attackers used bricks, iron pipes and as the night wore on, turned to Molotov cocktail bombs made from soda bottles filled with gasoline.

Cars, Trucks Hit

Cars and television trucks were smashed and one was burned as the rioters turned on newspapermen and television cameramen with a widely separated number of attacks.

Mr. Walker, the man who led the troops ordered by President Eisenhower into Little Rock in 1957 in another desegregation crisis, led a thousand college youths in one charge that left



James Meredith is followed closely by United States Chief Marshal James McShane (left) and other marshals today as he leaves the office where he enrolled as a student at the University of Mississippi at Oxford.

back a hundred yards from the marshals.

Mr. Walker jumped on a campus Confederate memorial and yelled:

"If you can't win, go home. Don't stay at the university. But, let's not quit. We can win."

The marshals, while armed, used only their tear gas bombs and never fired on their attackers, a Justice Department spokesman inside the beleaguered building said.

One time they fired warning shots in the air and another time punctured a fire hose being used by the students.

They were harassed and under danger from intermittent gunfire which came from a hidden sniper who potted away at the buildings.

Serious Situation

The plight of the marshals was becoming increasingly serious as the first military unit arrived on the campus.

This was the Oxford contingent of the Mississippi National Guard which had been Federalized by the President.

Its commander, Capt. Murray Falkner, a nephew of William Faulkner, the author who lived in Oxford, was among those injured. He was struck on the arm with a hurled brick.

The students and the outsiders "borrowed," as one said, a bulldozer and a fire engine and used these in an effort to run down the marshals and get close enough to hurl bricks.

The bricks and timber used to set barricades on the drives leading to the administration building were taken from a science building under construction close at hand.

The marshals, for the most part, stayed close around the building except for forays to drive the attackers back. They captured 31 prisoners during the night's rioting.

Two of these were operating the bulldozer and the firetruck. The truck made two successful runs close to the marshals before it was stopped amid a cloud of tear gas.

Wasn't Student

The operator, a Justice spokesman said, was not a student.

Most of the action and the bitterest fighting took place in front of a tree-spotted, park-like area called University Circle. It is adorned with a monument as a memorial to the Confederate dead in the Civil War.

The whole area is strewn today with the debris of the fighting—empty tear gas canisters, smashed and burned automobiles and television trucks, broken bricks, logs and slashed fire hoses.

The rioters went wild when they learned that Mr. Meredith, who had been denied admission three previous times to the university, had been brought without incident on to the campus.

Obscenities filled the air. The rioters' wrath was directed more at the marshals than at the Negro student who had been housed under heavy guard in an apartment on the campus to await enrollment today.

Officials Arrive

It came after Deputy Attorney General Nicholas de B. Katzenbach and other high Justice Department officials, who arrived here in an Air Force plane, conferred with the university officials, including Chancellor J. D. Williamson in the main administration building.

With a wild assortment of yells, screams and curses the rioters moved on the marshals surrounding the building. "You ——nigger lover" and "why don't you bring Kennedy down here" were some of the cries that filled the air thick with flying brickbats.

When word filtered into the ranks of the rioters that a marshal had been shot and seriously wounded a cheer went up.

The rioting broke out in frightening fashion as darkness came.

In a short while Mississippi State police, several hundred strong were withdrawn from the immediate fighting area and then moved off the campus.

This left the marshals and a small contingent of Army engineers, sent here as a housekeeping unit for the marshals, to hold off the repeated attacks.

With State police gone the entrances to the university campus were left wide open and anyone who wished could walk down the darkened streets toward the administration building. The building was often bathed in drifting smoke from the bombs that had been set off.

As unexpectedly as the State police roadblocks were called off, they were restored four hours and 45 minutes later just as the Regular Army forces began appearing on the campus.

This blocked off the university grounds from groups of men who seemed to be heading there in increasing numbers.

Quiet Week End

The night's wild disorders came after an ominously quiet week end here marked only by a few hijinks over Ole Miss's football victory over Kentucky Saturday night in Jackson, the State capital.

Tensions began building up when reports filtered through the town that some move could be expected soon to bring the Negro student here for registration.

Rumors flew thick and fast and the tension grew as word came that President Kennedy had taken control of the Mississippi National Guard. Angry mutterings were heard then and later about this action.

The State police, which had disappeared from Oxford late Friday, returned in force early Sunday. They sealed off the campus and would permit no one except students and those living on the campus. Newspapermen who had been given press quarters in the administration building were denied admittance.

Engineers Arrived

Early in the morning the engineers had arrived at Graham Lake, 15 miles from Oxford, and set up a housekeeping camp for the marshals.

At 2 p.m., amidst all sorts of rumors, the marshals arrived at the Oxford-University airport. First a DC-6 and then four two-engine planes landed and all were filled with marshals.

Chief United States Marshal James McShane and his assistant, Jack Cameron, descended from the four-motored plane and went to a telephone with Mr. McShane clutching a fistful of dimes.

Soon seven Army trucks drove up. The marshals, numbering about 70 lined up near the trucks in straggly military fashion. They stood and waited.

A little later an Air Force jet swooped down and disgorged Mr. Katzenbach and other Justice Department officials.

After more telephoning and conferring the officials and marshals climbed into troop carriers and three sedans and took off from the airport.

Midway to the highway they met a Mississippi highway patrol car carrying Col. T. B. Birdsong, State safety commissioner, and University Chancellor J. D. Williams. Another conference followed and then the caravan moved off.

By this time hundreds had gathered at the airport and lined the road leading into town.

Much to everyone's surprise the caravan turned abruptly into one of the university gates without opposition from the State police guards. Within a few minutes the empty troop carriers came out another gate and headed back to the airport.

The marshals quickly surrounded the administration building, and three hours later Mr. Meredith was brought to Oxford. He landed in a small plane at the airport accompanied by John Doar of the Justice Department and a marshal and was taken without incident through a gathering throng along the road to the university.

Reporters, not allowed in, watched from the entrance several blocks away. They could hear yells and cheers occasionally and got frequent reports from students who came and went.

As dusk came the mood of the crowd within the university grounds and outside began to change. At the airport Mr. McShane was asked by a young woman in torreador pants for an autograph for her son.

A few hours later a mob, first of students and then of students and outsiders, was crying for his blood.

Yoders Attacked

About dark reporters suddenly were allowed inside the grounds. Television cameraman Gordon Yoder of Dallas and his wife, a native of Jackson, Miss., were the first to reach the university circle.

Mr. Yoder left his car to make pictures and was set up. As State police stood by he went back to his car where both stood shoulder to shoulder around the building. There were cries, "tear gas," and the marshals donned their masks and took out their containers and readied their tear gas guns. Then the order would come "hold gas" and a little later "secure gas."

Order Came

All of a sudden the explosion came. The order came and this time a cascade of canister and tear gas bombs fell amidst the advancing students. A squad of State police and newsmen were caught in the fumes.

Mr. Guthman explained later that Chief Marshal McShane gave the order after a piece of iron pipe had been hurled at a marshal and left a big dent in his helmet liner.

Inside the building Col. Birdsong was asking the Justice Department officials if they wanted the State police to remain. He was told they did. The Mississippi official recommended that military troops be called out and about 8:30 p.m. (CST) the order for troops went out.

Then the State police, angered because they were caught in the first tear gas barrage and resenting, it seemed, the presence of the marshals, began withdrawing. Orders came up to them to keep back from the firing line.

Conditions rapidly worsened. Without the presence of the State police the attacks on the marshals grew bolder.

And more people, including women and girls, were pouring into the fighting area. There were advances and threats depending on the volume of tear gas.

CONGRESS

Continued From Page A-1

billion, which the House chopped down to $3.6 billion. The Senate committee restored about two-thirds of this cut, but a coalition of conservative Democrats and Republicans will try to trim it closer to the House figure.

Another bill which could delay adjournment is an omnibus $2.2 billion authorization for flood control, river and harbor projects, which is still tied up in the House Public Works Committee.

Closely related to this measure is the public works appropriation bill, which passed the Senate today ahead of foreign aid. Most of this money is for water projects authorized in past years.

The House is expected to act early this week on the postal rate increase bill, to which the Senate attached pay increases for Federal employes. The House must decide whether to accept it as it stands, or seek a conference with the Senate.

Two New Frontier measures which seem likely to die are the bills to create job opportunities for young people leaving school, and to help cities provide mass transportation.

ugly and dangerous. In Oxford, the ugliness and, danger is magnified to a gigantic scale.

And one of the ironies of the situation here today is that former Maj. Gen. Edwin A. Walker, who commanded the Federal troops that took over Little Rock, is on the opposite side of the fence here.

Mr. Walker whipped up the students and others on the campus of the University of Mississippi last night, when it became known that James H. Meredith, was on the campus.

After the Little Rock riots, Mr. Walker said that he found his duty there distasteful.

However, at the time, he was the crisp and professional soldier, who gave no sign of his feelings. He set up his command post at the corner of Central High School—the object of the riots.

Contrasts in Size

The contrast is most marked by the size of the operations here. In Little Rock, it was largely quiet three or four blocks from the school. In Oxford today, there is little quiet anywhere. On the contrary, there is a brooding sense of disaster.

Several days ago Mr. Walker said he planned to lead "tens of thousands" of volunteers to aid the cause of Gov. Ross Barnett.

But his only troops last night were a band of students and other persons whom he led in a charge on the positions of the Federal marshals.

They got within 100 feet but the tear gas fumes repelled them.

Gives Advice

Later, Mr Walker was giving demonstrators advice on how to counteract the acrid tear gas fumes.

Mr. Walker appeared on the Oxford town square during the disturbance there today.

Mr. Walker marched ahead

KENNEDY

Continued From Page A-1

the vigil with the Chief Executive.

The President did not get to bed until about 5:30 a.m. today and was up again at 9:45 a.m., White House Press Pierre Salinger told reporters.

Working with the President in his office and keeping in touch with events in Mississippi until 5:30 a.m. were his brother, Attorney General Robert F. Kennedy, and White House aides P. Kenneth O'Donnell, Theodore C. Sorensen, Lawrence F. O'Brien and Andrew T. Hatcher, associate press secretary.

The President had put off his address for 2½ hours, from 7:30 p.m. to 10 p.m. (EZT). In the interval, United States marshals had installed Mr. Meredith on the Ole Miss campus, and Gov. Ross Barnett had acknowledged "we are physically overpowered."

Mr. Kennedy avoided any dressing down of Gov. Barnett by name. And, as he spoke, the students at the university were ignoring the Governor's appeal to void violence.

The soldiers held that [illegible] nets within inches of [illegible] mer general, but did not [illegible] him. The officer said [illegible] thing to Mr. Walker [illegible] walked off through the [illegible]

$10,000 Winn[illegible] At Dice Shot By 'Poor Lose[illegible]

A Southeast Was[illegible] man has learned just ho[illegible] serous a poor loser can [illegible]

The "winner," Robert [illegible] derson, 23, of 4004 E[illegible] S.E., told police he was [illegible] the legs and robbed of [illegible] by one of the players in [illegible] game at a home in th[illegible] block of Ninth street N[illegible] Monday.

Mr. Anderson said th[illegible] dent occurred as he w[illegible] ing the game with h[illegible] nings.

He said another [illegible] asked him for $800 a[illegible] added: "I hate to do [illegible] you, but give me the [illegible]

Mr. Anderson did not [illegible] but continued walking a[illegible] shot in the legs by the [illegible] man who then robbed [illegible] the money.

Capt. Murray Kutner, [illegible] of the robbery [illegible] said police have arrested [illegible] year-old man and will b[illegible] case directly to the gra[illegible] because the holdup sus[illegible] presently on bond in c[illegible] tion with a narcotics ca[illegible]

Nuclear Sub Saf[illegible]

LONDON, Oct. 1 (AP) [illegible] British Admiralty has [illegible] orders forbidding men [illegible] aboard nuclear submari[illegible] wear watches with lu[illegible] dials. The order said suc[illegible] emit a radioactive ga[illegible] might affect instrume[illegible] nuclear subs.

KENNEDY JOI[illegible]

Washin[illegible] To Call

President Kennedy's [illegible] troops in Mississippi [illegible] latest in a long series o[illegible] actions dating all the wa[illegible] to George Washington.

Washington used [illegible] troops in 1794 to put do[illegible] Whisky Rebellion. In [illegible] farmers in Western Pe[illegible] vania objected to a liqu[illegible] tax.

In 1799, President Joh[illegible] ams used troops in [illegible] Pennsylvania against reb[illegible] citizens who refused t[illegible] Federal taxes. John Fri[illegible] arrested, and after [illegible] trials, was pardoned b[illegible] President.

Slave Act Riot

In 1833, President A[illegible] Jackson threatened u[illegible] troops when South C[illegible] "nullified" Federal [illegible] South Carolina backed [illegible] and the nullification [illegible] was rescinded.

MARSHALS' ROLE BLASTED

Southern Congressmen Call for Probe

Senator Eastland, Democrat of Mississippi, charged today that the "bloodshed" at Oxford, Miss., last night "is largely on the hands of the Fifth Circuit Court of Appeals."

He made the statement during Senate debate, in the course of which Senator Morse, Democrat of Oregon, suggested that, if former Army Gen. Edwin Walker took part in the campus riot, all available legal action "should be taken against him on charges of inciting an insurrection."

At another point in the debate, Senator Thurmond, Democrat of South Carolina, said it would be well for a congressional committee to investigate what happened in Mississippi yesterday.

Marshals Criticized

He made this statement after Senator Eastland read a long statement from the board of trustees of the University of Mississippi, critical of the way in which the force of United States marshals handled the situation.

In placing the blame on the judges of the appellate court who ruled on the Meredith case, Senator Eastland declared that Chief Judge Elbert P. Tuttle "aspires to be a Supreme Court Justice. He has become a Government judge, and that court is largely responsible."

In the statement they sent Senator Eastland, the trustees said the Department of Justice asked university officials yesterday to warn students not to assemble or demonstrate with a threat of expulsion if they did.

The university officials advised the Senator that they felt threats were not the way to handle the matter. They outlined a plan whereby on Sunday night a special edition of the Mississippian, the campus newspaper, would be distributed early Monday morning. They said they were preparing such a paper with appeals in it from various officials when they were informed that Mr. Meredith would be brought to the campus last night.

Time Not Appropriate

They said they advised the Justice Department this might not be an appropriate time "as the students were returning from their homes in large numbers at that time and that we have not yet had time to put into effect the appeal to students which was planned for late Sunday and early Monday morning. The university was informed that Mr. Meredith was coming anyway."

After describing the arrival of Mr. Meredith and the marshals, who surrounded the administration building, the report from the university official continued:

"As a natural consequence, students gathered in front of the Lyceum building to see what was going on. Before long you could hear the rebelling, giving college yells and, of course, occasional jeering. Some of the more reported to have flicked their cigarettes in the direction of the marshals from a position across the street from the marshals and some of the cigarettes were reported as being flicked on fabric covering military trucks."

The university officials reported that members of the State Highway Patrol were assisting the marshals and were pushing the students back onto the green and "seemed to have things under control when, without warning, the marshals fired tear gas projectiles, some of them at least fired point blank at the students and highway patrolment. This seemed, from all accounts, to have been unnecessary and illogical. This is also not the way to use tear gas, as any professional, well-trained law enforcement officer would know."

Investigation Proposed

Further on the university report accused the marshals of "amateurism," "poor leadership" and "bad judgment." They suggested that the Mississippi delegation in Co[illegible] have representatives o[illegible] Judiciary Committee [illegible] Mississippi to investigate

In the House, all [illegible] State's six House membe[illegible] cept Representative Sm[illegible] sued antiwar manifesto. [illegible] declared that their p[illegible] warning to President K[illegible] against attempting to r[illegible] Mr. Meredith as a stude[illegible] prophetic because "tensi[illegible] built to the point of a[illegible] caust."

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The Evening Star
WITH SUNDAY MORNING EDITION

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ps Fire Over Oxford Mob ter Quelling Campus Riot

Troops in battle gear move through a crowd of townspeople today at the square in Oxford, Miss., home of the embattled campus of the University of Mississippi.—AP Wirephoto.

Army troops escort a group of prisoners to the National Guard Armory following a disturbance today in downtown Oxford, Miss., site of riots protesting registration of a Negro at the University of Mississippi.—AP Wirephotos.

Meredith Registered; Two Die, Scores Hurt

BULLETIN

Former Maj. Gen. Edwin A. Walker was arrested today at a road block in Oxford, Miss., and charged on four offenses. Attorney General Robert F. Kennedy in Washington announced the charges, which included inciting to rebellion or insurrection, conspiring to commit this offense, conspiring to hinder Federal officers in their duties and assaulting a Federal officer.

By CECIL HOLLAND
Staff Writer

OXFORD, Miss., Oct. 1—Rifle fire cracked here today as Army troops moved in to clear marauding gangs out of the area around the town's public square.

Infantrymen with fixed bayonets methodically moved down streets leading from the square after a morning of disorders brought about by roving groups carrying on the battle over the enrollment of James H. Meredith in the University of Mississippi.

The 29-year-old Negro student was enrolled in the university this morning while Federal troops poured into Oxford after a night of wild and uncontrolled rioting on the nearby Ole Miss campus left two dead and scores injured.

More Pictures on Pages A-6, 7; Other Stories on Pages A-3, 6, 9.

Troops from the 2nd 'Indianhead' Infantry Division moved systematically down streets leading from the town square and in thorough fashion drove all the troublemakers from the area.

They were using live bullets but seemed to be firing over the heads of those fleeing before them.

Many of the young men were rounded up and with their hands held high were collected at street corners and then hauled away in trucks.

The townspeople said they were strangers and apparently had come in from other places.

There were no immediate reports of casualties.

The university campus remained quiet after soldiers with fixed bayonets disbursed a mob which rioted there most of the night.

The Negro student was registered in the university this morning behind the massed might of the Federal Government and troops carrying rifles with fixed bayonets.

As this compliance with Federal court orders was being carried out, roving gangs wandered through the courthouse square and along adjoining streets pelting Army convoys and foot soldiers who occupied the square with rocks, bottles, sticks and even a garbage can.

The gangs were made up of both youths and older men and hurled a barrage of taunts at the soldiers whenever they appeared.

Tossed Tear Gas

The Army first moved infantrymen into the area around the courthouse. They marched around the square and across the courthouse lawn before taking up positions.

After enduring the jeers and missile barrages, the infantrymen suddenly tossed tear gas cannisters at those who had been tormenting them and cleared the square.

Some of the infantrymen were Negroes and this served to infuriate even more the people who were collected around the square.

Nearly all business establishments around the large square, in the heart of this Deep South town, closed and locked their doors.

About one block south of the square, many young men, who appeared not to be natives of Oxford, congregated at the intersections of State Routes 6 and 7, principal arteries through town.

They hurled bricks at nearly every car that tried to run the gauntlet.

Convoys Still Pelted

Even with increasing numbers of troops along the streets and in the square, groups of young men still bombarded passing convoys with bottles, rocks and other missiles.

As one convoy passed through the town's center, a heavy log was dropped from a second floor balcony on one

ck Workers on Strike

President Acts To End Walkout

W YORK, Oct. 1 (AP)— ...shoremen quit work on ... and Gulf Coast ports ... after their contract ex... Within 10 hours, Presi... Kennedy invoked the ...artley Act in an attempt ...the work stoppage.

... presidential action, the ...ep in Taft-Hartley ma... appeared to be the ...mmediate likelihood of ... the unionized long...

Administration Sees Barnett As Breaking His Promise

By MIRIAM OTTENBERG
Star Staff Writer

Gov. Ross Barnett of Mississippi assured the President and the Attorney General that his State police would maintain order if Negro Student James H Meredith was brought to the University of Mississippi campus—and then, in the administration's view, broke his promise.

The off-again-on-again role of the Governor came to light as his apparent capitulation and guarantees of safe passage gave way to uncontrolled rioting on the campus last night

MEREDITH BEGINS FIRST DAY WITH COLONIAL STUDY

OXFORD, Miss. (AP)—Negro James Meredith's first scheduled class today as a student at the University of Mississippi was Colonial American history.

Other courses being taken by the first known Negro to enroll at the 114-year-old institution include English, political science, mathematics and Spanish.

Mr. Meredith is living in

generally agreed on a plan to put Mr. Meredith on the campus Sunday behind a Federal force.

Yesterday morning, Gov. Barnett called the Attorney General with something similar in mind. He asked for a show of force to justify his capitulation but promised that the Federal forces would run into no opposition.

Agreed on Two Points

The Attorney General and the Mississippi Governor consulted by telephone three or four times during the morning. Finally, at about 10:45 a.m., the Governor agreed on two

Kennedy Says He Did Duty

Broadcast Grim But Conciliatory

By the Associated Press

President Kennedy declares it was his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the State University.

Grim, yet conciliatory at times, the President said last night in a short radio-television address to the Nation that he hoped it would be unnecessary to use troops, even though conciliation and persuasion had failed to obtain admission of James H. Meredith.

After his address, Mr. Ken-

redith is followed closely by United States Chief Marshal
thane (left) and other marshals today as he leaves the office
enrolled as a student at the University of Mississippi at Oxford.

yards from frightening fashion as dark- ed from the four-motored
jumped on a new came. plane and went to a telephone
rate memorial In a short while Mississippi Soon seven Army trucks drove
win, go home. State police, several hundred up. The marshals, numbering
the university. strong were withdrawn from about 70 lined up near the
quit. We can the immediate fighting area, trucks in steely military
and then moved off the fashion. They stood and waited.
campus A little later an Air Force
This left the marshals and jet swooped down and dis-
while armed, a small contingent of Army gorged Mr. Katzenbach and
rear gas bombs engineers, sent here as a house- other Justice Department offi-
on their at- keeping unit for the marshals, cials.
the Department to hold off the repeated at- After more telephoning and
the brief- tacks. conferring the officials and
said. With State police gone the marshals climbed into troop
fired warning entrances to the university carriers and three sedans and
and another campus were left wide open and took off from the airport.
a fire hose anyone who wished could walk Midway to the highway they
students down the darkened streets to- met a Mississippi highway pa-
harassed and ward the administration build- trol car carrying Col. T. B.
intermittent ing. The building was often Birdsong, State safety commis-
came from a bathed in drifting smoke from sioner, and University Chancel-
who potted away the bombs that had been set lor J. D. Williams. Another con-
off. ference followed, and then the
caravan moved off.
As unexpectedly as the State By this time hundreds had
police roadblocks were called gathered at the airport and
off, they were restored four lined the road leading into
hours and 45 minutes later just town.
as the Regular Army forces Much to everyone's surprise
began appearing on the cam- the caravan turned abruptly
pus. into one of the university gates
This blocked off the univer- without opposition from the
sity grounds from groups of State police guards. Within a
men who seemed to be heading few minutes the empty troop
there in increasing numbers carriers came out another gate
and headed back to the airport.
Quiet Week End
The night's wild disorders The marshals quickly sur-
came after an ominously quiet rounded the administration
week end here marked only by building, and three hours later
a few hijinks over Ole Miss's Mr. Meredith was brought to
football victory over Kentucky Oxford. He landed in a small
Saturday night in Jackson, plane at the airport accom-
the State capital panied by John Doar of the
Tensions began building up Justice Department and a mar-
when reports filtered through shal and was taken without in-
the town that some move could cident through a gathering
be expected soon to bring the throng along the road to the
Negro student here for regis- university.
trations. Reporters, not allowed in,
Rumors flew thick and fast watched from the entrance sev-
and the tension grew as word eral blocks away. They could
came that President Kennedy hear yells and cheers, occa-
had taken control of the Mis- sionally and got frequent re-
sissippi National Guard. An- ports from students who came
gry mutterings were heard then and went.
and later about this action. As dusk came the mood of
The State police, which had the crowd within the university
disappeared from Oxford late grounds and outside began to
Friday, returned in force early change. At the airport Mr. Me-
Sunday. They sealed off the shane was asked by a young
campus and would permit no woman in torreador pants for
one except students and those an autograph for her son.
living on the campus. News- A few hours later a mob,
papermen who had been given first of students and then of
press quarters in the adminis- students and outsiders, was
tration building were denied crying for his blood.
admittance. **Yoders Attacked**
Engineers Arrived About dark reporters sud-
Early in the morning the denly were allowed inside the
engineers had arrived at Ox- grounds. Television camer-
ford, and set up a housekeep- man Gordon Yoder of Dallas
ing camp for the marshals. and his wife, a native of
At 7 p.m., amidst all sorts Jackson, Miss., were the first
of rumors, the marshals arrived to reach the university circle.
at the Oxford-University air- Mr. Yoder left his car to
port. First a DC-6 and then make pictures and was set up.
four two-engine planes landed As State police stood by he
and all were filled with mar- went back to his car where both
shals.
Chief United States Marshal
James McShane and his as-
sistant, Jack Cameron, descend-

pushing in on the marshals standing shoulder to shoulder around the building. There were cries, "tear gas," and the marshals donned their masks and took out their containers and readied their tear gas guns. Then the order would come "hold gas" and a little later "secure gas."

Order Came

All of a sudden the explosions came. The order came and this time a cascade of canisters and tear gas bombs fell amidst the advancing students. A squad of State police and newsmen were caught in the fumes.

Mr. Guthman explained later that Chief Marshal McShane gave the order after a piece of iron pipe had been hurled at a marshal and left a big dent in his helmet liner.

Inside the building Col. Birdsong was asking the Justice Department officials if they wanted the State police to remain. He was told they did. The Mississippi official recommended that military troops be called out and about 8:30 p.m. CST the order for troops went out.

Then the State police, angered because they were caught in the first tear gas barrage and resenting, it seemed, the presence of the marshals, began withdrawing. Orders came up to them to keep back from the firing line.

Conditions rapidly worsened. Without the presence of the State police the attacks on the marshals grew bolder.

And more people, including women and girls, were pouring into the fighting area. There were advances and threats depending on the volume of tear gas.

CONGRESS

Continued From Page A-1

billion, which the House chopped down to $3.6 billion. The Senate committee restored about two-thirds of this cut, but a coalition of conservative Democrats and Republicans will try to trim it closer to the House figure.

Another bill which could delay adjournment is an omnibus $2.2 billion authorization for flood control, river and harbor projects, which is still tied up in the House Public Works Committee.

Closely related to this measure is the public works appropriation bill, which passed the Senate today ahead of foreign aid. Most of this money is for water projects authorized in past years.

The House is expected to act early this week on the postal rate increase bill, to which the Senate attached pay increases for Federal employes. The House must decide whether to accept it as it stands, or seek a conference with the Senate.

Two New Frontier measures which seem likely to die are the bills to create job opportunities for young people leaving school, and to help cities provide mass transportation.

in the capital of Arkansas were ugly and dangerous. In Oxford, the tautness and danger is magnified to a gigantic scale.

And one of the ironies of the situation here today is that former Maj. Gen. Edwin A. Walker, who commanded the Federal troops that took over Little Rock, is on the opposite side of the fence here.

Mr. Walker whistled up the students and others on the campus of the University of Mississippi last night, when it became known that James H. Meredith was on the campus.

After the Little Rock riots, Mr. Walker said that he found his duty there distasteful.

However, at the time, he was the crisp and professional soldier who gave no sign of his feelings. He set up his command post at the corner of Central High School—the object of the riots.

Contrasts in Size

The contrast is most marked by the size of the operations here. In Little Rock, it was largely quiet three or four blocks from the school. In Oxford today, there is little quiet anywhere. On the contrary, there is a brooding sense of disaster.

Several days ago Mr. Walker said he planned to lead "tens of thousands" of volunteers to aid the cause of Gov. Ross Barnett.

But his only troops last night were a band of students and other persons whom he led in a charge on the positions of the Federal marshals.

They got within 100 feet, but the tear gas fumes repelled them.

Gives Advice

Later, Mr. Walker was giving demonstrators advice on how to counteract the acrid tear gas fumes.

Mr. Walker appeared on the Oxford town square during the disturbance there today.

Mr. Walker marched ahead

KENNEDY

Continued From Page A-1

the visit with the Chief Executive.

The President did not get to bed until about 3:30 a.m. today and was up again at 8:45 a.m., White House Press Pierre Salinger told reporters.

Working with the President in his office and keeping in touch with events in Mississippi until 5:30 a.m. were his brother, Attorney General Robert F. Kennedy, and White House aides P. Kenneth O'Donnell, Theodore C. Sorensen, Lawrence F. O'Brien and Andrew T. Hatcher, associate press secretary.

The President had put off his address for 2½ hours, from 7:30 p.m. to 10 p.m. EDT. In the interval, United States marshals had installed Mr. Meredith on the Ole Miss campus, and Gov. Ross Barnett had acknowledged "we are physically overpowered."

Mr. Kennedy avoided any dressing down of Gov. Barnett by name. And, as he spoke, the students at the university were ignoring the Governor's appeal to void violence.

The soldiers held their bayonets within inches of the former general, but did not touch him. The officer said something to Mr. Walker and he walked off through the crowd.

$10,000 Winner At Dice Shot By 'Poor Loser'

A Southeast Washington man has learned just how dangerous a poor loser can be.

The "winner," Robert E. Anderson, 23, of 4004 E street, S.E., told police he was shot in the legs and robbed of $10,000 by one of the players in a dice game at a home in the 4400 block of Ninth street N.W. last Monday.

Mr. Anderson said the incident occurred as he was leaving the game with his winnings.

He said another player asked him for $800 and then added: "I hate to do this to you, but give me the money."

Mr. Anderson did not reply, but continued walking and was shot in the legs by the other man who then robbed him of the money.

Capt. Murray Kutner, commander of the robbery squad, said police have arrested a 23-year-old man and will take his case directly to the grand jury because the holdup suspect is presently on bond in connection with a narcotics case.

Nuclear Sub Safety

LONDON, Oct. 1 (AP)—The British Admiralty has issued orders forbidding men serving aboard nuclear submarines to wear watches with luminous dials. The order said such dials emit a radioactive gas that might affect instruments in nuclear subs.

[illegible] consenting a lawyer.

The 51-year-old ex-convict asked the Appellate Court to reverse the District Court mainly on the grounds that the sentence was "disproportionately harsh in relation to the essential nature of the offense."

Morgan also argued that he was incompetent to act as his own chief counsel. Although he hired a lawyer, Morgan fled his own defense during the trial.

He was convicted last November on 13 counts of an indictment and faced a maximum sentence of 110 years in prison.

For a period of 18 months, Morgan impersonated a real lawyer, Lawrence Archie Harris, formerly of Washington, now living in Sacramento, Calif.

Polio Advisers Called by Terry

By the Associated Press

Surgeon General Luther L. Terry announced today he has called his special advisory committee on oral polio vaccines to meet tomorrow.

United States Public Health Service spokesmen said they knew of no particular reason for the meeting other than for the advisers to consider any additional information that has become available since they met on September 18, and to take another look at the general situation.

Tomorrow's meeting will be the fourth for the group, set up by Dr. Terry to evaluate the Nation's experience with oral polio vaccines and to make recommendations.

KENNEDY JOINS LIST

Washington Was First To Call Federal Troops

President Kennedy's use of troops in Mississippi is the latest in a long series of such actions dating all the way back to George Washington.

Washington used Federal troops in 1794 to put down the Whisky Rebellion, in which farmers in Western Pennsylvania objected to a liquor tax.

In 1799, President John Adams used troops in Eastern Pennsylvania against rebellious citizens who refused to pay Federal taxes. John Fries was arrested, and after several trials, was pardoned by the President.

Slave Act Riot

In 1833, President Andrew Jackson threatened use of troops when South Carolina "nullified" Federal tariffs. South Carolina backed down, and the nullification statute was rescinded.

Troops were called out to assist marshals in getting Anthony Burns, a Negro, through the streets of Boston and on a ship during Fugitive Slave Act riots in 1854.

During the Reconstruction period, much of the South was under military rule, and Federal troops were used to put down disturbances on a number of occasions.

The railroad strikes of 1887, which brought on widespread disturbances, brought out Federal troops to quell them, primarily on the basis of State requests.

Coxey's Army in 1894 was raised to demand Federal action during a depression. In one incident, President Cleveland ordered Federal troops into action to subdue a mob and recover a stolen railroad train in Montana.

In the Pullman strike of 1894, enforcement of Federal Court orders was a basis for the use of troops in Chicago. Interference with mail and with interstate commerce was also cited, but a broad order enjoined Eugene V. Debs at the time.

Governor Protested

The Justice Department, in a chronology of past troop use, pointed out that in the Pullman strike, the governor of Illinois, John P. Altgeld, not only did not request troops, but protested against their use.

Troops continued to be used on various occasions in strikes through the early 20th century. Usually this was at State request, but enforcement of Federal court orders was also used as a reason.

President Hoover in 1932 used troops to force Bonus Army marchers off Federal property, and troops took possession of plants in the Montgomery Ward seizure in 1946 under President Franklin D. Roosevelt.

The most recent use, of course, was in September 1957, when President Eisenhower sent Army units to Little Rock, Ark., under Federal statutes which the Justice Department said were direct descendents of the law George Washington sought.

MARSHALS' ROLE BLASTED

Southern Congressmen Call for Probe

Senator Eastland, Democrat of Mississippi, charged today that the "bloodshed" at Oxford, Miss., last night "is largely on the hands of the Fifth Circuit Court of Appeals."

He made the statement during Senate debate, in the course of which Senator Morse, Democrat of Oregon, suggested that, if former Army Gen. Edwin Walker took part in the campus riot, all available legal action "should be taken against him on charges of inciting an insurrection."

At another point in the debate, Senator Thurmond, Democrat of South Carolina, said it would be well for a congressional committee to investigate what happened in Mississippi yesterday.

Marshals Criticized

He made this statement after Senator Eastland read a long statement from the board of trustees of the University of Mississippi, critical of the way in which the force of United States marshals handled the situation.

In placing the blame on the judges of the appellate court who ruled on the Meredith case, Senator Eastland declared that Chief Judge Elbert P. Tuttle "aspires to be a Supreme Court Justice. He has become a Government judge, and that court is largely responsible."

In the statement they sent Senator Eastland, the trustees said the Department of Justice asked university officials yesterday to warn students not to assemble or demonstrate with a threat of expulsion if they did.

The university officials advised the Senator that they felt threats were not the way to handle the matter. They outlined a plan whereby on Sunday night a special edition of the Mississippian, the campus newspaper, would be distributed early Monday morning. They said they were preparing such a paper with appeals in it from various officials when they were informed that Mr. Meredith would be brought to the campus last night.

Time Not Appropriate

They said they advised the Justice Department this might not be an appropriate time "as the students were returning from their homes in large numbers at that time and that we have not yet had time to put into effect the appeal to students which was planned for late Sunday and early Monday morning. The university was informed that Mr. Meredith was coming anyway."

After describing the arrival of Mr. Meredith and the marshals, who surrounded the administration building, the report from the university official continued:

"As a natural consequence, students gathered in front of the Lyceum building to see what was going on. Before long you could hear the mobbing, giving college yells and, of course, occasional jeering. Some of the severe reported to have flicked their cigarettes in the direction of the marshals from a position across the street from the marshals and some of the cigarettes were reported as being flicked on fabric covering military trucks."

The university officials reported that members of the State Highway Patrol were assisting the marshals and were pushing the students back onto the grass and "seemed to have things under control when, without warning, the marshals fired tear gas projectiles, some of them at least fired point blank at the students and highway patrolment. This seemed, from all accounts, to have been unnecessary and illogical. This is also not the way to use tear gas, as any professional, well-trained law enforcement officer would know."

Investigation Proposed

Further on the university report accused the marshals of "amateurism," "poor leadership" and "bad judgment." They suggested that the Mississippi delegation in Congress have representatives of the Judiciary Committee go to Mississippi to investigate.

In the House, all of the State's six House members except Representative Smith issued another manifesto. They declared that their previous warning to President Kennedy against attempting to register Mr. Meredith as a student was prophetic because "tension has built to the point of a holocaust."

"All this happened because Federal authority insisted on pressing for the registration of one individual at Ole Miss, although it is well known that he has no genuine desire to obtain the benefits of learning available there," they stated.

Several other Southern members indorsed the Mississippi delegation's statement. Representative Rivers, Democrat of South Carolina, asserted this "Mississippi lies prostrate to most demeaning by Field Marshal Martin Luther King."

Daily and Sunday, per

Troops Fire Over Oxford M After Quelling Campus

Senate OKs $5.2 Billion Works Bill

Aid Funds Debate Is Next Big Item In Closing Rush

By J. A. O'LEARY
Star Staff Writer

The Senate today passed the $5.2 billion public works appropriation bill as Congress began what leaders hope will be the final week of the session.

The public works measure carries founds for numerous river, harbor and flood control projects, plus $500 million for the emergency program requested by President Kennedy to reduce unemployment. The vote on passage was 63 to 8.

It came after Senator Proxmire, Democrat of Wisconsin, was defeated 52 to 17, in an effort to knock out the Glen Elder reclamation project in Kansas, which he said would stimulate production of feed grains at a time when the Government is struggling to get rid of a feed grain surplus.

This leaves only three money bills remaining to pass one or both houses before Congress can adjourn. Also awaiting action this week are the conference reports on the President's foreign trade and tax revision bills.

Aid Bill Is Next

The Senate turned immediately to debate on the $4.3 billion foreign aid bill, which conservatives will try to cut.

Meanwhile, the House Appropriations Committee reported out the last supplemental appropriation bill, carrying $400 million for miscellaneous Government needs. The Senate Appropriations Committee was in session prepared to act on the other remaining money bill for the State, Justice and Commerce departments.

Smathers Plans Fight

But a comparatively minor bill, designed to let self-employed persons set up their own retirement plans, was the most serious threat to adjournment by Saturday.

Senator Smathers, Democrat of Florida, has given his colleagues notice he will try to delay adjournment to prevent President Kennedy from giving the pension bill a pocket veto.

The President has 10 days from last Saturday in which to sign or veto this bill. Senator Smathers is confident two-thirds in the House and Senate would pass the bill over a veto.

But if Congress adjourns while Mr. Kennedy is still considering the measure he could let it die without his signature.

Democratic leaders will try to get a decision from the President on the pension bill when they hold their weekly conference with him tomorrow morning.

Drive Against Aid

Meanwhile, Senator Ellender, Democrat of Louisiana, was preparing to launch a drive in the Senate to eliminate some of the $782 million the Senate Appropriations Committee restored to the Foreign Aid bill.

The administration asked for the full authorization of $4.7

See CONGRESS, Page A-6

Troops in battle gear move through a crowd of townspeople today at the square in Oxford, Miss., home of the embattled campus of the University of Mississippi.—AP Wirephoto.

Army troops escort a group of prisoners to the National Guard Armory following a disturbance today in downtown Oxford, Miss., site of riots protesting registration of a Negro at the University of Mississippi.—AP Wirephotos.

Dock Workers Go on Strike

President Acts To End Walkout

NEW YORK, Oct. 1 (AP).—Longshoremen quit work on Atlantic and Gulf Coast ports today after their contract expired. Within 10 hours, President Kennedy invoked the Taft-Hartley Act in an attempt to end the work stoppage.

The presidential action, the first step in Taft-Hartley machinery, appeared to be the only immediate likelihood of bringing the unionized longshoremen back to docks from New England to Texas.

Prospects for quick agreement on a new work contract seemed remote.

The White House said President Kennedy would create a board of inquiry to report to him by Thursday on the nature and scope of the work stoppage. On the basis of the board's report, the President will decide whether to order

See DOCKS, Page A-2

Administration Sees Barnett As Breaking His Promise

By MIRIAM OTTENBERG
Star Staff Writer

Gov. Ross Barnett of Mississippi assured the President and the Attorney General that his State police would maintain order if Negro Student James H. Meredith was brought to the University of Mississippi campus—and then, in the administration's view, broke his promise.

The off-again-on-again role of the Governor came to light as his apparent capitulation and guarantees of safe passage gave way to uncontrolled rioting on the campus last night and early today.

What Happened

The behind-the-scenes story of the last 24 hours explains why the President postponed his broadcast to the Nation, why the marshals at first went on the campus alone and why Federal troops were finally summoned to quell the rioters.

This is the story as the administration sees it, pieced together from reports reaching Washington.

On Saturday, Attorney General Robert F. Kennedy and Burke Marshall, his assistant attorney general in charge of the civil rights division, had generally agreed on a plan to put Mr. Meredith on the campus Sunday behind a Federal force.

Yesterday morning, Gov. Barnett called the Attorney General with something similar in mind. He asked for a show of force to justify his capitulation but promised that the Federal forces would run into no opposition.

Agreed on Two Points

The Attorney General and the Mississippi Governor consulted by telephone three or four times during the morning. Finally, at about 10:45 a.m., the Governor agreed on two points.

He promised that the Federal marshals and Mr. Meredith would be admitted to the campus without resistance and he guaranteed that he would preserve law and order through the use of State police, either working alone or in co-operation with the marshals.

This guarantee was repeated

See PROMISE, Page A-2

MEREDITH BEGINS FIRST DAY WITH COLONIAL STUDY

OXFORD, Miss. (AP).—Negro James Meredith's first scheduled class today as a student at the University of Mississippi was Colonial American history.

Other courses being taken by the first known Negro to enroll at the 114-year-old institution include English, political science, mathematics and Spanish.

Mr. Meredith is living in a two-room apartment in Baxter Hall. The apartment includes a kitchenette.

Kennedy Says He Did Duty

Broadcast Grim But Conciliatory

By the Associated Press

President Kennedy declares it was his inescapable duty to call out troops when Mississippi defied court orders to enroll a Negro at the State University.

Grim, yet conciliatory at times, the President said last night in a short radio-television address to the Nation that he hoped it would be unnecessary to use troops, even though conciliation and persuasion had failed to obtain admission of James H. Meredith.

After his address, Mr. Kennedy sat beside the telephone in his office getting up-to-the-minute reports on rioting, gunfire and tear gas sweeping across the university campus at Oxford—and the arrival on the scene of Federal military reinforcements.

Attorney General Robert F. Kennedy and several members of the White House staff kept

See KENNEDY, Page A-6

Meredit Two Die

Former Maj. ... rested today at a... charged on fe... Robert F. Kenne... charges, which i... insurrection, con... conspiring to h... duties and assaul...

By ...

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More Pictures on Page...

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The university ca... with fixed bayonets ... most of the night.

The Negro student ... morning behind the m... ment and troops carry...

As this compliance ... carried out, roving gan... square and along adj... and foot soldiers who o... sticks and even a garb...

The gangs were m... and hurled a barrage o... appeared.

T...

The Army first mo... the courthouse. They m... the courthouse lawn b...

After enduring the ... fantrymen suddenly to... had been tormenting "t...

Some of the infant... to infuriate even more ... the square.

Nearly all busines... square, in the heart o... locked their doors.

About one block s... who appeared not to ... the intersections of Sta... through town.

They hurled bricks ... the gauntlet.

Co...

Even with increasin... and in the square, gr... passing convoys with b...

As one convoy pa... heavy log was dropped ... of the passing vehicles.

The firing was att... Mississippi National Gu...

The rioting in Oxfor... Walker had appeared in... and wearing a 10-gallon...

He stayed in the a... of those in the crowd ... off as military eyes wa...

The Confederate f...

MEREDITH

Beleaguered Marshals Use Tear Gas, Refrain From Firing on Rioters

Continued From Page A-1.

the Lyceum Building at Ole Miss as Mr. Meredith was escorted by Registrar Robert Ellis.

Federal marshals, a bit the worse for wear after the night of shambles, surrounded the old Doric building.

Mr. Meredith walked out of the Lyceum a duly registered student. He was smiling and he seemed calm as he has been during the excitement of the past two weeks. A crowd gathered slowly 100 feet away in front of Conner Hall, across a campus street.

Impassioned students, yelling constantly, shouted:

"You've got blood on your hands."

"How's it feel to have blood on your hands?"

"Nigger go home."

Mr. Meredith's impassivity didn't alter when someone asked him if he were happy that his struggle to enroll met success.

"No," he said, "this is not a happy occasion."

Marshals to Stay

A few minutes after Mr. Meredith and his escort circled the Lyceum and returned without finding the proper class building, Edward O. Guthman, spokesman for the Justice Department, said:

"Marshals will escort Meredith about the campus as long as necessary. They won't leave him as long as he is in any danger."

At least 40 marshals have been berthed at Baxter Hall, the campus apartment building where Mr. Meredith was housed last night.

The Government built up its strength during the night despite the lull in the disorder. An Army spokesman said 4,000 regular troops now are in Oxford. The town's population is 5,283.

The campus rioting, punctuated with gunfire from the rioters ranks, broke out last night as the students and many outsiders vented their anger over the entrance of Mr Meredith to the 114-year-old institution.

Raged Through The Night

The riot raged throughout the night as students and outsiders repeatedly attacked several hundred marshals who had brought the Negro student to the campus late in the afternoon.

Regular Army troops were ordered here from their staging area in Memphis, Tenn., when the situation rapidly got out of hand under the cover of darkness.

Mississippi's Lt. Gov. Paul B. Johnson, jr., visited the campus at the height of the rioting and warned Justice Department officials who are here to expect more violence and possibly bloodshed during the day.

The Lieutenant Governor was said "to have expressed fears that many from outside Oxford were on the way here to join in the battle against integrating the university.

Newsman Killed

One of those killed in the campus rioting was a French newspaperman, Paul Guihard, representing the London Daily Sketch and a French news agency. After one of the early student forays he was found dead with a wound in the back.

A 23-year-old juke box repairman, Ray Gunter, of Oxford, also was fatally shot. He was taken from the university campus to Oxford Hospital, where he was pronounced dead on arrival.

A United States marshal, Graham Same, was critically wounded by a gunshot in the neck and was flown to the hospital at the Memphis Naval Air Station for emergency treatment. Another marshal, was wounded in the thigh by rifle

James Meredith is followed closely by United States Chief Marshal James McShane (left) and other marshals today as he leaves the office where he enrolled as a student at the University of Mississippi at Oxford.

back a hundred yards from the marshals.

Mr. Walker jumped on a campus Confederate memorial and yelled:

"If you can't win, go home. Don't stay at the university. But, let's not quit. We can win."

The marshals, while armed, used only their tear gas bombs and never fired on their attackers, a Justice Department spokesman inside the beleaguered building said.

One time they fired warning shots in the air and another time punctured a fire hose being used by the students.

They were harassed and under danger from intermittent gunfire which came from a hidden sniper who potted away at the buildings.

Serious Situation

The plight of the marshals was becoming increasingly serious as the first military unit arrived on the campus.

This was the Oxford contingent of the Mississippi National Guard which had been Federalized by the President.

Its commander, Capt. Murray Falkner, a nephew of William Faulkner, the author who lived in Oxford, was among those injured. He was struck on the arm with a hurled brick.

The students and the outsiders "borrowed," as one said, a bulldozer and a fire engine and used these in an effort to run down the marshals and get close enough to hurl bricks.

The bricks and timber used to set barricades on the drives leading to the administration building were taken from a science building under construction close at hand.

The marshals, for the most part, stayed close around the building except for forays to drive the attackers back. They captured 31 prisoners during the night's rioting.

Two of these were operating the bulldozer and the firetruck. The truck made two successful runs close to the marshals before it was stopped amid a cloud of tear gas.

Wasn't Student

The operator, a Justice spokesman said, was not a student.

Most of the action and the bitterest fighting took place in front of a tree-spotted, parklike area called University Circle.

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In a short while Mississippi State police, several hundred strong, were withdrawn from the immediate fighting area and then moved off the campus.

This left the marshals and a small contingent of Army engineers, sent here as a housekeeping unit for the marshals, to hold off the repeated attacks.

With State police gone the entrances to the university campus were left wide open and anyone who wished could walk down the darkened streets toward the administration building. The building was often bathed in drifting smoke from the bombs that had been set off.

As unexpectedly as the State police roadblocks were called off, they were restored four hours and 45 minutes later just as the Regular Army forces began appearing on the campus.

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Quiet Week End

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The State police, which had disappeared from Oxford late Friday, returned in force early Sunday. They sealed off the campus and would permit no one except students and those living on the campus. Newspapermen who had been given press quarters in the administration building were denied admittance.

Engineers Arrived

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Soon seven Army trucks drove up. The marshals, numbering about 70 lined up near the tracks in straggly military fashion. They stood and waited.

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After more telephoning and conferring the officials and marshals climbed into troop carriers and three sedans and took off from the airport.

Midway to the highway they met a Mississippi highway patrol car carrying Col. T. B. Birdsong, State safety commissioner, and University Chancellor J. D. Williams. Another conference followed and then the caravan moved off.

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The marshals quickly surrounded the administration building, and three hours later Mr. Meredith was brought to Oxford. He landed in a small plane at the airport accompanied by John Doar of the Justice Department and a marshal and was taken without incident through a gathering throng along the road to the university.

Reporters, not allowed in, watched from the entrance several blocks away. They could hear yells and cheers, occasionally and got frequent reports from students who came and went.

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Edwin O. Guthman, the Justice Department's public relations officer who had come to Oxford, came out and said in 10 minutes he would meet with reporters at a nearby motel for a briefing on what had happened.

The briefing still has not been held and the reporters' contacts with Mr. Guthman inside the administration building have been by telephone.

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Order Came

All of a sudden the explosion came. The order came and this time a cascade of canister and tear gas bombs fell amidst the advancing students. A squad of State police and newsmen were caught in the fumes.

Mr. Guthman explained later that Chief Marshal McShane gave the order after a piece of iron pipe had been hurled at a marshal and left a big dent in his helmet liner.

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Then the State police, angered because they were caught in the first tear gas barrage, and resenting, it seemed, the presence of the marshals, began withdrawing. Orders came up to them to keep back from the firing line.

Conditions rapidly worsened. Without the presence of the State police the attacks on the marshals grew bolder.

And more people, including women and girls, were pouring into the fighting area. There were advances and threats depending on the volume of tear gas.

Newsman Killed in R... Worked on His Day O...

NEW YORK (AP).—Paul Guihard, 30, the newsman who was killed last night at the University of Mississippi, worked in the New York bureau of Agence France Presse. He also was a part-time correspondent for the London Daily Sketch.

President Kennedy expressed today "the shock of the American people" at the slaying.

The President sent a telegram of condolence to Jean Marin, president and director general of Agence France Presse in Paris, which employed Mr. Guihard.

Mr. Kennedy told Marin:

"I want to express to you the shock of the American people on the death of your correspondent, Paul Guihard, last night in Oxford, Miss.

"The American people, I am sure, as well as the l... ing citizens in the ... Mississippi, share my ... that this could have h... in our country.

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Walker Aids Bands Fighting U. S. in Oxfo...

By REUBEN MODEEN
Associated Press Staff Writer

OXFORD, Miss., Oct. 1.—Little Rock was a skirmish. Oxford is a war.

The riots just five years ago in the capital of Arkansas were ugly and dangerous. In Oxford, the ugliness and danger is magnified to a gigantic scale.

And one of the ironies of the situation here today is that former Maj. Gen. Edwin A. Walker, who commanded the Federal troops that took over Little Rock, is on the opposite side of the fence here.

Mr. Walker whipped up the students and others on the campus of the University of Mississippi last night, when it became known that James H. Meredith, was on the campus.

After the Little Rock riots, Mr. Walker said that he found his duty there distasteful.

However, at the time, he was the crisp and professional soldier who gave no sign of his feelings. He set up his command post at the corner of Central High School—the object of the riots.

Contrasts in Size

The contrast is most marked by the size of the operations here. In Little Rock, it was largely quiet three or four blocks from the school. In Oxford today, there is little quiet anywhere. On the contrary, there is a brooding sense of disaster.

Several days ago Mr Walker said he planned to lead "some of thousands" of volunteers to aid the cause of Gov. Ross Barnett.

But his only troops last night were a band of students and other persons whom he led in a charge on the positions of the Federal marshals.

They got within 100 feet but the tear gas fumes repelled them.

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Later, Mr Walker was giving demonstrators advice on how to counteract the acrid tear gas fumes.

Mr. Walker appeared on the Oxford town square during the disturbance there today.

Mr. Walker marched ahead of a file of soldiers as he were their inspecting ... Finally, an Army ... asked him to move. He ... The officer ordered ... soldiers carrying rifles ... bayonets alongside him. ... The soldiers held their ... nets within inches of t... mer general, but did not ... him. The officer said ... thing to Mr. Walker ... walked off through the ...

CONGRESS

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Working with the President in his office and keeping in touch with events in Mississippi until 5:30 a.m. were his brother, Attorney General Robert F. Kennedy, and White House aides P. Kenneth O'Donnell, Theodore C. Sorensen, Lawrence F. O'Brien and Andrew T. Hatcher, associate press secretary.

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A Southeast West... man has learned just ho... gerous a poor loser can ...

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Nuclear Sub Saf...

LONDON, Oct. 1 (AP).—... British Admiralty has ... orders forbidding men a... aboard nuclear submarin... wear watches with lum... dials. The order said such ... emit a radioactive gas ... might affect instrumen... nuclear subs.

KENNEDY JOIN...

Washin... To Call ...

President Kennedy's u... troops in Mississippi ... latest in a long series of ... actions dating all the way ... to George Washington.

Washington used F... troops in 1794 to put dow... Whisky Rebellion, in ... farmers in Western Pe... vania objected to a liquo...

In 1799, President John... ams used troops in E... Pennsylvania against rebe... citizens who refused to ... Federal taxes. John Frie... arrested, and after ... trials, was pardoned by ... President.

PLAINTIFF'S EXHIBIT 13

...r 1, 1962

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Mr. Kennedy told Marin:

"I want to express to you the shock of the American people on the death of your correspondent, Paul Guihard, last night in Oxford, Miss.

"The American people, I am sure, as well as the law-abiding citizens in the State of Mississippi, share my sorrow that this could have happened in our country.

"I hope you will convey my condolences to his family."

Mr. Guihard, normally a desk editor, had been assigned to the integration story on his day off because his office was shorthanded.

He arrived in Mississippi yesterday, filed his first story from Jackson, then proceeded to Oxford.

Born in London of a French father and British mother, Mr. Guihard had worked for the French news agency for 10 years. He came here two years ago for a four-year assignment. He was a bachelor.

A novice playright, he was the author of a one-act avant garde comedy, "The Dark Chair." It played about five months off-Broadway last winter.

PAUL GUIHARD
—AP Wirephoto

Walker Aids Bands Fighting U. S. in Oxford

By [redacted]

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Finally, an Army officer asked him to move. He refused. The officer ordered several soldiers carrying rifles with bayonets alongside him.

The soldiers held their bayonets within inches of the former general, but did not touch him. The officer said something to Mr. Walker and he walked off through the crowd.

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$10,000 Winner At Dice Shot By 'Poor Loser'

A Southeast Washington man has learned just how dangerous a poor loser can be.

The "winner," Robert E. Anderson, 23, of 4004 E street, S.E., told police he was shot in the legs and robbed of $10,000 by one of the players in a dice game at a home in the 4400 block of Ninth street N.W. last Monday.

Mr. Anderson said the incident occurred as he was leaving the game with his winnings.

He said another player asked him for $800 and then added: "I hate to do this to you, but give me the money."

Mr. Anderson did not reply, but continued walking and was shot in the legs by the other man who then robbed him of the money.

Capt. Murray Kutner, commander of the robbery squad, said police have arrested a 22-year-old man and will take his case directly to the grand jury because the holdup suspect is presently on bond in connection with a narcotics case.

Nuclear Sub Safety

LONDON, Oct. 1 (AP).—The British Admiralty has issued orders forbidding men serving aboard nuclear submarines to wear watches with luminous dials. The order said such dials emit a radioactive gas that might affect instruments in nuclear subs.

Court Upholds Conviction of Fake Lawyer

The United States Court of Appeals today upheld the conviction of Daniel Jackson Oliver Wendell Holmes Morgan, who received a three-to-15-year prison sentence for impersonating a lawyer.

The 51-year-old ex-convict asked the Appellate Court to reverse the District Court mainly on the grounds that the sentence was "disproportionately harsh in relation to the essential nature of the offense."

Morgan also argued that he was incompetent to act as his own chief counsel. Although he hired a lawyer, Morgan led his own defense during the trial.

He was convicted last November on 13 counts of an indictment and faced a maximum sentence of 110 years in prison.

For a period of 16 months, Morgan impersonated a real lawyer, Lawrence Archie Harris, formerly of Washington, now living in Sacramento, Calif.

Polio Advisers Called by Terry

By the Associated Press

Surgeon General Luther L. Terry announced today he has called his special advisory committee on oral polio vaccines to meet tomorrow.

United States Public Health Service spokesmen said they know of no particular reason for the meeting other than for the advisers to consider any additional information that has become available since they met on September 15, and to take another look at the general situation.

"Tomorrow's meeting will be the fourth for the group, set up by Dr. Terry to evaluate the Nation's experience with oral polio vaccines and to make recommendations.

KENNEDY JOINS LIST

Washington Was First To Call Federal Troops

President Kennedy's use of troops in Mississippi is the latest in a long series of such actions dating all the way back to George Washington.

Washington used Federal troops in 1794 to put down the Whisky Rebellion, in which farmers in Western Pennsylvania objected to a liquor tax.

In 1799, President John Adams used troops in Eastern Pennsylvania against rebellious citizens who refused to pay Federal taxes. John Fries was arrested, and after several trials, was pardoned by the President.

Slave Act Riot

Troops were called out to assist marshals in getting Anthony Burns, a Negro, through the streets of Boston and on a ship during Fugitive Slave Act riots in 1854.

During the Reconstruction period, much of the South was under military rule, and Federal troops were used to put down disturbances on a number of occasions.

The railroad strikes of 1887, which brought on widespread disturbances, brought out Federal troops to quell them, primarily on the basis of State requests.

Coxey's Army in 1894 was

[fol. 2038]

DEFENDANT'S EXHIBIT 3

[Stamp—U. S. Court of Appeals—Filed Jul 27 1962—Edward W. Wadsworth, Clerk]
[Handwritten notation—I concur—JRB—D DeV]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself and others similarly situated, Appellant,

v.

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, Et Al., Appellees.

Order Vacating Stay, Recalling Mandate, and Issuing New Mandate Forthwith

Before Brown and Wisdom, Circuit Judges, and DeVane, District Judge.

Judge Wisdom:

In this case time is now of the quintessence. Time has been of the essence since January 1961 when James Meredith, in the middle of his junior year at Jackson State College (for Negroes), applied for admission to the University of Mississippi.

This Court heard three appeals of the case. In its opinion on the last appeal we concluded:

"... [F]rom the moment the defendants discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to discourage and to defeat by evasive tactics which would

> have been a credit to Quintus Fabius Maximus. . . . We see no valid, non-discriminatory reason for the University's not accepting Meredith. Instead, we see a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders."

Chronology highlights this case. June 25, 1962, this Court reversed the district court and remanded the case with instructions that the district court grant the injunction prayed for in the complaint. Rule 32 of the Rules of the [fol. 2039] Fifth Circuit, in part, reads:

> "Mandate shall issue at any time after twenty-one days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the mandate will be stayed for a further period of ten days. No further stay will be granted unless applied for within the delay given above. A mandate once issued will not be recalled except by the court and to prevent injustice."

During the twenty-one day period the defendants did not apply to this Court for a rehearing or for a stay of mandate. July 17 the mandate went down. Bright and early July 18, the attorney for the defendant presented to the Clerk for filing an order staying "the execution and enforcement of the mandate". The order, dated July 18 at Meridian, Mississippi, was signed by the Honorable Ben F. Cameron, United States Circuit Judge. Judge Cameron was not a member of the Court which heard any of Meredith's appeals. The Court which determined the cause was composed of Circuit Judges Brown and Wisdom and District Judge DeVane, sitting by designation. July 19 the Clerk, acting under instructions from this Court, telegraphed the parties through their counsel, requesting that they exchange and file, within five days, "statements of their positions with memorandum briefs for or against

the granting of any stays, including the vacating of the stay entered by Judge Cameron, the issuance by this Court of injunctions pending further appeal, or other appropriate action". The Court has now received and considered the statements and their supporting briefs.

It is unnecessary to decide whether a judge who is not a member of the Court determining the cause is not "a judge of the Court rendering the judgment or decree" within the meaning of 28 U.S.C.A. §2101(f). See Application of Chessman, 1954, 75 Cal. S. Ct. 85, 274 P. 2d 645. [fol. 2040] The Court is bigger than a single judge. Assuming, but without deciding, that Judge Cameron is indeed a judge of "the court rendering the judgment", we hold that the court determining the cause has inherent power to review the action of a single judge, whether or not the single judge is a member of the panel. Rosenberg v. United States, 1953, 346 U. S. 273, 73 S. Ct. 1152, 97 L. Ed. 1607, reconsideration denied, 346 U. S. 324, 73 S. Ct. 1171, 97 L. Ed. 1634, reconsideration denied, 346 U. S. 324, 73 S. Ct. 1178, 97 L. Ed. 1634. A contrary position would allow a judge in the minority, were he a member of the panel deciding the case, to frustrate the mandate of the majority. *And, it is unthinkable that a judge who was not a member of the panel should be allowed to frustrate the mandate of the Court.*

All of the members of this Court agree that when a mandate has been issued, it is logically and legally too late to stay it. Unless the Court should recall the mandate, the Court's control over the judgment below comes to an end after the mandate has been issued. That is the plain meaning of Rule 32. The authorities fully support the rule. Omaha Electric Light & Power Co. v. City of Omaha, 216 Fed. 848, setting aside on rehearing decree in 179 Fed. 455, which aff'd 172 Fed. 494, appeal dismissed 230 U. S. 123, 57 L. Ed. 1419, 33 S. Ct. 974; In re Nevada-Utah Mines & Smelters Corp., 204 Fed. 982, denying rehearing 202 Fed. 126. For this reason the purported stay is vacated and set aside.

Judge Brown and Judge Wisdom are also of the opinion that even if the thin residual control an appellate court might have over an issued mandate were broad enough to support a stay in exceptional cases, here the stay order should be vacated and set aside on the ground that it was improvidently granted.

[fol. 2041] Judge Cameron did not sit on this case. He did not have the opportunity of a sitting judge to study the record, to hear the argument, to discuss the facts and the law in the judges' conference on the case.

This is not a Chessman case. It is not a Rosenberg case. It is not a matter of life or death to the University of Mississippi. Texas University, the University of Georgia, Louisiana State University, the University of Virginia, other Southern universities are not shriveling away because of the admission of Negroes. There was no emergency requiring prompt action by a single judge. Apparently, however, there was studied action by the applicants' attorney to avoid asking the Court for a rehearing or for a stay.

In the matter of stays, this Court is not at all in the position of the Supreme Court. The Supreme Court is the final arbiter of the ultimate answer to any question sought to be preserved by a stay. Courts of Appeal, on the other hand, have disciplined themselves to take a restricted view of the propriety of issuing stays. When time is of the essence to the successful party in the Court of Appeals a stay should be predicated upon a doubtful question of law unresolved by earlier court decisions and there should be a reasonable likelihood of the Supreme Court finally deciding in favor of the applicant for a stay. See Rule 32 of the Rules of the Fifth Circuit Court of Appeals. As recently as October 26, 1961, the Fifth Circuit Court, with only Judge Hutcheson absent, rendered the following order:

> "Stays of Mandates of the Court after the denial of a motion for rehearing are to be cautiously granted to avoid situations such as where the applicant was the losing party in the trial court and there has been no grant of supersedeas."

Chief Justice Taft, in Magnum Import Co. v. Coty, 1923, 262 U. S. 159, 164, 43 S. Ct. 531, 67 L. Ed. 922, established [fol. 2042] guidelines for granting stays which have withstood the years:

> "The petition should, in the first instance, be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first; whether the case is one likely, under our practice, to be taken up by us on certiorari; and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. If it thinks a question involved should be ruled upon by this court, it may certify it. If it does not certify, it may still consider that the case is one in which a certiorari may properly issue, and may, in its discretion, facilitate the application by withholding the mandate or suspending its decree. This is a matter, however, wholly within its discretion. If it refuses, this court requires an extraordinary showing before it will grant a stay of the decree below pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and a decided balance of convenience before it will grant such stay."

In United States v. Louisiana, 1960, 364 U. S. 500, 81 S. Ct. 260, 5 L.Ed.2d 245 the Supreme Court was requested to grant a stay of a three judge court decision which nullified a series of Louisiana laws aimed at maintaining a statewide policy of school segregation. In denying the request for a stay, pending appeal, the Supreme Court ruled, "The scope of these enactments and the basis on which they were found in conflict with the Constitution of the United States are not matters of doubt." Similarly, in Evans v. Ennis,

1960, 364 U. S. 802, 81 S.Ct. 27, 5 L.Ed.2d 36, the Supreme Court denied a stay of a decision by the Court of Appeals for the Third Circuit holding a grade a year plan of desegregation invalid in the State of Delaware. Evans v. Ennis, 1960, 3 Cir., 281 F.2d 385. On the same day, the Supreme Court denied a stay in a school segregation case from Houston, Texas; Houston Independent School District v. Ross, 1960, 364 U. S. 803, 81 S. Ct. 27, 5 L.Ed.2d 36, where [fol. 2043] a district court rejected the school board plan and entered an order embodying its own grade a year plan. Houston Independent School District v. Ross, 1960, 5 Cir., 282 F.2d 95. See also Orleans Parish School Board v. Bush and Davis v. Williams, 1960, 364 U. S. 803, 81 S.Ct. 27, 5 L.Ed.2d 36. In Lucy v. Adams, 1955, 350 U. S. 1, 76 S.Ct. 33, 100 L.Ed. 3, the Supreme Court vacated a stay granted by a District Court of its order directing the admission of the first two Negroes to the University of Alabama pending appeal to the Fifth Circuit. The court there held that where the rights are personal and present and where the stay issue is coextensive with that on the merits, the stay should be denied. See also, Cooper v. Aaron, 1958, 358 U.S. at 27, 78 S.Ct. 1397, 3 L.Ed.2d 1. The Supreme Court also refused to reverse the action of Chief Judge Tuttle of the Fifth Circuit when he vacated a stay granted, by the District Court, pending appeal, in the University of Georgia case. Danner v. Holmes, 1961, 364 U.S. 939, 81 S.Ct. 376, 5 L.Ed. 2d 371. In this case Judge Tuttle's order stressed the fact that it was unlikely that this Court would reverse the District Court's decision in a case in which there had been a trial on a motion for preliminary injunction and a final hearing on the merits where all the facts aired in a lengthy trial and the judge made lengthy and careful findings of fact. See also, Hawkins v. Board of Control, 1958, 5 Cir., 253 F.2d 752, where this Court issued its mandate forthwith when the District Court delayed further adjudication of Hawkins' right to enter the University of Florida after nine years of litigation through the state court. In Tureaud v. Board of Supervisors of L.S.U., 1953, 346 U. S. 881, the

Supreme Court stayed this Court's reversal of the District Court's injunction order ordering the admission of a Negro student to L.S.U. As a result of the Supreme Court's stay pending certiorari, the injunction order of the District [fol. 2044] Court was reinstated and the applicant was able to enter the University of Louisiana.

The defendants have an absolute right to apply for a writ of certiorari—regardless of whether the mandate is stayed or issued. D ial of a stay is a minor inconvenience to the defendants. But to allow a stay would subject the successful litigant, Meredith, to the injustice of additional delays. Partly to avoid such a possibility, and to bring the case to a prompt ending after a full trial on the merits, this Court denied a preliminary injunction. Unfortunately, the wording of the mandate, *"that an injunction issue as prayed for in the complaint"* was so loose as to defeat the intentions of the Court. Accordingly, the mandate must be clarified by being recalled and amended.

There is no doubt as to the power of the court to recall its mandate. Thus, in Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 5 Cir., 1938, 97 F.2d 249, the Fifth Circuit held: "[The Court has the] power to recall the mandate and rehear the case, though too late under our rules regularly to do so." The opinion was written by Judges Sibley, Holmes, and Mize. In that case the term at which judgment was rendered had not closed. It had not in this case. However, "the power exists to recall the mandate and set aside the judgment even after the expiration of the term during which the judgment became final, but a court of appeals in the exercise of that power usually is guided by its own applicable rules, such as a requirement that good cause must be shown in order for a mandate to be recalled." 14 Cyclopedia of Federal Procedure, §69.14. See Hines v. Royal Indemnity Co., 6 Cir., 253 F.2d 111. See also Judge Holmes' opinion for this Court in Sun Oil Co. v. Burford, 5 Cir., 1942, 130 F.2d 10.

[fol. 2045] It is now forthwith ordered that the mandate and judgment of this Court be recalled and amended by

making explicit the meaning that was implicit in this Court's conclusions as expressed throughout its opinion in this cause, dated June 25, 1962. To this end, the order will now read as follows:

> The case is reversed and remanded with directions to the District Court forthwith to grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi. Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi, this Court herewith issues its own preliminary injunction enjoining and compelling each and all of said parties to admit plaintiff-appellant to, and allow his continual attend-
> [fol. 2046] ance at the University of Mississippi, further prohibiting and preventing said parties or any other of them from excluding said plaintiff-appellant from attendance to and continued attendance thereafter on the same basis as other students at the University of Mississippi.

Judge Cameron's stay order dated July 18 is forthwith vacated and set aside. The mandate in this cause is forth-

with recalled and amended as set forth herein. This Court's preliminary injunction against the defendants-appellees is forthwith issued.

Judge DeVane concurs in the result.

A true copy

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
/s/ (Signature Illegible)
Deputy

(Seal)

New Orleans, Louisiana

May 14, 1964

[fol. 2047]

DEFENDANT'S EXHIBIT 4

[Stamp—U. S. Court of Appeals—Filed Sep 12 1962—Edward W. Wadsworth, Clerk]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

JAMES MEREDITH, Petitioner,

vs.

CHARLES DICKSON FAIR, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the movant and of the opposition of the respondents thereto,

IT IS ORDERED that the orders of Circuit Judge Ben F. Cameron of the United States Court of Appeals for the Fifth Circuit of July 18, 1962, July 28, 1962, July 31, 1962, and August 6, 1962, purporting to stay the effectiveness of the mandates of the United States Court of Appeals for the

Fifth Circuit be, and the same are hereby, vacated and that the judgment and mandate of said Court shall be effective immediately.

IT IS FURTHER ORDERED that the respondents be, and they are hereby, enjoined from taking any steps to prevent enforcement of the United States Court of Appeal's judgment and mandate pending final action by this Court on the petition for writ of certiorari now on the docket.

/s/ HUGO L. BLACK
Associate Justice of the Supreme
Court of the United States

Dated this 10th day of September, 1962.

A true copy JOHN F. DAVIS

Test:

Clerk of the Supreme Court of the United States
Certified this Tenth day of September 1962

By B. F. CULLINAN
Chief Deputy

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By (Signature illegible)
Deputy

New Orleans, Louisiana May 14, 1964

[fol. 2048]

DEFENDANT'S EXHIBIT 5

[Stamp—Southern District of Mississippi—Filed Sep 14 1962—by Loryce E. Wharton, Clerk, by Deputy]

IN THE UNITED STATES DISTRICT COURT

FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

JAMES HOWARD MEREDITH, On Behalf Of Himself And Others Similarly Situated

V. No. 3130

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, et al.

ORDER GRANTING PERMANENT INJUNCTION

This matter is now before this Court by virtue of the Mandate of the United States Court of Appeals for the Fifth Circuit and the Mandate of Mr. Justice Black of September 10, 1962 setting aside all stays granted by Judge Ben F. Cameron and putting into effect the mandates of the Court of Appeals for the Fifth Circuit enjoining the Trustees and officials of the University of Mississippi from taking any steps to prevent enforcement of the mandates of the Court of Appeals for the Fifth Circuit, and this Court having now considered the mandates of the Court of Appeals for the Fifth Circuit of July 17, 1962, July 27, 1962 and its final order of August 4, 1962, and this Court having considered the mandate of July 17, 1962 wherein the Court of Appeals reversed the judgment of the District Court with directions to this Court to issue an injunction as prayed for in the complaint and by its mandate of July 27, 1962 ordered that the judgment of that Court issued as and for the mandate on July 17, 1962, be recalled and amended by making explicit the meaning that was im-

plicit as expressed in its opinion dated June 25, 1962 and ordering that this Court "forthwith grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining [fol. 2049] and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi."

And by its mandate of August 4, 1962 the Court of Appeals reaffirmed its orders of July 17, 1962 and July 27, 1962 in the following language: "All of our orders of July 17, July 27 and this date, therefore continue in full force and effect and require full and immediate obedience and compliance."

Now, therefore, it is here ordered, adjudged and decreed that the plaintiff, James Howard Meredith, be and he is hereby granted all the relief that is prayed for by him in his complaint and that the defendants, Charles Dickson Fair, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Louisville, Mississippi; Euclid Ray Jobe, Executive Secretary of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Jackson, Mississippi; Edgar Ray Izard, Hazlehurst, Mississippi; Leon Lowrey, Olive Branch, Mississippi; Ira Lamar Morgan, Oxford, Mississippi; Malcolm Mette Roberts, Hattiesburg, Mississippi; William Orlando Stone, Jackson, Mississippi; S. R. Evans, Greenwood, Mississippi; Verner Smith Holmes, McComb, Mississippi; James Napoleon Lipscomb, Macon,

Mississippi; Tally D. Riddell, Quitman, Mississippi; Harry Gordon Carpenter, Rolling Fork, Mississippi; Robert Bruce Smith, II, Ripley, Mississippi and Thomas Jefferson Tubb, West Point, Mississippi, Members of the Board of Trustees of State Institutions of Higher Learning; James Davis Williams, Chancellor of the University of Mississippi, Oxford, Mississippi; Arthur Beverly Lewis, Dean of the College of Liberal Arts of the University of Mississippi, [fol. 2050] Oxford, Mississippi, and Robert Byron Ellis, Registrar of the University of Mississippi, Oxford, Mississippi, and each of them, their agents, servants, employees, successors, attorneys and all persons in active concert and participation with them be and they hereby are permanently restrained and enjoined from:

(1) Refusing to admit plaintiff, James Howard Meredith immediately to the University of Mississippi and that they shall each of them be, and they are hereby required to admit him to the University of Mississippi upon the same terms and conditions as applicable to white students;

(2) From interfering in any manner with the right of plaintiff, James Howard Meredith to matriculate in, or attend the University of Mississippi;

(3) From taking any action or doing any act or being guilty of any conduct which will impair, frustrate or defeat his right to enter the University of Mississippi;

(4) Refusing to admit the plaintiff, James Howard Meredith to the University of Mississippi upon his applications heretofore filed, all of which are continuing applications.

It is further ordered that said defendants, or any of the classes of persons referred to, are prohibited and enjoined from excluding the said James Howard Meredith from admission to continued attendance at the University of Mississippi.

It is further ordered that the defendants, their servants, agents, employees, successors and assigns, and all persons

acting in concert with them, are enjoined to admit the plaintiff, James Howard Meredith to the University of Mississippi upon his applications heretofore filed and they are enjoined from excluding the said James Howard Meredith from admission to continued attendance at the University of Mississippi or discriminating against him in any way whatsoever because of his race.

[fol. 2051] It is further ordered that a copy of this order and injunction be served by the United States Marshal on each of the defendants herein.

ORDERED, this the 13th day of September, 1962.

/s/ S. C. MIZE
United States District Judge

[Seal]

A true copy, I hereby certify.

Loryce E. Wharton, Clerk, By: E. Mathison, Deputy Clerk.

[fol. 2052]

DEFENDANT'S EXHIBIT 6

[Stamp—U. S. Court of Appeals—Filed Sep 28 1962—Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,475

JAMES H. MEREDITH,

Appellant,

vs.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae and Petitioner,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

(Marginal initials illegible)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF CIVIL CONTEMPT.

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

This Court having on September 25, 1962 issued orders requiring Ross R. Barnett to appear before this Court today at 10:00 A. M., to show cause, if any he has, why he should not be held in civil contempt of the temporary restraining orders entered in this action on September 25, 1962, and Ross R. Barnett having been given notice of the orders to show cause, and it having been regularly called

on the calendar for hearing at 10:00 A. M. this day, and Ross R. Barnett having failed to appear or respond in person or by counsel, and having failed to deny the factual statements contained in the verified application of the United States, and of the appellant and

The Court having heard and received evidence on behalf of the United States and of the appellant, and having de- [fol. 2053] liberated and considered the legal issues involved, now renders its Findings of Fact and Conclusions of Law and Judgment as follows:

FINDINGS OF FACT

1. Since this Court entered its order of July 28, 1962, and the District Court for the Southern District of Mississippi entered its order on September 13, 1962, requiring the admission of James H. Meredith to the University of Mississippi, Ross R. Barnett, as Governor of the State of Mississippi, has issued a series of proclamations calling upon all officials of the state to prevent and obstruct the carrying out of the Court's orders with respect to the admission of James H. Meredith to the University. Two of these proclamations were issued by Ross R. Barnett on September 24 and September 25, 1962.

2. On September 25, 1962, this Court entered its temporary restraining orders restraining Ross R. Barnett from interfering with or obstructing in any manner or by any means the enjoyment of rights or the performance of obligations under this Court's order of July 28, 1962 and the order of the District Court of September 13, 1962.

3. At approximately 4:30 P. M. on September 25, 1962, Ross R. Barnett, having full knowledge of the existence and terms of this Court's temporary restraining orders, went to the office of the Board of Trustees of Institutions of Higher Learning in Jackson, Mississippi at a time when James H. Meredith was due to appear at the office and be enrolled as a student in the University of Mississippi, pursuant to the

order of this Court. When James H. Meredith arrived at the office and sought to enter for the purpose of enrolling, Ross R. Barnett deliberately prevented him from entering and told him that his application for enrollment was denied by Ross R. Barnett.

4. On September 26, 1962, James H. Meredith sought to enter the campus of the University of Mississippi in Oxford, [fol. 2054] Mississippi. He was prevented from entering by Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Ross R. Barnett.

5. The conduct of Ross R. Barnett in preventing James H. Meredith from enrolling as a student in the University of Mississippi has been with the deliberate and announced purpose of preventing compliance with the orders of this and other federal courts.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the person of Ross R. Barnett.

2. Ross R. Barnett is in contempt of the temporary restraining orders entered by this Court on September 25, 1962.

[fol. 2055] JUDGMENT OF CIVIL CONTEMPT

Upon the foregoing findings of fact and conclusions of law:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

Ross R. Barnett is in civil contempt of the temporary restraining orders of this Court entered September 25, 1962; that such contempt is continuing; and that Ross R. Barnett shall be committed to and remain in the custody of the Attorney General of the United States and shall pay a fine to the United States of $10,000. per day unless on or before

Tuesday, October 2nd, 1962 at 11:00 a.m. he shows to this Court that he is fully complying with the terms of the restraining orders, and that he has notified all law enforcement officers and all other officers under his jurisdiction or command:

(a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;

(b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.

Nothing herein shall prevent a later assertion of a charge of criminal contempt against Respondent.

[fol. 2056] Jurisdiction is hereby reserved for such other and further orders as may be appropriate.

Judges Jones, Gewin and Bell dissent from that portion of the judgment imposing a fine upon the Respondent.

[Seal]

A true copy

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

/s/ (Signature Illegible)
Deputy

New Orleans, Louisiana

May 14, 1964

[fol. 2057]

DEFENDANT'S EXHIBIT 7

It is time to move. We have talked, listened, and been pushed around far too much by the Anti-Christ Supreme Court. Rise . . . . . to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard: Ten thousand strong from every State in the union. Rally to the cause of freedom. The Battle Cry of the Republic. Barnett, Yes! Castro, No! Bring your flag, your tent, and your skillet. It's time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi.

The last time—in such a situation—I was on the wrong side. That was in Little Rock, Arkansas in 1957 and 1958. This time I am out of uniform and I am on the right side. And I will be there.

[Handwritten notation—Station KWKH—Shreveport, La. —"Party Line"—Wed Sept 26 '62 about 7:30 P. M.—by Ted Walker]

[fol. 2058]

DEFENDANT'S EXHIBIT 8

I am in Mississippi—beside Governor Ross Barnett.

I call for a national protest against the conspiracy from within.

Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.

This today is a disgrace to the Nation in "Dire Peril" —a disgrace beyond the capacity of anyone except its enemies. This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a nation.

EDWIN A. WALKER

[Handwritten notation—Sat. Sept 29th (about 5:00 P.M.) —from Jackson—from Ney Williams res.]

[fol. 2059]

DEFENDANT'S EXHIBIT 11

ON TO MISSISSIPPI.

As the forces of the New Frontier assemble to the North let history be witness to the courage and determination that calls us to Oxford to support a courageous Governor. His lawful stand for state sovereignty is supported by thousands of people beyond the state borders now on the way to join you at Oxford.

[Handwritten notation—Sunday—Sept 30 Called back by Ted from Oxford—about 9: A.M.]

[fol. 2060]

DEFENDANT'S EXHIBIT 12

RADIO INTERVIEW—WNOE

FRIDAY, SEPTEMBER 28, 1962

GENERAL EDWIN WALKER

INTERVIEWER: General Walker, do you still intend to follow through with your plans to go to Mississippi after the government warning today, supposedly that you will be held in contempt?

GENERAL WALKER: I plan to go to Mississippi as I had intended if and when federal troops are used in Mississippi. I do not feel that there is any constitutional law that prevents a citizen moving from state to state or place to place as he sees fit, and there are hundreds of causes moving to Mississippi, or that are reflecting their attitudes in Mississippi, and I am only a small part of this movement, and I intend to be there if and when the decision is made to use federal troops there.

INTERVIEWER: Well, do you personally, sir, believe that that order will be given by Attorney General Robert Kennedy?

GENERAL WALKER: I would hope that they certainly do not use federal troops as it was a catastrophe when they did it before in 1957 and '58 in Little Rock. It was unconstitutional then, as several governors had pointed out, and also many members of the bar, and they should read the [fol. 2061] Constitution more carefully and they would recognize this is unconstitutional. There is no law that requires integration.

INTERVIEWER: Well now, sir, what do you think the repercussions would be if these federal troops are sent to Oxford, and, as a matter of fact, the State of Mississippi?

GENERAL WALKER: I am not sure. It depends on what their mission is and what they are supposed to do and how they carry out that mission, and what the intents are after they get to Mississippi. I would say it certainly is obvious now that the cause of state rights extends far beyond Mississippi, and practically every state of the union is recognizing the importance of the sovereignty of the state, and that is very much involved, greatly involved, in this issue.

INTERVIEWER: Sir, what has been the general reaction to your plans of going to Mississippi with groups of citizens? I'm sure you have heard from quite a few people throughout the United States.

GENERAL WALKER: We are just utterly swamped here with telephone calls and offers of help and assistance and notifications that people are moving to Mississippi and that they want to assist in every way possible; that they are opposed to what the administration is doing in opposing the governor in Mississippi. I can assure you that the telephones shall never stop ringing. Calls are backed up six

[fol. 2062] and eight deep. People are telling me it's taking four or five hours to even get into our telephone system, and we have seven phones in the house. Messages are coming in offering support in groups of 10 to 20 to even 2,000.

INTERVIEWER: Well, sir, do you find these telegrams and well wishes from people throughout the United States are predominantly southern, or are they also coming from the north and the west and from the east?

GENERAL WALKER: They are from all parts of the country. Many have come in from Ohio, just a few minutes ago from St. Paul, quite a few from New York, Florida, of course, Los Angeles, and many of the states in between. I have just gotten off the line to Seattle, Washington.

INTERVIEWER: Do you have plans, sir, for rallies, if and when the federal troops are entered into Mississippi, of a certain point in the state where all your followers will then meet with you to protest the integration, if it does come about?

GENERAL WALKER: I intend to join the movement. There are thousands of people, I am sure, already in Mississippi—probably hundreds of thousands there—that are already standing beside their Governor Barnett. The best place to do this would, of course, be at the Capitol or at Oxford, at the university, since that is where the issue is involved, and I am sure that that is where most of the move-[fol. 2063] ments will move to, to show the grass roots movement in this issue.

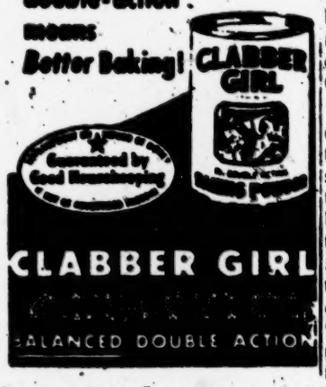
INTERVIEWER: One final question, sir. Just what were your thoughts when acting as an officer of the United States Army when you were commanded to enter Little Rock? What were your thoughts in 1957, seeing these same type of citizens in another state, so opposedly or reportedly opposing federal seizure, or federal acts, against a sovereign state, supposedly?

GENERAL WALKER: At that time I knew it was unconstitutional, and felt that it was at that time, in using troops, and it should never have been done. My principles have not changed, but now, out of uniform, I'm on the other side, and this time on the right side, and that is in opposition to unconstitutional actions by the federal government, and I'm very happy to be free from the requirements of the military service in those cases where the military service has been unconstitutionally used against the citizens of the United States. It would appear to me with all the problems in the international situation, and with an enemy, and a very critical enemy, 90 miles off our coast, it would be as utterly fantastic, as well as impossible, that the administration should now be in a cause and a purpose which is as to the disunity of the United States of America, when the important thing is today that all Americans be unified [fol. 2064] against the one and only important enemy in the world today—the one who has established that he intends to bury us—and by the President's own statement, this country is in dire peril.

You should know THIS about baking...

It's the BALANCE of ingredients in baking powder that governs its leavening action. Only when these are scientifically *balanced* can you be sure of uniform action in the mixing bowl plus that final, balanced rise to light and fluffy texture in the oven . . . That's the story of Clabber Girl's *balanced* double action . . . Better Baking everytime!

BALANCED double-action means Better Baking!



Text of General's Speech to Students

Here is the text of the speech made by Maj. Gen. Edwin A. Walker to the students of Little Rock Central High School yesterday morning:

Young ladies and gentlemen of Central High School. Mr. Blossom, your superintendent of schools, has asked me to come to your school this morning and discuss with you the situation in Little Rock and what it means to you students. I welcome this opportunity to do so.

As you know, the Fourteenth Amendment to the Constitution of the United States guarantees to all citizens the equal protection of the laws. Since the adoption of this amendment, many states have provided separate schools for their children on the basis of color. The laws establishing such schools have, however, been challenged in the courts; and about three years ago, the Supreme Court of the United States determined that such laws are contrary to the provisions of the Fourteenth Amendment and consequently invalid. This decision by the highest court in the land is, of course, an authoritative interpretation of our Constitution, is binding on all citizens and government officers, both state and federal, and may not, under our law, be changed except by an amendment to the Constitution.

Because of the Supreme Court's decision, it became necessary for those states maintaining separate schools to revise their systems to eliminate distinctions on the basis of color. The nature of these plans was left to the states and local communities, subject to approval by the local federal district courts. The Little Rock School District prepared such a plan which was approved by both the District Court and Circuit Court of Appeals. This plan provides for a very gradual abandonment of the separate school system starting this year.

Subsequent to the approval of this plan, attempts were made in the courts to prevent the school authorities from putting it into effect.

I need not go into the details of this litigation; sufficient to say, it was unsuccessful, and that the plan as originally approved remains unchanged and in full force and effect.

During the past few weeks, as you are well aware, the situation in Little Rock has been such as to prevent the entrance of a few students into your high school. Therefore, to see that the laws of the land be faithfully executed, the president has found it necessary to call the National Guard of Arkansas into the federal service and has directed that this force and such other armed forces as may be made available be used to enforce the orders of the court. As an officer of the United States Army, I have been chosen to command these forces and to execute the president's orders.

What does all this mean to you students? You have often heard it said, no doubt, that the United States is a nation under law and not under men. This means that we are governed by laws, properly decided upon by duly constituted authority, and not by the decrees of one man or one class of men. Since this is true, it means that we are all subject to all the laws, whether we approve of them personally or not, and as law-abiding citizens, have an obligation in conscience to obey them. There can be no exceptions; if it were otherwise, we would not be a strong nation but a mere unruly mob.

I believe that you are well-intentioned, law-abiding citizens, who understand the necessity of obeying the law, and are determined to do so. You have nothing to fear from my soldiers, and no one will interfere with your coming, going or your peaceful pursuit of your studies. However, I would be less than honest if I failed to tell you that I intend to use all means necessary to prevent any interference with the execution of your School Board's plan. This is what I have been ordered to do, and I intend to carry out my orders. Those who interfere or disrupt the proper administration of the school will be removed by the soldiers on duty and turned over to the local police for disposition in accordance with the laws of your community.

One last word about my soldiers. They are here because they have been ordered to be here. They are seasoned, well-trained soldiers, many of them combat veterans. Being soldiers, they are as determined as I to carry out their orders. However, as I stated before, the law-abiding people have nothing to fear from them. They have been carefully instructed not to molest any law-abiding citizen in his person or property, and they will obey these orders. Since a peaceful atmosphere must be maintained in the school and its vicinity, it may be necessary for them to issue instructions concerning such things as loitering, assembling in large groups, and otherwise making it difficult for them to perform their duties. I earnestly ask that you co-operate, for your own benefit and ours.

I wish you all success in your school year and Mr. Matthews [the principal], I thank you for the opportunity to talk to the student body.

Irish Ambassador's Son Shot By Friend

Washington, Sept. 25 (AP). — The son of Irish Ambassador John J. Hearne was shot and killed today. Police said a pistol in the hands of a friend discharged accidentally.

The victim, John Justin Hearne, 20, died with a bullet in his chest.

Police Capt. Albert Embrey said the pistol was fired by John E. Kieffer Jr., 22, in an office building where Kieffer's father operates the Universal Research and Consultants, Inc., a public relations firm.

Police quoted young Kieffer as saying the shooting occurred when he started to take the pistol from a drawer. Kieffer added, police said, that young Hearne also reached for the weapon and might have touched the trigger.

7 Brazilians Killed In Rent Battle

Rio de Janeiro, Brazil, Sept. 25 (AP).—A battle over rents between squatters at Santo Antonio and a colonization company killed at least seven persons and sent many Brazilian villagers across the border to Argentina for refuge, reports reaching here said today.

Santo Antonio is in the southern tip of Brazil.

Lights Out!

New York, Sept. 25 (AP).—An all-night beacon near the top of the Empire State Building will be kept turned off until November 1 so as not to interfere with the southern migration of birds. Many birds, thrown off course by the light, have crashed into the building or the ground.

Satchmo Changes His Mind

Davenport, Ia., (UP).—Louis ("Satchmo") Armstrong greeted the news of President Eisenhower's action in the Little Rock situation by proclaiming today "this is the greatest country." He indicated he may change his mind about abandoning a government-sponsored tour of Russia.

"Things are looking a lot better than they did before," the Negro jazz trumpeter told newsmen today.

He said "it was just wonderful" the way President Eisenhower explained his action in sending troops to Little Rock.

"The president said the troops are going down there and that's all right with me, it won't start any trouble," Armstrong said.

Armstrong last week accused Eisenhower of having "no guts" in dealing with the Little Rock situation and announced he would turn down a State Department invitation to tour Russia. He changed his tune today.

He said he had sent the president a telegram saying, "if you decide to walk into the schools with the colored kids, take me along daddy. God Bless you."

Biggest Truck

Lyon, France, Sept. 25 (AP).—The firm of Berliet will unveil what it calls the world's biggest and strongest truck at the Paris auto show opening October 3. Made for Sahara desert work, it carries 100 tons of freight, has a 600-horsepower engine weighing 5,520 pounds, carries 400 gallons of fuel, and has wheels 7 feet 3 inches in diameter. The main Sahara interest now is oil.

[fol. 2066]

DEFENDANT'S EXHIBIT 15

GENERAL SERVICES ADMINISTRATION

NATIONAL ARCHIVES AND RECORDS SERVICE

THE NATIONAL ARCHIVES

(Seal)

ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I CERTIFY That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Proclamation No. 3497

Obstructions of justice in the State of Mississippi

IN TESTIMONY WHEREOF, I, WAYNE C. GROVER, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Director, Office of the Federal Register of the National Archives, in the District of Columbia, this 20th day of March, 1964.

/s/ WAYNE C. GROVER
Archivist of the United States

By /s/ DAVID C. EBERHART

[fol. 2067]

OBSTRUCTIONS OF JUSTICE IN THE STATE OF MISSISSIPPI

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and

WHEREAS such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under those laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and

WHEREAS I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained:

NOW, THEREFORE, I, JOHN F. KENNEDY, President of the United States, under and by virtue of the authority vested in me by the Constitution and laws of the [fol. 2068] United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333

and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peaceably forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 30th day of September in the year of our Lord nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.

By the President:

/s/ JOHN F. KENNEDY

/s/ GEORGE W. BALL
Acting Secretary of State

[Stamp—The National Archives and Records Service—Filed and Made Available for Public Inspection—Sep 30 10:50 AM '62—In the Office of the Federal Register]

[fol. 2069]

DEFENDANT'S EXHIBIT 16

GENERAL SERVICES ADMINISTRATION

NATIONAL ARCHIVES AND RECORDS SERVICE

THE NATIONAL ARCHIVES

(Seal)

ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I CERTIFY That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Executive Order 11053

Providing assistance for the removal of unlawful obstructions of justice in the State of Mississippi

IN TESTIMONY WHEREOF, I, WAYNE C. GROVER, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Director, Office of the Federal Register of the National Archives, in the District of Columbia, this 20th day of March, 1964.

/s/ WAYNE C. GROVER
Archivist of the United States

By /s/ DAVID C. EBERHART

[fol. 2070]

EXECUTIVE ORDER

PROVIDING ASSISTANCE FOR THE REMOVAL OF UNLAWFUL OBSTRUCTIONS OF JUSTICE IN THE STATE OF MISSISSIPPI

WHEREAS on September 30, 1962, I issued Proclamation No. 3497 reading in part as follows:

"WHEREAS the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and

"WHEREAS such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under those laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and

"WHEREAS I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained:

[fol. 2071] "NOW, THEREFORE, I, JOHN F. KENNEDY, President of the United States, under and by virtue of the authority vested in me by the Constitution and laws of the United States, including Chapter 15 of Title 10 of

the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peaceably forthwith;" and

WHEREAS the commands contained in that proclamation have not been obeyed and obstruction of enforcement of those court orders still exists and threatens to continue:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, including Chapter 15 of Title 10, particularly Sections 332, 333 and 334 thereof, and Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. The Secretary of Defense is authorized and directed to take all appropriate steps to enforce all orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit and to remove all obstructions of justice in the State of Mississippi.

Section 2. In furtherance of the enforcement of the aforementioned orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, the Secre- [fol. 2072] tary of Defense is authorized to use such of the armed forces of the United States as he may deem necessary.

Section 3. I hereby authorize the Secretary of Defense to call into the active military service of the United States, as he may deem appropriate to carry out the purposes of this order, any or all of the units of the Army National Guard and of the Air National Guard of the State of Mississippi to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders. In carrying out the provisions of Section

1, the Secretary of Defense is authorized to use the units, and members thereof, ordered into the active military service of the United States pursuant to this section.

Section 4. The Secretary of Defense is authorized to delegate to the Secretary of the Army or the Secretary of the Air Force, or both, any of the authority conferred upon him by this order.

/s/ JOHN F. KENNEDY

THE WHITE HOUSE

September 30, 1962

[Stamp—The National Archives and Records Service—Filed and Made Available for Public Inspection—Sep 30 11:30 AM '62—In the Office of the Federal Register]

Walker Mentally Able To Stand Trial, Judge Says

EVE NOV 22 1962

OXFORD, Miss., Nov. 22 (AP)—Edwin A. Walker, the controversial former Army major general, has been ruled mentally competent to stand trial on charges of seditious conspiracy and inciting an insurrection.

U. S. District Judge Claude F. Clayton, who is an Army National Guard brigadier general, handed down the ruling Wednesday at the end of a two-day hearing to determine whether there was reasonable cause for a mental examination of the 53-year-old Walker.

The lean Texan was arrested here Oct. 1 after the desegregation rioting at the University of Mississippi which killed two persons.

Shortly before Clayton ruled in the Walker case, he ordered Chief U. S. Marshal James McShane released from the Lafayette County jail. McShane had surrendered to Sheriff Joe Ford on state charges of inciting a riot and breach of peace during the rioting.

McShane and one other person—who has not yet been identified—were indicted last week by the county grand jury after it probed the rioting which followed the arrival of Negro James H. Meredith on the university campus.

The judge set no date for Walker's trial. He accepted a mental test given Walker earlier this month at Dallas.

The judge said the examination made by Dr. Robert L. Stubblefield, professor at Southwestern Medical School in Dallas, "was essentially negative. No opinion was expressed. It did not say whether he was sane or insane."

Clayton added that from his observation of Walker's behavior while testifying Wednesday he "found that this man is competent" to aid in his defense of such criminal charges as may be presented.

Stubblefield's report said Walker is "functioning currently at the superior level of intelligence."

The report said, "on the Wechsler adult intelligence scale, his reasoning, judgment, vocabulary, fund of information and organizational ability were all above average for his age group."

Judge Clayton overruled defense objections that his earlier order for a mental test be erased from the court record. Although the judge held that Walker was mentally competent to stand trial, the primary purpose of the hearing was the defense motion to strike the sanity test order.

Clyde J. Watts of Oklahoma City, one of Walker's four attorneys, said Clayton's decision in placing the mental test in the case record would be appealed. Walker said afterward he felt he had been subjected to a great injustice.

Clayton, recently chosen to command the 31st (Dixie) Division of Mississippi and Alabama national guardsmen, expressed the greatest respect for Walker's military career.

Walker was questioned by his attorneys during the hearing and gave details of his arrest by federal troops. Neither he nor his attorneys mentioned his actions the night of the rioting.

Walker also discussed his controversial reprimand and loss of command of the 24th Division over a troop indoctrination program in Germany. He later resigned his Army commission.

Clayton said he would hold a hearing for McShane late in January. The Justice Department claimed McShane was "doing duties as a federal official" on the university campus.

After the release on a writ of habeas corpus of the husky, former New York policeman, County District Attorney Jesse Yancy Jr., said, "the case now rests in the hands of the federal court . . . However, the state contends McShane made unlawful acts and should be prosecuted in state court."

McShane was in charge of a team of some 300 federal marshals accompanying Meredith onto the campus.

In other developments:

The Mississippi Senate approved a resolution which blamed rioting at the university on the "ruthless and corrupted administration in Washington headed by the Kennedy klan."

[fol. 2073]

DEFENDANT'S EXHIBIT 17

1485

U. S. Orders Mental Tests For Walker

MORN OCT 3 1962

DEY 18

Former General's Attorneys Plan to Fight Court's Decision

SPRINGFIELD, Mo., Oct. 2 (AP)—Former Maj. Gen. Edwin A. Walker, a key figure in week-end battling over admission of a Negro to the University of Mississippi was ordered placed under psychiatric examination in a federal prison Tuesday.

His attorneys announced immediately they would fight the order Wednesday in U. S. District Court here. They instructed Walker to refuse to co-operate with prison physicians.

Walker was locked in the U. S. Medical Center here. He was brought from Oxford, Miss., in a U. S. Border Patrol plane Monday night after his arrest and arraignment on charges of inciting insurrection and seditious conspiracy.

U. S. District Attorney F. Russell Millin of Kansas City told reporters the psychiatric examination order was issued in Oxford Tuesday afternoon by U. S. District Judge Claude Clayton. Millin said it prevents Walker from obtaining his release under a $100,000 bond set Monday at his arraignment.

Millin said he understood the psychiatric examination would take 60 to 90 days and that during that period Walker would not be bailable.

However, in Washington, Rep. Bruce Alger, Texas Republican, said Attorney General Robert F. Kennedy had

Turn to Walker on Page 8

WALKER

Continued From Page 1

assured him Walker would be released on bail as any other citizen has the right to be. Kennedy was quoted as saying no examination of the ex-general could be made without a court hearing.

Alger told reporters he had telephoned the attorney general in view of his deep concern that Walker "has been sent to a mental hospital before having a court hearing."

Saying he admired Walker's "anti-Communist work," Alger said he was concerned for his rights as he would be for any of his other Texas constituents.

Clyde J. Watts, spokesman for Walker's corps of attorneys, said they would ask U. S. District Judge John W. Oliver, holding court here, for either a writ of habeas corpus freeing Walker or for an injunction against any surgical or medicinal treatment of the former general without the presence of a psychiatrist or physician approved by Walker's counsel.

Watts said he and two Springfield attorneys, George Donagan and William Wear, talked to Walker in the medical center Tuesday morning and found him "clear, lucid, undisturbed and possessing all his mental faculties."

Watts said they told Walker "that his response to questions asked by physicians or psychiatrists at the medical center should be only his name, rank and serial number—the same as an American soldier who has been captured."

Watts, reading from a four-page statement, told reporters he had talked to Judge Clayton at Oxford by telephone and was informed the order committing Walker for psychiatric examination was issued on the basis of testimony by Dr. Charles E. Smith, a Bureau of Prisons psychiatrist. Watts quoted Judge Clayton as saying Dr. Smith had not seen Walker.

Watts said he had known Walker since boyhood and "I can assure the public of the United States he is completely sound mentally and physically."

Walker Version

Watts said that during their talk with Walker Tuesday morning, Walker gave them his version of what happened at Oxford.

"He at no time led any assault, charge or overt act against any state or federal officer, including U. S. marshals," Watts said. "He at no time incited anyone to riot or disorder."

Walker told his lawyers, Watts said, that he contacted the sheriff in Oxford Saturday and Sunday and advised him he was "there to observe developments."

1487

Walker said he was eating dinner S[illegible]night during President [illegible]y's television speech to the nation when reporters advised him of a demonstration at the Ole Miss campus. He said he went there and found a "scene of considerable disturbance." He said he was standing near a Confederate monument about 300 yards from the administration building when several persons asked him to make a statement.

"General Walker made a statement that participants should avoid all seemblance of violence—that the real war was in Cuba, not Mississippi," Watts said.

'No Missile'

The general told the lawyers his remarks lasted about five minutes, and that as he watched the students going toward the U. S. marshals and then moving back, he was no closer than 30 feet to the officers.

Watts said Walker had "no missile, weapons or rocks" and that "he counseled the participants to avoid violence.

Watts said he learned that Walker was transferred from Oxford to the Springfield Medical Center on telegraphed orders from James V. Bennett, director of the Bureau of Prisons.

The lawyer said the statement he read to reporters had been concurred in by another Walker attorney, Robert Morris of Dallas, former counsel for the House un-American activities committee. Morris was in Cleveland, Ohio, Tuesday but was expected to arrive in Springfield Tuesday night or Wednesday.

Watts said Walker is willing to submit to an examination by any court-approved psychiatrist to determine whether he is mentally competent to consult with his counsel.

The $100,000 bail set for Walker was offered on the basis of Oklahoma sureties which were not otherwise identified. Mrs. George Walker of Center Point, Texas, wife of the general's rancher brother, told reporters in Houston that it had been raised from two sources — the family and others whom she did not identify.

[illegible]PY

[illegible]LEGRAM

[illegible]AR, NUMBER 245

[illegible]ss for C

[fol. 2075]

1488

DEFENDANT'S EXHIBIT 19

COURT REVERSAL ASKED

MORN dateline p[illegible] Page 1

Walker's attorneys said the U. S. attorney could call for a mental test only when he "can show reasonable ground for belief that a defendant may be presently insane or so mentally incompetent that he can not understand the proceedings against him or properly assist in his own defense."

In addition, Walker's attorneys also asked the court to strike from the record a telegram from James V. Bennett, director of federal prisons, to U. S. Atty. H. H. Ray at Oxford. The telegram concerned a memorandum from Charles E. Smith, chief psychiatrist of the federal prison bureau.

They charged the telegram "and all purported and assumed factual claims contained therein are redundant, immaterial, impertinent, scurrilous and scandalous, do great damage and prejudice to the defendant, maligns his mental capacity and violates every ethical and responsible standard of conduct."

They said Smith's memorandum "purportedly states or infers that Smith had read or heard some unidentified news reports and other unidentified information and based solely on this, believed that defendant Walker's conduct is unpredictable and Walker is suffering from paranoia, psychosomatic disorders and other underlying disorders."

The motion was filed with the court here late Tuesday. There was no indication when any action might be taken on it.

In Dallas Tuesday, Dr. R. L. Stubblefield, the psychiatrist designated to examine Walker, said he would ask two other psychiatrists to help him determine how to go about it.

Dr. Stubblefield of the University of Texas' Southwestern Medical School was named as one psychiatrist. The government named Dr. Winfred Overholser of Washington as the other.

Dr. Overholser's name was withdrawn after protests by Walker's lawyers, who said Dr. Overholser has a history of tending to seek commitments.

He said he will consult Thursday with Dr. Andrew Watson, professor of psychiatry of the University of Michigan, and Dr. Titus Harris, retiring professor of psychiatry at the University of Texas.

Court Asked To Reverse Walker Order

MORN OCT 17 1962

OXFORD, Miss., Oct. 16 (AP)—Attorneys for former Maj. Gen. Edwin A. Walker asked a federal court Tuesday to reverse its order that he undergo a psychiatric examination.

U. S. District Judge Claude Clayton had directed that Walker, facing four federal charges including insurrection for his role in desegregation riots here Sept. 30, be examined to see if he is mentally competent to stand trial.

In a motion filed here Tuesday, Walker's attorneys charged that the court's order "violates the constitutional rights" of Walker in four ways.

It listed these as:

1. "The right to make bail and be released thereon.

2. "The right to be represented by counsel at every stage of the proceedings against him."

3. "The right to notice of proceedings against him, which is a necessary element of due process of law.

4. "The right to be present in person at the hearing wherein defendant's mental sanity and mental competency is questioned."

Walker, arrested here Oct. 1 and sent to the Springfield, Mo., federal medical center, was freed six days later on $50,000 bond with the stipulation that he undergo the psychiatric examination.

A section of the motion by

Turn to Court Reversal on Page 2

DEFENDANT'S EXHIBIT 29

Walker Charges, Then Falls Back

Outsiders Take Part In Campus Rioting

By TOM GREGORY
Star Staff Writer

OXFORD, Miss. — Into the mob walked Edwin C. Walker, former major general of the United States Army.

Around him swirled a whirlpool of humanity and human emotion. Two hundred yards away, a line of gas-masked, club and tear gas-armed federal marshals had turned the ancient Lyceum building into a federal fort.

"Now we have a leader," screamed somebody. "Rally to General Walker!"

Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him.

"Tear gas won't stop him," another person yelled. "Follow General Walker."

About 50 yards from the federal line, tear gas bombs began falling around the group.

General Edwin Walker (retired), who wouldn't retreat, did.

One of Many

The former Army officer was just one of the number of outsiders — how many will probably never be known—who egged and aided a hard core of Ole Miss students into a rock flinging, destructive riot that left two dead, 75 to 100 injured, at least 31 arrested and seriously damaged the reputation of a university.

I walked through that howling, passionately unthinking mob for more than four hours during the violence here last night. I saw

(Turn to Page 2, Column 1)

Walker Charges, Then Falls Back

(Continued From Page One)

the rock throwers and the agitators.

I stood under a Confederate flag hoisted on the flag pole before the stately Lyceum and watched students and outsiders rush the marshals' line, retreat before tear gas, regroup and charge again—all without any attempt at control.

Most of the rioters were students—although the number of Ole Miss men steadily decreased through the night. The number of outsiders — non-students—steadily increased.

Denim-trousered adults and teenagers from nearby towns furnished the impetus that kept the college boys at their job of injury and destruction.

One Reference to Meredith

"Do you think they'll leave that nigger here now?" a young student asked nobody in particular shortly after the riot began. In each hand he held a brick.

That was the only direct reference to Negro James Meredith I heard after the rioting began.

Earlier the crowd had attacked at least two newsmen and destroyed a number of cameras and tape recorders, but during the height of the riot, they practically ignored writers taking notes. No cameramen dared take a picture once the situation got out of control.

I wore no identification and was dressed in a short-sleeved white shirt and tie. I was never questioned. Late in the evening, there were so many non-students that nobody questioned anybody who did not have a camera or recorder.

Only a few of the students—I would estimate 200—actually participated in the violence and destruction.

There were incidents of violence almost as soon as the newsmen started arriving on the campus about 7 p.m. But then, almost without warning, the marshals began firing tear gas into the crowd. After that it was a mob scene.

Walker Enters Scene

About an hour [illegible] rioting started General Walker entered the scene.

After his abortive attempt to reach the marshals' line, he confined his activity to speech-making and watching. A crowd gathered around him at the edge of the grove and he finally said, "All right, I'll speak to them."

Just prior to that, an Episcopal priest, Rev. Duncan Gray, Jr., had tried to talk him into leaving and taking the crowd with him.

"They'll follow you," Gray said.

But Walker stood at the foot of the old Confederate monument, and began speaking.

He told the crowd there had been a "sellout." He said a representative of the governor's office had told him that Gov. Ross Barnett's orders were not to let the marshals on the campus.

After an impromptu whispered conference with a blue-coated follower, Walker said, that a member of the Highway Patrol had been responsible for the sellout.

Again there was a conference and Walker said:

"The name is Birdsong."

Col. T. B. Birdsong is the head of the Highway Patrol and was in the car that led the first group of marshals to the campus during the afternoon.

Then, referring to the Episcopal priest who had asked him to leave:

"I am ashamed that I am an Episcopalian."

At this point Rev. Gray appeared in front of the crowd and was forceably taken from the area by men who feared that he would be injured.

Later a group of students attempted to arrange a truce, but were unable to make the deal (it was: no rocks, no tear gas) because of shouts from the crowd that had inched toward the building. Among the truce-triers were members of the Ole Miss football squad.

One of the shouters was a fat, middle aged man who quite obviously was not a student.

"No truce! No truce!" he shouted.

There was no truce. After a while the troops arrived.

[fol. 2080]

DEFENDANT'S EXHIBIT 30A

UPI A167 AJ

URGENT

5TH LEAD MEREDITH (A153)

BY AL KUETTNER

UNITED PRESS INTERNATIONAL

Oxford, Miss., Oct. 1 (UPI)—Negro James Meredith registered today at the University of Mississippi and began attending classes on a campus littered with the debris of a major riot that took two lives and injured at least 75 persons.

"It is not a happy occasion," he said.

About 400 U. S. Deputy Marshals and 1,000 Federal troops guarded the campus as the 29-year-old Negro cracked the segregation barriers of the 114-year-old school.

[Handwritten notation—Insert A26N]

The campus was brought under military control early today but the rioting spread to downtown Oxford and at least one soldier was hurt in a barrage of rocks, timbers and pop bottles before the crowd was dispersed with tear gas and reinforcements were brought in.

(MORE)—BU1110A10/1

UPI A168 AJ

1st add 5th lead Meredith (A167) Oxford X X X brought in.

Meredith, whose determination to desegregate "Ole Miss" brought about a conflict that threatened to rock the Federal Union, walked solemnly to an American Colonial History class at 9 A.M. CST to shouts of "Nigger, nigger" and "Was it worth two deaths?"

He was accompanied to the classes by three Deputy Marshals and U. S. Department of Justice representative Ed Guthman.

The Negro was met at the Registrar's Office byy University Registrar Robert B. Ellis who handed him a stack of forms. The historic occasion was concluded quietly.

Meredith, who caught a whiff of the tear gas that clouded the campus early today, rubbed his eyes occasionally.

(MORE)—BU1113A10/1. .

[fol. 2081]

DEFENDANT'S EXHIBIT 30B

UPI A26N AJ

Insert 5th lead Meredith (A167) Oxford after 3rd PGH XXX 114-year-old school.

The Justice Department announced today that Maj. Gen. Edwin Walker, resigned Army General who has become a vocal advocate of right-wing causes, has been arrested at a roadblock in Oxford and charged with a number of offenses, including inciting rebellion. Walker was seen during the riots egging the students on.

(PICKUP 4TH PGH: THE CAMPUS)

CB139PES. .

[fol. 2082]

DEFENDANT'S EXHIBIT 31

UPI A66

1st add Meredith. Oxvord (A65 XX More Violence.

Barnett ordered the State High Patrol yesterday not to attempt to stop the Federal Marshals. Both he and Kennedy advised the students not to resort to violence.

But that was not to be.

Shortly before 10 P.M. EDT, the word flashed around the campus that Meredith was there. And, even as Kennedy spoke, the riot began. A group of students threw lighted cigarets on the canvas top of a truck carrying U. S.

Marshals. The canvas caught fire and the Marshals, in steel helmets painted white and wearing orange vests with tear gas grenades, jumped out.

Then they fired the first barrage of tear gas at the students.

The murky white fumes rose and all but obscured the first floor of the main administration building. Students, screaming and yelling, bolted away to get out of the stinging gas. Some, tears streaming, went into a YMCA building and stood on chairs to listen to Kennedy on TV. Afterwards, many of them went back out and re-joined the violence.

Men were armed with brick bats, clubs and "Molotov cocktails"—beer and soft drink bottles filled with gasoline. One man struck a Federal Marshal in the leg with a two-foot iron pipe.

The Marshals loosed barrages of tear gas. The Mississippi State Highway Patrol, surrounding but not entering the campus, made no move. It had been ordered by Barnett not to hinder the Marshals but neither—apparently—did it have orders to help.

The riot grew even worse after Guihard and Gunter were killed. One group started an automobile full speed at a group of Marshals and jumped out. The car hit a tree.

Newsmen were beaten. Cameras were destroyed. Radio station sound trucks had their insides ripped out. Other cars were set afire.

One youth fired a fire extinguisher into the face of one of the drivers of the trucks used to bring in the Marshals. A State Highway Patrolman was struck in the face by a tear gas cartridge. A U. S. Marshal was shot in the neck.

Students were waving the Confederate flag during a lull in the rioting. Edwin A. Walker, former Army Major General who commanded troops at Little Rock, mounted a Confederate statue and advised the students to cease their violence.

"This is not the proper route to Cuba," Walker, who was [fol. 2083] wearing a big Texas hat, said.

The crowd jeered.

Later, Walker mounted the statue again and said:

"I want to compliment you all on the protest you make here tonight. You have a right to protest under the Constitution."

The battle swayed back and forth across the Ole Miss campus. The Federal Marshals appeared to hold the upper end of the campus around the Lyceum (Administration Building) and the demonstrators seemed to be in command of the lower end toward the entrance and surrounding the Confederate statue.

Lights were smashed, leaving the campus almost in total darkness.

The rioting had been going on for almost three hours when army troops put in their appearance at midnight. They were members of the Federalized Mississippi National Guard. They rolled into the campus in jeeps. There were about 200 of them.

One group of rioters had control of a fire engine and held back the Marshals with a steady stream of water which also tended to keep back the burning smoke of the tear gas.

It appeared at 3 A.M. EDT that the riot had been brought under control.

But then gunfire could be heard in the night. It was discovered a sniper with an automatic rifle had the Marshals pinned down and was taking potshots at the cars and men in front of the Lyceum.

The sniper also had National Guardsmen scurrying for cover. He fired repeatedly and the men took refuge behind trees and buildings.

The rioters barricaded University Avenue directly in front of the monument of the Confederate soldier. The barricande was about three feet high and three or four feet wide, built of lumber taken from a nearby construction project.

The Marshals were eagerly awaiting the arrival of the additional army forces. One regular unit, the 2nd battle group, 23rd Infantry, comprising about 1,100-men in 175-200 vehicles was rolling to Oxford from Fort Benning, Ga.

Two MP outfits were flown in by helicopter from a base at Memphis and additional units of the Mississippi National Guard were summoned.

MORE WN525AED

[fol. 2085]

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31,741-C

EDWIN A. WALKER

vs.

ASSOCIATED PRESS

Transcript of Hearing on Motion for New Trial—September 18, 1964

Be It Remembered that upon the hearing of the defendant on Motion for New Trial, before His Honor Charles J. Murray, Judge of said court, on the 18th day of September, A. D. 1964, the following proceedings were had and evidence adduced:

APPEARANCES:

Mr. Clyde A. Watts, 219 Couch Building, Oklahoma City, Oklahoma.

Mr. Toy Crocker, Continental Life Building, Fort Worth, Texas.

Mr. William Andress, Jr., 627 Fidelity Union Life Bldg., Dallas, Texas.

Attorneys for Plaintiff.

Mr. Sloan B. Blair, Mr. Daniel Settle, Mr. J. A. Gooch, First National Bank Building, Fort Worth, Texas.

Attorneys for Defendant.

[fol. 2086] Mr. Andress: If the Court please, we have filed some exceptions to that amended motion for new trial insofar as the calling of jurors is concerned.

The Court: All right. Do you want to be heard on it?

Mr. Andress: Yes, sir, we would like to be heard because we don't believe they have set forth in their motion with sufficient certainty and definiteness the basis for calling the jurors in here and bringing them back in that the motion that they have filed here does not set forth the names of any of the jurors who are supposed to have made the statements nor do they allege sufficiently that any such statements would have prejudiced their rights so as to be prejudicial jury misconduct under the rules. Now those are the holdings of such cases as Federal Underwriter's Exchange vs Skinner and Roy Jones Lumber Company vs Murphy, and Thompson vs The Railway Express Agency, and Smith vs Houston Transit Company, so we don't feel that they have set forth with sufficient certainty and definiteness what it is they propose to prove.

The Court: I am going to overrule you, counsel. I have already spent a substantial amount of time looking into this case, and if any of you haven't read it yet there is a very good law review by Associate Justice Jack Pope in [2087] 40 Texas Law Review 849 in which he reviews the problems involved in jury misconduct.

Now before we start I am going to tell you first of all what I am not going to hear as far as any of the jurors are concerned. As I understand Texas law we can only go into overt acts of the jurors and not their mental processes, so therefore a juror will not be permitted to testify that he was not influenced by any statement; he will not be permitted to testify that he was influenced by any statement. The Courts have held that goes into mental process. Moreover, a juror will not be permitted to say that he felt, he believed, he meant, he aimed, he desired, he was convinced, he was not convinced, nor may he give his impressions of any sort. I will only go into what was said, at what point it was said, and what, if anything, the jurors as a whole did after that point.

Mr. Gooch: We concede that those are the rules.
The Court: All right.

MR. M. L. MERIWEATHER, called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

[fol. 2088] Q. Please state your name.
A. M. L. Meriweather.
Q. Where do you live, Mr. Meriweather?
A. 300 Emma street, Forth Worth, Texas.
Q. Were you a juror in the case of General Edwin A. Walker versus the Associated Press that was tried in June of 1964 in this court-room?
A. Yes, sir.
Q. Did you participate as a juror in the hearing of the evidence and the deliberations after the evidence was closed?
A. Yes, sir.
Q. I will ask you if during the deliberations and prior to the time that a verdict was reached in this case that there were any statements made by any jurors, while all the jurors were together and prior to the time the verdict was reached, as to whether or not prejudice was indicated against the news media in general.

Mr. Andress: Now wait just a minute. That is calling for a conclusion.
The Court: Sustained.

By Mr. Gooch:

Q. Were you acquainted with a man by the name of Waverly Johnson who was foreman of the jury?
A. Yes, sir.
Q. A man by the name of Trotter who was a juror in the case?

[fol. 2089] A. Yes, sir.

Q. Would you tell the Court what, if anything, was said by those gentlemen relative to the news media in general?

A. Well one of them made the statement that the Associated Press was always hurting someone and something on that order, printing false statements.

Q. Was there anything said about news media in general?

A. There was a statement made by one of them, I don't recall which one,—Now this is about the Press itself?

Q. That's right. About news media is the question I asked.

Mr. Andress: If the Court please, we don't believe news media would be pertinent. We think it is what was said about Associated Press.

The Court: Overruled.

By Mr. Gooch:

Q. You have executed an affidavit in this case have you not, Mr. Meriweather?

A. Yes, sir.

Mr. Andress: If the Court please, the affidavits are not admissible, not even for refreshing his memory, and we are going to object to his re-reading his affidavit at the present moment.

The Court: Overruled.

A. You are referring to this one here?

The Court: Mr. Meriweather, if you say anything at all [fol. 2090] to Mr. Gooch you have to say it loud enough for the court reporter and counsel to hear it.

Mr. Gooch: That's right.

The Court: Now all he has done so far is just hand you the affidavit. He hasn't asked you any further question.

A. Well, now, of course.

The Court: He hasn't asked you a question.

By Mr. Gooch:

Q. Have you re-read your affidavit that you gave in this case?

A. Yes, sir.

Q. Were the matters set forth in that affidavit true and correct to the best of your knowledge and belief at the time you executed it?

A. Yes, sir.

Q. Now in that affidavit you state "One juror stated that news services were always publishing false and malicious reports".

A. Yes, sir.

Q. Was that statement made in the jury-room when all jurors were present prior to the time a verdict was reached?

A. Yes, sir.

Q. Was there anything said in the jury-room and prior to the time the verdict was reached, when all jurors were present about money?

[fol. 2091] A. Yes, sir.

Q. What was that?

A. One of the jurors stated that he should be awarded the full amount because the Associated Press had plenty of money.

Q. Do you remember what juror said that?

A. I don't recall his name, but he was the same fellow that works out there with me, a tall slim fellow.

Q. Was his name Trotter?

A. I believe it was, sir.

Q. Was anything said to this effect, that the Associated Press had plenty of money and would never miss it?

A. Yes, sir.

Q. Was that prior to the time the verdict was reached?

A. It was before, yes, sir.

Q. Was there anything said about a Georgia Football coach having received a substantial award and damages for libel?

A. Yes, sir. They made a statement that one of the coaches received the full amount on a libel suit.

Q. Was that statement made before the verdict was reached?

A. Yes, sir.

Q. Do you recall any statement made by a man by the name of Johnson, who was the foreman, as to his antagonism or non-antagonism toward the Associated Press?

Mr. Andress: That is a conclusion, Your Honor.

The Court: It would be, Mr. Gooch.

[fol. 2092] Q. State what, if anything, Mr. Johnson said about the Associated Press, if you recall.

A. Well, he didn't say a whole lot, he just kind of left the impression that he was—

The Court: Wait just a minute. I will strike that.

Mr. Gooch: All you can do is say what he said. If you recall.

A. Well I don't recall his exact words, Mr. Gooch.

Q. Can you give the substance of what he said?

A. Well it was something on the order that the Press was always—hurt people and printing false statements. Something on that order.

Mr. Gooch: That's all.

Cross examination.

By Mr. Andress:

Q. Mr. Meriweather, when did the jury go out and start its deliberations? What time of day?

A. Well I don't recall. Whenever the trial was over.

Q. Was it in the afternoon of one day or the morning of the day you brought in the verdict?

A. It was in the afternoon.

Q. And that afternoon you elected a foreman?

A. Yes, sir.

Q. You elected Waverly Johnson as the foreman. Is that right?

[fol. 2093] A. Yes, sir.

Q. Now how long was it after you started your deliberations that anybody said anything about the Associated Press always hurting someone and printing false statements?

A. Oh, I would say within about thirty minutes.

Q. Within about thirty minutes?

A. Uh huh.

Q. And who was it that said that?

A. The foreman, Johnson.

Q. Now the foreman, was he sitting at the head of the table?

A. No, sir.

Q. Where was he sitting?

A. He was sitting over on this side.

Q. Over on this side? Let's see, toward the window or away from the window?

A. Towards the door.

Q. Towards the door. And where were you sitting?

A. I was sitting next to him, on the east side of him.

Q. Were you and he talking together when he made that remark?

A. No, sir.

Q. Who did he make the remark to?

A. Just the jury as a bunch.

Q. What did any of the other jurors then say or so?

A. Well, like Mr. Gooch asked me, there was one of them [fol. 2094] made the statement the Associated Press had plenty of money.

Q. That was right after Mr. Johnson said that the Associated Press was always hurting someone with false stories and then somebody in reply to that said the Associated Press had plenty of money?

A. No, sir, it wasn't after that.

Q. Was it before that?

A. It was when they voted on malice and they started voting on how much money.

Q. At that time had a vote been taken on the amount of money?

A. No, sir.

Q. Now when the vote was taken on the amount of money did everybody speak up and say what they thought was the proper amount of money?

A. Everyone but me.

Q. Everyone but you. You didn't express any view on the amount of money?

A. Well I didn't agree on it.

Q. You mean in the discussion you didn't agree on the amount?

A. Yes, sir.

Q. At the time that this discussion began did everyone else agree on the $500,000?

A. On the first count, yes, sir.

[fol. 2095] Q. Now was it before or after that that this remark was made about the Associated Press having plenty of money?

A. It was after that.

Q. After that?

A. Uh huh.

Q. In other words it wasn't until after eleven jurors had voted in favor of $500,000.00 as actual damages that somebody said the Associated Press had plenty of money?

A. That's right, and award the full amount.

Q. Of course the full amount asked for for a million dollars.

A. Yes, sir.

Q. And the eleven jurors had already decided not to award the full amount but to award the figure they had arrived at.

A. Well we hadn't got into the malice part yet.

Q. But I mean the $500,000.00.

A. Yes, sir.

Q. Now do you know of anybody that actually heard, other than yourself, what Mr. Johnson said about the Associated Press hurting someone, printing false statements?

A. I am sure that all the jurors did.

Q. Did anybody make a comment about it at the time?

A. I think not, sir.

Q. Nobody made any comment at all.

A. No, sir.

Q. The matter wasn't discussed any further?

[fol. 2096] A. No, sir.

Q. So that it was simply a comment made by Mr. Waverly Johnson that was not picked up and didn't become a discussion and wasn't talked about any further.

A. Not that particular one. The other one was discussed quite a bit.

Q. Which one?

A. The one about the Press having quite a bit of money. I stopped that because I told them it didn't make any difference how much money the Press had and in the first place they didn't know how much they had, and I thought it was out of order, and that's when said "Meriweather's right, let's drop it".

Q. And you told them the jury should not consider that, that it was outside the record and shouldn't be considered. Is that right?

A. That's right.

Q. And then was it dropped?

A. Yes, sir.

Q. And all of that took place after eleven jurors had already voted for $500,000.00.

A. On the five hundred, yes, sir.

Q. Now when Mr. Waverly Johnson made the remark about the Associated Press always hurting somebody did anybody speak up then like you very properly did a little later on to say, "Well we musn't consider that. That's not to be considered"?

[fol. 2097] A. I didn't say a thing.

Q. Did anybody else speak up and say that?

A. Not that I recall.

Q. In other words that was a remark that was made and they just let it lay. Nobody did anything further about it at all.

A. I don't think there was any further discussion on it, no, sir.

Q. Do you remember who it was that mentioned something about the Georgia Football coach collecting?

A. No, I don't recall which one it was, which one of the jurors.

Q. Do you remember at what stage of the game that happened?

A. That happened when we were voting on the malice part.

Q. When you were voting on the malice part?

A. Uh huh.

Q. Did you take these issues in order and work through them?

A. Yes, sir.

Q. And so the malice part would be one of the very last things you did wouldn't it?

A. Yes, sir.

Q. It wasn't until you got to the malice part that the mention was ever made about the Georgia Football coach.

A. The best I recall I made some statement myself that a libel suit was hardly ever awarded the full amount, and that's when this come in. One of the jurors said "Well the [fol. 2098] football coach was awarded the full amount".

Q. Well, of course, that had been a matter that was about as well spread in the public press as the incident over in Mississippi, wasn't it? I mean all of you knew about that didn't you?

A. I suppose so, yes, sir.

Q. Was there any further comment or discussion about it?

A. Not that I recall.

Q. That was just one of the things that anybody that reads the papers knew something about and nobody paid any attention to it then?

A. I guess so.

Mr. Gooch: We object to that last question and the answer that nobody paid any attention to it.

The Court: Yes, it is sustained. This juror may not testify as to whether someone did or did not pay any attention to it.

By Mr. Andress:

Q. Let me ask you another question if I may, Mr. Meriweather. When this remark was made about the Georgia Football coach in reply to the remark that you made, was there any further discussion about it?

A. Oh, I don't think there was any long discussion. There may have been a few words said here and there, something on that order.

[fol. 2099] Q. Just a casual remark as you discussed things in the jury?

A. Yes.

Mr. Gooch: We object to the "casual remark".

The Court: Sustained. Just give it in the context in which it occurred.

A. Well, that's about how it happened.

Mr. Andress: That's all.

Mr. Wm. J. Martin Tarter called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name.

A. William J. Martin Tarter.

Q. Where do you live, Mr. Tarter?

A. Route one, Keller.

Q. And were you one of the jurors in the case of General Edwin A. Walker versus the Associated Press that was tried in this court in June of 1964?

A. Yes, sir.

Q. Have you executed an affidavit in connection with this case, Mr. Tarter?

A. Yes, sir. I know what it says.

Mr. Andress: We have the same objection to the
[fol. 2100] The Court: Same ruling.

By Mr. Gooch:

Q. Would you like to refresh your memory with it?

A. No, sir, I know what it says.

Q. All right. Now do you recall that the jury spent some several hours in deliberations before a verdict was reached?

A. About two hours I believe.

Q. Now prior to the time the jury reached its verdict and brought it into open court—

After you got into the jury room I assume that you elected a foreman. Is that correct?

A. That's right.

Q. Then did a general discussion of the case take place?

A. Yes, sir.

Q. Prior to answering any issues in the case was there some discussion in the jury-room?

A. Yes, sir, the whole case was debated in general.

Q. That's prior to the time you answered any issues?

A. Yes, sir.

Q. Was there anything said by anybody, and name if you can, as to whether or not news media in the past had been guilty of irresponsible and malicious reporting?

Mr. Watts: Objected to as leading.

The Court: Sustained.

By Mr. Gooch:

[fol. 2101] Q. Please state whether or not there was anything said about the news media in general prior to the time you voted on the issues and prior to the time you brought in a verdict.

A. Yes, sir, there was.

Q. What was that?

A. Well it was said I believe—excuse me for saying I believe— It was said that the news media had been malicious in their reporting in the past in some cases.

Q. All right. Was that prior to the time you started voting on the issues?

A. Yes, sir, I believe it was.

Q. Was it said prior to the time that the verdict was actually brought into open court?

A. Would you please rephrase that?

Q. Was that said prior to the time the verdict was actually brought into court—before you were discharged?

A. Yes, sir.

Q. Now, do you know which juror made the statement that you have just attributed to him?

A. No, sir, I don't. I don't recall.

Q. Do you recall that a man by the name of Johnson was foreman?

A. Yes, sir, he was.

Q. Do you recall whether or not he made that statement?

Mr. Watts: We object to that as leading and suggestive, [fol. 2102] putting the words in the witness' mouth.

The Court: Sustained.

By Mr. Gooch:

Q. Do you now recollect as to who might have made the statement that you have mentioned?

A. No, sir, I can't.

Q. Do you know how many of such jurors might have made the statement that you have attributed to the irresponsibility and malicious reporting.

Mr. Andress: We object to how many might have; we want to know how many did.

The Court: I sustain the objection in that form.

By Mr. Gooch:

Q. Do you know how many?

A. Sir, everyone has an opinion on that subject.

The Court: That isn't what he asked you. He asked you how many expressed that opinion in the jury-room.

A. No, sir, I couldn't give you an exact number. There were several of us.

Q. Were you one of them?

A. Yes, sir, I was.

Mr. Gooch: That's all. Thank you.

Cross examination.

By Mr. Andress:

Q. Mr. Trotter, was there any continued discussion of [fol. 2103] anything of that sort with respect to the Associated Press itself?

A. No, sir, there wasn't.

Q. In other words it was a general conversation rather than one directed to the Associated Press?

A. That's right.

Q. Now when you came to pass upon the issues here so far as you were aware was anything considered other than the evidence that had been heard from the witness stand?

Mr. Gooch: If the Court please, we object to that.

The Court: You may not answer that question. That's going into his mental processes.

Mr. Andress: I think we can find some law in connection with that, Judge.

Q. I believe, Mr. Trotter, I am correct. This is the first time you had served on a jury isn't it?

A. That's right.

Q. At any time when any of this conversation about the news media generally was under discussion did anyone say that, well you weren't interested in news media generally but in the Associated Press and you ought not to consider what the news media generally might or might not do?

A. I don't recall, sir.

Q. Do you have any idea how many people may have heard this remark that was made about news media being malicious in the past?

[fol. 2104] A. Everyone I imagine.

Q. Now in connection with the issues and the answering of the issues was there any sharp split in the jury or were they pretty well together the first time you took a ballot on the issues?

Mr. Gooch: We object to that as mental processes.

The Court: Re-read the question, Mr. Nuss, please.

(Whereupon the question was read)

The Court: Sustained in that form.

By Mr. Andress:

Q. All right. Now, Mr. Trotter, do you remember what the vote was the first time that you took a vote on the first special issue about whether or not—as to whether or not General Walker led a charge?

A. Yes, sir, I do. It was ten for Walker and Meriweather voted against and there was one person who didn't vote.

Q. All right. Now on special issue No. two as to whether that statement that Walker led a charge constituted fair comment was the vote about the same?

A. Now as I recall the question it was ten and one didn't vote, one of them.

Q. Would you say the first time the votes were taken that

they generally ran ten in favor of the way you finally answered the issues on the first ballot on each one of them?

Mr. Gooch; We object to that if the Court please as [fol. 2105] improper.

The Court: Overruled.

A. On about the third statement there you know on the paper it changed to eleven to one, and on the fifth I believe now that it changed to eleven and Meriweather quit voting.

By Mr. Andress:

Q. And it went that way all the way through?

A. Throughout the first reading of it.

Q. Now you didn't hear any comment about you ought to give a million dollars because the Associated Press had plenty of money, did you?

A. The statement was brought up I believe that the Associated Press had a lot of money but at that time I don't believe that the million dollars had been brought up in that statement.

Q. Was that after you had already voted on the $500,000.00 total one time like Mr. Meriweather remembered it?

A. I believe it had, sir.

Q. Did you hear any statement about the Georgia Football coach?

A. Sir, I am real sure that the Butts case was never discussed. Let me say something, I brought up now that in Germany there was a German news media, I believe now, I am not sure which one, or now that it was German, but they reported in the Spring I believe that Khrushchev had been killed, you know, if you recall that, but the Butts case I don't ever recall being discussed.

[fol. 2106] Q. Things like that were matters of pretty common knowledge in a discussion?

A. Yes, sir, it is.

Mr. Gooch: If the Court please, we object to that as improper examination.

The Court: Sustained.
Mr. Andress: That's all.
Mr. Gooch: That's all, thank you.

MR. R. A. HOBSON, called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name.
A. R. A. Hobson.
Q. Where do you live, Mr. Hobson?
A. 1401 Boyce.
Q. Were you one of the jurors in the case of General Walker versus the Associated Press that was tried in this court-room in June of 1964?
A. I was.
Q. You have been in the court-room while Mr. Meriweather and Mr. Tarter have testified, have you not?
[fol. 2107] A. Yes, sir.
Q. Did you hear any statements made in the jury-room, and if so please state when, if you heard them, regarding the news media in general?
A. I don't recall just what was said at that time.
Q. Was there something said about the news media?
A. Well in the general discussion there was something said but I don't recall just what.
Q. Was there anything said about the news media had been guilty of false and malicious—

Mr. Watts: We object to that, Judge.
Mr. Gooch: Let me finish the question.
Mr. Watts: The damage is done. Regardless of starting out to lead the witness we object to even finishing the inquiry.
The Court: I think so, counsel.

By Mr. Gooch:

Q. Can you recall anything that was said about the news media in general?

A. Nothing more than that sometimes they had been at fault.

The Court: Sometimes what?

A. Had been at fault in printing falsified news.

By Mr. Gooch:

Q. Was there anything said concerning the amount of money that was to be awarded, concerning the ability of the [fol. 2108] Associated Press to pay?

A. Well, of course, when we started talking about the amount that we need give him, of course that had to be discussed. We couldn't all agree on the same amount the first go round.

Q. Was there any discussion as to whether or not the Associated Press had a lot of money?

Mr. Watts: We object to it as leading and suggestive and putting words in the witness's mouth.

The Court: Sustained.

By Mr. Gooch:

Q. Do you recall anything further about, that might have been said about the Associated Press' financial statement, or financial affairs?

A. Oh, nothing more than that the Associated Press probably had a lot of money.

Q. Now I will ask you whether or not there was any discussion as to what a large verdict against the Associated Press might do toward the news media in general.

Mr. Andress: We object to that, Your Honor, as being leading and suggestive.

The Court: Overruled.

Mr. Andress: It certainly goes into mental processes, a discussion of what the effect of it would be.

The Court: Read it to me again, Mr. Nuss.

(Whereupon the question was read)

[fol. 2109] The Court: Overruled.

A. I don't recall that any such statement was made.

By Mr. Gooch:

Q. Do you recall having discussed this matter with Mr. Settle and Mr. Blair shortly after the jury was discharged?

A. Oh, we exchanged a few words. I don't remember what was said.

Q. I will ask you if you made this statement at that time:

Mr. Andress: Just a minute. We object to his attempting any kind of statement in impeachment of what he is now testifying without laying the proper predicate.

The Court: Overruled.

By Mr. Gooch:

Q. "That a high award as damages in this case would act as a deterrent to false reporting by the entire Press in the future". Do you remember making that statement?

A. I don't recall.

Q. Would you say you did or didn't?

A. I still don't recall whether I did or not.

Q. Was anything like that said in the jury-room prior to the time the verdict was reached?

A. If it was I don't remember.

Mr. Andress: Now if the Court please, we are going to object to this line of questioning because this is in strict accordance with the charge of the Court defining what is [fol. 2110] meant by punitive damages to act as a deterrent, and we think that any such discussion, if it took place, is a perfectly proper discussion under the Court's charge.

The Court: It may be, counsel, but I have to hear it before I can determine that.

Mr. Gooch: I believe that an answer to that would be chronological.

The Court: I am going to let you go on into it.

By Mr. Gooch:

Q. Now the statements that you have recalled and testified here to as having recalled, were those statements made prior to the time the jury reached its verdict and brought it into open court?

A. Well, of course, it would have to have been before we reached a verdict.

Q. Was it also before any of the issues had been answered?

A. No, it was just during the process of reaching a verdict.

Mr. Gooch: That's all.

Cross examination.

By Mr. Andress:

Q. Mr. Hobson, this business about the Associated Press probably had a lot of money, was there any extended discussion on that?

A. No.

Q. Was that after you had already taken a vote on the [fol. 2111] amount and eleven people had voted on the amount of $500,000.00? Like Mr. Meriweather remembered it?

Mr. Gooch: Now, we object to comparing one witness' testimony with another.

The Court: Sustained. Just ask him what he recalls.

Mr. Andress: What we asked him is whether he heard the testimony of these other witnesses.

The Court: I heard it, and I sustain his objection.

A. Now what was the question?

By Mr. Andress:

Q. Was there any such discussion here about the A. P. having a lot of money after you had already taken one vote on the amount of money to be awarded?

A. Well I think it was, yes.

Mr. Andress: That's all.

Mr. Gooch: That's all. Thank you.

Mrs. I. A. Smith, called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Mrs. Smith, please state your name?

A. Mrs. I. A. Smith.

Q. And your address please.

[fol. 2112] A. 3537 Ruth Road.

Q. Were you one of the jurors in the case of General Walker versus the Associated Press tried in this court-room in June of 1964?

A. Yes.

Q. Do you recall taking part in the deliberations leading to the verdict?

A. I recall doing it, yes.

Q. Did you hear any reference to the news media in general by word of mouth from any other jurors prior to the time you answered the questions and prior to the time you brought the verdict into the court-room?

Mr. Watts: Your Honor, we object to that as leading. He can ask her what she heard and when she heard it.

Mr. Andress: I don't think he can fix the time.

The Court: No, I don't think so, Mr. Gooch. You have asked three questions in one.

Mr. Gooch: The Court has sustained the objection so I will start over, Mrs. Smith.

Q. Do you recall a discussion at any time during the deliberations of the jury concerning news media in general?

A. Yes, I believe there was some discussion.

Q. Will you please tell us what it was?

A. That the news media had been in error in reporting news.

Q. Do you remember when with reference to answering [fol. 2113] the questions that statement was made?

A. No, I don't.

Q. Was it before the verdict was brought in to the Court? Was it during the jury's deliberations is what I am trying to ask.

A. Yes, I believe it was.

Q. Do you remember at what part of the deliberations that statement was made?

A. No, Mr. Gooch, I don't.

Q. Do you remember whether it was before or after you had answered any of the issues?

A. No, I don't recall.

Mr. Gooch: That's all.

Cross examination.

By Mr. Andress:

Q. Mrs. Smith was there any discussion about the Associated Press in particular or was it just news media in general?

A. There was discussion of A. P. and news media.

Q. That included the radio, television, newspapers, magazines and just everything. Is that right?

A. Yes, I believe so.

Q. Was there any extended discussion at that time?
A. No.
Q. Do you remember who made any remarks about it?
A. No, I'm sorry I don't.
[fol. 2114] Q. Would you say it was one person or more than one?
A. I would say it was more than one.
Q. Would you say it was just a remark and a reply and then it passed off?
A. Yes, more like small talk.

Mr. Andress: That's all.
Mr. Gooch: No further questions.

MRS. T. E. TOMLINSON called as a witness by the defendant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Gooch:

Q. Please state your name and address, Mrs. Tomlinson?
A. My name is Mrs. T. E. Tomlinson.
Q. And your address please, ma'am?
A. 4001 Pershing.
Q. Were you one of the jurors in the case of General Walker versus the Associated Press that was tried in this court-room in June of 1964?
A. Yes, I was.
Q. Mrs. Tomlinson, did you hear any discussion in the jury-room at any time prior to the jury returned its verdict concerning news media in general?
A. Yes.
[fol. 2115] Q. Could you tell the Court what that discussion was?
A. Well it was just a general discussion of different medias.

Q. What was said, please, ma'am?

A. I don't recall just what was said.

Q. Was there anything said, any discussion about news media making false reports?

Mr. Watts: We object to it as leading and suggestive.

The Court: Sustained.

By Mr. Gooch:

Q. Do you recall anything that might have been said about the news media in general?

A. No, sir.

Q. Mrs. Tomlinson, I am not trying to trip you but do you recall talking to Mr. Blair and Mr. Settle shortly after the jury returned its verdict in this case?

A. Yes, I do.

Q. Do you remember stating to them in substance—

Mr. Andress: If the Court please, we are going to object to asking this lady what she said at some prior date to somebody not under oath. The question is what took place that she testifies to under oath, and we object to this form of interrogation.

The Court: Overruled.

[fol. 2116] Mr. Andress: May it go to the entire line?

The Court: No, just to this question.

By Mr. Gooch:

Q. Did you make this statement: "That because of the false and erroneous reporting of the news media in general in the past that the Associated Press had two strikes against it to begin with"?

A. I don't recall saying that.

Q. Would you say you did or didn't?

A. I didn't say that.

Q. But there was some discussion in the jury room of news media in general. Is that correct?

A. Yes.

Mr. Watts: We object to that as repetition.
The Court: I will let her go ahead and answer that.

By Mr. Gooch:

Q. Can you give the substance of it in any particular?
A. Of what, Mr. Gooch?
Q. Of what was said about the news media.
A. In the jury-room?
Q. Yes, ma'am.
A. Well it was discussed that A. P. and other forms of news media was at fault at times.

Mr. Gooch: That's all. Thank you.

Cross examination.

[fol. 2117] By Mr. Andress:

Q. Mrs. Tomlinson, was that discussion after you had voted on these first issues? In other words after the jury had already voted about all the issues except money?
A. Mr. Andress, I don't recall whether it was before. I presume it was before though.
Q. That's all you recall about the conversation?
A. Yes.
Q. And was it any extended discussion or just passing remarks?
A. Just passing remarks.

Mr. Andress: That's all.
Mr. Gooch: That's all. That's all we have, Your Honor, on that feature.
The Court: All right. Does the plaintiff have anything so far as jurors are concerned?
Mr. Andress: No, sir.

Mr. Gooch: We are not waiving any of the questions. The Court's attention is called specifically that most of the other objections or grounds for motion for new trial are based on the written record and the objections and exceptions to the Court's charge as the Court probably has noted. We have urged a complaint here to a portion of the evidence, and I believe the Court will recall that none of the witnesses were allowed to testify concerning the word [fol. 2118] "charge". General Walker, when he was on the stand, over our objection, was allowed by the Court to testify that he did not lead a charge and answered that question specifically.

The Court: Mr. Gooch, let me ask you this question: Don't you think that General Walker had, as part of his case, to deny that the story was true?

Mr. Gooch: No, I don't think so for the purpose of this argument, because you had not allowed any other witness to use the word "charge", and you did comment to the jury, Your Honor, "Mr. Gooch, I will allow this witness to answer that question with the word charge in it", which I believe was a comment in that you allowed this witness to use the word charge in connection with his testimony.

The Court: Did I use the word charge in my statement to you or did I just say, "I will permit this witness to answer that question"?

Mr. Gooch: I can't be specific now whether it was or not but I had an objection to him answering the question, the specific question, as to whether or not he led a charge. You said, "Mr. Gooch, I will allow this witness to answer that question". Whether or not you used the word charge in overruling my objection I can't be positive. I would have to look at the record, but you did say, "Mr. Gooch, I will [fol. 2119] allow this witness to answer that question", and complaint is made. No disrespect to the court.

The Court: I understand.

Mr. Gooch: But people raise these objections and lots of times the Court in the heat of the battle has made mistakes. Not this Court, but some courts have. But I don't want to take that as a waiver of the assignment of error.

Then the next thing we present is the unconscionable amount of this verdict. General Walker testified that his popularity had not waned, that he was still getting just as many calls to make speeches as he ever had. It's true that one witness testified that after having said on two or three occasions that the news report of General Walker including his insanity hearing and so on and so forth had damaged his character finally confined it and said that General Walker's reputation had been damaged in a particular area in Texas.

The Court: You say you are raising the question about excessiveness of the verdict?

Mr. Gooch: Yes, sir.

The Court: What part in your motion?

Mr. Gooch: It's in there about seven or eight times.

The Court: You don't ask for a remittitur do you?

[fol. 2120] Mr. Gooch: I believe under the rules, if the Court please, we are not required to ask for a remittitur. We raise the question of excessiveness because that's in the hands of the Court.

Mr. Andress: Only in connection with jury misconduct, Judge; I don't see anywhere else.

The Court: Let me hear from Mr. Gooch first, and then I will hear from you, Mr. Andress. I didn't find it when I read it over.

Mr. Gooch: "Damages found by the jury in answer to special issue No. nine, to-wit, the sum of $500,000.00 is so grossly excessive as to be manifestly wrong and unjust, and to show that the jury disregarded the evidence and was influenced by passion, prejudice and other improper motives," which is in the language of rule 328, paragraph J, under 10, and it's in there another three or four times. Maybe be considered that each and every point as raised in our amended motion for new trial has been presented?

The Court: Yes, sir.

Mr. Gooch: That's all.

The Court: I will tell you first, Mr. Andress, I am not going to rule today. I want to give you time, both of you, to prepare briefs so far as this jury misconduct is concerned.

[fol. 2121] Mr. Andress: Judge, there is a long motion there which has been presented in gross. There is no earthly use in taking up your time unless there is some particular thing.

The Court: The only thing I want the brief on is jury misconduct.

Mr. Andress: We also want to direct to your attention that we have here a motion to reform the judgment to give us back our exemplary damages.

The Court: Which is now overruled.

Mr. Andress: You will note our exception and in any order exception and notice of appeal.

The Court: I have already passed on that once.

Mr. Andress: Yes, sure you have, but I am not giving up on it.

The Court: Yes, I understand.

Mr. Andress: Your Honor, there is nothing in particular to reply to then so far as counsel are concerned and so far as this motion for new trial is concerned. Of course the permission of General Walker to testify to a charge the Court's point I think was well taken that it was necessary for the defendant who is charged with it to so speak. Furthermore he was the only person on the witness stand who, as a qualified expert from his long military career could testify to whether he did or did not lead a charge. He was [fol. 2122] an expert and the others weren't.

We will submit a brief.

The Court: All right, now, I would like to have it if it's possible by September 28th. Will that give you enough time?

Mr. Andress: That's ample time.

The Court: That's a non-jury week and I will have more time.

Mr. Andress: How do you want that handled? Do you want a brief from him and a reply brief from us, or just what do you want?

The Court: Do you want to submit anything, Mr. Gooch?

Mr. Gooch: We will submit you a brief.

The Court: All right. You submit one and send it to Mr. Andress as soon as you can, and you can reply to that, but I would like to have them both by the 28th if possible.

Mr. Andress: All right.

Mr. Gooch: All right, sir.

The Court: Now how much time has expired and how much more time do I have? Have you checked that Mr. Blair?

Mr. Blair: This motion was filed, Your Honor, on August 31st which means that we have 45 days from that [fol. 2123] date as I understand it.

The Court: Well you have 15 days after it is presented don't you?

Mr. Blair: Yes, sir.

The Court: Well it's presented today.

Mr. Andress: So far as I am concerned if the Court wants additional time I am perfectly willing to extend it.

Mr. Gooch: You can't extend it.

Mr. Andress: We can do this, we can argue this thing and present it on the 30th of September officially and then give you 15 days.

The Court: I can make a decision within 15 days if I can get your briefs by the 28th, both of them.

Mr. Watts: If Your Honor please, since this is the last appearance in person we will have in the court I would like to have about 30 seconds.

The Court: Yes, sir.

Mr. Watts: If your Honor please, after living thru this lawsuit I sincerely feel that deep in the conscious of the Court there rests a firm and abiding conviction that

this defendant had a fair trial, that the parties have had their day in court and that justice has been done, and it would be a tragedy for the Court after the type of a jury verdict that has come in here to upset the composite wis-
[fol. 2124] dom and judgment of twelve American citizens.

The Court: Do you desire to reply to that, Mr. Gooch?

Mr. Gooch: All I can say is I don't think the Associated Press has had a fair day in court coupled with what has transpired here, the time in which it was tried, the obvious discussion of the jury of the news media as a whole, the outlandish award of the amount of damages, the finding of exemplary damages when there was no evidence whatsoever is in such a state as to cause me to believe very firmly and maybe just as firmly, if not more firmly than Mr. Watts, that the Associated Press has not had a fair trial, but has been subjected to undue influences, to the sins and alleged errors of the news media elsewhere, to statements that have drifted in as to what has happened in other cases, the overall picture is to me one that the Associated Press has not had the benefit of a fair and impartial trial at the hands of its peers.

The Court: All right, gentlemen.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 2126] AGREEMENT OF COUNSEL

It is hereby agreed by and between counsel representing the plaintiff and the defendant in the above numbered and entitled cause that the above and foregoing 2125 pages contain a full, true, and correct transcript of all proceedings had and evidence adduced upon the trial of the above numbered and entitled cause taken at the time and place set forth in the captions hereof, together with a full, true, and correct transcript of the proceedings had and evidence adduced upon the hearing of the defendant's motion for new trial; and

We further agree that this record containing eleven volumes may be filed in this case as the Statement of Facts. This the 30th day of November A. D. 1964.

Looney Watts Looney Nichols & Johnson, C. J. Watts; Andress, Woodgate, Richards & Condos, Wm. Andress, Jr., Attorneys for Plaintiff.
Cantey, Hanger, Gooch, Cravens & Scarborough, Sloan B. Blair, Attorneys for Defendant.

Approved, Chas. J. Murray, Judge presiding.

[fol. 2127]

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16624

THE ASSOCIATED PRESS, Appellant,

vs.

EDWIN A. WALKER, Appellee.

From the District Court of Tarrant County

PER CURIAM. OPINION—July 30, 1965

This is a libel suit. The parties will be designated as they were in the court below or The Associated Press as the A. P. and Walker by name.

The following are the reports of which Walker complained:

"October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'

"October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.

" 'This allowed me to follow the crowd—a few students [fol. 2128] and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p. m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a

neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

"'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

"'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral [fol. 2129] support they needed.

"'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

"'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

"'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

"'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

"'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

"'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

"'There were cheers. It was apparent that Walker had complete command over the group.

"'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

"'One Ole Miss student queried the former General,

"What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

"'Walker suggested the use of sand to snuff out the tear gas.

"'"This stuff works real well, but where can you get it?", he asked.

"'At this time the rioters were using a University fire [fol. 2130] truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

"'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

"'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

"'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

"'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.'"

The only two statements of the above quoted reports which were complained of by Walker as being libelous and which form the basis of special issues submitted by the Court were: (1) "Walker, who Sunday led a charge of students against federal marshals on the Ole Miss Campus" (October 2, 1962 report), and (2) "Walker assumed command of the crowd" (October 3, 1962 report). For the sake of brevity these two statements will hereinafter be referred to as the "charge" and "command" statements respectively.

In answer to special issues one through four, the jury found that the "charge" statement was not "substantially true", did not constitute fair comment, was not made in good faith and was actuated by malice. It found to the same effect in response to similar issues five through eight concerning the "command" statement.

In answer to issue No. 9 the jury found damages in the sum of $500,000.00 and having found that A. P. was actuated by malice in answer to special issues Nos. four and eight the jury, in response to special issues Nos. ten and eleven [fol. 2131] found that exemplary damages should be awarded and in the amount of $300,000.00.

Based upon the verdict of the jury, judgment was entered for Walker and against the A. P. in the sum of $500,000. The judgment recited that there is no evidence to support the jury's findings of malice and $300,000 for exemplary damages.

Appellant contends that the court erred in rendering judgment for appellee rather than it because (1) as a matter of law the evidence conclusively established that the "charge" and "command" statements were substantially true; (2) each statement was a fair comment about a matter of public concern published for general information and thus privileged under the provisions of Art. 5432, V. A. C. S.; (3) such statements made without malice are protected by the First and Fourteenth Amendments to the Constitution of the United States; (4) over objection appellee was permitted to testify that he did not assume command; (5) it held as a matter of law that the "charge" and "command" statements were libelous rather than submitting issues as to each; (6) the evidence conclusively established as a matter of law that the "charge" and "command" statements were made in good faith with reference to matters it had a duty to report to its members and thence to the public; (7) the amount of damages found was so grossly excessive as to be patently wrong and unjust and the findings in response to the damage issue No. 9 and to special issues one, two, three, five, six and seven

are so against the weight and preponderance of the evidence as to be manifestly wrong and unjust and thus insufficient to support such answers; and (8) the evidence conclusively established as a matter of law that the jury was guilty of material misconduct which probably resulted in injury to the defendant.

We affirm.

[fol. 2132] Evidence

In discussing the points relating to the quantity and quality of the evidence we have examined the complaints of the appellant in the light of the Article by Chief Justice Robert W. Calvert entitled, "'No Evidence' and 'Insufficient Evidence' Points of Error", 38 Tex. Law Rev. 361 and authorities therein cited.

The evidence considered in its most favorable light in support of the findings of the jury and the judgment of the court is in essence as follows: At approximately 4:00 P. M. of the day in question, a ring of Federal marshals had encircled the Lyceum Building. Walker arrived on the campus about 8:45 P. M. At that time a loud, violent riot was in progress in an area of the campus known as the Circle. A crowd assembled in the Circle area, began taunting and jeering the marshals. By 8:00 P. M. a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks and other missiles. The rioters attempted to charge the marshals with a fire truck and then with a bulldozer. "Molotov cocktails" were hurled at the marshals. Finally rifle fire erupted. The next morning the campus looked like a battlefield. Soon after his arrival, Walker, after some urging to say a few words, spoke from the steps of the Confederate Monument. While there is some dispute as to what he said, there is testimony that he told the assembled groups that while they had a right to protest that violence was not the answer. He was

"booed" or "jeered" at this time and again when urging a cessation of violence. He and others walked in the direction of the Lyceum Building where the marshals were stationed but he never came closer to the marshals than the monument or the length of a football field. He was there to watch what happened. He wanted a peaceful demonstration as a protest. His presence there was not illegal or [fol. 2133] unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and to report. He was one of the crowd. He was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherwise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk, described as strolling, ambling, or "moseying" along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: "You don't."

Throughout the trial Walker maintained the firm position that because of his opposition to the use of Federal troops within a State, and his personal knowledge of the deviation between the occurrences at Little Rock where he was indeed in command and the newspaper stories of those occurrences, that he was at Oxford to see for himself at first hand what was actually going on. He maintained that he did not assume command of the crowd, did not lead a charge, and did not participate in the rioting. He was present for the sole purpose of observing. The jury saw him, observed his demeanor, heard what he said, and believed him.

"'No evidence' points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclu- [fol. 2134] sively the opposite of the vital fact." 38 Tex. Law Review, pp. 361, 362, supra.

Subdivisions (a) and (b) above have no application to the record or the facts in this case. As to (c) we have viewed the evidence in its most favorable light in support of the findings of the jury upon which the judgment of the Court is based, considering only the evidence and the inferences which support the findings and rejecting the evidence and the inferences which are contrary to the findings. In the application of this test we have determined that all of the findings of the jury, upon which the Court based its judgment, are supported by ample evidence. Having reached this conclusion it follows that we find no merit in the appellant's contention that the evidence establishes conclusively the opposite of what the jury found. We find that none of the situations discussed by Judge Calvert under (a), (b), (c) or (d) is disclosed by the record. Further we have concluded from our study and examination of the entire record that the findings of the jury upon which the Court based its judgment is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust.

Jurors are the exclusive judges of the controverted issues of fact raised by the evidence, of the weight to be given the evidence, and the inferences to be drawn therefrom. They are the exclusive judges of the credibility of the witnesses. "The law does not attempt to tell jurors what amount or kind of evidence ought to produce a belief in their minds. They may believe a witness although he has been contradicted. They may believe the testimony of one witness and reject the testimony of other witnesses.

They may accept part of the testimony of one witness and disregard the remainder." McCormick & Ray, Texas Law of Evidence, § 3; Austin Fire Ins. Co. v. Adams-Childers Co., 246 S. W. 365 (Tex. Com. App. 1923).

"The mere fact that a verdict is against the preponderance of the evidence will not authorize a reviewing court [fol. 2135] to set it aside, if there is some evidence to support it, or evidence that would support a verdict either way. The court of civil appeals will set aside the verdict and findings of a jury only in cases where they are so against such a preponderance of the evidence as to be manifestly unjust or clearly wrong, or where they show clearly that the finding or verdict was the result of passion, prejudice, or improper motive, or in such obvious conflict with the justice of the case as to render it unconscionable." 4 Tex. Jur. 2d, p. 395, § 838, and authorities cited therein.

"Where evidence is conflicting, a reviewing court will not disturb the jury's verdict or findings if there is evidence of probative value to support them, unless the evidence is so overwhelmingly against the verdict or findings as to shock the conscience or show clearly that the conclusion reached was wrong or was the result of passion, prejudice or improper motive.

"The findings on conflicting evidence are usually regarded as 'conclusive,' 'binding,' or 'decisive,' and will be 'adopted' or 'accepted' as the findings of the appellate court, unless some good reason is presented that would justify the court in taking some other view.

"A jury finding on facts will not be set aside because it does not appear to be clearly right; it must appear to be clearly wrong before the appellate court will disturb it.

"The fact that the appellate court would not have found as the jury did is not the test to be applied on appeal. The true test is that made by the jury, on firsthand evidence, adduced before them from living witnesses whose credibility and the weight to be given their testimony were determinable by the jury. Where the jury's findings are in accord with the testimony of different disinterested wit-

nesses, the fact that there is other testimony to the contrary does not authorize the appellate court to overturn the verdict. . . ." 4 Tex. Jur. 2d 390, § 837, and authorities cited therein.

[fol. 2136] In the application of the rules of law and the authorities above referred to, we overrule all points of error relating to the quantity or quality of the evidence supporting the findings of the jury upon which the Court based its judgment.

We find no error on the part of the Court in permitting Walker to testify that he did not assume command of the crowd.

He testified that he became a professional soldier upon completing four years at West Point in 1931 when he was commissioned as a Second Lieutenant. He had combat experience in the Mediterranean, European and Asiatic Theatres during World War II and in Korea. He finally attained the rank of Major General. During the course of the trial Walker testified on several occasions without objection that during the Little Rock matter he took command of the troops, was assigned as commander or that the troops were under his command. In connection with the occasion in question at Ole Miss he was asked if he, "participated in any way in any activity of the crowd that was throwing things at the Marshals?" He answered without objection that he had not participated in any way. He was then asked if he assumed "any command over this crowd." Objection was made on the ground that the answer would be a conclusion on the part of the witness. The Court permitted Walker to answer and he stated, "I certainly did not," and in response to another question he answered without objection that he certainly knew what it meant to assume command. The news item in question had identified Walker as the former Major General who commanded the 101st Airborne Division at Little Rock followed by the statement, "Walker assumed command of the crowd."

The Article in question stated as a fact that Walker had "assumed command of the crowd." We think that Walker, subject of this remark, had the right to deny or affirm the truth of it. We think that the opinion in Goode v. Ramey, 48 S. W. 2d 719 (El Paso Civ. App., 1932, re-[fol. 2137] fused), is applicable. Therein it was stated, "We are not prepared to say under the record, as presented here, that it was error to admit the statement of the witness. The issue sought to be proved was not a mixed question of law and fact, but purely a fact question. We think the issue was one upon which a witness in possession of all the facts may properly state his opinion or conclusion to which such facts would fairly lead, notwithstanding the witness' answer may embrace the very issue to be submitted to the jury. The conclusion of the witness is then testified to like any other fact to be considered by the jury for what they may believe it to be worth. Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314; Adkins-Polk Co. v. John Barkley & Co. (Tex. Civ. App.) 297 S. W. 757; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11."

If we are mistaken in holding that the testimony of Walker was admissible we nevertheless overrule the point of error because we are of the opinion that the error, if any, in admitting the testimony, was harmless within the meaning of Rules 434 and 503, T. R. C. P.; Dallas Railway & Terminal Co. v. Bailey, 250 S. W. 2d 379, 151 Tex. 359 (Sup. Ct., 1952).

Fair Comment

The appellant contends that the "charge" and "command" statements constituted fair comment and thus were privileged under the provisions of Art. 5432, V. A. C. S. We find and hold that both the "charge" and the "command" statements were statements of fact and not of comment. *"Walker, who Sunday night led a charge of students against federal marshals . . . . "* and *"Walker assumed*

command of the crowd . . . .", (emphasis added) are positive statements of fact. Truth of the statements would constitute a complete defense. Appellant failed in its effort to establish this defense to the satisfaction of the jury which found that neither of the statements were substantially true.

[fol. 2138] In an article on "Fair Comment" by John E. Hallen, 8 Tex. Law Review 41 (1929-30), the author in discussing Art. 5432, V. A. C. S., states: "The 1927 Libel Law provides:

"'The publications of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel . . .

"'4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.'

"Paragraph 4 was in no way changed by the 1927 amendments and has appeared exactly in that form since 1901.

". . . the right of fair comment was not created by the statute. It is well recognized by the common law. Every one has the right to comment on matters of public interest and general concern and within limits is not liable for stating his real opinion on such subjects, however severe the criticism may be. It is immaterial whether or not the criticism is sound, or whether the court or jury would agree with it, so long as it represents the honest opinion of the speaker upon a matter of recognized public interest.

"The statute expressly declares that fair comment by newspapers and periodicals is privileged. But since this right was enjoyed by everyone at common law, the statute gives the newspaper no added privileges. Nor is it to be construed as taking away the common law defense of individuals. . . . (p. 41)

"It should be remembered that there is a distinction between comment or criticism, which is the opinion of the speaker or writer upon certain facts, and the facts upon which that opinion is based. A misstatement of fact cannot

ordinarily be justified by a plea of fair comment. . . . (p. 43) [fol. 2139] "It has already been said that fair comment is a criticism, discussion, or expression of opinion upon existing facts and does not protect against a misstatement of the facts themselves. The question of what should be called fact and what comment is difficult. . . ." (p. 53)

"Texas has swung from its early holding in the Copeland Case (Express Printing Co. v. Copeland, 64 Tex. 354 (1885) that an untrue charge of crime, honestly and reasonably made, about a public officer, is privileged, to its present position that such a charge cannot be justified by a newspaper. In following its present doctrine Texas is supported by the weight of authority, and there are strong reasons for its holding." (p. 99)

An article under the heading of "Libel and Slander—Fair Comment—Statements of Opinion" by Tom J. Mays appears in 16 Tex. Law Review 87 (1937-38). He commences with, "A judicial warning to the press with respect to comment and criticism upon matters of public interest is discernible in the recent decision of Houston Printing Co. v. Hunter." 105 S. W. 2d 312 (Fort Worth Civ. App., 1937), affirmed 106 S. W. 2d 1043 (Tex. Sup., 1937). The article continues, "That fair comment and criticism upon such matters is qualifiedly privileged is quite generally recognized both at common law and in Texas by statute. On the other hand, where false allegations of fact are made regarding matters of public concern, the courts are not in accord. Perhaps a majority of the courts hold that false allegations of fact are not entitled to immunity even though made in good faith and without malice. . . . Texas is clearly in line with the majority, holding that falsification of the facts is never privileged.

"Although the distinction between statements of fact and statements of opinion or comment has been freely recognized, it is generally conceded that distinguishing the two becomes a difficult problem in many cases." (p. 88)

[fol. 2140] "Most of the cases, it seems, wherein the words are held actionable as statements of fact, have found imputation of malfeasance, misconduct, or corruption in office, or imputations of evil or corrupt motives in the administration of duties. These being treated as statements of fact, then certainly a false imputation of crime committed by a public officer or candidate would be actionable as a statement of fact in Texas. (pp. 89-90) . . .

"It is manifest that some method is needed by which to distinguish between statements of fact and comment; and it is equally certain that no absolute test can be laid down. But it is submitted that more desirable and satisfactory results can be reached." (p. 90)

The author suggests the following test by which to distinguish statements of fact from comment, "Where the statement alleged to be libelous can be reasonably construed by the reader as an expression of opinion only, on the basis of facts either already known to the reader or else reasonably assumed by the person writing the statement to be known to the reader, then it should be regarded as fair comment. Where, however, the statement alleged to be libelous, as reasonably construed, conveys to the reader not only an expression of the writer's opinion, but also certain supposed information, and this information conveyed does not accord with the true facts, it is not comment, but should be treated as a statement of fact.

"Under this test, whether a publication will be treated as a statement of fact and libelous, if untrue, will depend upon the surrounding circumstances of each particular case. Under such a guidance, even an imputation of crime might be held to be merely an expression of opinion and not actionable." (p. 91)

In, "The Press and the Law in Texas" by Norris G. Davis, University of Texas Press, Austin, 1956, it is stated [fol. 2141] that, " . . . the right of fair comment is a weak defense in most libel suits. It is subject to so many limitations that it is seldom completely applicable. There are three groups of limitations. First, the comment must be

limited to matters of public concern. Second, the article must be a statement of opinion—or comment—rather than a statement of fact, a very difficult distinction to make. Finally, the comment must be reasonable and fair and made in good faith, and this limitation is also difficult to define." (p. 65)

"Even if the subject matter and the person concerned are clearly matters of public concern, there remains two severe limitations. One of these, the requirement that the story or article must be comment, not a statement of fact, has caused by far the most trouble. The separation of comment from factual statements in most stories and articles is extremely difficult, and Court decisions have shown confusion on the point." (p. 67) "One important rule developed for separation of fact and comment is the theory that imputation of dishonest motives to a public official or imputation of an act constituting a crime under the law is a statement of fact and cannot be considered fair comment." (p. 68) San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574 (CCA of Texas, 1908, Ref.); Forke v. Homann, 39 S. W. 210 (CCA of Texas, 1896, ref.). The author in reference to the article by Mays in 16 Tex. Law Review 87 (1937-38), states: "One writer who has studied the fair-comment cases in Texas and has found the same confusion illustrated here has offered the following definitions of 'opinion statements' and 'fact statements.'" (p. 73) He then quotes the test suggested by Mays and continues: "Certainly the courts should become aware of the need to distinguish statements of fact from opinion on a less arbitrary basis than is now customary. If the Supreme Court would adopt such a definition as the one quoted above, it would do much toward creating such an awareness. Actual differentiation of fact and opinion would still be difficult, but court decisions would be more just. (p. 74) [fol. 2142] "Actually, it is clear that almost any story, editorial, or other type of news article must be a mixture of statements of fact and comment, even though the writer

attempts to confine himself to comment. Any type of comment, in implication at least, must be based on fact; and newsmen know that the most effective comment is that based on startling and important statements of fact. Newsmen should therefore be prepared to prove the truth of any statement of fact and to rely on fair comment as defense only for the conclusions drawn from these true facts. They should strongly urge the courts also to make the distinction between fact and opinion rather than, as they so often do, plead all defenses to all parts of a story alleged to be libelous." (p. 74)

In our opinion the test suggested by Mr. Mays and favorably commented on by Mr. Davis is a good one. We think that its application to the facts in this case support our holding that the statements involved were statements of fact and that the appellant was not prepared to prove the truth of either statement. The information conveyed was not in accord with the true facts. Reference is made to the complete text of the articles above referred to and the authorities cited therein. See also 36 Tex. Jur. 2d, Libel and Slander, §§ 87, 89, 92 and 171 together with cases cited under each.

We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution. These Amendments prohibit Congress from making laws abridging freedom of speech and of the press and the State from making or enforcing laws of similar nature.

"The interest of the public in obtaining information about public affairs and of the defendant in discussing such matters is often brought directly in conflict with the plaintiff's claim to his own good name, and the law must draw a line between them. . . . (8 Tex. Law Rev. 41, p. 98) [fol. 2143] "It is not true that false and derogatory statements about a man's character are today always actionable. If they were, the whole defense of privilege would be swept

away. Nor is it true that everything may be justified under a defense of free speech or press. These rights as embodied in constitutions and statutes, were designed primarily to prevent interference by the government with a man's talking or writing, and not to do away with responsibility for what was said. If 'Freedom of the Press' always furnished a complete defense there could be no such tort as libel. . . ." (8 Tex. Law Rev. 56)

"It is submitted that any decision based entirely upon the right to an inviolate character or freedom of speech is unsound. Either doctrine given full sway would annihilate the other. . . ." (8 Tex. Law Rev. 61)

"Articles 5430, 5431, 5432, and 5433, Vernon's Texas Civil Statutes, 1948, clearly declare the policy of this State regarding the question of libel. The law protects the right of a citizen to defend his reputation and good name from libelous publications, and this right is zealously guarded. Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197; Belo & Co. v. Looney, 112 Tex. 160, 246 S. W. 777; Express Pub. Co. v. Keeran, Tex. Com. App., 284 S. W. 913." Fitzjarrald v. Panhandle Pub. Co., 228 S. W. 2d 503 (Tex. Sup., 1950).

We find no application of the authorities cited by the appellant to the facts of this case.

Libelous Per Se

Did the Court commit error in holding as a matter of law that the "charge" and "command" statements were libelous per se, rather than to submit same to the jury for its determination? We think not. The language contained in the statements is not ambiguous. There can be no doubt as to the meaning of either.

Each of the statements imputed to Walker the crime of [fol. 2144] insurrection against the United States. It is undisputed that the crowd on the Ole Miss Campus was engaged in rioting and by force interfering with the efforts

of U. S. marshals to enforce an executive order of the President of the United States issued under sanction of law and of applicable statutes. Insurrection is punishable by fine or imprisonment or both.

The statements further imputed to Walker responsibility for the death of two men and of the wanton destruction of property, all accomplished by students and others under his leadership and direction. The onslaught of the riotous crowd "led" by Walker who had "assumed command" was such that Van Savell considered he was, "lucky to have been arrested and glad to be behind closed, heavily guarded doors."

It imputed that Walker, who "advised on several tactics," none of which were ever specified, directed or advised on the making and use of the molotov cocktails (gasoline bombs) and other offensive weapons used by the rioters.

"The court should construe the meaning of unambiguous language, pass on its defamatory character, and instruct the jury accordingly. But where the language is ambiguous or of doubtful meaning there is a question for the jury." 36 Tex. Jur. 2d 496, § 166; p. 482, § 156 of the same text and cases cited under each. Fitzjarrald v. Panhandle Pub. Co., supra.

"To charge a person with or impute to him the commission of any crime for which punishment by imprisonment in jail or the penitentiary may be imposed is slanderous or libelous per se." 36 Tex. Jur. 2d 288, § 7; H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515.

"Any written or printed language tending to degrade a person in the estimation of honorable people, or imputing to him disgraceful or dishonorable acts, is libelous per se." 36 Tex. Jur. 2d 297, § 13.

"The language claimed to be defamatory must be taken as a whole. Thus, a newspaper article must be considered in its entirety in determining the sense in which its language is used, and whether the article, or a particular

[fol. 2145] statement therein, is libelous." 36 Tex. Jur. 2d 313, § 27.

"'Libelous per se' means that written or printed words are so obviously hurtful to person aggrieved by them that they require no proof of their injurious character to make them actionable." Rawlins v. McKee, 327 S. W. 2d 633 (Texarkana Civ. App., 1959, ref., n.r.e.).

"Defamatory language may be actionable per se, that is, in itself, or may be actionable per quod, that is, only on allegation and proof of special damages. The distinction is based on a rule of evidence, the difference between them lying in the proof of the resulting injury. Language that necessarily, in fact or by a presumption of evidence, causes injury to a person to whom it refers is actionable per se. In other words, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. Where the language is actionable per se damages are conclusively presumed and need not be proved." 36 Tex. Jur. 2d 280, § 2.

"To be libelous a publication must be defamatory in its nature, and must tend to injure or impeach the reputation of the person claimed to have been libeled. The language used, taken in connection with the facts and circumstances alleged by way of innuendo, must be reasonably calculated to produce one or more of the results mentioned in the statutory definition; that is, it must have the effect of injuring or tending to injure the person to whom it refers to the extent of exposing him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty, integrity, or virtue.

"It is not necessary, however, that the language have all the injurious or pernicious tendencies enumerated in the statute; it is actionable if it has any of them. . . .

[fol. 2146] "A publication that tends to subject the plaintiff to public contempt, or that impeaches his integrity or

reputation, is libelous though it does not charge him with a crime.

"The term 'public hatred,' as found in the statutory definition, signifies public or general dislike or antipathy." 36 Tex. Jur. 2d 285, § 6.

Damages

In connection with special issue No. 9 the jury was instructed that it may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained as a direct and proximate result of the statements inquired about. The jury awarded $500,000.00.

From our investigation and study of the record we are unable to find any legal justification to disturb the award of damages. If any improper influences were present they do not appear from the record. Under the pleadings the appellee sought damages, including exemplary damages, in the sum of $2,000,000.

"Mental suffering on the part of the person defamed is one of the direct results of a libel or slander. Accordingly, injury to the feelings, humiliation, and anguish of mind are proper elements of compensatory damages, provided they are the direct and proximate result of the defamation. This suffering is classed as general damages, that are presumed to have been sustained, and that, in actions for libel, are recoverable under a general averment, without specific proof that they were incurred, and, by virtue of statute, regardless of whether there was any other injury or damage, even though the publication was not libelous per se." 36 Tex. Jur. 2d 402, § 98.

"The plaintiff is entitled to compensation for injury to his character or reputation caused by the defamation. . . . [fol. 2147] It follows that the jury, in fixing the amount of recovery, may consider the loss of, or injury to, character or reputation, even though there is no proof thereof nor

any proof of good character. . . ." 36 Tex. Jur. 2d 400, § 97.

"In other words, a general allegation of damages will admit evidence of those damages naturally and necessarily resulting from the defamation charged. It is unnecessary to itemize the elements of general damages; rather, the amount may be alleged in the aggregate. Thus, the plaintiff need not aver the nature, character or extent of the mental suffering caused, or even that he thereby suffered any agony, but it is sufficient to aver the damages he sustained by reason thereof. . . ." 36 Tex. Jur. 2d 445, § 126.

"Generally speaking, the damages resulting from a libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, or the court in a case tried without a jury, and an appellate court will not disturb the verdict or award unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. . . .

"In fixing the amount the jury may take into consideration the motives of the defendant, and the mode and extent of publication. . . ." 36 Tex. Jur. 2d 405, § 102.

Exemplary Damages

By counter-points the appellee contends the court erred in setting aside the findings of the jury in response to special issues Nos. 4, 8, 10 and 11, which related to malice and exemplary damages.

Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, "you are instructed that by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a [fol. 2148] conscious indifference to the right or welfare of the person to be affected by it."

The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above

definition before he was entitled to a finding of malice and exemplary damages.

The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings.

We think there is yet another reason to support the Court's action in disregarding the jury's answers to the issue relating to malice and exemplary damages, namely, the lack of necessary pleadings and proof required under the holdings in Western Union Tel. Co. v. Brown, 58 Tex. 170 (Tex. Sup., 1882); Wortham-Carter Pub. Co. v. Littlepage, 223 S. W. 1043, p. 1046 (Fort Worth Civ. App., 1920, no writ hist.), and Fort Worth Elevators Co. v. Russell, 70 S. W. 2d 397 (Tex. Sup., 1934).

The record leaves some doubt as to whether A. P. is an incorporated or an unincorporated association. It does appear, however, that its composition, the manner in which it functions, and its organizational set-up is more akin to a corporation than not and that the holdings in the above cited cases would be applicable.

We think the record in this case will support our view. Certainly, A. P. is not an individual. Having no mind and being an entity only by a fiction of law, it must be held incapable of entertaining actual or express malice unless the requirements of the holding in Fort Worth Elevators Co. v. Russell, Western Union Tel. Co. v. Brown and Wortham-Carter Publishing Co. v. Littlepage, supra, are complied with. A. P. is referred to as a corporation in the appellee's brief.

[fol. 2149]

Jury Misconduct

We find no error in the action of the Court in overruling the appellant's amended motion for new trial because of alleged misconduct of the jury.

During a general discussion of the case a juror remarked that the A. P. (or news media generally) was always hurting someone by the printing of false or malicious reports of words to this effect. There was considerable discrepancy in the testimony of the five jurors called to testify on the motion for new trial as to whether the reference was to the A. P. or to news media generally. It was a casual statement. "Nobody made any comment at all" about it. It is undisputed that it was quickly dropped. Who made the statement, which jurors or how many probably heard it or specifically at what stage in the proceedings the statement was made was not shown. It was dropped and not again mentioned. The jury discussed and answered the issues in order. They were 11 to 1 on the issues preceding those relating to malice and exemplary damages. While discussing these issues a remark was made that the full amount should be awarded because the A. P. had plenty of money and it was mentioned "about the Georgia football coach (Wally Butts) collecting." The jurors were in dispute as to whether the statement concerning Butts was ever made. It is without dispute that the statements, if any, were made after the jury had already found damages in the sum of $500,000 and were considering the issues on malice and exemplary damages.

The juror who was the last to agree on the $500,000 was the juror who stopped the discussion as to how much money the Press had. He pointed out that it did not make any difference and was out of order. The matter was promptly dropped. The only answers which could have been influenced or affected by such statements, if any, were those to the issues on malice and exemplary damages and these find-
[fol. 2150] ings of the jury were disregarded by the Court on other grounds in the rendition of judgment.

In order to justify a new trial under Rule 327, T. R. C. P., the movant has the burden of establishing to the satisfaction of the Court that it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted by reason of the alleged jury misconduct. The appellant failed to meet its burden under this rule.

The trial court in its findings of fact and conclusions of law found that none of the statements singly or collectively induced any juror to change an answer or vote differently than he would otherwise have done. That there was no showing of probable injury to the appellant because of such statements.

"When a trial court hears the testimony of jurors on an issue of misconduct, alleged to have occurred during the jury's deliberation upon its verdict, he is accorded the same latitude in passing upon the credibility of the witnesses and of the weight to be given to their testimony as the jury had upon the trial of the original cause. If there be any inconsistencies or contradictions in the testimony of a witness upon the hearing of a motion for new trial, it rests within the sound discretion of the trial court to harmonize and reconcile such conflicts so far as possible. A juror's testimony upon such hearing may be so contradictory and inconsistent that the trial court in exercising its privilege to pass upon the credibility of the witness may be justified in disregarding his entire testimony. Carl Construction Co. v. Bain, 235 Ky. 833, 32 S. W. (2d) 414." Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S. W. 2d 770 (1932).

In our opinion the alleged improper statements, when viewed in the light of the evidence on the motion for new [fol. 2151] trial and on the trial of the case and on the record as a whole, did not probably result in injury to defendant. Rules 327 and 434, T. R. C. P.

Having considered each of the appellant's points of error and the cross-points raised by the appellee and having concluded that each should be they are each and all accord-

ingly overruled, and the judgment of the trial court is affirmed.

Per Curiam

[fol. 2152] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 2153]

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS
From the District Court of Tarrant County
(No. 31,741-C)
16624

THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

JUDGMENT—July 30, 1965

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellee, Edwin A. Walker, do have and recover of and from appellant, The Associated Press, and its surety on its supersedeas bond, Houston Fire and Casualty Insurance Company, the amount adjudged below, with interest thereon at the rate of six per cent per annum from August 3, 1965, together with all costs in this behalf expended, both in this Court and in the trial court, for which let execution issue, and that this decision be certified below for observance.

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS
17887—16624

THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

ORDER DENYING APPELLANT'S MOTION FOR REHEARING—
September 17, 1965

This day came on to be heard the motion by appellant for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

[fol. 2154]
IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS
17888—16624

THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

ORDER DENYING APPELLEE'S MOTION FOR REHEARING—
September 17, 1965

This day came on to be heard the motion by appellees for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

[fol. 2155] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 2156]

IN THE SUPREME COURT OF TEXAS

From Tarrant County, Second District

No. A-11,069

THE ASSOCIATED PRESS

vs.

EDWIN A. WALKER

ORDER DENYING APPLICATIONS FOR WRITS OF ERROR—
February 9, 1966

Application of The Associated Press, as well as the conditional application of Edwin A. Walker, for writs of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that same present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicant, The Associated Press, and its surety, Houston Fire & Casualty Insurance Company, and applicant, Edwin A. Walker, each pay all costs incurred on their respective applications for writs of error.

IN THE SUPREME COURT OF TEXAS

From Tarrant County, Second District

No. A-11,069

THE ASSOCIATED PRESS

vs.

EDWIN A. WALKER

ORDER DENYING MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR—March 23, 1966

Motion of The Associated Press for rehearing of its application for writ of error having been duly considered, it is ordered that such motion be, and hereby is, overruled.

[fol. 2157] Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, March 30, 1966—Lida Swanson, Clerk.

[fol. 2158] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 2159]

SUPREME COURT OF THE UNITED STATES

No. 150—October Term, 1966

THE ASSOCIATED PRESS, Petitioner,

v.

EDWIN A. WALKER.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Second Supreme Judicial District and/or the Supreme Court of the State of Texas is granted and one and one half hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
DEC 1 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. ~~814~~ 37

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. ———.

CURTIS PUBLISHING COMPANY,

Petitioner,

v.

WALLACE BUTTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 16, 1965.

Opinions Below.

The opinions of the United States Court of Appeals for the Fifth Circuit (R. 1616-1678, 1786-1801, Appendix B, pp. 5a-75a) are not yet reported. The opinion of the United States District Court for the Northern District of Georgia on petitioner's motion for new trial (R. 88-101, Appendix B, pp. 76a-88a), is reported in 225 F. Supp. 916. The opinion of the United States District Court for the Northern District of Georgia, denying petitioner's motions for new trial under Fed. R. Civ. P. 60(b) (R. 1460-1468; Appendix B, pp. 89a-96a), is reported in 242 F. Supp. 390.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 16, 1965. A timely petition for rehearing was denied on October 1, 1965. The jurisdiction of the district court was based on diversity of citizenship and amount under 25 U. S. C. § 1352(a)(1). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

1. Whether the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *New York Times Co. v. Sullivan,* 376 U. S. 254 (1964), may be disregarded in reviewing a verdict and judgment rendered prior to the *New York Times* decision, on the ground that the constitutional question was not raised by the defendant at the antecedent trial.

2. Whether a publication charging, in substance, that the athletic director of a state university gave to the football coach of another state university confidential information calculated to affect the outcome of a forthcoming football game between the two schools is protected by the First Amendment, as interpreted by this Court in the *New York Times* and subsequent decisions.

3. Whether an award of $400,000 as punitive damages for libel, after a jury verdict of $3,000,000 in punitive damages, constituted, in the circumstances, an abridgement of freedom of the press or a taking of property without due process of law.

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are set forth in Appendix A, pp. 1a-4a.

Statement.

This is a libel action instituted by respondent against the petitioner on March 25, 1963, in the United States District Court for the Northern District of Georgia demanding $5,000,000 in general damages and $5,000,000 punitive damages for the alleged defamation of respondent in an article published in *The Saturday Evening Post* of March 23, 1963.

The article (R. 1407-1410; Appendix D, pp. 101a-104a) entitled "The Story of a College Football Fix" and subtitled "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall," asserted that on September 14, 1962, eight days before the opening game of the football season between the University of Georgia and the University of Alabama, George Burnett, an insurance salesman in Atlanta, while dialing a local telephone number, was accidentally connected into a long distance telephone call from respondent at that local number to Paul Bryant in Tuscaloosa, Alabama. Respondent, the former head coach of the football team of the University of Georgia, was then athletic director of the University. Bryant was the head coach of the football team of Alabama.

According to the article:

> Burnett listened to the conversation between Butts and Bryant and heard Butts give Bryant detailed information about Georgia's team and the plays and formations it would use against Alabama in the forthcoming game.
>
> Occasionally, in response to Bryant's questions, Burnett heard Butts say "I don't know about that. I'll have to find out." The conversation ended with Bryant telling Butts that he would telephone him at home the next Sunday.

Burnett made notes of what he heard but decided to forget the incident and put his notes away.

Alabama won the football game 35-0, its team exhibiting familiarity with Georgia's plays and tactics.

After brooding about this until early January, Burnett decided to tell his story and exhibit his notes to Johnny Griffith, the head coach of Georgia's team. Griffith reported this information and gave Burnett's notes to the University authorities, precipitating an investigation in which Burnett cooperated and in the course of which Butts resigned as athletic director.

In an editorial accompanying the article, the *Post*'s editors referred to it as "the story of one fixed game of college football", asserting that the "corrupt were two men—Butts and Bryant—employed to educate and to guide young men."

Admitting the publication of the article, petitioner denied that it was published "wilfully, maliciously and falsely," as averred by the respondent (R. 22, 26) and also pleaded truth as a defense (R. 27)—a plea that the trial court ruled the defendant had the burden of establishing by a preponderance of evidence (R. 44, 1347).

At the trial it was established by records of the telephone company, and was not denied by respondent, that Butts telephoned Bryant on September 13,[1] the call lasting 15 minutes (R. 165-167, 1416). It was also proved and not denied that Bryant called Butts at his home the following Sunday, the call lasting one hour and seven minutes (R. 168-169, 1417). There was conflicting evidence, however, as to whether Butts gave Bryant any information about Georgia's team, formations and plays and as to the value of the information that Burnett, according to his prior

1. The article inaccurately fixed the date of the call as September 14, but Burnett's notes and testimony both fixed the date correctly as September 13 (R. 178, 189).

statement, his notes and his testimony, heard Butts give. There also was dispute as to the adequacy of the *Post*'s investigation of Burnett's story prior to its acceptance and publication and as to the publication policy followed by the *Post* under its recently changed command.

The District Court held that petitioner's evidence in support of its plea of truth sufficed to present a question for the jury, declining to direct a verdict for the plaintiff on that issue (R. 480-488). It charged the jury, in accordance with its prior ruling (R. 44) that the defendant had the burden of proving the truth of the "sting of the libel" by a preponderance of evidence (R. 1347, 1349); that unless the defendant proved the statements to be true, they were libelous per se (R. 1348-1350); that malice was "to be inferred" (R. 1353); and that "the law will presume that anyone so libeled must have suffered damage" (R. 1353). The jury also was instructed that where "it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required to award punitive damages" (R. 1356). Actual malice, the court charged, "encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1356).

On August 20, 1963, the jury returned a verdict in favor of respondent, awarding him $60,000 general damages and $3,000,000 punitive damages (R. 1371). Petitioner filed a timely motion for new trial, contending *inter alia* that the verdict for punitive damages was invalid under the First, Fifth and Fourteenth Amendments to the Constitution. On January 14, 1964, the District Court denied petitioner's constitutional claims on the ground that they represented only an attack on the Georgia statute allowing punitive damages and, as such, should have been

raised prior to verdict (225 F. Supp. at 920; Appendix B, p. 83a). However, the court found the amount of the punitive damages to be "grossly excessive" (225 F. Supp. at 920; Appendix B, p. 83a) and granted petitioner's motion for new trial conditioned on respondent failing to remit that portion of the punitive damages in excess of $400,000 within 20 days (225 F. Supp. at 922; Appendix B, p. 88a). Respondent filed the remittitur (R. 103). On January 22, 1964, the District Court entered judgment for $460,000 against petitioner (R. 105). Petitioner filed a notice of appeal to the Court of Appeals for the Fifth Circuit on January 24, 1964 (R. 106).

On February 28, 1964, petitioner moved again for a new trial under Rule 60(b)(2) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence (R. 1428-1455). While this motion was pending, this Court, on March 9, 1964, decided *New York Times Co. v. Sullivan*, 376 U. S. 254. Thereafter, on March 23, 1964, petitioner filed an additional motion for new trial under Rule 60(b) contending that the respondent as Director of Athletics of the University of Georgia was a public official within the meaning of the *New York Times* decision and thus precluded from recovering for a statement relating to his official conduct without proof that the statement was published with knowledge that it was false or with reckless disregard of whether it was false or not; that the definition of "actual malice" given the jury by the District Court did not conform to this requirement; and that the evidence at the trial did not suffice to prove malice in this sense with the "convincing clarity" required by the *Times* decision.[2]

---

2. The additional motion for new trial under Rule 60(b) was inadvertently omitted from the printed record. It is, however, included in the certified record filed in this Court with this petition and, for the convenience of the Court, is reproduced herein as Appendix C, pp. 97a-100a.

Though the issue had not been litigated as such at the trial, the record showed or it was subject to judicial notice that the University of Georgia is a state institution operated by the Board of Regents of the University System (*Ga. Code Ann.* §§ 32-101 et seq.); that the respondent was employed as the Director of Athletics of the University by the separately incorporated Athletic Association, an organization directed by faculty members and alumni which is an agent of and employed by the Board of Regents (R. 262, 1161-1165; see *Allen v. Regents,* 304 U. S. 439, 443, 452 [1938]); that by virtue of his position respondent was also a member of the faculty (R. 1466); that he received a salary of $12,000 per annum from the Association (R. 1162, 1165), part of his salary being paid directly by the University subject to teacher retirement (R. 810, 1123); and that his duties were to supervise the entire athletic program of the University, including the scheduling and location of intercollegiate games in all sports, planning and budgeting, the adding of new athletic facilities and ticket sales (R. 569, 654-655).

The District Court denied the motions for new trial on April 7, 1964, ruling both that the respondent was not a public official within the principle of the *New York Times* decision and that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not" (242 F. Supp. at 395; Appendix B, p. 96a). Petitioner filed a notice of appeal from this decision on April 10, 1964 (R. 1469).

On appeal from the judgment and the order denying the motion for new trial under Rule 60(b), petitioner urged the constitutional contentions rejected by the District Court on the motions for new trial and argued, in addition, that the judgment entered on the remittitur was repugnant to the Constitution.

The Court of Appeals affirmed the judgment by divided vote. The majority (Judge Spears, with the concurrence of Judge Brown) declined to rule upon petitioner's contentions based upon the *New York Times* decision on the ground that petitioner's failure to raise at the trial the constitutional questions that some of its attorneys knew were being litigated in the *Times* case "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*" (Appendix B, pp. 20a-21a). Ignoring the constitutional attack on the verdict, the Court also held that there was "ample basis for the trial court's judgment" in selecting "the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts" (Appendix B, p. 32a); and that the requirement of the remittitur of the punitive damages held to be excessive was "a permissible course" that "does not infringe upon the Seventh Amendment's guaranty of jury trial" (Appendix B, pp. 31a-32a).

Judge Rives dissented on all points. In his view the respondent was a public official and the publication related to his official conduct, within the principle of *New York Times* (Appendix B, pp. 36a-46a); the trial court's instruction did not comply with the *New York Times* standard since it permitted "recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood" (Appendix B, pp. 41a-42a); it was the duty of the District Court to give effect to the supervening decision of this Court by granting the motion for new trial (Appendix B, p. 46a) and the defendant may not be "said to have waived by 'silence' a constitutional right not enunciated at the time" (Appendix B, p. 42a).

Apart from the constitutional deficiency of the criterion of malice embodied in the District Court's instruction to the jury, Judge Rives also concluded that the $400,000 punitive award was a deprivation of property without due process and a prior restraint forbidden by the First Amendment; and that the jury verdict of $3,000,000 so reflected passion and prejudice that it could not be cured by the remittitur consistently with the Seventh Amendment. These grounds Judge Rives thought, were all properly presented in petitioner's attack upon the verdict and upon the District Court's denial of the motions for new trial.

A petition for rehearing before the Court of Appeals *en banc*, filed under Fifth Circuit Rule 25(a), was denied by the same panel of the Court by the same divided vote, the majority and the minority reiterating their positions in further opinions (Appendix B, pp. 62a-75a).

REASONS FOR GRANTING THE WRIT.

I.

In holding that the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *New York Times Co. v. Sullivan*, may be disregarded in reviewing a verdict and judgment rendered prior to the *Times* decision on the ground that the question was not raised by the defendant at the antecedent trial, the Court of Appeals has decided an important federal question in a way that conflicts with applicable decisions of this Court and of the courts of other Circuits.

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). The doctrine applies to "*nisi prius* and appellate tribunals alike" (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543 [1941]) and has been reaffirmed repeatedly upon a supervening change in the law governing the cause, whether the change was worked by treaty as in *The Schooner Peggy*, by constitutional amendment as in *United States v. Chambers*, 291 U. S. 217 (1934); *Massey v. United States*, 291 U. S. 608 (1934), by the repeal or the enactment of a statute, as in *United States v. Tynen*, 11 Wall. 88 (1870); *United States v. Alabama*, 362 U. S. 602 (1960); *Hamm v. Rock Hill*, 379 U. S. 306 (1964), by a novel interpretation of a statute as in *Hormel v. Helvering*, 312 U. S. 552 (1941); *Helvering v. Richter*, 312 U. S. 561 (1941); *Uebersee Finanz-Korp. v. McGrath*, 343 U. S. 205, 212-213 (1952) or by a judicial alteration of a rule of common law (*Vandenbark v. Owens-Illinois Glass Co., supra*).

That the rule governs when the change in law derives from a revised interpretation of the Constitution by this Court assuredly is not an open question. See *Linkletter v. Walker,* 381 U. S. 618, 622-629 (1965); *Griffin v. California,* 380 U. S. 609 (1965); *White v. Maryland,* 373 U. S. 59 (1963). Whether or not the change will be accorded retrospective operation in collateral attack upon a final judgment, it will, as this Court said in *Linkletter* "be given effect while a case is on direct review" (381 U. S. at 627).

The judicial duty thus defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. Such a condition would be patently unthinkable in cases where the change is wrought by legislative action, since no ruling could be premised upon unenacted legislation. *Cf. 149 Madison Avenue Corp. v. Asselta,* 331 U. S. 795 (1947), *modifying* 331 U. S. 199 (1947); *Alaska Juneau Gold Mining Co. v. Robertson,* 331 U. S. 793 (1947); *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446, 477 (1948). The situation is no different when the change is brought about by a decision modifying the prevailing norm. Here, too, a lower court must make its rulings prior to the change under the law that is established at that time. A litigant wishing himself to challenge the prevailing rule may, to be sure, be asked to lay the groundwork of that challenge in the lower court, futile though his effort there may be. *Cf. Yakus v. United States,* 321 U. S. 414, 444-445 (1944). The higher court will thus obtain the benefit of ventilation of the issue in the court below before it must confront the novel question raised.[3] But neither this nor

3. Petitioner's motion for new trial, filed under Rule 60(b) promptly following the *New York Times* decision and before this judgment became final (*cf. Polites v. United States,* 364 U. S. 426, 433 [1960]), afforded the District Court an opportunity to rule on the effect of that decision prior to the Court of Appeals' review.

any other purpose of the legal system is subserved by insisting that a litigant anticipate a change he does not seek to bring about, under penalty of forfeiting its benefit if it should subsequently be ordained, while his case is still pending in the courts. Even a state rule of procedure must be shown to serve a valid interest of the state judicial system if it is relied on to foreclose consideration of a federal contention. *Henry v. Mississippi,* 379 U. S. 443 (1965). A federal court can surely have no greater freedom to decree a forfeiture of constitutional protection on a ground that serves no useful purpose in administration of the law.[4]

That there was no anticipatory objection in *Griffin, White, Helvering* or *Uebersee* (*supra* pp. 10-11) is, we submit, decisive of the proposition that it may not be required as a pre-condition of invoking supervening judgments of this Court. This is the view of the three Circuit Courts which, anticipating or following this Court's decision in *Linkletter* held nonetheless that *Mapp v. Ohio,* 367 U. S. 643 (1961), governed in cases pending on direct review at the time of the *Mapp* decision, despite the absence of objection to the evidence when it was offered at the antecedent trial. *United States ex rel. Carafas v. LaVallee,* 334 F. 2d 331 (2d Cir. 1964), *cert. denied,* 381 U. S. 951 (1965); *United States ex rel. West v. LaVallee,* 335 F. 2d 230 (2d Cir. 1964); *Dillon v. Peters,* 341 F. 2d 337 (10th Cir. 1965); *United States ex rel. Dalton v. Myers,* 342 F. 2d 202 (3d Cir. 1965). State courts, facing the question on appeal, have reached the same decision on the issue. *People v. Loria,* 10 N. Y. 2d 368 (1961); *State v. Smith,* 37 N. J. 481 (1962); *Commonwealth ex rel. Ensor v. Cummings,* 416 Pa. 510 (1965);

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4. Since the District Court, ruling on petitioner's motion for new trial under Rule 60(b), held the *New York Times* decision inapplicable to this cause, it is entirely clear that the anticipation of that issue at the trial by an objection to the charge could not in fact have altered the result.

cf. Commonwealth v. Jacobs, 346 Mass. 300 (1963); *People v. Kitchens,* 46 Cal. 2d 260, 262-263 (1956). The result has been the same in pending cases calling for the application of *Malloy v. Hogan,* 378 U. S. 1 (1964), and *Griffin v. California;* 380 U. S. 609 (1965). See *People v. Roberts,* — Cal. 2d —, 45 Cal. Rptr. 155 (1965); *State v. Lanzo,* 44 N. J. 560 (1965); *People v. McLucas,* 15 N. Y. 2d 167 (1965); *cf. Tehan v. United States ex rel. Shott,* 381 U. S. 923 (1965). So too under *Escobedo v. Illinois,* 378 U. S. 478 (1964). See *People v. Hillery,* 62 Cal. 2d 692 (1965); *King v. State,* — Del. —, 212 A. 2d 722 (1965); *State v. Clifton,* — Ore. —, 401 P. 2d 697 (1965). For other Court of Appeals decisions giving effect to later rulings not anticipated by an earlier submission, see, *e.g., Sulzbacher v. Continental Casualty Co.,* 88 F. 2d 122 (8th Cir. 1937); *Ruppert v. Ruppert,* 134 F. 2d 497 (D. C. Cir. 1942); *United States v. O'Connor,* 237 F. 2d 466, 471 (2d Cir. 1956).

The decision of the court below cannot be reconciled with this impressive body of authority and, dealing as it does with the respect to be accorded to decisions of this Court, it urgently demands review. The decision, to be sure, was cast in terms of finding "waiver" by petitioner. But the sole ground of "waiver" was the failure to advance in the trial court *before* this Court's decision in *New York Times Co. v. Sullivan* "the constitutional grounds asserted in Times" to the knowledge of one of petitioner's co-counsel (Appendix B, pp. 13a-18a, 21a). If, as we submit, there was no duty to anticipate the ruling of this Court in *New York Times,* there was no basis for the finding made. See, *e.g., United States ex rel. Angelet v. Fay,* 333 F. 2d 12, 16 (2d Cir. 1964), *aff'd,* 381 U. S. 654 (1965). *United States ex rel. Durocher v. LaVallee,* 330 F. 2d 303, 309-310 (2d Cir. 1964). *Cf. England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411, 422 (1964); *Aetna Insur-*

ance Co. v. Kennedy, 301 U. S. 389, 393 (1937). The reference to a "known right or privilege" in *Johnson v. Zerbst,* 304 U. S. 458, 464 (1937) and *Fay v. Noia,* 372 U. S. 391, 439 (1963) envisages, of course, a right known to exist, not one merely asserted in another litigation. Indeed, the Circuit Court's concern with "waiver" added to the forfeiture that it decreed the spectacle of an inquiry into the extent to which the various attorneys for petitioner were aware of the issues tendered in *New York Times.* Far from supporting the determination of the Court, that "unseemly trial of Curtis' lawyers" (Rives, J., dissenting, Appendix B, p. 74a) adds further reason for review.

That the *New York Times* decision broke new ground in holding that the First and Fourteenth Amendments impose limits on state libel law, as well as in its formulation of the nature of the limits they impose, is not a point we feel obliged to labor here. See *New York Times Co. v. Sullivan,* 376 U. S. 254, 268, 279, 283, 297, 299 (1964); *cf. Abernathy v. Patterson,* 295 F. 2d 452, 456 (5th Cir. 1961).

We submit, therefore, that the Court of Appeals was legally obliged to test this judgment in the light of this Court's ruling in the *New York Times* decision. But even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgment of this Court "as may be just under the circumstances" (28 U. S. C. § 2106; see *Hormel v. Helvering,* 312 U. S. 552, 556-557 [1941]), we think it clear that such discretion was abused by the decision to decline review. For here the issue was presented to the District Court at the first reasonable opportunity following this Court's decision (*cf. Herndon v. Georgia,* 295 U. S. 441, 444 [1935]; *Polites v. United States,* 364 U. S. 426 [1960]); the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the

result;[5] and only the unfounded ground of waiver was adduced to justify denial of review. Even after a plea of *nolo contendere,* this Court has been astute to grant an opportunity to a defendant to present a possible defense established by a subsequent decision. *United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 411-412 (1947). *Cf. United States v. Ohio Power Co.,* 353 U. S. 98 (1957); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964). No less solicitude is due to a defendant who has not confessed to judgment when enormous punishment has been imposed and the supervening ruling goes to First Amendment rights.

II.

The District Court in ruling on the motion for new trial under Rule 60(b) held that the publication here in suit was not protected by the ruling of this Court in *New York Times Co. v. Sullivan* and subsequent decisions because the respondent was not a "public official" within the meaning of the rule this Court laid down. The only other Judge who passed upon the issue, Judge Rives dissenting

5. The Court of Appeals in denying the petition for rehearing, regarded as "persuasive" the respondent's suggestion that petitioner pleaded truth as a defense rather than raising constitutional defenses "in order to get the right to open and close the arguments" (Appendix B, pp. 67a-68a). The right to open and close was, however, a concomitant of the burden of proof which the Georgia law placed on defendant if the plea of truth was made (R. 44; *Ga. Code Ann.* § 105-1801). If a constitutional defense had been coupled with that plea, there is no support whatever for the view that the burden would have shifted to the plaintiff. In fact, the defense presumably would have been stricken upon motion. Moreover, if that defense could not have been coupled with the plea and the defendant had to choose between a plea that it thought valid and an as yet unestablished defense, as the Court appears to intimate below, it is unthinkable to find a waiver of federal right in the choice to rely upon the plea. *Cf. Fay v. Noia,* 372 U. S. 391, 439 (1963); *Green v. United States,* 355 U. S. 184, 192-194 (1957); *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411, 422 (1964); *Whitus v. Balkcom,* 333 F. 2d 496 (5th Cir. 1964).

in the court below, squarely rejected this conclusion. The issue thus presented plainly is a question calling for this Court's review.

The question is, indeed, akin to that *sub judice* in *Rosenblatt v. Baer,* No. 38, this Term, argued here on October 20, 1965. Here, as in *Rosenblatt,* the trial court's charge did not conform to the requirements of *New York Times; Garrison v. Louisiana,* 379 U. S. 64 (1964); *Moity v. Louisiana,* 379 U. S. 201 (1964); *Henry v. Pearson* and *Henry v. Collins,* 380 U. S. 356 (1965), if the respondent's official position brought the publication within the constitutional privilege that those decisions have established. In *Rosenblatt* the plaintiff was employed by County Commissioners to operate a public recreation area and the publication impugned his honesty in the discharge of those official duties. Here the respondent was employed as the Athletic Director of a State University by an Athletic Association functioning as agent of the Board of Regents and the publication impugned his fidelity in the discharge of the public trust that he assumed. The considerations deemed to warrant this Court's review in *Rosenblatt* accordingly are applicable here.

If, as we submit, the rule of *New York Times* applies to any publication critical of the conduct of public employees in the discharge of their duties of employment, since there is a public interest in the way that they discharge their duties, it is clear that a reversal is demanded here. The man who wished his tombstone to record that he was "father of the University of Virginia" (Randall, *The Life of Thomas Jefferson,* vol. iii, pp. 563-564 [1858]) would surely be amazed by the conclusion of the District Court that the Director of Athletics of a State University was not a "public official," within the meaning of a constitutional principle designed to preserve free discussion of the way in which all public trusts may be discharged.

It is, of course, irrelevant that the District Court considered that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (242 F. Supp. at 395; Appendix B, p. 96a). The Court did not submit that question to the jury and its verdict made no finding on the issue. The ruling that there was a jury question on defendant's plea of truth, despite the burden of persuasion placed on the defendant, applies *a fortiori* on this record if the plaintiff must establish reckless disregard.

III.

Whether or not the rule of liability applied in the District Court satisfied the constitutional requirements defined by the *New York Times* and subsequent decisions, the verdict and the judgment in this cause present substantial questions of profound importance to the freedom of the press.

First: The jury verdict of $3,000,000 punitive damages for a publication causing injury assessed at $60,000 was not only "grossly excessive", as the District Court has found; it contravened the First Amendment and entailed a deprivation of due process. These points were made against the verdict by the motion for new trial (R. 46-48) and were, therefore, plainly open in the Court of Appeals on appeal from the judgment.

Conceding, *arguendo,* that a punitive award in libel cases, imposed as a deterrent to the defendant and to others and "to protect the community" (R. 1356), is not *per se* an unconstitutional method of regulating publication (*cf. Day v. Woodworth,* 13 How. 362, 370-371 [1851]), it is clear that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms." *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940). For that reason, even though a measure bur-

dening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960). See also, *e.g.*, *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958); *Smith v. California*, 361 U. S. 147, 150-151 (1959); *Bates v. Little Rock*, 361 U. S. 516 (1960); *Freedman v. Maryland*, 380 U. S. 51 (1965). As Mr. Justice Brandeis said long ago "a police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive." *Whitney v. California*, 274 U. S. 357, 377 (1927) (concurring opinion). Indeed, quite apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression". *Life & Casualty Co. v. McCray*, 291 U. S. 566, 571 (1934).

Since the First and the Fourteenth Amendments apply to all the agencies of government (*N. A. A. C. P. v. Alabama*, 357 U. S. 449, 463 [1958]; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 68 [1963]), a jury verdict must be tested by these standards, no less than a judicial or administrative action or an act of legislation.

So tested, we believe it clear that the $3,000,000 verdict, representing 65% of the defendant's retained earnings (R. 1389), was in violation of the Constitution. The verdict plainly was designed to put defendant out of business and was thus, as Judge Rives said below (Appendix B, pp. 51a-52a), equivalent to a prior restraint. Prior restraint or not, it takes no argument to show that such a penalty, imposed in addition to full compensation for all injury believed to be inflicted on the plaintiff and the mitigation of such

injury involved in the mere fact of verdict, "unduly" infringed the "protected freedom" and inflicted "sheer oppression". Nothing could be better calculated than a verdict of this kind to impose "the pall of fear and timidity" upon the press and thus create "an atmosphere in which the First Amendment freedoms cannot survive". *New York Times Co. v. Sullivan*, 376 U. S. at 278. The maximum penalty against a corporation for criminal libel is fixed by Georgia law at a fine of $1,000. *Ga. Code Ann.* §§ 26-2101; 27-2506. That legislative judgment as to what is necessary to protect the community provides, in our submission, the perspective for appraising the constitutional validity of this award.

This jury verdict, therefore, even more than that in *New York Times* supplies what Mr. Justice Black, concurring in that judgment, called "dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (376 U. S. at 294). The only way that threat can be removed, short of according the absolute privilege this Court declined in *Times* to find embodied in the First Amendment, is to hold that a jury's compensatory verdict must bear reasonable relationship to the amount of damage shown and that a punitive additional award must be proportionate to the offense committed, as that offense is measured by the damages incurred. The punitive verdict here did not comport with these requirements and thus was tainted by a violation of the Constitution.

Second: If the verdict was, as we submit, unconstitutional, it was not saved by the remittitur required by the District Court. For even though the use of a remittitur may be too well established to be "reconsidered or disturbed at this late day," as this Court reluctantly declared

in *Dimick v. Schiedt*, 293 U. S. 474, 485 (1935), it is no less established that a verdict based upon a jury's prejudice cannot be cured. *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 521 (1931); *National Surety Co. v. Jean*, 61 F. 2d 197, 198 (6th Cir. 1932); *Brabham v. Mississippi*, 96 F. 2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone*, 205 F. 2d 267 (4th Cir. 1953). A verdict violative of the Constitution surely is no less incurably defective, if, indeed, the jury's prejudice is not in such a case to be presumed.

The vice of such a verdict is shown plainly in this case. For when the trial court found the jury's verdict to be "grossly excessive", it did not ask itself what size of verdict might comport with constitutional requirements and show a due regard for the importance of preserving freedom of the press. It asked, instead, what was the largest verdict "ever sustained for punitive damages by the Appellate Courts" and, finding that figure to be $175,000 (of which $100,000 was the largest sum awarded against any one defendant) in *Reynolds v. Pegler*, 223 F. 2d 429 (2d Cir. 1955), it expressed its "considered opinion that the maximum sum" that "should have been awarded . . . should be $400,000" (225 F. Supp. at 919-920; Appendix B, pp. 81a-83a). That the magnitude of the invalid jury verdict exerted a substantial influence upon the Court's determination is, therefore, undeniable. The Court's award was inescapably a "fruit" of the illegal action of the jury. *Cf., e.g., Wong Sun v. United States*, 371 U. S. 471, 484 (1963).

Third: Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, we contend that the punishment imposed is repugnant to the Constitution.

In assessing the sum of $400,000 as "the maximum" that "should have been awarded", the Court, as we have

said, employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. Such a determination, taking no account of the effect of such a punishment upon defendant or of the threat of like awards on other publications revealed no solicitude at all for First Amendment guarantees. The size of the award, no less than its unprincipled assessment, thus impinges far too heavily and arbitrarily upon the freedom of the press to preserve the "breathing space" required by that First Amendment freedom "to survive". *N. A. A. C. P. v. Button,* 371 U. S. 415, 433 (1963).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV.

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, lib-

erty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE TITLE 28.

§ 2106 *Determination* "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 60(b).

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons

(1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949."

GEORGIA CODE ANNOTATED.

§ 26-2101 (340 P. C.)

LIBEL DEFINED; PUNISHMENT.—A libel is a malicious defamation, expressed either by printing or writing, or signs, pictures or the like, tending to blacken the memory of one who is dead, or the honesty, virtue, integrity, or reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule. Every person convicted of this offense shall be punished as for a misdemeanor. (Cobb. 812.)

§ 27-2506 (1065 P. C.)

MISDEMEANORS, HOW PUNISHED.—Except where otherwise provided, every crime declared to be a misdemeanor shall be punished by a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months, to work on the public works in such public works camp or

other appropriate institution under the jurisdiction of the State Board of Corrections not to exceed 12 months, any one or more of these punishments in the discretion of the trial judge. (Acts 1865-6, p. 233; 1878-9, p. 54; 1895, p. 64; 1908, p. 1119; 1956, pp. 161, 168; 1957, pp. 477, 482.)

§ 32-101

CREATION OF BOARD OF REGENTS. CORPORATE NAME OF TRUSTEES OF UNIVERSITY OF GEORGIA CHANGED.—There is hereby constituted a department of the State Government of Georgia, to be known as the "Board of Regents of the University System of Georgia." The name of the corporation heretofore established and existing under the name and style, "Trustees of the University of Georgia," is hereby changed to "Regents of the University System of Georgia" (Acts 1931, pp. 7, 20).

§ 32-113

GOVERNMENT OF UNIVERSITY OF GEORGIA.—The management and government of the University of Georgia, and all of its branches named in section 32-103 are vested in the Board of Regents (Acts 1931, pp. 7, 21).

§ 105-1801 (4488)

PLEA OF AUTHORITY UNDER LAW; EFFECT AS TO RIGHT TO OPEN AND CONCLUDE.—In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue; but such plea shall not give to the defendant the right to open and conclude the argument before the jury, unless it shall be filed before the plaintiff submits any evidence to the jury trying the case (Acts 1888, p. 35).

APPENDIX B.

The Decisions Below.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 21491.

CURTIS PUBLISHING COMPANY,

Appellant-Appellee,

versus

WALLACE BUTTS,

Appellee-Appellant.

(AND REVERSE TITLE)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(July 16, 1965.)

Before RIVES and BROWN, *Circuit Judges,* and SPEARS, *District Judge.*

SPEARS, *District Judge:* This is a libel suit. Curtis Publishing Company[1] published an article in the March 23, 1963 issue of the Saturday Evening Post[2] entitled "The Story of a College Football Fix", characterized by the Post

1. Hereinafter referred to as either "Curtis", "defendant" or the "Post".

2. Also referred to herein as the "Post".

in the sub-title as "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall."

On March 25, 1963, Wally Butts,[3] former Athletic Director of the University of Georgia, instituted this action against Curtis. In August, 1963, the case was heard before a jury, which returned a verdict against Curtis for $60,000 general and $3,000,000 punitive damages. Conditioned upon the failure of Butts to remit that portion of the award for punitive damages in excess of $400,000, the trial court granted Curtis' motion for new trial. At the same time, Curtis' motion for judgment notwithstanding the verdict was denied. On January 22, 1964, after Butts had filed a remittitur, Curtis' motion for new trial was denied, and judgment for Butts in the amount of $460,000 was entered. Thereafter, Curtis filed motions for new trial under Rule 60(b), F. R. Civ. P., which were denied on April 7, 1964. This appeal is taken from the judgment of January 22, 1964, and from the trial court's denial of Curtis' motions for judgment notwithstanding the verdict and for new trial. We affirm.

Curtis publishes various magazines including the Post. Prior to the publication of the story in question, the editor-in-chief, undoubtedly hoping to attract more readers, had decided to "change the image" of the magazine by making it an "expose" type, and embarking upon a policy of "sophisticated muckraking", in order "to provoke people" and "make them mad".[4]

The article[5] involved was based upon a claim by one George Burnett that on September 13, 1962 he had acci-

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3. Sometimes hereinafter referred to as "Butts" or "plaintiff".

4. See note 25, infra.

5. The following editorial comment was inserted at the beginning of the story:

"Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

dentally overheard, and made notes of, a long-distance telephone conversation between Butts and "Bear" Bryant, football coach at the University of Alabama, in which Butts divulged certain information about football plays the University of Georgia would use in its opening game against Alabama. Georgia was subsequently defeated 35-0.

About four months after the alleged telephone conversation Burnett contacted various people, including Georgia football coach Johnny Griffith, and then decided to tell his story to the Post. A writer, Frank Graham, Jr., was assigned by the Post to investigate and write the story, and an Atlanta sports editor was retained to advise him. Graham never saw Burnett's notes, as they were at the time in the possession of Georgia school officials; he did not interview a witness known by him to have allegedly discussed the notes with Burnett on the same day the telephone conversation purportedly took place; he never viewed the game films; and neither he nor anyone else on behalf of the Post ever contacted Butts or Bryant. He agreed

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"Before the University of Georgia played the University of Alabama last September 2, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled.—THE EDITORS."

In the story itself it is stated, among other things, that "(t)he Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating". Georgia coach Johnny Griffith was quoted as saying bitterly to a friend, "I never had a *chance.*" The next sentence read: "When a fixer works against you, that's the way he likes it."

that both he and Curtis knew publication of the article "would ruin Coach Butts' career".

On March 11, 1963, eleven days before the article was published, Curtis was informed by telegram and letter, both sent by Butts' counsel, of the "absolute falsity of the charges" contained in the proposed story. The record does not disclose that any additional investigation was initiated, and the telegram and letter went unanswered. In addition, a long-distance telephone appeal that the article not be published, made by Butts' daughter prior to publication, was rejected. After the article was published, Curtis refused a demand that it publish a retraction.

The Post took the position from the beginning that the statements made in the article concerning Butts were true, and that because of their nature it had exercised great care by thoroughly checking every significant source of information as to their truthfulness and accuracy, in advance of publication.

Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks and to be on probation at the time he claimed to have listened in on the conversation.

Both Butts and Bryant testified. Each emphatically denied the charges contained in the article and stated that there was never any conversation between them having as its purpose the fixing or rigging of any football game. Several football players, past and present, expressed their opinions to the effect that the outcome of a football game cannot be rigged or fixed without participation by the

players themselves, and that there is no way in which two coaches can rig or fix the outcome of a football game without the players' knowledge. Other "experts" stated their opinion that the information contained in the "so-called" Burnett notes would not be of any assistance at all to the University of Alabama in preparing for its game with the University of Georgia. In several instances Butts' witnesses denied direct quotations attributed to them in the article.

In an opinion written by the district judge the facts are stated in some detail,[6] and no useful purpose could be served by repeating them here, although portions thereof pertinent to specific issues later discussed may be utilized. It is significant, however, at this point, to say that in view of the verdict it rendered, the jury undoubtedly accepted Butts' version that the story was "willfully, maliciously and falsely" published, as a result of which he has suffered substantial injury to his "peace, happiness and feelings", as well as to his "honor, reputation and integrity". As the trial judge saw it: "The article was clearly defamatory and extremely so. . . . The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable."[7] We wholeheartedly agree with that appraisal.

The Issues Presented.

Curtis submits twenty-eight specifications of error which are argued in its brief under ten propositions. The issues involved are: (1) Was the article libelous per se? (2) Does the court's judgment violate Curtis' rights under the First, Fifth and Fourteenth Amendments? (3) Did the

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6. Butts v. Curtis Publishing Co. (N. D. Ga. 1964), 225 F. Supp. 916.

7. Id. at 919.

arguments of Butts' counsel, not objected to at the trial, require a new trial? (4) Did the court err in excluding certain testimony offered to impeach the credibility of Butts and the witness John Carmichael? (5) Were the extra-judicial statements of George Burnett, and the statements made to him by third person, properly excluded? (6) Did the trial court commit plain error in instructing the jury? (7) Did the trial court err in refusing to charge the jury that it should construe Butts' testimony "most strongly against him"? (8) Did the trial court err in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely? (9) Does the "newly discovered evidence" offered in Curtis' motion under Rule 60(b), F. R. Civ. P. require a new trial? (10) Is the award of punitive damages so excessive that it cannot be cured by the remittitur?

THE ARTICLE AS LIBELOUS PER SE.

The trial judge charged the jury that the article was libelous per se. This was objected to by Curtis on the ground that Butts was not actively engaged in the profession of a football coach at the time of publication, and, that no special damage was shown.[8] Curtis took the same position in its motions for directed verdict and for judgment notwithstanding the verdict.

Curtis' contention in this regard cannot be sustained. This is a *libel* suit as distinguished from a *slander* suit.[9]

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8. In support of this proposition, Curtis cites—Weatherholt v. Howard, 143 Ga. 41, 84 S. E. 119 (1915); Van Epps v. Jones, 50 Ga. 238 (1873); Mell v. Edge, 68 Ga. App. 314, 22 S. E. 2d 738 (1942); Haggard v. Shaw, 100 Ga. App. 813, 112 S. E. 2d 286 (1959); and Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S. E. 222 (1935). These cases, however, appear to be "delinquent debtor cases" referred to in note 11, infra.

9. Ga. Code Ann. § 105-701 (libel), § 105-702 (slander).

Under Georgia law, a plaintiff may recover in a libel action where the defamation is apparent from the writing itself, without the necessity of alleging or proving special damages,[10] and it is not necessary that he be engaged in the pursuit of his trade, business or profession at the time of publication.[11]

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10. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S. E. 2d 906 (1960), the leading case in Georgia, states that words which, if merely spoken, would not be actionable in absence of special damage, may be libelous when printed if false and tend to injure reputation and bring one into public hatred, contempt or ridicule. Ordinarily, only general damages need be alleged in an action for libel.

11. Ga. Code Ann. § 105-701, defines libel as the "false and malicious defamation of another, expressed in print . . . tending to injure the reputation of an individual and exposing him to public hatred, contempt, or ridicule . . .", without the requirement that the charges be calculated to injure one in his trade, office or profession. A newspaper libel is described in Ga. Code Ann. § 105-703, as being "any false and malicious defamation of another in any newspaper, magazine or periodical tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule", again without the requirement that the charges refer to one's trade, office or profession. Only in the area of slander is a reference to one's trade, office or profession required. Ga. Code Ann., § 105-702.

The case of Floyd v. Atlanta Newspapers, Inc., supra, note 10, in its definitive statement of the Georgia law of libel explains that written words are sufficient to constitute libel per se if they tend to bring a man into public hatred, contempt or ridicule. Damages will be presumed from the nature of the words themselves and their harmful effect and no proof of special damages is necessary. Where the only possible construction is that the words are libelous per se, upon proof thereof, the only remaining question for the jury is that of damages. See also Restatement of the Law Second, Torts, Tentative Draft No. 11, April 15, 1965, Section 569, wherein Georgia is named as one of the majority of states following this rule, and, as explained in the notes to Restatement of the Law of Torts, 1938, Vol. III, Sec. 569, Comment e, pp. 168-9, it may be libelous to impute misconduct in one's trade, etc., although he is at the time no longer engaged in the pursuit of the trade, business or profession.

Curtis cites many cases in support of its position (see note 8, supra. However, these are part of a group of cases known in Georgia as the "delinquent debtor cases", and, as explained by the Floyd case, stand in a class by themselves, and have no bearing on causes of action other than those involving charges that one owes a debt and refuses

But even if the law necessitated a showing that Butts was actively engaged in the profession of a football coach at the time of publication, we think this requirement has been satisfied.

The story was purchased by Curtis on February 22, 1963. Butts resigned as Athletic Director effective February 28, 1963. The article was published in the March 23, 1963 issue of the Post. Thus it may be assumed that Butts was at least temporarily out of work on the day of publication, but it hardly follows that he had completely abandoned the coaching business.

Actually, Curtis admitted in its answer that Butts "has enjoyed a national reputation as a successful and respected member of the coaching profession", and that he "has been approached and offered employment as head football coach by several colleges and professional football teams in the country due entirely to his reputation as a successful member and leader in his profession." This admission, in and of itself, would indicate a recognition that Butts was still identified with some phase of football activities.

Upon Curtis' insistence, its second defense asserting that the statements contained in the article were true, was held to be a valid plea of justification. By interposing this plea, Curtis admitted a prima facie case,[12] but gained the valuable right to open and close. The complaint alleged that "plaintiff's career *as a member of the football coaching profession* had been ruined and destroyed by this scurrilous and contemptible defamation." (Emphasis sup-

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to pay, or owes a debt long past due. In this isolated situation the charge is, as a matter of law, uniformly held in Georgia, not libelous per se, and it is in these cases that Curtis finds language to the effect that falsely spoken or written words that do not contain a charge made in reference to one's trade, office or profession are not actionable without proof of special damages.

12. See Ga. Code Ann. § 105-708 and § 105-1801; Baldwin v. Davis, 188 Ga. 587, 590, 4 S. E. 2d 458 (1939).

plied.) Without regard to any question as to whether the plea constitutes an admission that the remarks were made with malice, it is our view that it necessarily carries with it an admission, not only that the libelous statements were made by Curtis, but also that they were made in relation to Butts "as a member of the football coaching profession". Under all the circumstances, it is untenable to say that simply because Butts was temporarily out of a job at the time of publication, he was not actively engaged in the coaching business as a means of livelihood.[13]

We hold that the trial court correctly charged the jury that the article was libelous per se, and that he did not err in denying Curtis' motions for a directed verdict and for judgment notwithstanding the verdict.

Curtis' Constitutional Rights.

Curtis contends that the trial court's judgment violates and abridges its rights of freedom of speech and of the press guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. It relies upon the case of *New York Times Company v. Sullivan*, 376 U. S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), decided subsequent to the trial of this case, in which it was held that in order for a public official in a libel suit to recover any damages he must prove that a statement against his official conduct was published "with actual malice—that is knowledge that it was false or with reckless disregard of whether it was false or not". 376 U. S. at 279-80.

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13. In the Missouri case of Clark v. McBaine, 299 Mo. 77, 252 S. W. 428 (1923), at 432, cited by Curtis, the Court stated that though the plaintiff "had been removed as a member of the faculty, . . . his profession, or means of a livelihood, was still that of a professor of law, and a writer of textbooks upon the law, and the gist of his damages . . . consisted of injury done to his standing as a professor and writer of law."

This holding, says Curtis, "drastically changed the constitutional principles applicable to libel actions", by announcing new safeguards which "make it manifestly clear not only that the rules of law which were applied in the trial of the instant case were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot be permitted to stand."

Countering this, Butts says that the invocation of the constitutional defenses in libel cases has received emphatic and substantial attention by scholars and Courts over the years; that the *Times* case resulted in no fundamental change of law, but merely gave new sanctions to a long standing rule; and that in any event, Curtis did not invoke those defenses even though they are more broadly stated in the Georgia law than in the *Times* case.[14] Moreover, Butts emphasizes that the *Times'* constitutional grounds now asserted were not timely raised or preserved below. In fact, they were presented for the first time in the F. R. Civ. P. 60(b) motion filed on March 23, 1964, long after trial.

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14. In support of his position, Butts cites: "Justice Black and First Amendment 'Absolutes'; A Public Interview," 37 N. Y. U. L. Rev. 349 (1962); C. L. Black, Jr., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," Harpers, February, 1961, p. 63; Caldwell v. Crowell-Collier Pub. Co., (5th Cir. 1947), 161 F. 2d 333; Sweeney v. Schenectady Union Pub. Co., (2d Cir. 1941), 122 F. 2d 288, aff'd 316 U. S. 642 (1942); Henry v. Collins, 158 So. 2d 28 (Miss. 1963); Louisiana v. Garrison, 244 La. 787, 154 So. 2d 400 (1963); Louisiana v. Moity, 245 La. 546, 159 So. 2d 149 (1963); and other pre-Times defamation cases. He points out that the Supreme Court in Times recognizes that "a like rule" has existed for a number of years in some state courts; that the Kansas Supreme Court, in Kennedy v. Mid-Continent Telecasting, Inc., 193 Kans. 544, 394 P. 2d 400 (Kan. 1964), noted that the Times decision requires no change in the law; that the trial court said (note 23, infra) that Georgia provides this "like rule" by a statute granting a qualified privilege for "comments upon the acts of public men in their public capacity and with reference thereto", citing Ga. Code Ann. § 105-709(6); and that privilege can be lost by proof of actual malice, citing Ga. Code Ann. § 105-710.

The record reflects that Curtis did not object to the trial court's instructions.[15] The *Times* case was decided by the Alabama Supreme Court on August 30, 1962. A petition for writ of certiorari presenting constitutional questions identical to those now being urged by Curtis, was filed in the United States Supreme Court on November 21, 1962, four months prior to the filing of the complaint in this case on March 25, 1963.[16] Certiorari was granted in the *Times* case on January 7, 1963. The jury verdict in the instant case was returned on August 20, 1963, and the trial court's judgment thereon was entered the same day. A Birmingham, Alabama law firm, which represented the New York Times in the case brought against it by Sullivan, also, together with Curtis' General Counsel, represented Curtis in a libel suit Coach Bryant had filed against it in the United States District Court at Birmingham, Alabama. A member of this law firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant, and had talked with the author, Graham, about the matter prior to publication of the story. The same lawyer, together with another member of the firm, sat (as did the General Counsel for Curtis) at Curtis' Counsel table throughout the trial of this case.[17]

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15. See Rule 51, F. R. Civ. P. Also see note 36, infra.

16. We have examined the petition for writ of certiorari presenting the constitutional questions, and find that it was filed by the New York Times Company on November 21, 1962. The brief for respondent in opposition was filed on December 15, 1962, and petitioner's reply thereto was filed on December 29, 1962.

17. The Birmingham law firm of Beddow, Embry and Beddow, which represented the New York Times in the Supreme Court of Alabama, is also shown to be counsel for the Times in the Supreme Court of the United States. Mr. Roderick Beddow of that firm represented Curtis in the case of Paul Bryant v. Curtis Publishing Company, in the United States District Court in Birmingham, and both he and Mr. T. Eric Embry of that firm sat, along with the General Counsel of Curtis, Mr. Philip H. Strubing, at the Curtis counsel table throughout the trial of this case. Butts' brief states,

While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*.

The Supreme Court said, in *Michel v. Louisiana*, 350 U. S. 91, 99, 100 L. ed. 83, 76 S. Ct. 158 (1955), that "(t)he test (in making a claim to a constitutional right) is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court.'" It then cited the case of *Yakus v. United States*, 321 U. S. 414, 444, 88 L. ed. 834, 64 S. Ct. 660 (1944), for the proposition that "(n)o procedural principle is more familiar to this court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right."[18]

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without contradiction, that Mr. Beddow "initially 'sent them (Curtis) this information' about the alleged telephone conversation and was a principal in the initial work of the author Frank Graham."

18. Michel v. State of Louisiana, 350 U. S. 91, 76 S. Ct. 158, 100 L. ed. 83 (1955), involved a Louisiana statute requiring any challenge to the composition of a Grand Jury to be made before the end of the term of the Grand Jury, holding that the statute was not unconstitutional, and that since the petitioners had not, under that statute, made timely challenge to the constitutional composition of the Grand Jury, they waived any such right to so challenge the Grand Jury. The court announced that the test was whether the defendant had had a reasonable opportunity to have the issue as to the claimed right heard and determined by the court.

On the other hand, in the case of Reece v. State of Georgia, 350 U. S. 85, 76 S. Ct. 167, 100 L. ed. 77 (1955), decided at the same time as the Michel case, the state court had refused to consider the

It cannot be said that this case falls within the category of those cases cited by Curtis [19] which hold that if subsequent to a trial or hearing, but before a final decision by the trial or appellate court, the fundamental law is changed, it is the duty of the court to apply the law as amended. Those were "exceptional cases", where there was no waiver and the court was satisfied that to do otherwise would result in a "plain miscarriage of justice". In this case, however, even if it is assumed that the basic law has

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defendant's motion to quash the indictment filed before his arraignment on the ground of the composition of the Grand Jury, because, by Georgia practice, objections to the Grand Jury must be made before the indictment is returned. The court held that there had been no waiver there, and that due process had been violated, because defendant, a semi-illiterate Negro, had no counsel until the day after his indictment, pointing out that "the right to object presupposes an opportunity to exercise that right."

In Kewanee Oil and Gas Co. v. Mosshamer, (10th Cir. 1932), 58 F. 2d 711, where the constitutionality of a state statute was raised on appeal, the court stated that "if the constitutionality of a statute is not raised in the pleadings ordinarily it may not be raised at the trial."

Other cases decided by district courts, and holding that constitutional questions ordinarily must be raised at the trial, are: Alexander v. Daugherty (D. C. Wyo. 1960), 189 F. Supp. 956 (only where failure to raise the constitutional question at the trial was due to ignorance, duress or other reason for which petitioner could not be held responsible, may redress be had, and then if "it is made to appear that there had been such gross violation of constitutional right as to deny the defendant the substance of a fair trial"); Houck v. Eastchester P. U. District (D. C. Alaska 1952), 104 F. Supp. 588; Mount Tivy Winery v. Lewis (N. D. Cal. 1942), 42 F. Supp. 636; and White Cleaners and Dyers v. Hughes (W. D. La. 1934), 7 F. Supp. 1017.

19. Ziffrin, Inc. v. United States, 318 U. S. 73, 87 L. ed. 621, 63 S. Ct. 465 (1943); United States v. Schooner Peggy, 5 U. S. (1 Cranch) 103, 2 L. ed. 49 (1801); and Hormel v. Helvering, 312 U. S. 552, 85 L. ed. 1037, 61 S. Ct. 719 (1941), an unusual case in which the Supreme Court allowed the Tax Commissioner to assert for the first time on appeal in the Court of Appeals the taxability of income under another section of the code, but stated that "ordinarily an appellate court does not give consideration to issues not raised below . . . (but) there may be exceptional cases where injustice may otherwise result except where express waiver is given."

been changed, the situation is quite different. For whatever tactical or other reason[20] Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge, through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading even problems of local jurisprudence Curtis' complete and utter silence amounted to "an intentional relinquishment or abandonment of a known right or privilege."[21]

Without expressing any opinion as to whether *Times* fundamentally changed the substantive law applicable to libel cases, or whether the charge on malice given by the trial court was adequate under *Times*,[22] or whether Butts

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20. Butts thinks it can be inferred that "defendant never considered plaintiff to be in any class of 'public men' so as to make the defense available."

21. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed. 1461 (1938).

22. The trial court's charge on malice was, in part, as follows:

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact . . .

"Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its

was the kind of "public official" contemplated by *Times*,[23] or whether a reversal might otherwise be required if the

discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred, and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights . . . ."

23. In a second opinion dated April 7, 1964 (See Butts v. Curtis Publishing Company (N. D. Ga. 1964) ..... F. Supp. ....., at .....), denying Curtis' motions under Rule 60(b), the trial judge gave the following as his views concerning Butts' status as a "public official":

"In the present motion at hand, the defendant contends that plaintiff's action comes under the Times ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 105-107(6). Just where in the ranks of government employees the 'public official' designation extends, the Supreme Court in the Times case did not determine. The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

"Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located in Athens) and the Georgia School of Technology (located in Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equip-

constitutional issues had been timely presented, we hold that Curtis has clearly waived any right it may have had

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ment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see Page v. Regents of University System of Georgia, 93 F. 2d 887, 891-892. As was stated in the Page case, the 'coaches' are also members of the faculty.

"Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners' he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a state or public educational institution is not that of a public officer or official, but he is merely an employee thereof. Regents of the University System of Georgia v. Blanion, 49 Ga. App. 602(4); Board of Education of Doerun v. Bacon, 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of New York Times Company v. Sullivan, supra."

See also: Martin v. Smith, 239 Wis. 314, 1 N. W. 2d 163, 140 ALR 1063.

The case of Barr v. Matteo, 360 U. S. 564, 3 L. ed. 2d 1434, 79 S. Ct. 1335 (1959), cited in the Times case, held that in the reciprocal situation where two government employees were suing the director of an important United States Government agency for his alleged libelous conduct, the director, a public official, has absolute privilege, regardless of the existence of malice, in defense of the alleged libel, although his conduct was within the outer perimeter of his line of duty. The policy of this position is to aid in the effective functioning of government by assuring that government officials shall be free to exercise their duties without fear of damage suits with respect to acts done in the course of those duties.

In cases decided since the Times case, the "public official" designation has not been extended. The court, in the case of Garrison v. Louisiana, 379 U. S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209, (Nov. 1964), in reversing the conviction of the New Orleans Parish District Attorney for the criminal defamation of eight judges of the Criminal District Court of the Parish of New Orleans, stated that "the rule protects . . . the free flow of information to the people concerning

to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*.

THE ARGUMENTS OF COUNSEL.

Curtis contends that the jury arguments of Butts' counsel constituted "significant and fundamental errors which the court may notice without objection".

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public officials, their servants . . .", whatever touches upon "an official's fitness for office is relevant . . . . A candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office". Justice Goldberg, in his concurring opinion, stated that 'libel on the official conduct of the governors (of the people) . . . can have no place in our Constitution."

The Second Circuit, in Pauling v. News Syndicate Company, Inc. (2nd Cir. 1964), 335 F. 2d 659, considered the possible extensions of the doctrine of the Times case, stating that a candidate for public office would seem an inevitable candidate for extension, and that once an extension is made, the participant in public debate on any issue of grave public concern would be next in line. Quoting the Time case, the court then said: " 'The profound issues should be uninhibited, robust, and wide-open', now applied to confer immunity on 'vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials', may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The Henry v. Collins and Henry v. Pearson cases, 380 U. S. 356 (1965), reversed a judgment for the plaintiffs on the ground that the lower court's charge to the jury on malice was error under the Times and Garrison cases, thus indicating that a County Attorney and a Chief of Police would come within the privilege. Justices Black, Douglas and Goldberg concurred, not due to the error in the charge, but on the ground that such a suit would violate the First and Fourteenth Amendments under the Times case, where the defendant published his criticism of the plaintiffs' performance of their public duties.

This court in Buckley v. The New York Times (5 Cir. 1964), 338 F. 2d 470, after deciding the case on procedural grounds, stated in dicta that "a judicial determination by this court of the proposition that the principles of (the Times case) should be extended to candidates for public office, must await an appropriate case."

For other cases decided by district courts, see: Smoot v. League of Women Voters of the Grand Traverse Area (W. D. Mich. 1964), 36 F. R. D. 4; and H. O. Merren & Co., Ltd. v. A. H. Belo Corp. (N. D. Tex. 1964), 228 F. Supp. 515.

The record reflects that Curtis was represented at the trial by several attorneys. One argument for each side was made on Friday and the remaining arguments were completed the following Monday. Much of the argument of which complaint is now made was offered on Friday. Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.

The trial court correctly disposed of this matter in the following language:

> "It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial." [24]

If, as Curtis' counsel now claim, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", and "unsworn testimony of counsel", it is inconceivable to us that they would have delayed so long without raising the slightest hint of an objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended weekend recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought.

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24. Supra note 6, at 922.
See also: Fidelity & Casualty Co. of N. Y. v. Williams (5th Cir. 1952), 198 F. 2d 128.

Furthermore, after carefully considering the entire record, we do not consider that the arguments belatedly objected to would have required a reversal, even if timely objections had been made. Some of the argument was invited, but the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama. The editor-in-chief of the Post set the tone and the stage for the attack. He openly boasted that the Post's new policy of "sophisticated muckraking" was the "final yardstick" of editorial achievement since it meant "we are hitting them where it hurts." It was no wonder that the author Graham was equally callous in admitting that he knew that "when this article was published that was the death of Wally Butts in his chosen profession" and that "Curtis Publishing Company knew that when that article was published it would ruin Coach Butts' career." The policy of the magazine so bluntly stated[25] was by itself

25. In the deposition of Clay D. Blair, Jr., editor-in-chief, it was developed that for the first quarter of 1963, Curtis showed a loss of about $1.1 million, compared to a loss in 1962 for the same quarter of $4.7 million; that in 1960 the amount of advertising revenue was $106 million; that in 1961 the figure had dropped to $86 million; that Blair was made a vice-president of Curtis in June of 1962; that circulation is one of the factors that affects advertising revenues; that demography is important, because "all circulation in Russia would not be appealing to General Motors;" that Blair wrote a memo to his staff, which found its way to a national magazine, in which he was quoted as saying: "The final yardstick is the fact that we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism"; that he was not being facetious when he used the phrase "sophisticated muckraking"; that he meant it when he said it and when he testified; that he was correctly quoted as being "concerned with the image of the Post and in trying to get a new image, portray a different type of magazine"; that he did change the image of the Post; that the Butts issue was representative of the new type magazine Curtis was interested in publishing; that "we have perhaps come . . . 25 per cent of the way with this issue . . . toward the goal of the magazine that I envision"; that this issue is a step in the right direction; that he was acquainted with the term "muckraking" prior to using it in the interview which led to an article in Newsweek on November 19, 1962; that in the interview with News-

more than enough to inflame the jury. Counsel for Butts could only gild the lily.[26]

The Exclusion of Testimony.

Butts was asked by Curtis' counsel on cross-examination if he recalled having made a statement over television, on a date prior to the institution of this action, that he "would never at any time and never . . . (had) done anything that would injure the University of Georgia". He responded that he had made a statement to that effect, but that "as far as my services at the University of Georgia are concerned that represents only my opinion". Proferred evidence which Curtis asserts "is replete with incidences of Butts' unfaithfulness and disloyalty to the University of Georgia", was excluded by the trial court. Curtis insists, however, that the evidence should have been admitted, not only to demonstrate Butts' true character, but to impeach his credibility as a witness.

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week he stated that he intended to "restore the crusading spirit . . . the sophisticated muckraking, the expose in the mass magazines . . . to provoke people, make them mad"; that he further stated in the interview: "But careers will be ruined, that is sure", and he could not quarrel with the fact that Butts' career was one of the careers to which reference was made in that statement.

26. The trial court also pointed out that Butts was unquestionably one of the leading figures in the national football picture; that responsible officials of the Post knew that after the article was published Butts' career would be ruined; that Butts, through his attorney, had notified Curtis before publication that the article was false; that one of Butts' daughters had telephoned long distance to a Post official with a plea that the article be withheld from publication; and that after publication Butts had, pursuant to Georgia law, requested a retraction from Curtis, which was refused. The court then commented that the jury was warranted in concluding from all the facts in the case, including "the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights." Supra note 6 at 919.

We are in agreement with the trial court that proof of Butts' character could be made by reputation only, and that particular acts of misconduct are irrelevant.[27]

The rule that "a party may be cross-examined to bring out matters, even though they may be collateral, which are inconsistent with the testimony given by him",[28] is not applicable here. The answer given by Butts to the question asked by Curtis' counsel concerning a statement previously made out of court, was not such an affirmative profession of faithfulness and loyalty to the University of Georgia, made at the trial, as would open the door, for the purpose of impeachment, in mitigation of damages, or otherwise, to the admission of alleged incidents of "unfaithfulness and disloyalty" to that institution, either by cross-examination of Butts, or by direct evidence from other witnesses.

Complaint is made that Curtis was not permitted to show that Butts had refused to answer certain questions in his deposition, and that evidence offered as to purportedly false testimony given by Butts in his deposition was rejected. Butts refusal to answer was on advice of counsel. The answers sought were subsequently supplied, but Curtis argues that because of the delay it was denied adequate discovery and thereby "lost valuable time in the preparation of its case".

The trial judge was clothed with broad discretion in controlling the extent of direct and cross-examination,[29] and we cannot say that he abused that discretion in excluding the proffered evidence.

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27. Note 6, supra, at 921.

28. 98 C. J. S. Witnesses, § 399; 3 Wigmore, Evidence (3d. ed. 1940), § 1006(2).

29. See Roberson v. United States, (5 Cir. 1957) 249 F. 2d 737; Carpenter v. United States, (4 Cir. 1959) 264 F. 2d 565; Poliafico v. United States, (6 Cir. 1956) 237 F. 2d 97.

Similarly, we do not think the trial court abused his discretion in refusing to admit evidence that the witness Carmichael, while a minor in Ohio, had been convicted of petty larceny in 1933. The ruling was based upon lapse of time.[30]

Curtis sought to introduce into evidence certain extra-judicial statements made by George Burnett, and statements made to him by third parties. These included inquiries made by Burnett of the telephone operator and her replies thereto;[31] a telephone conversation between Burnett and one Milton Flack, purportedly made immediately after Burnett had overheard a telephone conversation between Butts and Bryant;[32] Burnett's conversation with one Bob Edwards about the notes he had taken;[33] Burnett's statements at meetings with officials of the University of Georgia; and statements of these university officials made in checking Burnett's story at meetings with

30. Supra note 6, at 921.

31. Curtis says this was offered only to show that a telephone conversation between Butts and Bryant had actually taken place. Butts, however, contends no such limitation was placed on this testimony.

32. Burnett testified that he had been trying to contact Milton Flack by telephone when he intercepted the alleged call between Butts and Bryant, after which he says he hung up the phone and sat for about twenty or thirty seconds before picking up the phone and again calling Flack's number. Curtis wanted to prove that Burnett asked Flack: "Is Wally Butts in your office now Milt", to which Flack is supposed to have replied that Butts was at that time in his office making a telephone call. The court allowed Burnett to state that he called Flack, but excluded as hearsay anything he might have said to Flack.

33. Bob Edwards was division manager of the company with which Burnett was connected. Burnett testified that he had a conversation with Edwards on January 4, 1963 about the notes he had taken on September 13, 1962. The court sustained an objection to the conversation itself on the ground that it was hearsay. On cross-examination, Burnett testified that he did not have his notes with him when he first talked with Edwards on January 4, 1963, but did show them to Edwards some two weeks later.

him.[34] All of these incidents had been reported in the article.

It was, of course, important from Curtis' standpoint that it show its good faith in publishing the article. The proffered evidence would have tended to show that these statements as set forth in the article had, in fact, been made, and we think the trial court should have admitted it for that limited purpose only. However, the full import of most, if not all, of that evidence got before the jury in some form before the trial was concluded.

In any event, none of the testimony involved related to the real "sting of the libel", and we do not consider that substantial error was committed in its exclusion. Curtis had the burden to show more than nominal error to secure reversal for rulings of evidence,[35] and this it has failed to do.

THE JURY INSTRUCTIONS.

Complaint is made that the trial court committed plain and prejudicial error in instructing the jury. No objections to any instructions were made at the trial of the case.[36] Rule 51, F. R. Civ. P., provides in part that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury."

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34. Curtis contends that the investigation conducted by the officials of the University of Georgia would support Burnett's credibility, because it demonstrated his willingness to cooperate, and to have his story questioned.

35. Rule 61, F. R. Civ. P.; Jennings v. United States (5 Cir. 1934), 73 F. 2d 470, 471.

36. The claim that certain of the jury instructions violated constitutional rights of Curtis is dealt with in this opinion under the heading "Curtis' Constitutional Rights". See notes 15-23, supra.

Full opportunity was afforded counsel for Curtis to make any objections before the jury was permitted to consider its verdict. Under Rule 61, F. R. Civ. P., all errors which could not change the result of the trial, or which did not affect the substantial rights of the parties, are harmless and must be disregarded. No action taken by the court with respect to any instruction now under attack appears inconsistent with substantial justice, or to have affected the substantial rights of the parties, and we agree with the trial court that Curtis may not now complain.[37]

THE REFUSAL TO GIVE REQUESTED INSTRUCTIONS.

There is no merit to Curtis' contention that the trial court erred either in refusing to charge the jury that it should construe Butts' testimony most strongly against him, or in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely.

The court's charge fully covered the general rules relating to the credibility of witnesses. The question concerning the credibility of any witness, and whether or not he had been successfully impeached, was left entirely to the jury. There was no showing that any witness had knowingly and wilfully testified falsely, and the evidence was more than adequate to support the verdict, even if the jury had completely disregarded the alleged equivocal testimony of Butts.

THE "NEWLY DISCOVERED EVIDENCE".

In its motion for new trial under Rule 60(b)(2), F. R. Civ. P., Curtis contended that new evidence discovered since the trial conclusively demonstrates the falsity of the

37. Supra note 6, at 922.

testimony of two of Butts' witnesses, Dr. Frank A. Rose and Coach Paul "Bear" Bryant, and strongly supports the defense of justification.

The trial court rejected this contention because (1) Curtis had not exercised reasonable diligence, (2) the evidence would merely tend to affect the weight and credibility of the testimony of Dr. Rose, and (3) the evidence would not have changed the verdict in this case.[38]

We are in accord with the trial court's conclusions, and do not find that he has abused his discretion.

PUNITIVE DAMAGES.

The trial judge gave his reasons for requiring the remittitur of all punitive damages in excess of $400,000.[39] There is not the slightest suggestion that he thought, or even intimated, that the larger award was based on passion or prejudice. On the contrary, fully aware of the distinction between a verdict excessive in amount which may be reduced by remittitur, and one resulting from improper influences such as passion and prejudice which may not be corrected in this way, the judge necessarily rejected the idea that this verdict had been infected by such destructive elements.

The Georgia Code expressly provides for punitive damages.[40] Under Georgia law, three things are left for the

38. In his opinion dated April 7, 1964 the trial court fully discussed this matter. (See supra note 23, at 16).

39. Supra note 6, at 919.

40. Ga. Code Ann. § 105-2002: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." Also see National Association for the Advancement of Colored People v. Overstreet, ... Ga. ...., ... S. E. 2d .... (No. 22814, April 20, 1965, as modified May 7, 1965). See Division 4, subd. (b) of opinion.

jury to determine: (1) "when punitive damages shall be allowed"; (2) "the amount of such damages"; and (3) the purpose of the award as "either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."[41] Obviously there are, and can be, no precise standards for these determinations. Not for the first time in the common law tradition, the law turns to the jury. And Georgia prescribes that "(t)he measure of . . . punitive damages . . . is to be fixed by the enlightened conscience of an impartial jury."[42] What the "enlightened conscience" of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages.

But, of course, no one would suppose that it is left wholly and solely to the jury. As with every other issue traditionally for jury resolution, the trial judge must still determine whether, as a matter of law, the verdict comports with law. The law recognizes that an award of any type of damages—compensatory or punitive—made by a jury free of bias, may be too small or too large. When that occurs—when the judge concludes that the law regards the verdict as too small or too large—then appropriate action must be taken by the court. Reviewing the amount of the verdict and reaching the conclusion that it is more than the law would permit is not, therefore, the equivalent of the judge's determination that excessiveness is due to a runaway jury, under the spell of passion or bias.

The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages

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41. National Association for the Advancement of Colored People v. Overstreet, supra, note 40.

42. Id.

could be made, and (b) what the maximum would be. As to (a), the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was "ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."[43] Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess.[44] The latter is a permissible course and does not infringe

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43. The trial court said, in its April 7, 1964 opinion (see supra note 23, at 16), that:

"If it were conceded that plaintiff Butts was a 'public official', the case of New York Times Company v. Sullivan would not permit the vacating of this court's previous judgment, as the ruling in the Times case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice'—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Italics supplied). In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. Butts v. Curtis Publishing Company, 225 F. Supp. 916."

44. State Farm Mutual Automobile Insurance Company v. Scott, (5th Cir. 1952) 198 F. 2d 152.

Curtis cites Crowell-Collier Publishing Company v. Caldwell (5th Cir. 1948), 170 F. 2d 941, where this Court held that the refusal to set aside a libel verdict of $237,500 was an abuse of discretion. Judge Hutcheson found that "litigants, witnesses, lawyers and jury seemed to regard the contest as a sporting event, a wager by battle, in which the best battler ought to and would win;" that the trial judge "held himself a little too aloof from the trial . . ., with the result that the trial got out of hand;" and that "when counsel for defendant made vigorous objections to the argument as highly improper, inflammatory, and prejudicial, and requested the court to instruct the jury to disregard them, the court said merely: 'Objection overruled. Request denied. Exception noted'". Obviously, the same circumstances were not present in the instant case, where the judge was in complete control, the trial was conducted in an orderly, efficient and proper manner, and no objections whatever were made to the conduct of the trial, or to the arguments of counsel.

upon the Seventh Amendment's guaranty of a jury trial.[45] In making his determination as to (b), he pursued the correct standard of keeping the verdict "within the reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights."[46] Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts.[47] Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment.

To have granted a new trial might appear to have been an easier way out. But that is really no solution. On a retrial, the judge could not instruct the next jury as to the dollar maximum of any such verdict. So that jury would be pretty much on its own, under the unavoidably vague, elastic standards prescribed in the Code, as measured by the enlightened conscience of an impartial jury.[48] The

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45. Arkansas Valley Land & Cattle Co. v. Mann, 1889, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854; International Paper Co. v. Busby, (5 Cir. 1950) 182 F. 2d 790; United States v. Certain Parcels of Land in Rapides Parish, La., (5 Cir. 1945) 149 F. 2d 81, 83.

46. Supra note 6, at 920.

47. Supra note 6, at 919. Butts, in arguing that the district court was far more lenient to Curtis in reducing the award than was justified, said: "The jury in the case at bar recognized that a 100 million dollar corporation with a circulation of between six and seven million copies and a readership of approximately 22,000,000 persons can be deterred by no less than three million dollars as a charge for its misuse of a cherished American freedom—the freedom of every man to live unthreatened by calumny. This jury believed that anything less than this amount would merely add to the audacious course of 'sophisticated muckraking' upon which the Curtis Publishing Company has admittedly set its sights." See also note 26, supra.

48. See notes 40 and 41, supra.

trial judge, on the second trial, would then be forced to repeat the process of testing for (a) and (b). If, as urged by Curtis, the determination by the judge that the amount is too much, necessarily means a new trial, it is quite possible that the case would never end. Georgia has prescribed the "punishment" for aggravated willful torts. The law ought not to frustrate the vindication of that policy by an unrealistic procedure. The jury verdict, as reviewed and reduced by the trial judge, is the tort-feasor's assurance that such damages will not exceed that which the law would tolerate to achieve the Georgia objective of deterring repetition or compensating wounded feelings.

Conclusion.

This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

The case was fully developed during extensive pretrials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is AFFIRMED.

In view of our holding, we have given no consideration to Butts' cross appeal.

RIVES, *Circuit Judge*, dissenting:

Wallace Butts, former Athletic Director of the University of Georgia, instituted this diversity action in the district court against the Curtis Publishing Company, publishers of *The Saturday Evening Post*. The complaint demanded $5,000,000 general and $5,000,000 punitive damages for an alleged libel contained in an article entitled, "The Story of a College Football Fix," which was published in the March 23, 1963, issue of the *Post*. The action resulted in a jury verdict against the defendant for $60,000 general damages and $3,000,000 punitive damages. The district court granted the defendant's motion for a new trial, conditioned upon the failure of the plaintiff to remit that portion of the award of punitive damages in excess of $400,000. The district court was of the opinion that the award of $60,000 for actual damages was not excessive, but the court concluded that the award for punitive damages was "grossly excessive." Pursuant to the district court's order, the plaintiff filed a remittitur and thereafter the district court overruled the defendant's motion for a new trial and entered judgment for the plaintiff in the amount of $460,000. Approximately six weeks after the district court entered judgment, the Supreme Court decided *New York Times Co. v. Sullivan*,[1] and the defendant filed its motion

1. 376 U. S. 254 (1964). See, generally, Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L. Rev. 1 (1965).

for new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The defendant contended that the previous judgment should be vacated and a new trial ordered in light of the *New York Times Co.* case. The district court denied the motion.

It is my view that the district court erred in not granting a new trial in light of *New York Times Co.* If mistaken in that view, I am nonetheless convinced that the part of the judgment awarding $400,000 in junitive damages cannot stand in the light of the first, fifth and seventh amendments to the Constitution.

First, however, let me say that this record makes clear beyond controversy that the questions of fact are for the jury's determination. The district court denied the plaintiff's motion for a directed verdict. Plaintiff's counsel insisted and the following colloquy ensued:

"MR. LOCKERMAN:

"—on the point that the defendant had not, under the evidence that it has shown, proven the truth under the burden that it had of the things that it has said against the plaintiff in this article.

"THE COURT:

"Mr. Lockerman, I think it would [be] in error for this Court to withdraw that issue from the Jury."

In ruling on the motion for new trial, however, the district court commented: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." The majority opinion quotes that comment and adds its "Amen" thus: "We heartily agree with that appraisal." I do not think that any such appraisal should be made. Even a casual reading of the record demonstrates that the questions of fact should be left to the jury.

I. *Sullivan v. New York Times Co.* necessitates reversal of the judgment in toto.

The Supreme Court in *New York Times Co. v. Sullivan* held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it was false or not.[2] The district court did not think the *New York Times Co.* case governed the present action for the reason that the present plaintiff was not a "public official" as contemplated by the *New York Times* rule, and for the reason that ample evidence existed from which a jury could have concluded that there was reckless disregard by the defendant of whether the article was false or not. [R., pp. 1467-68.] The district court stated that "to hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of *New York Times Company v. Sullivan.* . . ." [R., p. 1467.] The plaintiff held to be a "public official" in *New York Times Co.* was Commissioner of Public Affairs, one of three elected Commissioners of the City of Montgomery, Alabama. His duties involved the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.[3] The Supreme Court noted:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for pur-

2. 376 U. S. 254, 279-80 (1964); Garrison v. Louisiana, 379 U. S. 64, 67 (1964).

3. See New York Times Co. v. Sullivan, 1964, 376 U. S. 254, 256.

poses of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo,* 360 U. S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisment concerned what was allegedly his official conduct as Commissioner in charge of the Police Department.[4]

It is clear that "public officials" as contemplated by *New York Times Co.* are not limited to elected officials. In *Garrison v. Louisiana,*[5] decided subsequent to *New York Times Co.,* the District Attorney for Orleans Parish, Louisiana, was convicted of criminal libel for issuing a statement disparaging the judicial conduct of the eight judges of the Criminal District Court. The Supreme Court's decision, which brought the District Attorney's statement within the purview of criticism of the official conduct of "public officials" and entitled to the benefit of the *New York Times Co.* rule, did not hinge on whether the eight judges were elected officials. No mention was made of how the judges obtained their positions. Moreover, it is clear from the Court's statement in *New York Times Co.,* quoted above, that the rule applies to "government *employees.*" The question reserved by the Court was "*how far down* into the lower ranks of government employees the 'public official' designation would extend. . . ."[6] A precise formula for designation of "public officials" for the purpose of the *New York Times* rule was not attempted. Indeed,

4. *Id.* at 283, n. 23.

5. 379 U. S. 64 (1964).

6. New York Times Co. v. Sullivan, 376 U. S. 254, 283, n. 23 (emphasis supplied).

it is clear from the background and reasons for the rule that to fashion and apply a precise formula for designation of "public officials" for the purpose of the *New York Times* rule would be a formidable, if not impossible, task.[7]

The first amendment secures freedom of expression upon public questions. The constitutional safeguard, the Supreme Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[8] Similarly, "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[9] Mr. Justice Brandeis has stated that "those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."[10] *New York Times Co. v. Sullivan,* 1964, 376 U. S. 254, 269-70. As was said in *Garrison v. Louisiana,*[11] "the First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co. v. Sullivan.* . . ." It was against this background that the Supreme Court in *New York Times Co.* stated that the newspaper advertisement, which contained an inaccurate description of events occurring in Montgomery in connection with the civil rights movement, was an expression of grievance and protest on

7. Cf. Burton v. Wilmington Parking Authority, 1961, 365 U. S. 715, 722 (state responsibility under the Equal Protection Clause).

8. Roth v. United States, 1957, 354 U. S. 476, 484.

9. Bridges v. California, 1941, 314 U. S. 252, 270.

10. Whitney v. California, 274 U. S. 357, 375-76 (1927) (concurring opinion).

11. 379 U. S. 64, 75 (1964).

one of the major public issues of our time and would seem clearly to qualify for the constitutional protection.[12]

It is therefore necessary to examine the facts and weigh the circumstances to determine whether the allegedly defamed plaintiff is involved in the "conduct of the public business"[13] to an extent which attains constitutional significance.

The plaintiff held his position of Athletic Director of The University of Georgia by reason of a contract with the Board of Regents of the University System of Georgia, which hired him as an employee. [Brief for Appellee, p. 67.] The plaintiff supervised the scheduling and location of games, planned and budget, attended to the addition of new athletic facilities, supervised ticket sales and prepared plans for band trips and performances. Moreover, he generally supervised "the entire athletic program of the school." [R., pp. 654-55; Brief for Appellee, pp. 69-70.] The education of youth in the State of Georgia is unquestionably a matter of public concern. By his position the plaintiff is intricately involved with a significant public issue, that is, the education of the youth who attend The University of Georgia—a public institution. According to the Duke of Wellington, "The battle of Waterloo was won on the playing fields of Eton." The ever-increasing difficulties to be faced by this nation require the utmost integrity in the training of its youth. I think the plaintiff is a "public official" as contemplated by the *New York Times Co.* decision.

The article, which the defendant published under the subtitle, "How Wally Butts and Bear Bryant Rigged a Game Last Fall," concerned alleged information on Georgia plays given by Wallace Butts to Coach Paul Bry-

12. See 376 U. S. at 271.

13. Garrison v. Louisiana, 1964, 379 U. S. 64, 73.

ant relating to the University of Alabama and the University of Georgia football game played in Birmingham in September 1962. The article charged Wallace Butts with being corrupt and with betraying his players. It charged that the players were forced into the game like "rats in a maze" and "took a frightful physical beating." In an italicized preface to the article, "The Editors" stated that Wallace Butts and Coach Bryant were participants in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same preface, Wallace Butts was relegated to a status worse than that of "disreputable gamblers" and a corrupt person who, employed to "educate and guide young men," betrays or sells out his pupils. [See R., pp. 88-89 (order granting motion for new trial.)]

I think it clear that the defendant's statements are within the purview of criticism of the official conduct of public officials. As stated by the Supreme Court, "the public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[14]

The district court charged the jury that general damages were recoverable absent proof of actual malice. The plaintiff argues that even if the *New York Times* rule is applicable, the district court's failure to charge that malice is a prerequisite for actual damages is harmless error since the district court charged that actual malice was required

14. Garrison v. Louisiana, 1964, 379 U. S. 64, 76-77.

for an award of punitive damages and the jury awarded punitive damages. I do not agree that the district court's charge complies with the *New York Times* rule.

In dealing with the question of punitive damages, the district court charged the jury:

> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an *intent to injure one.* Malice also denotes a wanton or reckless indifference *or culpable negligence with regard to the rights of others.*" [R., pp. 1356] (Emphasis supplied.)

I think it clear that the district court's charge does not embrace the *New York Times Co.* definition of actual malice, which is with knowledge that *the statement* was false or with reckless disregard of whether it was false or not. The *New York Times* rule emphasizes "the knowingly false *statement* and the false *statement* made with reckless disregard of the truth,"[15] and not merely intent to injure the individual or negligent disregard of the rights of others. The necessary requisite to a showing of actual malice under the *New York Times* standard is proof that "the lie . . . [is] knowingly and deliberately published about a public official" or published "with reckless disregard of the truth."[16]

Since the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of

15. *Id.* at 75 (emphasis supplied).
16. *Ibid.*

harm, rather than intent to inflict harm through falsehood, the charge does not comply with the *New York Times* standard.[17]

The majority of this Court have held that the defendant "has clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*." While I respect the judgment of the majority, I do not share that judgment.[18] In short, I do not think the defendant may be said to have waived by "silence" a constitutional right not enunciated at the time; it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision.

In the *New York Times Co.* case, the trial judge charged that the portions of the advertisement in issue were "libelous *per se*," that "general damages need not be alleged or proved but are presumed," that the plaintiff was entitled to recover both such "presumed" and punitive damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive. The jury awarded damages of $500,000. The questions presented to the Supreme Court in the petition for a writ of certiorari dealt with the *award* of $500,000, the *sufficiency of the evidence* and the lack of proof of *special damages* in light of the first amendment as embodied in the fourteenth.[19] Conspicuously absent is any

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17. Henry v. Collins, 1965, 380 U. S. 356; see Garrison v. Louisiana, 1964, 379 U. S. 64, 73.

18. It seems to me that to constitute such a waiver there must have been "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 1938, 304 U. S. 458, 464; Fay v. Noia, 1963, 372 U. S. 391, 439.

19. In detail, the questions presented were:

"1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a state may hold libelous *per se* and actionable by an elected City Commissioner, without proof of special damage, statements critical of the

suggestion that the first amendment, as embodied in the fourteenth amendment, requires that a public official must prove *actual malice* against critics of his official conduct.[20] Apparently this is due to the fact that the defendant's objections in the trial court were directed to the absence of a requirement of proof of special damages.[21] Only by looking at the *New York Times Co.* case in retrospect can it be said that the defendant has waived the great constitutional rights contemplated by the *New York Times* rule. But applying the same "retrospective look" to the present case,[22] it is also clear that had the defendant contended the same as did the defendant in the *New York Times* case, *i.e.*, that the first and fourteenth amendments were "infringed by holding the publication libelous and actionable

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conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

"2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him and punishable as libelous *per se*.

"3. Whether an award of $500,000 as 'presumed' and punitive damages for libel constituted, in the circumstances of this case, an abridgement of the freedom of the press." Petition for Writ of Certiorari, p. 2, New York Times Co. v. Sullivan, 1964, 376 U. S. 254.

20. In three of the 105 pages of their petition for certiorari, counsel dealt with "the doctrine espoused by the court below . . . that a public official is entitled to recover 'presumed' and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to 'injure' him 'in his reputation' or to 'bring' him 'into public contempt' as an official—unless a jury is persuaded that it is entirely true." Except for the statement of the case and facts, malice was mentioned in one sentence. See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 13, New York Times Co. v. Sullivan.

21. See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 8, New York Times Co. v. Sullivan.

22. In football jargon, "by being Monday morning quarterbacks."

without proof of special damage,"[23] it would not have affected the trial of the present action; for the district court ruled, in dealing with the motion for new trial, that the *New York Times* rule was not applicable to the present plaintiff. [R., p. 1467.]

The fact that the present defendant offered no defense under Georgia law, which provides that communications concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions, cannot be said to constitute a waiver of a defense that the plaintiff is a "public official" under the *New York Times* standard. As recognized by the plaintiff, members of the athletic department are, like members of the faculty, "employees" under Georgia law and are not considered in "public office" or "officers."[24] Thus, although the Georgia statute which grants a privilege to "comments upon the acts of public men in their public capacity and with reference thereto"[25] appears as broad, if not broader, than the "public official" as contemplated by *New York Times Co.*, the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered.

Moreover, I think that *Henry v. Collins*,[26] reflects that the Supreme Court does not intend to allow the great constitutional rights inherent in the *New York Times* rule to be ignored in a case such as the present one.

In *Henry v. Collins*, the most recent Supreme Court decision interpreting the *New York Times* rule, the Court reversed per curiam the judgments obtained by a county attorney and a chief of police in their libel actions against the petitioner. The petitioner had charged that his arrest

23. *Ibid.*
24. Brief for Appellee, pp. 67-69.
25. Ga. Code Ann., § 105-709(6).
26. 1965, 380 U. S. 356.

for disturbing the peace was the result of "a diabolical plot." The trial judge had charged "that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed." The Supreme Court reversed since the trial judge's instructions concerning malice did not comply with the *New York Times* rule. The trial of the plaintiff's suit and the decision of the Mississippi Supreme Court affirming the judgments occurred shortly before the Supreme Court handed down *New York Times Co.* Like the present defendant, the defendant in *Henry* raised his first amendment question by a motion for a new trial. However, the defendant in *Henry* filed a motion for a directed verdict at the same time which also raised the first amendment question. Both motions were overruled. Significant is the fact that the constitutional questions raised by the motions were raised for the first time after the close of the plaintiffs' case.[27]

Since the majority of this Court are not of the opinion that the judgment must be reversed, considerations of effective judicial administration do not require me to review the evidence in the present record to determine whether it could constitutionally support a judgment for the plaintiff should the plaintiff seek a new trial.[28]

In summary, I think the present diversity action was brought by a public official for criticism of his official conduct; therefore, he was limited to an award of damages for a false statement made with "actual malice"—that is, with knowledge that it was false or with reckless dis-

27. See Petition for Writ of Certiorari to the Supreme Court of Mississippi, Henry v. Pearson, p. 6. Henry v. Pearson and Henry v. Collins were decided together. See Henry v. Collins, 1965, 380 U. S. 356.

28. New York Times Co. v. Sullivan, 1964, 376 U. S. 254, 284-85.

regard of whether it was false or not. The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision supervening the district court's judgment, that is, *New York Times Co. v. Sullivan*. In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial.[29]

II. That part of the Judgment awarding $400,000 punitive damages violates the defendant's rights under the first, fifth and seventh amendments.

On the question so far discussed, that is, whether *New York Times v. Sullivan* necessitates reversal of the judgment in toto, I would concede that there is a debatable issue of waiver on which I differ from the majority. The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion for new trial (R., pp. 46-48). As to the questions now to be considered, there can be no issue of waiver.

The punitive damages, either as found by the jury or as fixed by the court, are many times greater in amount than the general damages. Under the court's instructions to the jury, the general damages included compensation "for the mental anguish, pain, mortification, and humiliation he has experienced as a result of the publication." (R. 1354) The punitive damages included no element to which the plaintiff was entitled by way of compensation, but, accord-

29. Sulzbacher v. Continental Cas. Co., 8 Cir. 1937, 88 F. 2d 122.

It should be noted that the learned district judge in the present case did not deny the defendant's motion for a new trial on the basis that the defendant had "waived" the constitutional rights defined in *New York Times Co.*, but, instead, considered the motion for new trial on its merits. [R. pp. 1464-68.]

ing to the court's instruction to the jury, "the purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award." (R. 1356) The statute which allows the jury to impose punitive damages is Georgia Code Annotated § 105-2002, which reads:

> "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

In the present case "compensation for the wounded feelings of the plaintiff" had been included in the general damages. [See R., p. 1354, quoted *supra*.] The trial court expanded considerably on the alternative purpose "to deter the wrongdoer from repeating the trespass"; it included also "a warning to others not to commit a like offense," the protection of "the community," and "an expression of ethical indignation." [See R., p. 1356, quoted *supra*.] The jury was bound to observe the instructions of the court. For the purpose of considering whether the jury's award of punitive damages exceeded constitutional bounds, it is of no moment that it may also have exceeded the limits set by the statute.[30] The court further instructed the jury that, ". . . if you decide to award punitive damages, the sum

30. According to the brief of the appellee, plaintiff (p. 86): "It is apparent that the purpose of this Code section in cases of defamation is to deter the defendant from republishing this one particular libel at a later date. It does *not* prevent the defendant from publishing any *other* matter, whether thought libelous of the plaintiff or not." (Emphasis the appellee's.)

you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion." [R., p. 1356.] The jury could reasonably infer that no limit was placed on the exercise of its discretion.

If the defendant corporation had been tried under the Georgia criminal libel statute,[31] it might have been punished by a fine "not to exceed $1,000."[32] As it is, the defendant stands subjected to a judgment of $400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the $400,000 sufficed to express the trial judge's sense of "ethical indignation" while that of the jurors swelled to $3,000,000—3,000 times the maximum fine which could have been imposed in a criminal prosecution.

Further, in a criminal proceeding, the defendant was subject to *no* fine unless proved guilty beyond a reasonable doubt, while here the judge charged the jury that "'. . . the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true. . . .'" (R., p. 1347.)

I would not imply that the return of punitive damages in the ordinary case is constitutionally suspect, for more than a century ago the Supreme Court commented:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine

31. Ga. Code Ann. § 26-2101.
32. Ga. Code Ann. § 26-2101.

has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."

Day v. Woodworth, 1851, 54 U. S. (13 How.) 362, 370-71.

The theory of punitive damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.[33] There can be no serious question but that the Georgia statute permitting "additional damages"[34] is constitutional upon its face.

However, as that statute was applied by (1) the court's instructions to the jury, (2) the jury's verdict, and (3) the reduced judgment ultimately entered by the court on motion for new trial, the award of punitive damages in the present case is tantamount to a criminal fine or penalty. As said in the very recent case of *United States v. Archie Brown,* U. S. Oct. Term, 1964, No. 399, decided June 7, 1965:

"It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

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33. Bryson v. Bramlett, Tenn. 1958, 321 S. W. 2d 555, 557; Margaret Ann Super Markets v. Dent, Fla. 1953, 64 So. 2d 291-92; Pratt v. Duck, Tenn. Ct. App. 1945, 191 S. W. 2d 562, 564-65; Foster v. Bourgeois, Tex. Civ. App. 1923, 253 S. W. 880, 885, aff'd 259 S. W. 917; 15 Am. Jur. Damages, § 266; 25 C. J. S. Damages, § 117.

34. Ga. Code Ann. § 105-2002, quoted *supra,* p. 47.

Similarly, in *Trop v. Dulles*, 1958, 356 U. S. 86, 96, it was said:

> "In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.[18] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.[19] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[20]

"18. Of course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 608-610; 64 Yale L. J. 714, 722-724.

"19. E.g., *United States v. Lovett, supra* [328 U. S. 303]; *Pierce v. Carskadon*, 16 Wall. 234; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277.

"20. E.g., *Mahler v. Eby*, 264 U. S. 32; *Hawker v. New York*, 170 U. S. 189; *Davis v. Beason*, 133 U. S. 333; *Murphy v. Ramsey*, 114 U. S. 15."

Footnote 18 to the text just quoted make clear that the enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to a criminal fine. I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post facto punishment 400 times as great as the defendant could have anticipated from the criminal libel statute,[35] and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.[36]

35. Ga. Code Ann. § 26-2101; compare art. 1, sec. 9, clause 3 of the Constitution.

36. See amendment 5 to the Constitution.

If there should be any doubt that the award of $400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co. v. Sullivan*, 1964, 376 U. S. 254, 277-78, has clear application to the facts of this case:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N. W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to

civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70." [37]

For yet another reason the award of $3,000,000 by the jury, or of $400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award.[38] Can any standard be more vague or arbitrary than "an expression of ethical indignation" first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.[39]

Still further, I submit that the remittitur violates the defendant's rights under the seventh amendment. The trial judge concluded "that the award for punitive damages in this case was grossly excessive. It is the court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00." [R., p. 95]

37. See also Cantwell v. Connecticut, 1940, 310 U. S. 296, 306; Near v. Minnesota, 1931, 283 U. S. 697, 713-14, 720-23.

38. Staub v. City of Baxley, 1958, 355 U. S. 313, 322.

39. Smith v. California, 1959, 361 U. S. 147, 151; Crump v. Board of Public Instruction, 1961, 368 U. S. 278, 287.

In another part of his opinion on motion for new trial, the district judge commented: "The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained." [R., p. 93] The district judge's opinion is silent as to the underlying reason for such a grossly excessive verdict. The majority opinion says that ". . . the judge necessarily rejected the idea that this verdict had been infected by such destructive elements [as passion or prejudice]." [Majority opinion, p. 28.] With deference, I submit that that conclusion is not based on the record or on anything said by the trial judge. To the contrary, in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: "Suppose the court should determine that probably a certain portion of the argument was improper, and therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again. . . ." [R., p. 1373.]

The majority of this Court labors under a different impression. It several times refers to the defendant's new policy of "sophisticated muckraking" without benefit of what the defendant claimed that it meant by that expression [R., pp. 37-38, 1019.]:

> "Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of 'sophisticated muckraking' in the sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country." [R., pp. 37-38.]

It was, of course, for the jury to say whether the defendant's explanation was true. In any event, I agree with the majority that the expression "was by itself more than

enough to inflame the jury." [Opinion, pp. 21-22.] If, as is impliedly conceded, the jury was "inflamed," then was not passion and prejudice the most probable cause for its grossly excessive verdict? The majority continues, "Counsel for Butts could only gild the lily." [Opinion, p. 22.] I am tempted to facetiously comment on their plentiful supply of "gilt," but, in a more serious vein, I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel.

The majority says that "some of the argument was invited . . . ," but is not more specific as to the particular argument of defendant's counsel which amounted to an invitation. However, the appellee's brief (p. 93) refers to the following:

> "Mr. Cody's exact words were: (R. 1267)
>
> > " 'The point I want to make is that a man [plaintiff] that will go to one of your public officials [Comptroller General], *bet* enough to start into this business and a lot of other businesses while he is charged with the duty of Athletic Director, but it is worse, in order to obtain the license to do that, to misrepresent your financial condition.' (Emphasis added)."

In response, there is attached to appellant's reply brief as Exhibits A and B, the affidavit of Mr. Cody supported by the affidavit of Rufus L. Hixon, the official court reporter. The court reporter's affidavit is to the effect that "after deponent had examined his stenotype notes, he telephoned Mr. Bondurant to state that the word 'bad' had been used by Mr. Cody in his closing argument but that the word

'bet' had been erroneously transcribed." [Exhibit B, p. 8a, Appellant's Reply Brief.]

In addition, I would note that in beginning his argument, counsel for the defendant referred to his attachment to the University of Georgia and to the fact that the trial judge, opposing counsel, and he had received their training in that institution. The arguments of counsel are set forth in the record (pp. 1257-1341). They do not, in my opinion, disclose any invitation or provocation to justify or excuse the improper and inflammatory argument of plaintiff's counsel. The following excerpts are only samples of the objectionable parts of that argument, but, I submit, that they speak so loudly as not to require comment:

> "Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. [R., p. 1289.]
>
> ". . . . . .
>
> "Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter,

and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it.

". . . . . .

"I am looking to you for my protection. Heavens (sic) knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them. [R., p. 1319.]

". . . . . .

"I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

". . . . . .

"My time is up, I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating

even since it came out, and I have lived in agony along with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wallace Butts.

"You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess, They will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to old Georgia.'" [R., pp. 1321-22.]

If this dissent serves no other purpose, it will at least preserve for posterity the colorful peroration last quoted. Seriously, it seems to me that "the public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." *N. Y. Central R. R. Co. v. Johnson,* 1929, 279 U. S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the $3,000,000 punitive damage verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.[40]

It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to

40. Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 1931, 283 U. S. 520; Brabham v. State of Mississippi, 5 Cir. 1938, 96 F. 2d 210; Ford Motor Co. v. Mahone, 4 Cir. 1953, 205 F. 2d 267; National Surety Co. v. Jean, 6 Cir. 1932, 61 F. 2d 197.

trial by jury.[41] The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W. Va. LQ 1, 17, 18, quoted in 6 Moore F. P. (2d ed.) 3738-39, seems to me unanswerable.[42]

That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from $3,000,000 to $400,000 represents nothing more specific than the difference between the jury's and the judge's sense of "ethical indignation." The jury's verdict cannot be recognized in the final judgment.

I appreciate that in the federal courts the right to a jury trial is to be determined as a matter of federal law in diversity as well as other actions.[43] It is, however, both interesting and instructive to refer to Georgia law. The statute permitting the award of punitive damages,[44] says that "[. . . *the jury* may give additional damages. . . ." (Emphasis supplied.) Another statute prescribes: "The question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Ga. Code Ann. § 105-2015.

It has long been the law of Georgia that "the trial judge has no power to order that, as a condition to the

41. See Dimick v. Schiedt, 1935, 293 U. S. 474, 482-87.

42. See 6 Moore F. P. (2d ed.) ¶ 59.05(3); 3 Barron & Holtzoff ¶ 1305.1; 30 Am. Jur. New Trial, §§ 209, et seq.; 66 C. J. S. New Trial, §§ 209, et seq.

43. Simler v. Conner, 1963, 372 U. S. 221-22; Ammons v. The Franklin Life Ins. Co., 5 Cir., No. 21418, decided June 28, 1965. Nonetheless, it does seem anomalous for the federal courts to require the state courts to accord the strictest guaranty of jury trial when indicated by a federal statute (*e.g.*, the Federal Employers' Liability Act), and then, in a diversity case to refuse to recognize the requirement of jury trial imposed by a state statute.

44. Ga. Code Ann. § 105-2002, quoted *supra* p. 47.

refusal of a new trial, a portion of the verdict shall be written off as excessive, except where from the application of the law to the evidence, the excess can be accurately ascertained." Syllabus 4 by the Court, *Central of Ga. Ry. Co. v. Perkerson*, 1901, 112 Ga. 923, 38 S. E. 365. That action was for the death of a railroad employee. The plaintiff recovered a verdict for $10,833.33. The trial court ordered a new trial conditioned on the plaintiff's consent to a remittitur of the part of the verdict in excess of $8,500.00, and, upon plaintiff's consent, entered judgment for that amount. On defendant's appeal, the Supreme Court of Georgia reviewed the authorities at length and reversed. A part of its opinion reads:

> "It is manifest that the verdict for $8,500 was rendered by the judge, and not by the jury, and it is impossible to ascertain from the evidence in the case how he arrived at that exact amount. It is evident from his order that he was dissatisfied with the verdict, as to the amount of damages found, and that, if he had not thought he had the power of remitting a portion of the damages, he would have set the verdict aside and granted a new trial upon the ground that the verdict was excessive. The judge may have the power to determine that a verdict is grossly excessive, and for that cause to order it set aside, and yet have no power to fix the exact amount for which it should stand. 'The power to control does not include the power to find. Like the executive veto, it arrests, but does not by its exercise bestow the power to enact.'"

Even more pertinent is a very recent case where the trial court, with plaintiff's consent, reduced the exemplary or punitive damages awarded by the jury from $4,000 to $1,500. The conditional judgment for new trial was re-

versed with directions that a new trial be granted. The Court said:

> "In determining punitive or exemplary damages it is impossible to lay down any fixed rules for a precise mathematical calculation; 'and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases that this finding should not have exceeded a certain sum, is to invade their peculiar province, and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized either by the words of the law, or by the precedents and practice in such cases.' Savannah, Florida & Western Ry. v. Harper, 70 Ga. 119, 123-124 [citing many other authorities].
>
> "It is our wish to make it clear that nothing held here or in any of the authorities cited is subject to the inference that a trial judge is restricted in the exercise of his exclusive discretion to grant or deny a motion for new trial on the general grounds. We do emphasize that where the determining of the amount of a particular class of damages lies exclusively with the jury, the trial court must either grant or deny a new trial on the basis of the jury's award. The trial judge cannot condition the exercise of his discretion in granting or denying a new trial on an acceptance by the parties of a different sum selected by him."

City Motor Exchange v. Ballinger, Ga. App. 1964, 138 S. E. 2d 925, 926-27.

The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot

escape the conviction that by the remittitur in this case that right has been denied to the defendant.

Both because *New York Times v. Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON PETITION FOR REHEARING.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 21491.

CURTIS PUBLISHING COMPANY,

Appellant-Appellee,

versus

WALLACE BUTTS,

Appellee-Appellant.

(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(October 1, 1965.)

ON PETITION FOR REHEARING.

Before RIVES and BROWN, *Circuit Judges,* and SPEARS, *District Judge.*

PER CURIAM: As Curtis' petition for rehearing asserts that the waiver found by us is based on "alleged facts, most of which are outside the record", and upon "unsupported statements in Butts' brief, which for the most part are not true", we deem additional comment appropriate.

The burden of Curtis' brief, elaborated in the petition for rehearing, is that *Times* came like a bolt out of the blue, and no one either knew of, or could anticipate, that a state-created libel damage action was subject to or could be controlled by First Amendment freedom of speech constitutional limitations. Therefore, the argument runs, until *Times* there was no reason to assert the constitutional claim, and consequently it should not be held to the usual appellate consequence of failing properly to preserve the point.

Obviously this Court is not required to accept the mere assertions of Curtis. This Court has the duty of determining whether this contention of Curtis was well founded. While this partakes of factual evaluation in a sense, the question of waiver is a law problem—i.e., whether skilled counsel would reasonably think the contention to be plausible. Since Curtis did not seek to raise the constitutional issues before verdict and judgment, it was entirely proper to look to the sources discussed in our original opinion in order to ascertain the pertinent facts. Until the filing by Curtis of its petition for rehearing, the statements in Butts' brief, referred to by Curtis, had not really been disputed. And now, after having given full consideration to the affidavits and to all other matters presently submitted by Curtis, we are still of the firm opinion that when all of the acts and conduct of Curtis' attorneys are tested in the light of reason, Curtis cannot sustain the proposition that its counsel were ignorant of a constitutional claim so as to be totally excused for the complete absence of any timely assertion of it.

To its petition for rehearing, Curtis attaches affidavits made by Philip H. Strubing, whose Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, is general counsel for Curtis; by T. Eric Embry, whose Birmingham, Alabama law firm represented the New York Times Com-

pany in the case brought against it by Sullivan (*Times* case), and also represented Curtis in the related libel cases brought against it in the United States District Court by Coach Paul Bryant;[1] and by Welborn B. Cody, who was lead trial counsel for Curtis in the *Butts* case. In general, the affidavits assert that Mr. Embry and his partner, Roderick Beddow, Jr., attended the trial of this *Butts* case as spectators only, were not consulted concerning trial strategy, and did not advise Mr. Cody concerning the constitional questions they had raised in *Times*. Mr. Cody stated that "he was not aware of the constitutional issues being urged in (the *Times*) case."

There is no dispute that the lawyers who sat together at the Curtis counsel table during the Butts trial were representing Curtis either in this case or in the related Bryant libel suits pending in Alamaba, so presumably they were all on Curtis' payroll. Unusual as it would be for them not to consult with one another concerning strategy and tactics during the two-week trial, we accept the statement that neither Mr. Embry nor Mr. Beddow informed Mr. Cody of the constitutional questions being raised in the *Times* case.

But what about Mr. Strubing? In his affidavit he stated that he participated actively in the preparation of the *Butts* case for trial, and that he also worked actively with Mr. Embry in the preparation of the related *Bryant* cases. He is also on the brief in our case and participated in the arguments.

Butts' response to the petition for rehearing refers us to the records of this Court, of which, of course, we may also take judicial notice. In Cause No. 21,152, *The Curtis Publishing Company v. Honorable H. H. Grooms, United*

1. Civil Actions Nos. 63-2-W and 63-166, brought in the Western and Southern Divisions respectively, of the Northern District of Alabama.

States District Judge for the Northern District of Alabama Curtis sought a writ of mandamus to compel Judge Grooms to vacate his orders denying Curtis' motion for change of venue. That record reflects that on February 26, 1963 (one month before the Butts suit was filed) Mr. Strubing's law firm, together with the firm of which Mr. Embry and Mr. Beddow are members, signed and filed in the Alabama District Court a motion to dismiss the related libel action instituted by Bryant, on the grounds, among others, that:

> "To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States . . .
>
> "To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourtenth Amendment to the Constiution of the United States . . ."

In a later suit filed against Curtis by Bryant the same two law firms made identical contentions in a motion to dismiss signed and filed by each of them in the District Court on April 30, 1963, still more than three months before the trial of the *Butts* case.

If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an *active* participant in all three cases, so he certainly should have known what the rights of Curtis were. Although he now says that he was not aware of the constitutional defenses articulated by

Times until that case was decided by the Supreme Court some six months after the trial of the *Butts* case, neither he nor his local counsel (Mr. Embry) considered a final decision in *Times*—or for that matter any other case—a necessary prelude to raising in the related *Bryant* cases, the constitutional claim previously asserted by Mr. Embry in *Times*.[2] And for good reason, at least ever since June 1962 when those who wished could see the handwriting on the wall, certainly as the moving finger followed the voice of Mr. Justice Black's celebrated "First Amendment 'Absolutes'; A Public Interview".[3]

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2. That these constitutional claims were well preserved by these counsel in *Times* without the learning which was to come several years later through the words of the *Times* opinion is recognized by the Court itself: "The (Alabama trial) judge rejected petitioner's contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments." 376 U. S. 254, 263.

The Alabama Supreme Court also recognized the assertion of these constitutional claims for it "rejected petitioner's constitutional contentions with the brief statements that "the First Amendment of the U. S. Constitution does not protect libelous publications * * * 14 So. 2d at 40." 376 U. S. 254, 264.

3. Justice Black and First Amendment "Absolutes"; A Public Interview, Edmond Cahn and Mr. Justice Hugo L. Black, 37 NYU Law Review 549 (June 1962). The background of the interview was the Justice's lecture entitled "the Bill of Rights", delivered at the New York University School of Law, February 17, 1960, published at 35 NYU Law Review 865 (1960). See, e.g.:

> "CAHN: Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?
>
> "JUSTICE BLACK: My view of the First Amendment * * * is that it said Congress should pass none of these kinds of laws. * * * I have no doubt myself that the provision * * * intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. * * *" (557)
>
> "* * *
>
> "My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my

Granted that the extra-judicial statements of a single Justice do not an opinion make,[4] the Court itself in *Times* treats this newly announced rule as a natural development of the constitutional propositions long recognized by its extensive writings on First Amendment freedom of speech rights.[5] Thus, it emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U. S. 254, 269. Announcing its rule, it referred to the "oft-cited statement of a like rule * * * adopted by a number of state courts * * * found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)"—a decision then nearly half a century old.

Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis

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own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.

"* * *

"I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me, '* * * Government shall not attempt to control the ideas a man has. * * * Government shall not abridge freedom of the press or speech. It shall let anyone talk in this country.' * * * Let them talk! In the American way, we will answer them." (563)

4. They were shortly to be announced *ex cathedra* in his concurring opinion in *Times*, 376 U. S. 254, 293, joined by Mr. Justice Douglas and substantially echoed by Mr. Justice Goldberg (with Justice Douglas), 376 U. S. 254, 297.

5. See the extended annotations, The Supreme Court and the Right of Free Speech and Press, 11 L. Ed. 2d 1116-1175; 2 L. Ed. 2d 1706; 93 L. Ed. 1151.

elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses [6] it had raised in the Alabama *Bryant* cases, in order to get the right to open and close the arguments.

Nor, as suggested in Judge Rives' dissenting opinion on denial of rehearing, do we consider that our action is at all inconsistent with the principle of law expressed for the Court by Judge Wisdom in *Commissioner of Internal Revenue v. Chase Manhattan Bank*, 5 Cir., 1958, 259 F. 2d 231, 238, cert. denied, 359 U.S. 913.[7]

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6. These would include the conditional privilege recognized by § 105-709(6) of the Georgia Code concerning published statements relating to the "acts of public men in their public capacity". See Note 20, 376 U. S. 254 at 280.

7. Actually, in this tax case the theory later developed for the first time in this court had been raised in the bank's petition filed in the lower court and agreed upon by both parties at the trial. The Court, in deciding to consider the development of the theory, stated that the "tax liability as to the testamentary trust depends on whether Daniel's will put Marie to an election. *The question is in the case.* A just determination of the appeal requires us to decide it." (Emphasis supplied). This case involved the gift tax liability under three trusts created by the decedent, "Daniel", one of which was a testamentary trust of his residuary estate from which his wife, Marie, was to receive the income for life, the remainder to be divided among Daniel's descendants. In the Tax Court, the bank's petition stated that "the estate was still under administration and that 'no determination has yet been made as to whether or not the said Marie Elizabeth Moran has elected to take under the will' . . . that Marie's motive 'in not taking against the will was to benefit herself' ". At the trial the Commissioner and the bank agreed to assume that Daniel's will put Marie to an election and that Marie's receipt of income from the trust was sufficient to show that she had elected to take under the will. They differed only as to whether the effect of the election was that she had made a taxable gift. The Tax Court held that Daniel's will put Marie to an election and that Marie's "acquiescence" in the testamentary trust constituted a taxable gift. On appeal, for the first time in the case, the defendant made the assertion that Daniel's will did not purport to dispose of Marie's share and therefore she was not put to an election, thereby denying that Marie transferred her share of the community estate to the trust. In answer to the Commissioner's objection to the bank's new argument

In that case, the legal theories developed in this Court for the first time could be fairly disposed of on the record, and the opposing party was not prejudiced by the use of other theories.[8] However, here Curtis seeks a reversal so that a new record based on different theories may be made at another trial. The wholesome desire "to secure the just * * * determination of every action", neither dis-

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that Marie was not put to an election, and its contention that the taxpayer is not at liberty to urge as a ground for reversal a point not raised in the court below, the court states that "indeed, . . . the taxpayer invited error . . . worse, the invitation was accepted. But an appellant has no vested right in an opponent's error of law in the lower court—especially when the protesting appellant is the Commissioner of Internal Revenue . . . (who) owes a duty to all taxpayers . . . to see that the tax law is applied justly. . . . Federal procedure is moving away from what Pound calls 'the sporting theory of justice', Wigmore the 'instinct of giving the game fair play', and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A. Daniel's will is in the record and speaks for itself. '(W)here, as here, the case below was tried, not upon any misapprehension of the facts, but upon a misapprehension of the effects of those facts in law, appellant may not be prevented from pressing here for the application, to the proven facts, of the correct principles of law.' . . . 'We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties.'"

See also Jack Ammann Photogrammetric Engineers, Inc. v. Commissioner of Internal Revenue, (5th Cir. 1965) 341 F. 2d 466, a tax case citing Commissioner of Internal Revenue v. Chase Manhattan Bank, in determining that since legal theories were there being urged "that can be fairly disposed of on the record before us. We do not consider that we should refuse to consider them merely because they were not urged in the Tax Court."

8. See Glavic v. Beechie, (5th Cir. 1964) 340 F. 2d 91. The majority refused to consider a question not presented for determination in the District Court. Judge Wisdom in his concurring opinion stated, in opposing this decision, that he "would allow either party on appeal to advance a new theory or to change his theory of the case—if: (1) all the relevant evidence is before the court, (2) the opposing party has had adequate time to brief the point, and (3) the opposing party is not prejudic(ed) by not having introduced evidence below that would have militated against the validity or effect of the new theory."

penses with the rules of procedure, nor forecloses the applicability of the doctrine of waiver when all of the elements which constitute that doctrine are present, as in the present case.

As to all other contentions in the petition for rehearing and supporting brief, we adhere without further comment to the holdings in our original opinion. Finding no error, see Rule 25(a) of this Court, the petition for rehearing is denied.

PETITION DENIED.

RIVES, *Circuit Judge*, Dissenting:

The majority undertakes to bolster its holding "that Curtis has clearly waived any right it might have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times."[1]

I.

As suggested in my earlier dissent,[2] that is not true as to the holding in *Times* that a state law of civil libel which sustains the imposition of extremely large awards of damages in libel actions may constitute a prior restraint on freedom of expression forbidden by the First and Fourteenth Amendments. *New York Times Co. v. Sullivan*, 1964, 376 U. S. 254, 277, 278.

The enormous amount of the verdict in the present case could not have been anticipated. Curtis raised the

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1. Slip Opinion, pp. 17 and 18.
2. Slip Opinion, pp. 46, 47, 52 and 53.

point seasonably as a ground for its first motion for new trial.[3]

In ruling on that motion the district court recognized that: "As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds v. Pegler,* D. C., 123 F. Supp. 36; 2 Cir., 223 F. 2d 429." 225 F. Supp. 916, at 919. Nonetheless, after the plaintiff filed his remittitur, the district court entered judgment against Curtis for $400,000 punitive damages plus $60,000 general damages, or a total of $460,000. Since that time, Curtis has lost no opportunity to insist that the $460,000 award, if sustained, is so large as to constitute a prior restraint upon freedom of the press within the rule announced in the *Times* decision. On that issue, there is, I submit, no debatable question of waiver. For reasons expressed in my prior dissent,[4] I would rule with Curtis on that issue.

As to the punitive damage award, the section of the Georgia Code quoted in my earlier dissent[5] and the oral charge to the jury,[6] make clear that the very purpose of

3. "That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by the First and Fourteenth Amendments of the United States Constitution because:

". . . . . .

"(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press." (Record, pp. 46, 47.)

4. Slip Opinion, pp. 51, 52 and 53.

5. Section 105-2002, Georgia Code Annotated.

6. "The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award."

punitive damages is to act as a deterrent to future conduct, which, in libel cases, means a prior restraint on freedom of expression. When that deterrent or restraint assumes proportions of the jury's verdict, $3,000,000, or even of the award made by the district court, $400,000, I submit that it is forbidden by the First and Fourteenth Amendments.[7]

The part of the *Times* opinion relating to prior restraints on freedom of expression was certainly not "new law." Nor was that part of the opinion limited to public officials. Clearly, I submit, whether Butts was a public official or not, the enormous award of damages must be set aside.

II.

The specific holding in *Times,* which had not theretofore been generally recognized, was that a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It was that principle to which I referred in my earlier dissent,[8] when I said "it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision."[9] Now on petition for rehearing, counsel makes affidavit that: "The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented

7. See Bantam Books, Inc. v. Sullivan, 1963, 372 U. S. 58, 70, cited in *Times* (376 U. S. at 278).

8. Slip Opinion, p. 42.

9. An opinion which I had reached from an examination of the petition and briefs on certiorari.

in the Alabama courts nor in the petition for certiorari to the United States Supreme Court."

In order properly to object[10] to the district court's instructions allowing recovery of general damages without proof of malice, and recovery of punitive damages on a definition of malice at variance with that prescribed in *Times,* counsel must have anticipated that specific holding of the *Times* decision.

Judge Morgan, the District Judge in the present case, recognized, at least impliedly, that Curtis had not waived that constitutional right by its failure to insist upon it at the trial, when, in denying the motion for new trial under Rule 60(b), Fed. R. Civ. P., he considered and ruled on the defense on its merits. *Butts v. Curtis Publishing Co.,* N. D. Ga. 1964, 242 F. Supp. 390.

Based largely on facts dehors the present record, the majority held that Curtis' trial counsel had knowingly and intentionally waived the constitutional protections afforded by the *Times* case, by failing to raise them at the trial. In response to that holding, three of Curtis' attorneys have filed with this Court their sworn affidavits.[11] Now the majority goes still further beyond the present record and considers another case shown by the records of this Court but of which Judge Morgan could not have taken judicial notice when he considered and ruled on Curtis' section 60(b) motion. With deference, I submit that it is the function of this Court simply to review the ruling of the district court on the record before that court.

If, however, we are to resort to evidence outside the record and to bolster our judicial notice from records in

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10. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 51, Fed. R. Civ. P.

11. Ethically permissible "when essential to the ends of justice." A. B. A. Canons of Prof. Ethics No. 91.

other cases, those extraneous matters do not impugn the integrity and veracity of Curtis' trial counsel. It seems clear to me that, at the time of trial, counsel had no notice of the *specific* holding thereafter made in *Times*. It is impossible for me to believe that, if counsel had any such notice, they would have knowingly and intentionally waived the specific constitutional protection afforded by the *Times* case "in order to get the right to open and close the arguments," as suggested in the majority opinion.

It is too much to hold counsel to the duty of anticipating the specific holding of *Times*, because of general assertions of First Amendment defenses in other cases, or even because of Mr. Justice Black's view that the First Amendment ". . . intended there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. . . ." [12] The majority paints with such a broad brush as to require the assertion of a First Amendment defense in *every* libel or defamation case hereafter litigated.

With deference, I submit that it is the outworn sporting theory of justice [13] which leads the majority to convert this appeal into an unseemly trial of Curtis' lawyers. The function of this Court is not to decide a contest, but to administer justice. Curtis, not its lawyers, stands mulcted in damages to the extent of $460,000 as the result of a trial conducted on a fundamentally and constitutionally deficient theory of law.

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12. Quoted in footnote 3 to the majority opinion on rehearing.

13. "Federal procedure is moving away from what Pound calls 'the sporting theory of justice,' Wigmore the 'instinct of giving the game fair play,' and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a Court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A." Commissioner of Int. Rev. v. Chase Manhattan Bank, 5 Cir. 1958, 259 F. 2d 231, 238.

The resulting damage extends far beyond the monetary loss to Curtis. This Court's refusal to consider and decide whether constitutional standards were observed in adjudging Curtis liable is a grave reflection upon the administration of justice itself. Permitting such a libel judgment to stand will cause ". . . the pall of fear and timidity [to be] imposed upon those who would give voice to public criticism in an atmosphere in which the First Amendment freedoms cannot survive."[14]

A just determination requires this Court to consider and decide this appeal on its merits.[15] The altered situation created by the intervening decision of the Supreme Court makes that a compelling duty.[16]

I, therefore, respectfully dissent.

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14. New York Times Co. v. Sullivan, 1964, 376 U. S. 254, 278.

15. Hormel v. Helvering, 1941, 312 U. S. 552, 556, 557.

16. The Peggy, 1801, 5 U. S. (1 Cranch) 103, 110; Connor v. New York Times Co., 5 Cir. 1962, 310 F. 2d 133, 135, and cases there cited.

OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ON PETITIONER'S MOTION FOR NEW TRIAL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

CIVIL ACTION

No. 8311.

WALLACE BUTTS,

Plaintiff,

v.

CURTIS PUBLISHING COMPANY,

Defendant.

The jury in this libel action returned a verdict for general damages against the defendant in the sum of $60,000.00 and for punitive damages in the sum of $3,000,000.00.

The defendant moves, under Rule 59 of the Federal Rules of Civil Procedure, 28 U. S. C. A., to set aside the verdict for damages principally upon the ground of excessiveness, as set out in Ground 1 of the defendant's motion. Apart from defendant's contention that the verdict is excessive, the defendant sets out 23 other grounds in its motion for a new trial (Ground 5 of defendant's motion having been abandoned).

The cause of action by plaintiff arose by virtue of an article published by defendant in its March 23, 1963, issue of the *Saturday Evening Post,* said article having been principally written by one Frank Graham, Jr., but with

assistance from others employed by the defendant. The article was entitled "The Story of a College Football Fix", with the subtitle "How Wally Butts and Bear Bryant Rigged a Game Last Fall". The article concerned alleged information on Georgia plays given by Butts to Coach Bryant relating to the Alabama-Georgia football game played in Birmingham, Alabama, in September, 1962.

The article charged Butts with being corrupt and with betraying his players, and that the players were forced into the game like "rats in a maze" and "took a frightful physical beating". The article charged, in an italicized editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of "disreputable gamblers", and a corrupt person who, employed to "educate and guide young men", betrays or sells out his pupils.

Plaintiff Butts had been Head Football Coach at the University of Georgia from 1939 until 1961, at which time he became Athletic Director. As a member of his profession, he had been president of the Football Coaches Association, and by invitation had coached the College All-Stars, the Blue-Gray All Star Game, and the North-South All Star Game. Butts has been a lecturer and speaker at clinics and banquets throughout the United States. Testimony adduced was that plaintiff had been offered employment by several college and professional football teams in the country and was negotiating with a Texas professional team when the article was published, but thereafter negotiations were discontinued.

Evidence was introduced that on March 18, 1963, Butts, through his attorney, notified the Curtis Publishing Company that the article was false and advised that the article

not be published; and that thereafter, pursuant to Georgia law, Butts requested a retraction from Curtis, which was refused. It was admitted on the trial that one of Butts' daughters had telephoned long distance to a *Saturday Evening Post* official with a plea that the article be withheld from publication. The evidence of plaintiff showed that plaintiff was capable of earning a minimum of $12,000.00 per annum from his football activities, but that since the publication, all prior negotiations had been terminated.

The defendant filed its answer of justification and plead that the statements in the article were true. The defendant thus assumed the burden of proving the truth of the article. See *Cox v. Strickland*, 101 Ga. 482.

Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overheard between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia game. By some mechanical defect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the same was brought it its attention by Curtis' Birmingham, Alabama, lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the *Saturday Evening Post*.

The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the *Saturday Evening Post*, knew that Burnett had been convicted of "bad check writing". No representative of the *Post* looked at the notes before the article

was published. According to Coach Griffith of Georgia, defendant's witness, "a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had". No effort was made by the *Post* to view the actual game film, although the Sports Editor of the *Post*, one Roger Kahn, considered that necessary.

Inserted in the article were the following direct quotations, which were subsequently denied under oath by the parties quoted:

(1) Graham wrote that Burnett had told him that Larry Rakestraw, Georgia quarterback, placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. Burnett later testified under oath that he had not told Graham any such thing.

(2) Mickey Babb, another Georgia football player, specifically denied the quotation in the article attributed to him pertaining to knowledge by the Alabama team of the Georgia formations and plays. Babb was quoted in the article as saying the Alabama players knew Georgia's key play (eighty-eight pop) and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. This was confirmed by Coach Johnny Griffith.

(3) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him, which was also to the effect that Alabama knew Georgia's plays.

(4) Coach Johnny Griffith categorically denied three separate and distinct quotations in the article that were attributed to him.

(5) There were many other instances in which the individual, credited by Graham as giving Graham certain information which was included in the article, categorically denied under oath that any such information had been furnished.

Frank Graham, Jr., author of the article, and Charles Davis Thomas, the Managing Editor of the *Saturday Evening Post*, testified by deposition that they both knew that after the article was published plaintiff Butts' career would be ruined. The author of the article, Frank Graham, Jr., testified by deposition at the trial. Curtis' Editor-in-Chief, Clay Blair, Jr., and its Senior Editor, Davis Thomas, were present in court but testified by deposition. Furman Bisher, of Atlanta, who was paid to assist in the preparation of the article, testified by deposition.

The article was clearly defamatory and extremely so. The *Saturday Evening Post* had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable.

This Court does not feel that the award of $60,000.00 for actual damages was excessive. The evidence showed plaintiff to be a man in his fifties, and that his earnings from his profession had been a minimum of $12,000.00 per annum.

The Court must now consider the amount of punitive damages awarded. What is the nature of punitive damages

and for what purpose do we allow their imposition? The law of Georgia provides that in every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages to deter the wrong-doers from repeating the trespass. Sec. 105-2002, Georgia Code Annotated, 1933.

This Court, however, is greatly concerned with the size of the verdict as to punitive damages. An examination has been made of many cases and the awards made throughout the several jurisdictions of the United States, both in the Federal and the State Courts. As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds v. Pegler,* 123 F. Supp. 36, 223 F. 2d 429. Since the award in the case at hand, the New York Supreme Court, Appellate Division, October Term, in the case of *Faulk v. Aware, Inc., and Hartnett,* has reduced the award of punitive damages in the amount of $2,500,000.00 to $150,000.00. The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained. *Reynolds v. Pegler,* supra.

True, fixing the amount of damages is primarily in the province of the jury, and it has been said, with respect to libel cases, "the jury is generally considered to be the supreme arbiter on the question of damages". *Lynch v. New York Times Company,* 171 A. D. 399, 401. The Court, if possible, should try to avoid invading that field. However, a Court may not stand by idly when it is apparent that a verdict is excessive. In *Sunray Oil Corporation v. Allbritton,* 188 F. 2d 751 (5 Cir. 1951), Judge Hutcheson emphasized that a district judge has a duty to grant a new trial, not only when the jury's verdict is excessive as a

matter of law, but also where "it is larger in amount than the judge thinks it justly ought to be". Thus, he said:

> "Whether, in the opinion of the district judge a verdict is excessive as a matter of fact, that is, though not contrary to right reason and, therefore not excessive as a matter of law, it is larger in amount than the judge thinks it justly ought to be, or is excessive as a matter of law, that is, is so monstrous or inordinate in amount as to find no support in right reason, he has the same power, the same duty, in the one case as in the other to relieve against the excessiveness by granting a new trial or requiring a remittitur in lieu."

As was held by the late Judge Parker in the case of *Virginian Railway Company v. Armentrout*, 166 F. 2d 400, 408:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. * * *
>
> "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

In accordance with the cases cited above, this Court feels it is its duty to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or

reckless indifference to the plaintiff's rights. In observance of such duty, this Court concludes that the award for punitive damages in this case was grossly excessive. It is the Court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00.

Movant's Grounds 2, 3, and 4 assert that the right given by Section 105-2002, Georgia Code Annotated, 1933, to a jury to grant punitive damages violates the rights guaranteed by the Federal Constitution to freedom of speech and press and to substantive and procedural due process. These contentions are without merit. However, these constitutional questions are raised for the first time by this motion. No constitutional question concerning the statute was ever raised by movant's pleadings. The contention that a State statute is unconstitutional is an affirmative defense and must be so pleaded in defendant's answer. *Kewanee Oil & Gas Company v. Mosshamer,* 58 F. 2d 711, 712; *White Cleaners & Dyers v. Hughes,* 7 F. Supp. 1017 (D. C. La. 1934, 3 judges).

Movant's Ground 5 has been expressly withdrawn by defendant.

Grounds 6 through 13 of defendant's motion contend that error was committed in excluding certain evidence as to specific acts of misconduct by plaintiff, defendant contending that this evidence should have been permitted for the purpose of impeachment and in mitigation of damages. The first consideration is Section 38-202, Georgia Code Annotated, 1933, which provides as follows:

> "The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct."

The defendant contends that under Rule 43(a) of the Federal Rules of Civil Procedure, this evidence is admissible in Federal Court. Rule 43(a) provides that in determining admissibility of evidence where there is a conflict between the State and the Federal rule, the plaintiff is entitled to the benefit of the more favorable rule. *Hambrice v. F. W. Woolworth Company,* 290 F. 2d 557.

However, on the question with which this Court is concerned and without passing upon the question as to whether the matter is substantive or procedural, it appears that there is no conflict between the Georgia rule and the Federal rule as to the admissibility of the specific acts of misconduct on the part of the plaintiff.

Under the decision of *Cox v. Strickland,* 101 Ga. 482, it is held that the filing of a plea of justification in defense to an action of libel puts the plaintiff's character in issue, and a defendant has a right to show that the plaintiff's general character is bad, but cannot, in so doing, go into the proof of specific acts or resort to general rumors by hearsay.

Neither under the majority of federal decisions which this Court has studied would such tests be admissible. See *Tribune Association v. Follwell,* 107 F. 646; *Sun Printing & Publishing Association v. Schenck,* 98 F. 925; *Morning Journal Association v. Duke,* 128 F. 657.

As was said in the *Schenck* case, supra:

> "It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendence of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."

As further authority sustaining the inadmissibility of such evidence, see *Wigmore on Evidence,* 3d Edition, Section 209, where it is stated that the reputed character of the plaintiff in an action of defamation is admissible in mitigation of damages so long as proof of character is made by reputation only; but particular acts of misconduct are irrelevant and such evidence is universally regarded as improper. Pertinent to this issue is the statement of Richards, C. B., in the case of *Jones v. Stevens,* 11 Price 235, 265:

> "I cannot . . . allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice and throw on him the difficulty of showing a uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge."

Movant contends that this Court erred in refusing to charge Section 38-1806 of the 1933 Georgia Code Annotated. There was no showing that any witness wilfully and knowingly testified falsely, and this Court charged generally on the subject of impeachment. See *Smaha v. George,* 195 Ga. 412.

Ground 15 of defendant's motion is without merit. Ground 16 of movant's motion is without merit. See *Smaha v. George,* supra; and *Branan v. LaGrange Truck Lines, Inc.,* 94 Ga. App. 829.

Grounds 17 and 18 of defendant's motion contend error in excluding evidence tending to impeach witness John Carmichael. Such evidence was offered by defendant to show that witness Carmichael had been convicted in 1933 while witness was a minor in Ohio. The Court, in its

discretion, refused to admit such evidence because of the lapse of time. See *Goddard v. United States,* 131 F. 2d 220; *Sinclair Refining Company v. Southern Coast Corporation,* 195 F. 2d 626.

The alleged false statements for the purpose of obtaining licenses were inadmissible. A witness cannot be impeached by proving contradictory statements previously made by him as to matters not relevant to his testimony and to the case. *Grant v. Hart,* 197 Ga. 662; *Haynes v. Phillips,* 67 Ga. App. 574. Both Grounds 17 and 18 of the defendant's motion are without merit.

Grounds 19, 20, and 21 do not merit the granting of a motion for a new trial on any of the grounds as set forth.

Ground 22 of defendant's motion for a new trial asserts error because of arguments of plaintiff's counsel in the closing remarks to the jury. No objection nor complaint was ever raised to any portion of plaintiff's counsel's argument to the jury, although separate arguments were made by counsel for both parties on separate days of the trial. Arguments were begun on Friday by both counsel and completed on Monday. Much of the argument of which complaint is now made was offered on Friday, and yet on the following Monday, no objection was raised on this portion of counsel's summation. Counsel for defendant consisted of numerous counsel, and yet exception was only made on the filing of this motion. It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial. See *Travelers Insurance Company v. Bell,* 5 Cir. 1951, 188 F. 2d 725; *Thomson v. Boles,* 123 F. 2d 487; *Hobart v.*

O'Brien, 243 F. 2d 735; *Uhl v. Echols Transfer Company*, 5 Cir. 1956, 238 F. 2d 760. For the reasons stated above, Ground 22 of defendant's motion is without merit.

Ground 23(a) (b) (c) (d) and (e) of defendant's motion for a new trial complained of errors in the Court's instructions to the jury. The instructions complained of in these grounds of defendant's motion were not objected to at the trial of the case. Rule 51 of the Federal Rules of Civil Procedure provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Opportunity was afforded counsel for defendant to make such objections before the jury was permitted to consider its verdict. Under the above-cited rule, the defendant may not now complain. See also *Pruett v. Marshall*, 5 Cir. 1960, 283 F. 2d 436; *Williams v. National Surety Corporation*, 5 Cir. 1958, 257 F. 2d 771; *Moore v. Louisville & Nashville Railroad Company, Inc.*, 5 Cir. 1955, 223 F. 2d 214.

Defendant's contention based on Ground 24 of defendant's motion for a new trial is without merit for the reasons stated in this Court's ruling on defendant's motion for a judgment notwithstanding the verdict this day filed with the Clerk of the Court.

All of the grounds set out in defendant's motion for a new trial, excepting Ground 1, are denied for the reasons stated above.

As to the first ground of the defendant's motion for a new trial, a federal trial court has authority to determine

whether a verdict is excessive and to grant either a new trial or to require a remittitur. *State Farm Mutual Automobile Insurance Company v. Scott,* 5 Cir. 1952, 198 F. 2d 152.

An order in compliance with this opinion will be filed this date.

This the 14th day of January, 1964.

LEWIS R. MORGAN,
United States District Judge.

ORDER.

(Filed January 14, 1964.)

Now, this the 13th day of January, 1964,

IT IS ORDERED that the motion of the defendant, Curtis Publishing Company, for a new trial is granted unless the plaintiff, Wallace Butts, within twenty (20) days after the service of this order, shall, in a writing filed with the Clerk of the United States District Court for the Northern District of Georgia, remit all the punitive damages awarded above the sum of $400,000.00; the award for general damages in the amount of $60,000.00 to remain undisturbed.

(Signed) LEWIS R. MORGAN,
Lewis R. Morgan,
United States District Judge.

OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ON PETITIONER'S ADDITIONAL MOTION FOR NEW TRIAL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

CIVIL ACTION
No. 8311.

WALLACE BUTTS,

Plaintiff,

v.

CURTIS PUBLISHING COMPANY,

Defendant.

Defendant, on February 28, 1964, under Rule 60(b)(2), Federal Rules of Civil Procedure, 28 U. S. C. A., filed a motion for a new trial upon the ground of the discovery of new evidence, contending that such evidence conclusively demonstrates the falsity of the testimony of two of the plaintiff's witnesses, Dr. Frank A. Rose and Coach Paul Bryant, and strongly supports the defense of justification. The motion is also based upon alleged conduct of plaintiff in attempting to avoid the conditions on which defendant's motion for a new trial was denied and a judgment in plaintiff's favor was granted.

Thereafter, defendant filed an additional motion for a new trial pursuant to Rule 60(b), Federal Rules of Civil Procedure, because of a change in the law of libel and the constitutional restrictions placed upon an action for libel by virtue of the United States Supreme Court decision of March 9, 1964, in the case of *New York Times Company v. Sullivan.*

Even though a final judgment had been entered in the case at hand and an appeal from such judgment has been perfected by the filing of a notice of appeal, this District Court retains jurisdiction to consider and deny such motions under Rule 60(b). See *Ferrell v. Trailmobile, Inc.*, (5 C. A., 1955) 223 F. 2d 697.

The gist of Part I of the first motion is that there is substantial variance between the testimony of Dr. Rose and Coach Bryant in their testimony at the trial of this case and depositions which were later given by Dr. Rose and his secretary, Mrs. Marian H. Park, in an action pending in the Northern District of Alabama in the case of *Paul Bryant v. Curtis Publishing Company*, Case No. 63-166, which testimony by deposition was taken on January 8, 1964.

In attempting to sustain its plea of justification, the defendant introduced at the trial of this case a letter dated March 6, 1963, written by Dr. Rose, as President of the University of Alabama, to Dr. O. C. Aderhold, as President of the University of Georgia. The letter concerns certain telephone calls relating to conversations on new football rule changes which had transpired between Coach Bryant and plaintiff Butts. At the trial, Dr. Rose in his testimony, in attempting to explain the contents of the Aderhold letter, stated that the letter was hurriedly dictated on the morning of March 6, 1963, and signed by his secretary, Mrs. Park, as he (Dr. Rose) was attempting to catch an early morning plane for Washington, D. C., to attend a meeting of the American Council on Education.

In the depositions taken in the *Bryant* case, defendant shows that Dr. Rose did not go to Washington, D. C., on the date of March 6, 1963, nor was the letter hurriedly dictated as there was a previous draft of Aderhold letter, dated March 5, 1963, which draft was substantially the

same as the contents of the March 6, 1963, original letter mailed and received by President Aderhold.

The defendant further asserts that Dr. Rose, in his testimony at the trial testified that Coach Bryant told him he did not remember the call of September 16, 1962, to Coach Butts in Athens, Georgia, although he could have made it, and even though Rose had interrogated Bryant several times between February 24, 1963 and March 6, 1963. However, by a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, Bryant, in this letter, informed Rose that he remembered the call to Butts in the middle of September very well, and that although Rose admitted receiving the letter dated February 28, 1963, prior to March 6, 1963, Rose still maintained throughout his testimony in said deposition that Bryant reported to him through all the investigation that he had no recollection of the Sunday, September 16, 1962, telephone call to plaintiff Butts.

Defendant contends that on the issue of the letter (Exhibit D-21) plaintiff was able to explain away the contents of the letter by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter, and Bryant's total lack of recollection concerning the telephone call, when in fact the newly discovered evidence establishes that Bryant did recall the Sunday telephone call and that the letter was not a hasty, error-laden letter, but was a careful and thoughtful letter, and that someone received the draft of such letter dated March 5, 1963, prior to its final draft on March 6, 1963.

The phrase "newly discovered evidence" refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant. In the case of *Chemical Delinting Company v. Jackson*, 193 F. 2d 123, 127, the Fifth Circuit Court of Appeals has held:

"The motion must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that such evidence will probably produce a different result."

See also *King v. Leach,* (5 C. A., 1942) 131 F. 2d 8.

The evidence clearly shows that the letter from Bryant to Rose was in existence in the latter part of February, 1963. The evidence further shows that the draft of the letter from Rose to Aderhold was in existence prior to March 6, 1963. Under the liberal discovery rule provided by the Federal Rules of Civil Procedure, the defendant could have obtained all of this evidence which it now has available prior to the trial of this case in August, 1963. No facts have been shown by the movant here from which this Court may infer reasonable diligence on its part.

Even assuming the evidence could not have been produced at the trial in August by due diligence—inferences not fairly conveyed by the record—the evidence now presented tends merely to affect the weight and credibility of the evidence of Dr. Rose and does not constitute a proper basis for a new trial. See *English v. Mattson,* (5 C. A., 1954) 214 F. 2d 406, 409; *Grant County Deposit Bank v. Greene,* 200 F. 2d 835.

After considering the "newly discovered evidence" presented in the motion at hand, and from this Court's review of all the evidence presented at the trial of the case, even if all the testimony entered at this hearing on the motion had been presented at the trial in August, this new evidence affecting the credibility of Dr. Rose would not have changed the verdict in this case. See *Chemical Delinting Company v. Jackson,* supra, and *English v. Mattson,* supra.

The second ground advanced by the defendant for a new trial under Rule 60(b) is to vacate the judgment entered against the defendant and to grant a new trial because after the plaintiff had filed his written consent to the remittitur (this consent still being on file) that, to the defendant's motion for a new trial, the plaintiff has filed a notice of cross-appeal. The question of the cross-appeal and the merits thereof are not for decision by this trial Court, but is a matter to be considered on appeal. See *Woodworth v. Chesbrough,* 244 U. S. 79, 61 L. Ed. 1005.

The thrust of defendant's additional motion for a new trial under Rule 60(b) is based upon the recent decision of the United States Supreme Court, rendered on March 9, 1964, in the case of *New York Times Company v. Sullivan.* The Supreme Court's ruling in the *Times* case, speaking through Mr. Justice Brennan, held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The contention of the defendant is that the *Times* case is controlling for the case at hand, and that under this motion the previous judgment should be vacated and a new trial granted. In order that a prior decision of a court shall govern, such prior decision must be in point, and as a test in determining whether the adjudicated case is a precedent, such case should be measured by a similarity to the second case in its controlling facts. See *United States v. L. A. Tucker Truck Lines, Inc.,* 344 U. S. 33, 97 L. Ed. 54.

In the *Times* case, the Supreme Court held actual malice must be proved to recover general damages in actions

of libel brought by public officials against critics of their official misconduct. However, the concurring opinion of Justices Goldberg and Douglas stated:

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech."

In the present motion at hand, the defendant contends that plaintiff's action comes under the *Times* ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 107-709(6). Just where in the ranks of government employees the "public official" designation extends, the Supreme Court in the *Times* ease did not determine.[1] The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

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1. In Footnote 23 of the majority opinion, it was stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U. S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, ..."

Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Session Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located at Athens) and the Georgia School of Technology Board of Regents at both the University of Technology (located at Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see *Page v. Regents of University System of Georgia,* 93 F. 2d 887, 891-892. As was stated in the *Page* case, the "coaches" are also members of the faculty.

Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of "public officials" to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on "a business comparable in all essentials to those usually conducted by private owners"[2] he would not be a public

2. See *Allen v. Regents of the Unversity System of Georgia,* 304 U. S. 439, 451.

officer or official. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia v. Blanton,* 49 Ga. App. 602(4); *Board of Education of Doerun v. Bacon,* 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the "public official" designation beyond that contemplated by the ruling in the case of *New York Times Company v. Sullivan,* supra.

If it were conceded that plaintiff Butts was a "public official", the case of *New York Times Company v. Sullivan* would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves "actual malice"—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Emphasis supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company,* 225 F. Supp. 916.

For the reasons stated above, the defendant's motions under Rule 60(b) to vacate the judgment entered against the defendant are denied.

This the 7th day of April, 1964.

LEWIS R. MORGAN,
Lewis R. Morgan,
United States District Judge.

APPENDIX C.

Defendant's Additional Motion for New Trial Pursuant to Federal Rule of Civil Procedure 60(b).

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION.

CIVIL ACTION

No. 8311.

WALLACE BUTTS,

Plaintiff,

v.

CURTIS PUBLISHING COMPANY,

Defendant.

Because of the drastic change in the law of libel and the constitutional restrictions placed upon an action for libel brought about by the Supreme Court's recent decision, on March 9, 1964, in the case of *New York Times Company v. Sullivan,* 32 U. S. Law Week 4184 (March 10, 1964), the defendant hereby moves this Court, pursuant to Rule 60(b)(6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. The verdict and judgment in this case awarded plaintiff damages for injury to his reputation as a football coach on account of statements made by defendant concerning plaintiff's actions while acting as Director of Athletics of the University of Georgia. The Director of Athletics of the University of Georgia is a public official: *Page v. Regents of University of Georgia,* 93 F. 2d 887 (5th Cir., 1937) (reversed in 304 U. S. 439 upon other grounds).

2. Said *New York Times Company v. Sullivan* case held that the constitutional guarantees provided by the First and Fourteenth Amendments prohibit a public official from recovering *any* "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of whether it was false or not."

3. The following portions of the instruction given by the Court to the jury constitute error in that the Court stated that general damages could be recovered by the plaintiff without the plaintiff being required to prove the existence of "actual malice" on the part of the defendant:

> "I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication." R. 1624,

"As the publication was libelous per se, I charge you that malice is to be inferred. However, the existence of malice may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact." R. 1630.

4. Applying the constitutional standards enunciated in the said *New York Times Company v. Sullivan* case, the proof presented in the instant case to show actual malice on the part of the defendant lacks the "convincing clarity", which such constitutional standards demand, and thus such evidence cannot sustain the judgment entered for the plaintiff. There was no evidence introduced in the instant case to prove that the statements made in the article defendant published in the March 23, 1963 issue of "The Saturday Evening Post" concerning plaintiff were made with knowledge on the part of the defendant that they were false, or with a reckless disregard of whether they were false or not. On the contrary, plaintiff proved in his own case that the Post editors responsible for the publication of the story—Blair and Thomas, R. 1024—were satisfied of the truthfulness and accuracy of the story. R. 1038, 1137-1138.

Therefore, the instant case was clearly tried upon unconstitutional assumptions, the correct principle unfortunately not being announced until after the trial by the Supreme Court's landmark decision in the *New York Times Company v. Sullivan* case. As Mr. Justice Goldberg recognized in that case, "we are writing upon a clean slate."

A hearing upon this Motion is respectfully requested.

WELBORN B. CODY,
Attorney for Defendant.

Of Counsel:

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McCLATCHEY & REGENSTEIN,
1045 Hurt Building,
Atlanta, Georgia 30303
Jackson 2-7420

GEORGIA VERSUS ALABAMA

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Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

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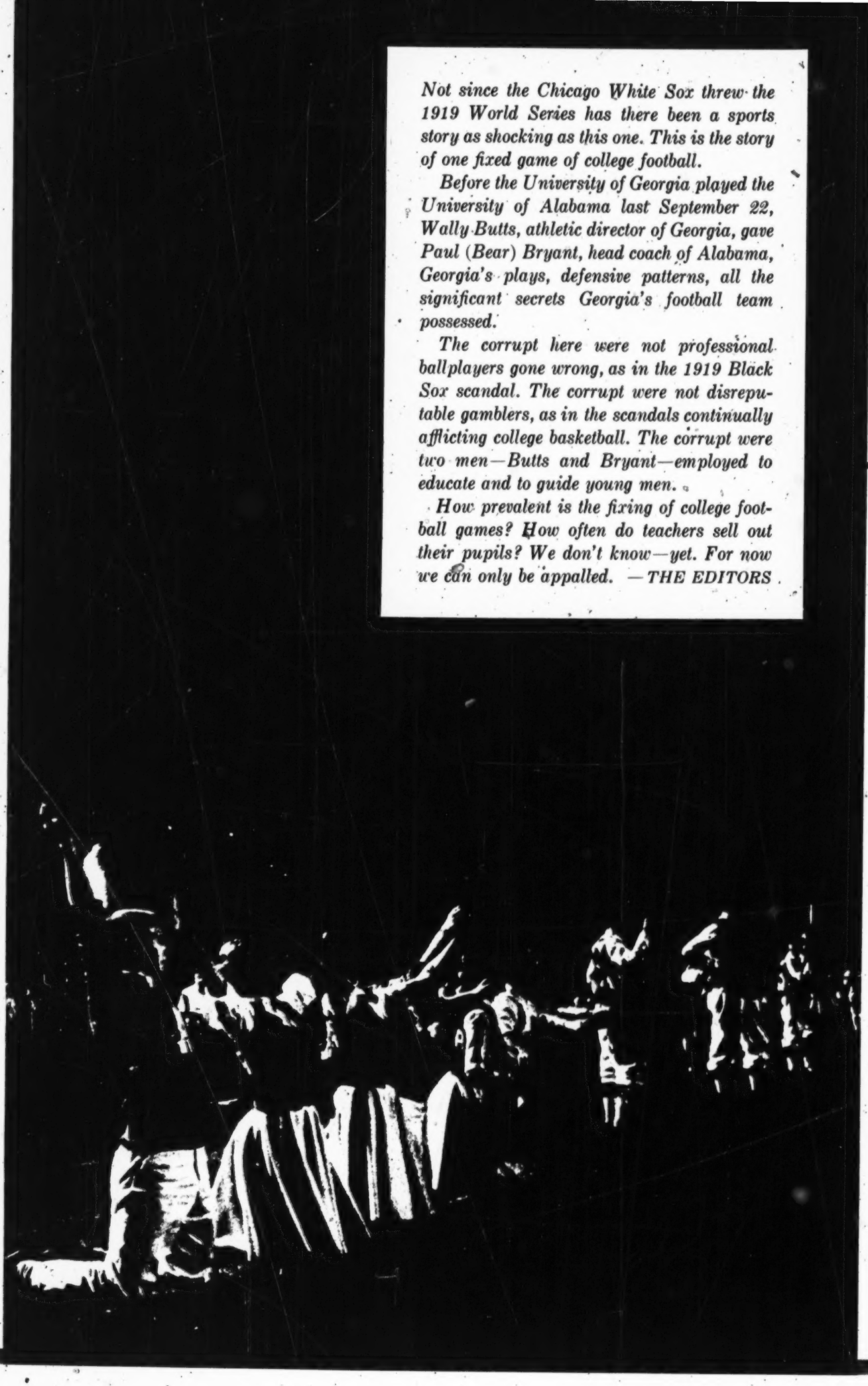
How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled. —THE EDITORS

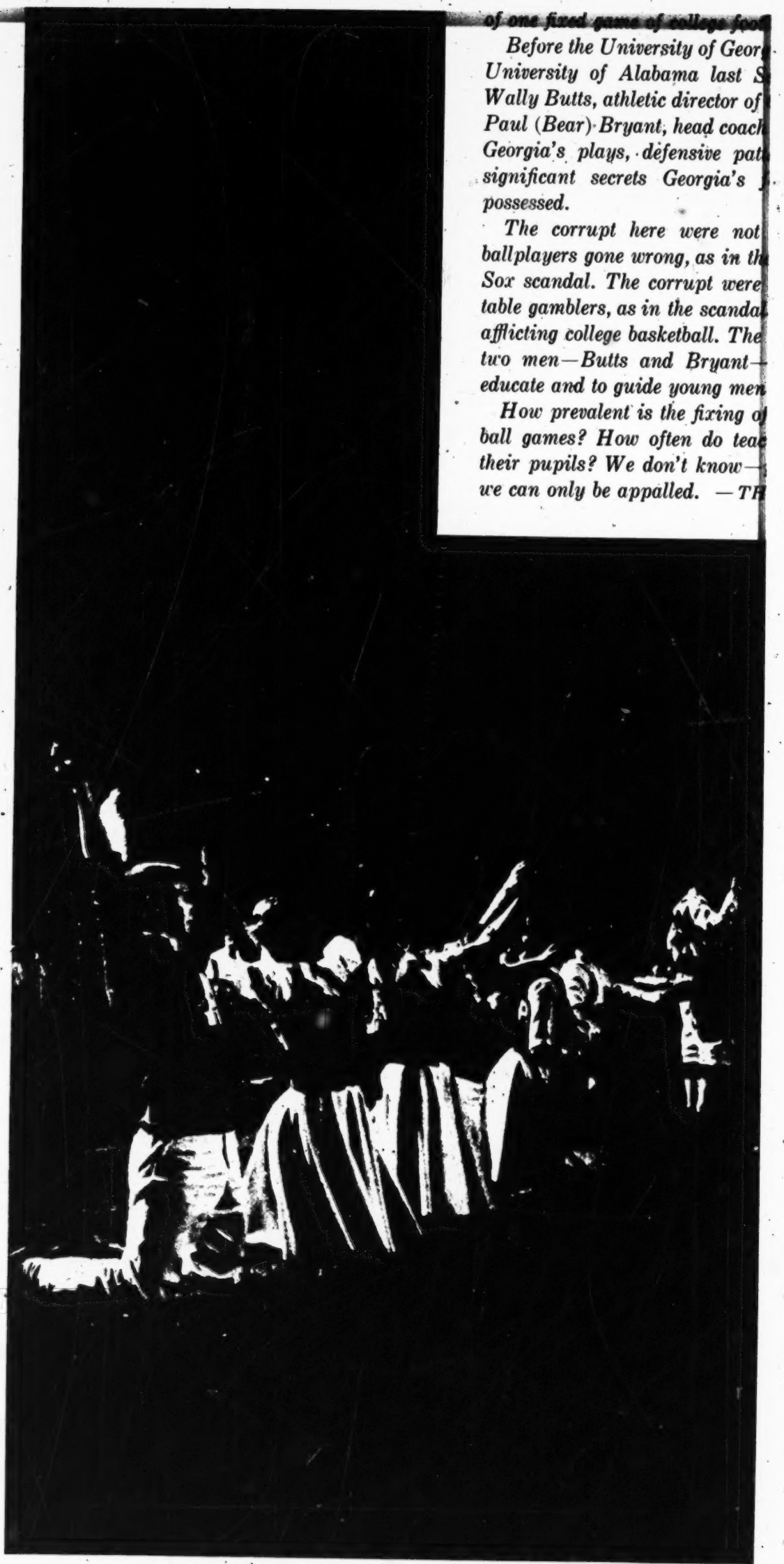


Appendix D

THE STORY OF A COLLEGE FOOTBALL FIX

A SHOCKING REPORT OF HOW WALLY BUTTS AND "BEAR" BRYANT RIGGED A GAME LAST FALL

By FRANK GRAHAM JR.



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"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

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Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. "'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32–6.)

Only one man in the Georgia camp did not despair that day. Asked by reporter

George Burnett of Atlanta: He overheard critical long-distance call.

Wally Butts, former athletic director of Georgia: He gave away Georgia plays, defense patterns.

Head coach Paul (Bear) Bryant of Alabama. He took plays for his defending national champions.

remain in his job. On January 28 a report reached the newspapers that Butts had resigned. At first it was denied by Butts and the university. A few days later it was confirmed with the additional news—that Butts would remain as athletic director until June 1 so that he could qualify for certain pension benefits. Rumors flooded Atlanta. One of the wildest was that Butts was mysteriously and suddenly ill and had entered the state hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game.

But if Butts was seen publicly, events involving him remained closely guarded secrets. Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University of Georgia. There he met Dr. O. C. Aderhold, the university president. Burnett's story was carefully checked. He then agreed to take a lie-detector test, which was administered by polygraph expert Sidney McMain, in the Atlanta Federal building. Burnett passed the test to everybody's satisfaction.

Phone-company check

Next an official of the Southern Bell Telephone Company checked and found that a call had been made from the office of Communications International to the University of Alabama extension noted by Burnett on his scratch pad. This information corroborated Burnett's statement that the call had been made at about 10:25 in the morning and had lasted 15 or 16 minutes.

"I jotted down the time when the call was completed," Burnett said. "It was 10:40. This is an old navigator's habit, I guess. For instance, I know that I was shot down over Saint-Vith at exactly 10:21, because when the bombardier called 'Bombs away!' I looked at my watch and wrote down the time. A few seconds later we got hit."

University officials still nursed reservations about Burnett's story because of the fantastic coincidence that had enabled him to overhear Butts's call. Then, during one of the many conferences he attended in attorney Barwick's office in the Rhodes-Haverty Building, a second coincidence, equally odd, cleared the air. Barwick placed a call to Doctor Aderhold at the university. Suddenly, Barwick and Aderhold found themselves somehow braided into a four-way conversation with two unknown female voices. The two men burst into nervous laughter. Burnett's story gained a little more credence.

February 21 was a painful day for George Burnett. He was summoned once more to Barwick's office, because Bernie Moore, the commissioner of the Southeastern Conference, "wanted to ask some questions." On Burnett's arrival he found not only Moore but Doctor Aderhold, two members of the university's board of regents, and another man identified as Bill Hartman, a friend of Wally Butts.

From the start, Burnett sensed a mood of hostility in the air. The ball was carried by one of the members of the Georgia board of regents, who confronted Burnett with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "'I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END

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Butts gia-Alabama game at Legion Field, Birmingham, A
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On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up his telephone and dialed the number of a local public-relations firm. The number was Jackson 5-3536. The line was busy, but Burnett kept trying. On the fourth or fifth attempt he had just dialed the final number when he heard what he later described as "a series of harsh electronic sounds," then the voice of a telephone operator said:

"Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"

And then a man's voice: "I'll hold, operator."

Like most males over the age of four in Atlanta, George Burnett is a football fan. He realized that he had been hooked by accident into a long-distance circuit and that he was about to overhear a conversation between two of the colossi of Southern football. Paul (Bear) Bryant is the head coach and athletic director of the University of Alabama, and Wallace "Wally" Butts was for 22 years the head coach of the University of Georgia and, at the time of this conversation, the university's athletic director. Burnett ("I was curious, naturally") kept the phone to his ear. Through this almost incredible coincidence he was to make the most important interception in modern football history.

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Bryant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said. "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller," and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

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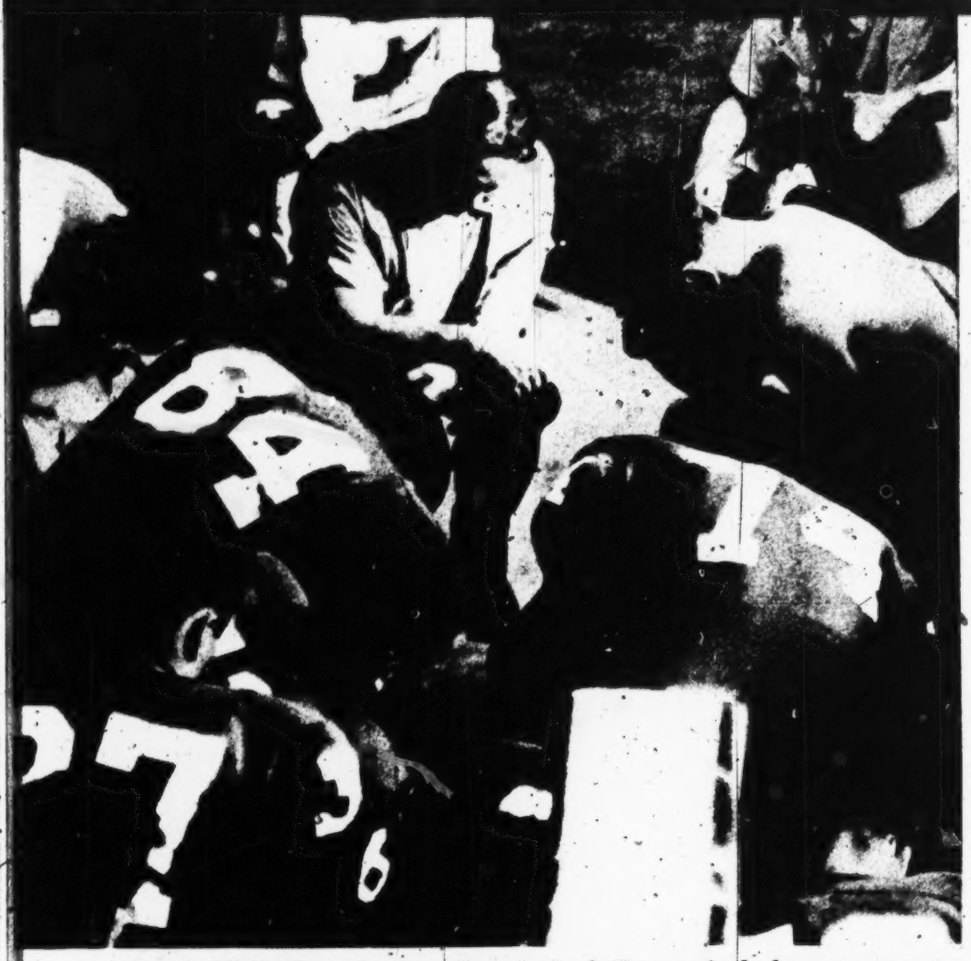
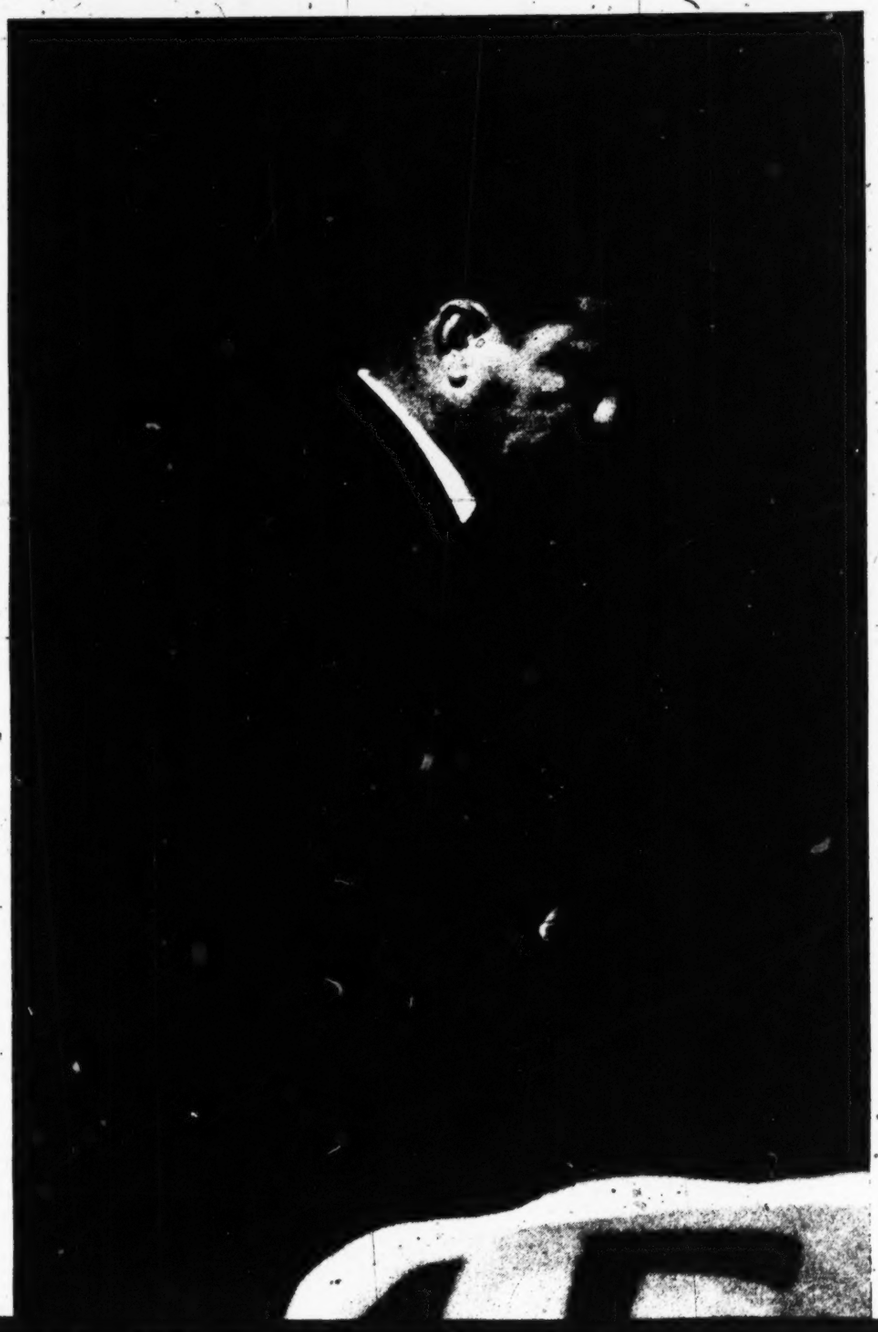


Solemnly Wally Butts leads a Georgia football team in locker-room prayer.



Downcast coach Griffith slouches near bench as Georgia team is slaughtered.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential*."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furore, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

"You know, Bob," Burnett said, after they had talked business for a while, "there's something that's been eating me up for a long while. I was going to tell you about it at the time, and then I decided to keep quiet. But I think you should know this, being a friend of Johnny Griffith."

After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go ahead but to

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John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential*."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furore, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

"You know, Bob," Burnett said, after they had talked business for a while, "there's something that's been eating me up for a long while. I was going to tell you about it at the time, and then I decided to keep quiet. But I think you should know this, being a friend of Johnny Griffith."

After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go ahead but to try to keep his name out of it. Powerful men in Georgia might be offended if Wally Butts was hurt, and Burnett did not want to jeopardize his own career just when things were beginning to break nicely for him.

But like so many others, Burnett found that there is no such thing as a little involvement. Griffith pressed to meet him, and nervously Burnett agreed. In the middle of January he met with Edwards and Griffith in the Georgia coach's room at Atlanta's Biltmore Hotel. Simultaneously a general meeting of the Southeastern Conference coaches was taking place at the Biltmore.

The Georgia-Alabama game had been forgotten by most of the coaches and athletic officials present. A popular topic of conversation was a late-season game between Alabama and Georgia Tech, in which Bryant's long winning streak had been broken.

Alabama, a five-point favorite, had trailed 7–6 with only a little more than a minute to play. Then Alabama made a first down on the Georgia Tech 14-yard line. Since Bryant had a competent field-goal kicker, the classic strategy would have been to pound away at the middle of Tech's line, keeping the ball between the goalposts and, on third or fourth down, order a field-goal try. (Alabama had defeated Georgia Tech on a last-minute field goal in 1961.) Instead, Bryant's quarterback passed on first down. The pass was intercepted, and Georgia Tech held the ball during the game's waning seconds, thus scoring last season's greatest upset.

During the January conference at the Biltmore, Bryant was frequently kidded about that first-down pass.

Away from the bars and the crowds, in Griffith's room the talk was only of Georgia-Alabama. Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Suspicions confirmed

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left. "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to

# of Georgia's beaten Bulldogs: "I never had a chance."

with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END

Butts and Bryant meet as friends, exchange warm greetings before the Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1960.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

CASE NO. 814

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Petitioner[1] refers to the opinion of the United States Court of Appeals for the Fifth Circuit as unreported and reproduces a copy as Appendix B to its petition. This opinion is reported in 351 F. 2d 702 (5th Cir. 1965).

QUESTIONS PRESENTED

Respondent construes the questions presented to be as follows:

I. Under the facts of this case, did petitioner waive the right to challenge the verdict and judgment on any

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[1]Petitioner is hereafter sometimes referred to as "Cu[illegible]".

of the constitutional grounds asserted in *New York Times v. Sullivan*, 376 U.S. 254 (1964) by its decision not to assert any such grounds at or before the long and expensive trial?

II. Assuming that *Times v. Sullivan* does apply and the constitutional defenses were not waived, did the undisputed evidence show conclusively that actual malice was proved?

III. Under the facts of this case, did the amount of punitive damages constitute an abridgement of freedom of the press or the taking of property without due process of law?

ADDITIONAL STATUTES INVOLVED

In respondent's Appendix A are set forth additional statutory provisions involved.

COUNTER-STATEMENT

The questions must be determined in the light of the facts of the case. The statement in the petition for certiorari is deficient in many respects.

CURTIS' STATEMENT FAILS TO SET OUT THE FACTS AS TO WAIVER

Curtis fails to set out the background against which it made its decision as to the strategy it would employ in defending the case. This is of vital importance in determining the question of waiver. In considering the facts, the choice made by Curtis should be kept in mind, to wit, that it would rest its

defense squarely and solely on a plea of justification under which it would obtain the right to open and conclude before the jury, and no other defenses would be relied on. Only when its strategy failed did Curtis seek some constitutional ground of defense, turning hopefully to *New York Times v. Sullivan* as a means of escape.

Curtis Raised The Constitutional Defenses In Two Alabama Libel Suits

One of a number of libel suits pending against Curtis when the article involved in this action was published was a suit filed in Alabama by Paul Bryant, head football coach of the University of Alabama, because of a previous article that had been published by the *Post*. A co-defendant with Curtis in that libel suit was Furman Bisher, Sports Editor of *The Atlanta Journal*, the author of the previous article. (R. 497-98). The Birmingham, Alabama law firm defending petitioner and Bisher in that libel suit steered the editors of the *Post* to one George Burnett in Atlanta from whom they bought the instant Butts-Bryant story. (R. 497-98). In that libel suit, as well as a later suit filed by Bryant because of the article here involved, Curtis raised the following constitutional defenses:

> "(f) To subject this defendant to libel in the circumstances complained of would abridge the freedom of speech and of the press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

"(h) To subject this defendant to libel in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States."

(See respondent's Appendix B; petitioner's Appendix B, pp. 64a-65a).

Curtis' Defensive Strategy

Two days after publication, respondent filed suit against petitioner. (R. 1925). Petitioner filed its defensive pleadings, relying solely upon its plea of justification.

No constitutional questions of any kind were raised by Curtis in its answer, notwithstanding the following remarkable situation: Petitioner, represented by the same lawyers who defended *The New York Times* in *Times v. Sullivan*, raised the First and Fourteenth Amendment defenses in the first *Bryant* suit in Alabama and again in the second *Bryant* suit in Alabama. (Exhibits A and B to "Response To Petition For Re-Hearing En Banc" as filed in the Court of Appeals, Respondent's Appendix B). Curtis' General Counsel (through Mr. Strubing) actively participated in both Alabama cases, as well as in this case. Notwithstanding, no constitutional defenses were raised in this case. As pointed out by the Court of Appeals (351 F. 2d at 734; Pet. for Cert., App. B, p. 65a):

"If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related

> *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an active participant in all three cases, so he certainly should have known what the rights of Curtis were."

Even though given the full opportunity during the lengthy pre-trial proceedings and during the trial, which lasted fifteen days, petitioner chose not to raise any constitutional grounds of defense, and no such objections were made to the trial court's charge as to malice as required by Fed. R. Civ. P. 51.

CURTIS' STATEMENT FAILS TO SET OUT THE FACTS WHICH ESTABLISHED MALICE

Petitioner knew and admitted it knew when the article was published that its publication would "ruin the career of Wallace Butts" and "would result in his death in his chosen profession." (R. 915-16).

Curtis' New Editorial Policy

Prior to publication of the article in question, the *Post's* Editor-in-Chief, due to a severe and continuing loss of revenues (R. 935-36), had embarked upon a new editorial policy characterized by the *Post's* Editor as "sophisticated muckraking" — of conducting an "exposé type magazine," (R. 943) "of provoking people, making them mad." (R. 944). When Mr. Blair was asked in the taking of his testimony if he had not been facetious when he boasted on a previous occasion that he would change the image of the *Post* from that which everyone had learned to admire and respect to that of a "sophisti-

cated muck-raker," Mr. Blair testified that he "was not being facetious," that he "meant it then" and "mean it now." (R. 939). When asked how the article which is the subject of this suit fitted in with the "new image," the Editor-in-Chief of the *Post* testified "I would say we have gone 25 per cent toward the goal of the magazine that I envision." (R. 940). Mr. Blair testified that he had in fact changed the image of the *Post*. (R. 940). On January 15, 1963, Clay D. Blair, Jr., as Editor-in-Chief, had written a memorandum to the staff of the *Post* congratulating them on "putting out one hell of a fine magazine," stating "the final yard stick: we have about six law suits pending, meaning that we are hitting them where it hurts, . . ." (R. 1376). When questioned in this case as to what kind of law suits he was referring to in that memorandum, Mr. Blair stated "all of these are libel suits." (R. 938). When asked whom he had reference to in his use of the phrase "hitting them where it hurts," Mr. Blair testified "'Them' is the general phrase to refer to the whole United States of America." (R. 938.)

Curtis Ignored Warnings That The Stories Were False

Eleven days before publishing the story petitioner was categorically informed by telegram and letter of the "absolute falsity of the charges" to be made in the proposed story. (R. 1023) (R. 947-48). Petitioner ignored those warnings and published the story knowing full well in advance that it would "ruin the career of Wallace Butts", "would result in his death in his chosen profession", and "that the careers of two men would be ruined as a result of the publication of the story." (R. 1014). Before publishing the article petitioner made

no effort to contact either Wallace Butts or Coach Paul Bryant of the University of Alabama for any statement to be carried in the article by either of them as to whether the charges against them were true. (R. 897). The *Post* had a readership of twenty-two million (R. 1014-15) and neither respondent nor Coach Bryant was given any opportunity whatsoever for a retort before that forum. After the article was published respondent was further denied any voice before petitioner's forum of twenty-two million readers in that petitioner ignored a prompt and urgent demand by respondent that it publish a retraction of the defamatory statements against him. (R. 22, 26).

Petitioner paid George Burnett $5,000 for the story. (R. 1380-81). This was in February, 1963. The telephone call which Burnett claimed he had listened in on between respondent and Coach Bryant was in September, 1962. Petitioner and its writer, Frank Graham, Jr., knew when they bought the story from Burnett that he had been convicted of writing bad checks and was at that time on probation (R. 911, 912, 913). They further knew there were possibly other instances of "bad-check writing" by George Burnett. (R. 1016). Davis Thomas, a Senior Editor of the *Post*, knew the criminal background of George Burnett and testified that he considered one who wrote bad checks to be the same as a "liar." (R. 1016).

As will be shown, the record is replete with evidence of Curtis' malice, all of which was artfully ignored in Curtis' Statement of the Facts.

The District Court's Summary Of The Evidence In Respect Of Malice

The facts in respect of malice were summarized by the trial judge as follows:

> "The article charged Butts with being corrupt and with betraying his players and that the players were forced into the game like 'rats in a maze' and 'took a frightful physical beating.' The article charged, in an italicized editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of a 'disreputable gambler,' and a corrupt person who, employed to educate and guide the young men, betrays or sells out his pupils." (225 F. Supp. at 917; Pet. for Cert., App. B. p. 77a).

> "Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overheard between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia game. By some mechanical defect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late

December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the same was brought to its attention by Curtis' Birmingham, Alabama lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the Saturday Evening Post.

"The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the Saturday Evening Post, knew that Burnett had been convicted of 'bad check writing.' No representative of the Post looked at the notes before the article was published. According to Coach Griffith of Georgia, defendant's witness, 'a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had.' No effort was made by the Post to view the actual game film, although the Sports Editor of the Post, one Roger Kahn, considered that necessary.

"Inserted in the article were the following direct quotations, which were subsequently denied under oath by the parties quoted:

> (1) Graham wrote that Burnett had told him that Larry Rakestraw, Georgia quarterback, placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. Burnett later testi-

fied under oath that he had not told Graham any such thing.

(2) Mickey Babb, another Georgia football player, specifically denied the quotation in the article attributed to him pertaining to knowledge by the Alabama team of the Georgia formations and plays. Babb was quoted in the article as saying the Alabama players knew Georgia's key play (eighty-eight pop) and knew when Georgia would use it. Babb testified Georgia had no 'eighty-eight pop' play. This was confirmed by Coach Johnny Griffith.

(3) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him, which was also to the effect that Alabama knew Georgia's plays.

(4) Coach Johnny Griffith categorically denied three separate and distinct quotations in the article that were attributed to him.

(5) There were many other instances in which the individual, credited by Graham as giving Graham certain information which was included in the article, categorically denied under oath that any such information had been furnished.

"Frank Graham, Jr., author of the article, and Charles Davis Thomas, the Managing Editor of the Saturday Evening Post, testified by deposition that they both knew that after the article was published plaintiff Butts' career would be ruined. The author of the article, Frank Graham, Jr., testified by deposition at the trial. Curtis' Editor-in-Chief, Clay Blair, Jr., and its Senior Editor, Davis Thomas, were present in court but testified by deposition. Furman Bisher, of Atlanta, who was paid to assist in the preparation of the article, testified by deposition.

"The article was clearly defamatory and extremely so. The Saturday Evening Post had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." (225 F. Supp. at 918-19; Pet. for Cert., App. B, pp. 78a-80a).

The Circuit Court Approved The District Court's Appraisal Of The Evidence

In affirming the trial court, the Court of Appeals stated:

> "This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.
>
> "The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial.
>
> "Believing and so finding that the trial was fair, and that the judgment of the trial court

was correct and proper in all respects, it is AFFIRMED." (351 F. 2d at 719-20; Pet. for Cert., App. B, pp. 38a-34a).

The jury's verdict of $60,000 as general damages and $3,000,000 as punitive damages was rendered on August 20, 1963. On August 29, 1963, Curtis filed its initial motion for new trial. (R. 46). On January 22, 1964, the District Court entered judgment in the case in the amount of $460,000, representing $60,000 general damages and $400,000 punitive damages. (R. 105)

Thereafter, petitioner filed under Fed. R. Civ. P. 60(b) an additional motion for new trial on the alleged ground of recently discovered evidence, during the determination of which it developed that petitioner had paid Coach Paul Bryant $300,000 following the trial of this case rather than go to trial in his case based upon the same libelous article here involved. (R. 1456-57).

The Court of Appeals, in well reasoned opinions, rejected all of the arguments made by petitioner.

SUMMARY OF ARGUMENT

I.

Curtis, which elected not to urge any constitutional grounds of defense before or during the trial, now contends that this Court's reliance on those grounds in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), relieves it of the consequences of that election and permits it to raise those grounds for the first time on appeal. That Curtis knew of the constitutional defenses and elected not to use them in this case is established

by the fact that it urged such defenses in two companion libel suits pending against it at the same time in Alabama and that its Alabama counsel were contemporaneously representing *The New York Times* in the *Times* case. The Court of Appeals was correct in holding that, for its own reasons of trial strategy, Curtis obviously decided to rely solely on its plea of truth in this case and thereby waived its right to raise additional defenses on appeal and has no right now to complain of its choice. *Yakus* v. *U.S.*, 321 U.S. 414, 444 (1944); *U. S.* v. *Sorrentino*, 175 F.2d 721 (3rd Cir. 1949), *cert. den.* 338 U.S. 868 (1949); *Ackerman* v. *U. S.*, 340 U.S. 193 (1950).

This Court's holding in *Times* v. *Sullivan* that proof of actual malice is required by a public official in a libel suit was no change in the law but merely gave confirmation to a principle which has long been the law. *Gandia* v. *Pettingill*, 222 U.S. 452, 457 (1912); *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F.2d 288 (2nd Cir. 1941), aff'd by equally divided court, 316 U.S. 642 (1942); *Caldwell* v. *Crowell-Collier Pub. Co.*, 161 F.2d 333, 336 (5th Cir. 1947). Therefore, even without regard to Curtis' action in the companion cases and its knowledge of the proceedings in *Times*, the *Times* holding does not afford it an excuse for its failure to raise the constitutional defenses here urged.

Respondent was not a public official within the meaning of *Times* but an employee of a separate business entity, so *Times* could in no event be applicable. Georgia Code Sections 32-152 and 32-153; *Regents of the University System of Georgia* v. *Blanton*, 49 Ga. App. 602, 176 S.E. 673 (1934); *Board of Education of Doerun* v. *Bacon*, 22 Ga. App. 72, 95 S.E. 753 (1918);

Page v. *Regents of the University System of Georgia*, 304 U.S. 439, 452 (1938).

II.

In this case, as distinguished from the *Times* case, there was overwhelming proof of actual malice. The evidence established that Curtis had deliberately chosen a policy of "sophisticated muckraking," of "provoking people, making them mad," and measured its success by the number of libel suits against it. It intentionally ignored warnings received well in advance of publication that the story was false and made no effort to check the truth of the information it had obtained. It went on to add, guised as statements of fact, damaging charges for which there were no basis at all.

It would be useless to require another trial in view of the overwhelming evidence of malice.

The court's charge in respect to malice was adequate and met the standards set down in *Times*, and no objections were made by Curtis to the court's charge in respect to malice as required by Fed. R. Civ. P. 51.

III.

Curtis callously published the spectacular article here involved, knowing it would ruin respondent, for the purpose of improving its circulation. As such it was a "libeller for profit" and not entitled to the same protection under the United States Constitution against punitive damages as is the responsibly and objectively informative segment of the press.

Curtis having requested the trial judge, in open court, to reduce the size of the verdict, it cannot complain of the trial judge having done so. Curtis in its desire to profit from libel deliberately sought to squeeze from respondent his "breathing space . . . to survive," and cannot now complain that the $400,000.00 award of punitive damages deprives it of that "breathing space." There is no law in Georgia or the Federal courts that requires the existence of any relationship between compensatory and punitive damages.

ARGUMENT

I.

PETITIONER WAIVED THE RIGHT TO CHALLENGE THE VERDICT AND JUDGMENT ON ANY OF THE CONSTITUTIONAL GROUNDS ASSERTED IN *TIMES V. SULLIVAN*.

Petitioner Chose The Strategy Of Which It Now Complains

It is elementary that a litigant who claims a constitutional right must assert that right at an appropriate time in a litigation in order to rely on it on appeal.

Curtis cannot explain away its decision not to raise at the trial constitutional defenses of which it was fully aware and upon which it now relies on the ground that those defenses might have been overruled below. Nor should Curtis be heard to complain that it was under no duty to raise constitutional defenses below.

What was the situation faced by Curtis when it determined its trial strategy? At that very time there were pending against it in the Federal courts in Alabama the two libel suits brought by Bryant, in both of which it had set up the defenses of the First and Fourteenth Amendments (Pet. for Cert., App. B, pp. 64a-65a; Resp. App. B). In both Alabama suits it had also raised the "public man" defense granting the publisher a privilege conditional on the absence of actual malice in libel suits brought by public persons. (Resp., App. B). This "public man" defense, together with a number of other defenses raised in the Alabama cases, might have been raised here but Curtis elected not to do so.[2]

What was done by petitioner's counsel in this case is not difficult to understand. They merely chose the defense which they felt would be the most effective for their own use and chose not to rely on any other defenses.

The Circuit Court, in the first of its two decisions, after considering the affidavits filed in support of the petition for rehearing and the questions of law involved, reached the following conclusion relative to

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[2]The "public man" rule as set out in Section 105-709(6) of the Georgia Code (Resp. App. A) provides a privilege, conditioned on the absence of actual malice, to publications commenting "upon the acts of public men in their public capacity. . . ." The statutory privilege has been construed to grant a complete defense to publications falling within its terms, even though the publications may have been false. See *Pearce v. Brower*, 72 Ga. 243 (1884); *Wilson v. Sullivan*, 81 Ga. 238, 7 S.E. 274 (1888); *Augusta Evening News v. Radford*, 91 Ga. 494, 17 S.E. 612 (1893). Certainly a full defense would have included Georgia Code Section 105-709(6).

Curtis' choice of trial strategy (351 F. 2d at 735; Pet. for Cert. App. B, p. 67a):

> "Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses[6] it had raised in the Alabama *Bryant* cases, in order to get the right to open and close the arguments."

Again, the Circuit Court met Curtis' argument relative to its awareness of the constitutional defenses squarely by saying (351 F. 2d at 710; Pet. for Cert. App. B, pp. 15a-16a):

> "The *Times* case was decided by the Alabama Supreme Court on August 30, 1962. A petition for writ of certiorari presenting constitutional questions identical to those now being urged by Curtis, was filed in the United States Supreme Court on November 21, 1962, four months prior to the filing of the complaint in this case on March 25, 1963. Certiorari was granted in the *Times* case on January 7, 1963.

"[6]These would include the conditional privilege recognized by §105-709(6) of the Georgia Code concerning published statements relating to the 'acts of public men in their public capacity.' See Note 20, 376 U.S. 254 at 280."

The jury verdict in the instant case was returned on August 20, 1963, and the trial court's judgment thereon was entered the same day. A Birmingham, Alabama law firm, which represented the New York Times in the case brought against it by Sullivan, also, together with Curtis' General Counsel, represented Curtis in a libel suit Coach Bryant had filed against it in the United States District Court at Birmingham, Alabama. A member of this law firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant, and had talked with the author, Graham, about the matter prior to publication of the story. The same lawyer, together with another member of the firm, sat (as did the General Counsel for Curtis) at Curtis' Counsel table throughout the trial of this case.

"While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

Prominent among the questions which have been considered and passed on by this Court and by other

courts during the last several decades have been cases involving the right of freedom of speech. It is inconceivable that petitioner, a publisher for over two hundred years of several magazines of nationwide circulation, should not have considered raising that question in this libel suit as it had in the Alabama suits.

This Court's Decisions Relative To Waiver Support Respondent

The doctrine of waiver, as applicable to the facts of this case, is classically stated by this Court in *Yakus v. U. S.*, 321 U.S. 414, 444 (1944) as follows:

> "No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. [Citing cases]. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. [Citing cases]."

The waiver cases cited by Curtis are distinguishable because petitioner chose here, as a matter of strategy, to intentionally waive the constitutional grounds asserted in *Times*. Courts have long recognized that counsel may choose not to use certain defenses for strategic purposes and such choice will amount to an intentional relinquishment of a known right. *U. S. v. Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

In *Ackerman v. U. S.*, 340 U.S. 193 (1950), the Court held at page 198:

> "His choice was a risk, but calculated and deliberate in such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong considering the outcome of the *Elibar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

It is of further interest to note that even Judge Rives, who dissented from the decision of the Court of Appeals relative to waiver, felt that the issue of waiver was a "debatable" one. (Pet. for Cert., App. B, p. 46a, 351 F. 2d 702, 726). Respondent respectfully submits that issue should be here decided in his favor as it was below and that this Court should decline to review this case.

This Court's Holding in Times v. Sullivan Affords Curtis No Excuse For Its Decision Not To Raise At The Trial The Constitutional Defenses Now Urged

An analysis of *Times*, upon which petitioner relies for a review by this Court, shows that it made no change of law but merely gave sanction to a long-standing rule of state law and federal constitutional law as enunciated by courts and urged by scholars.

The *Times* case did not create the First Amendment. In that decision, this Court emphasized that the "gen-

eral proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269.

This Court held in a libel case over fifty years ago that since the plaintiff was a "public officer [U. S. Attorney] in whose course of action connected with his office the citizens of Porto Rico had a serious interest . . ., anything bearing on such action was a legitimate subject of statement and comment . . . at least in the absence of express malice. . ." *Gandia v. Pettingill,* 222 U. S. 452, 457 (1912). *Gandia* stands for the proposition that a qualified privilege has long existed under federal law in libel cases where the plaintiff is a "public official."

The identical constitutional issue now insisted on was raised twenty-two years ago in *Sweeney v. Schenectady Union Pub. Co.,* 122 F. 2d 288 (2nd Cir. 1941), aff'd by equally divided courts, 316 U.S. 642 (1942). Seventeen years ago the Fifth Circuit Court of Appeals applied this specific defense in *Caldwell v. Crowell-Collier Pub. Co.,* 161 F. 2d 333, 336 (5th Cir. 1947). The argument offered by counsel for that defendant (Crowell-Collier) was that since the publication in question "related to a public officer," it was privileged. The Fifth Circuit Court of Appeals apparently dealt with this contention as a sound statement of law, holding that the privilege had been avoided by an allegation in the complaint that the publisher was guilty of "malice in fact."

This Court in *Times* recognized that a "like rule" has existed for many years in state courts. It stated at page 280 "an oft-cited statement of a like rule, which

has been adopted by a number of state courts, is found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)." In a footnote at that point in its decision this Court cited eleven decisions from ten different states, as well as six scholarly works. The Kansas Supreme Court has stated since *Times* that *Times* requires no change in the law of that state since the principles found in *Times* have long been the law. *Kennedy v. Mid-Continent Telecasting, Inc.*, 394 P. 2d 400 (Kan. 1964).

It is obvious from *Times* itself, *Gandia, Sweeney, Caldwell, Coleman* and the decisions from ten different states cited in the footnote at page 280 of this Court's decision in *Times*, as well as the six scholarly works there cited, that the defenses there discussed have long been recognized as being available to a defendant in a libel suit.

The decisions cited by Curtis for the proposition that this Court must apply any change in the law pending appeal are inapposite here. Those cases involve the effect of an intervening treaty in *U. S. v. The Schooner Peggy*, 1 Cranch 103 (1801); applicability of state law under the rules of decision statute in *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941); enactment of the Eighteenth Amendment repealing prohibition in *U. S. v. Chambers*, 291 U.S. 217 (1934); enactment of a statute in *U. S. v. Alabama*, 362 U.S. 602 (1960); enactment of the Civil Rights Act of 1964 in *Hamm v. Rock Hill*, 379 U.S. 306 (1964). We are not here concerned with a change in the law. *Times v. Sullivan* merely gave constitutional sanction to a long recognized legal principle.

Curtis' belated insistence "that *Times* came like a bolt out of the blue" (351 F.2d at 733) in granting constitutional protection in defamation cases is all the more incongruous when viewed in light of the fact that (although Curtis chose not to rely on those defenses at the trial) Curtis did raise First Amendment defenses in its initial motion for new trial, filed five months before the *Times* decision was rendered.

Respondent Was Not A "Public Official"

Respondent was employed by the Athletic Association to supervise the intercollegiate sports program of the University of Georgia. This Court described the supervision of that program as it relates to football and other activities from which revenue is derived, as the exercise of a proprietary rather than a governmental function. It held in *Page v. Regents of University System of Georgia*, 304 U.S. 439, 452 (1938):

> ". . . however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a . . . tax laid on . . . admissions. . .
>
> "The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain."

The Athletic Association, respondent's employer, has, by a statute enacted in 1949, been declared to be a

corporation and not an agency of the State. Georgia Code Annotated, Section 32-152 (See Resp., App. A) provides:

> "The Athletic Associations of the University of Georgia and the Georgia School of Technology are hereby declared to be corporations, incorporated under charter issued by the Superior Court of the county in which said Associations are located."

Section 32-153 of the Code provides:

> "The associations named are hereby declared, not to be agencies of the State. . ." (See Resp., App. A)

Respondent submits, therefore, that he was not a "public official" as envisioned by *Times v. Sullivan*.

As the District Court held on this point:

> "Plaintiff Butts was director of athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of "public officials" to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on "a business comparable in all essentials to those usually conducted by private

owners" he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a State or public education institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia v. Blanton,* 49 Ga. App. 602(4); *Board of Education of Doerun v. Bacon,* 22 Ga. App. 72." (Pet. for Cert., App. B, pp. 95a-96a).

II.

UNLIKE *TIMES V. SULLIVAN,* THE UNDISPUTED EVIDENCE SHOWS CONCLUSIVELY THAT ACTUAL MALICE WAS PROVED

Even if it should be held that *Times v. Sullivan* does apply, the evidence in this case fully justifies the conclusion reached by the jury and affirmed by both the District Court and the Court of Appeals that actual malice was proved and, therefore, no useful purpose could possibly be served by granting the writ. A brief resume of the evidence follows.

(1) Curtis was informed of the falsity of the story eleven days prior to publication of the story as a result of the telegram, letter, and telephone call. (R. 22, 23, 26, 947-49).

(2) Although there was adequate time in which to do so, no investigation or any other action was carried out as a result of these communications. (R. 947-49, 1023).

(3) Prior to publication of the story, Curtis' adver-

tising revenues had been falling drastically. (R. 935-36). In order to bolster these revenues Editor-in-Chief Blair undertook four months before publication of this story to "change the image" of the magazine. (R. 940). He initiated a policy of "sophisticated muckraking," of "exposé in the mass magazines." (R. 943). The new image was intended "to provoke people, make them mad." (R. 944). Blair testified that he "was not being facetious," that he "meant it then (November 1962)" and "mean it now (May 1963)." (R. 939).

(4) Only two months prior to publication of this story, Curtis' Blair wrote a memorandum (R. 1376) to his personnel (which found its way into another magazine's pages (R. 937)) complimenting them on their work under the new editorial policy and outlining "the final yardstick: we have about six law suits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1376). Blair later testified that the "them" who were being hit was everyone in the United States and the law suits were all libel suits. (R. 938).

(5) Editor Blair later considered the Butts issue as bringing the magazine "25 per cent toward the goal of the magazine that I envision." (R. 940).

(6) The *sole* source of the story was one George Burnett, a man *known* to Graham *from the beginning* as a bad-check artist. (R. 911-13). Managing Editor Thomas, who also knew of Burnett's bad check record, considered such a person to be a liar. (R. 1016).

(7) Neither author Graham nor anyone else with Curtis made any *attempt* to talk to John Carmichael,

who was known to Graham to have been with Burnett when the latter allegedly overheard the telephone conversation. (R. 511, 1015-16). By performing this easy task, Graham would have learned at the outset that the whole story was a fabrication. (R. 850-51). Managing Editor Thomas admitted that "a responsible journalist" should rely on something more than the mere word of Burnett. (R. 1017).

(8) Although the story as written relied heavily on the supposed existence and contents of some "notes" which Burnett allegedly made of the telephone conversation, no Curtis representative ever saw or read the notes, notwithstanding the fact that Burnett told Graham that he needed the notes to refresh his memory (R. 212) and that he "couldn't remember anything definite about it without his notes." (R. 525). When the notes were finally analyzed, they turned out to be largely nonsensical. (R. 386-87).

(9) Before publishing the story, Curtis made no effort to view the game film, although Sports Editor Kahn considered that to be necessary (R. 970-71) and the collaborator, Furman Bisher, thought "it would have been a very good idea." (R. 1026).

(10) No effort was made to interview any member or coach of the Alabama team in order to determine whether any changes had been made in the game plans. (R. 1026).

(11) The patently outrageous story was never submitted to anyone familiar with the sport of football in order to get a knowledgeable reaction.

(12) Neither principal mentioned in the story was ever contacted before publication.

(13) After such a shockingly shoddy "investigation", Curtis published the story with full knowledge that it would ruin the career of Wallace Butts and "would result in his death in his chosen profession." (R. 915-16).

(14) Furthermore, certain direct quotations which were inserted in the article for the sole purpose of lending truth to the charges were denied under oath by the parties alleged to have been quoted.

(a) Graham wrote that Burnett had told him that Larry Rakestraw (University of Georgia quarterback) placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the forthcoming Georgia play would be a run or a pass. (This, of course, would have been vital information for an opponent.) (R. 365-66). Petitioner was aware of the importance of this information and put it in its article to convince the readers of the truth of its indictment of Wallace Butts. (R. 1022). But Burnett denied under oath that he had told Graham any such thing. (R. 241). Georgia's Head Coach, Johnny Griffith, a witness for petitioner who was in a better position than anyone else to know whether in fact Rakestraw did this with his feet, testified that it was not true. (R. 366).

(b) Miekey Babb, University of Georgia all-

conference end, specifically denied the quotation in the article attributed to him that the Alabama team knew the Georgia formations and plays. (R. 745). Babb was quoted in the article as saying the Alabama players knew Georgia's key play (described in the article as "eighty-eight pop") and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. (R. 746). This was confirmed by Coach Johnny Griffith. (R. 383).

(c) Sam Richwine, Georgia trainer, specifically and categorically denied (R. 752) the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays.

(d) In its article petitioner wrote that Georgia Coach Griffith had stated: "We knew somebody had given our plays to Alabama and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts." Coach Griffith, appearing as a witness for petitioner, testified emphatically that he had said no such thing. (R. 369).

(e) The article states that "Griffith went to University officials, told them what he knew and said he would resign if Butts was permitted to remain on his job." At the trial Coach Griffith categorically denied having done or said that. (R. 369).

(f) The article quotes Coach Griffith as saying, "You know, during the first half of the Alabama game my players kept coming to

the sideline and saying, 'Coach, we been sold out.' " Coach Griffith at the trial denied that. (R. 371).

(g). The article attributes the following direct quotation to Coach Griffith, " 'I never had a chance did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.' " Coach Griffith denied under oath having said that to anybody. (R. 372).

Considering the above evidence, the District Court held on April 7, 1964: (Pet. for Cert. App. B p. 96a)

"If it were conceded that plaintiff Butts was a 'public official', the case of *New York Times Company v. Sullivan* would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice' — that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Emphasis supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company,* 225 F. Supp. 916."

On review, the Fifth Circuit, after giving "full consideration to the entire record" held that: (351 F. 2d 702, 719, Pet. for Cert. App. B, p. 33a)

"The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not."

That reckless disregard as to whether printed statements are false constitutes malice was confirmed by the Court of Appeals for the Seventh Circuit in *Pape v. Time, Inc.*, No. 15101, C.A. 7, Dec. 28, 1965, wherein it was stated:

"As stated in our previous decision — '. . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655) — 'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*.'

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. There-

> fore, it was error for the District Court to grant defendant's motion for a summary judgment."

Respondent submits that since both the District Court and the Fifth Circuit have held unequivocally that actual malice was proved in the instant case, nothing really would be accomplished by remanding the case for further consideration in light of *Times*.

The Charge As To Malice Was Adequate

Petitioner complains that the District Court's charge on malice was insufficient in the light of *Times v. Sullivan*. When the District Court's charge is examined *in toto*, it will be found that it measures up to the standards laid down in *Times v. Sullivan*. It is particularly important to note that no exception was made by petitioner at the conclusion of the charge with reference to the instructions on malice, as required by Fed. R. Civ. P. 51. (Resp. App. A).

The definition of malice as given in the trial court's charge to the jury in this case was in effect the same as the definition of malice given in *Times*. The trial court charged (R. 1356-57):

> ". . . actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence without regard to the rights of others. . . . The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights. . . .

"Actual malice involves the state of one's mind, and your determination must be made from all the surrounding facts and circumstances.

"Further [whether] actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case."

III.

THE JUDGMENT FOR PUNITIVE DAMAGES VIOLATED NO CONSTITUTIONAL RIGHTS OF PETITIONER

In Point III of its reasons for granting the writ, petitioner presents three arguments: *First*, the punitive damages awarded by the jury "contravened the First Amendment and entailed a deprivation of due process" (p. 17); *Second*, the jury verdict was not "saved by the remittitur required by the district court" (p. 19); and *Third*, the remittitur itself "is repugnant to the Constitution."

FIRST: Under this argument petitioner, after conceding *arguendo* that "a punitive award in libel cases, imposed as a deterrent to the defendant and to others and 'to protect the community', is not *per se* an unconstitutional method of regulating publications. . .," makes the astonishingly shortsighted statement that "the verdict was designed to put defendant out of business. . . ." (p. 18). It was less than two years ago that this same petitioner published "The Story Of A College Football Fix" which it stated at the time would

put Wallace Butts "out of business." Petitioner's editor boasted to his staff that the *Post* had six law suits (all libel) pending, "meaning we are hitting them where it hurts." It strikes respondent that petitioner would urge this Court to substitute the laws of economics in place of ". . . the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life. . . .' That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values — *values reflecting the concern of our society for the right of each individual to be let alone.*" *Tehan v. Shott,* No. 52, decided by this Court January 19, 1966.

Respondent recognizes and will be the first to defend the constitutional provisions which guarantee freedom of the press and would never suggest that these rights be circumscribed. But freedom of the press does not include a license to publish untruthful and defamatory charges against another who has no means of retaliation except through the processes of the law, the cost of which to many can be prohibitive. Those who enjoy the freedom of the press must recognize that it includes a corresponding obligation and responsibility to print only that which is true and not that which holds individuals up to public hatred, scorn and ridicule by publishing untrue, malicious and defamatory charges about them.

The most valuable possession of the journalistic profession is unquestionably the constitutional provisions which protect its right to a free press. *The most valuable possession of an individual is his good repu-*

tation and good character. Loss of career, health, reputation of any man in his declining years cannot be measured by a few dollars, nor by many. This is the true injury of a libel such as this one: it becomes an inescapably legacy of shame to all who follow in the line of blood. As the Court so aptly said in *Tehan v. Shott, supra,* citing *Linkletter v. Walker,* 381 U.S. 618:

> "the ruptured privacy. . . . cannot be restored."

The proof in this case conclusively shows that this "Story Of A College Football Fix" was an integral part of the new editorial philosophy adopted by petitioner to ameliorate the dramatic decline in its revenues. As stated before, petitioner felt that hitting famous people "where it hurt" and thereby inviting widely publicized libel suits would inure to its financial advantage. Historically, this type of libeller has been classified as a "libeller for profit." Certainly this type of libeller is not representative of the "American press" referred to by Mr. Justice Black in *Times v. Sullivan* as being "virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." (376 U.S. at 294). A "libeller for profit" has been characterized by the Georgia Supreme Court as follows:

> "A newspaper is a great power. There will doubtless appear no greater factor in the progress and development of our common country. Some men owe to the press the respect they exhibit for religion and morality; they fear its lash. The newspaper should discriminate; upon its lofty pedestal it should com-

mand respect for its high-toned thought, its justice, its conservatism and its moderation. The press should be free; it should not be deterred from its legitimate work. It leads thought; it moulds public opinion; it thinks for the people. Some men have illustrated this great calling; they have appreciated its duties and obligations; they have lent an ear to the right; their endeavors have kept time to the needs and necessities of the great millions who exemplify the virtue, religion and morality of this country.

"*The man that sits in this high place, athirst for greed and gain; whose opinions depend upon the amount of money he gets in his wallet; who attacks private character when he is paid to do so, is an usurper and a public enemy.* As well might Judas Iscariot exhibit the price of his perfidy as an excuse for his crime, as for a libeller to set up that he published the libel complained of for money. If this plaintiff is guilty of the acts published against him, these defendants had a right to publish them, and they did a public service in doing so. On the contrary, if he is not guilty, and *if it is an effort to defame and degrade him, the law should not withhold its vindication.*" *Cox v. Strickland,* 101 Ga. 482, 495, 28 S.E. 655 (1897) (Emphasis added).

It is our position that our Constitution, laws and courts were not and are not designed for the protection of irresponsible libellers for profit who are concerned only with the character assassination of their

victims. The more prominent the victim, the more sensational the libel, and the greater the profit will be.

SECOND: Petitioner argues here that the remittitur required by the District Court was unconstitutional as being "inescapably a 'fruit' of the illegal action of the jury." Let respondent state here and now that when petitioner first made this point in its brief on appeal to the Fifth Circuit, he was shocked and surprised. During the oral arguments before the District Court on petitioner's motion for new trial, the subject of the District Court's right to order a remittitur was discussed at length between the trial judge and counsel for petitioner. In his Fifth Circuit brief, respondent pointed out that "at the time (Curtis) filed its designation of parts of the Record to be printed (Butts) did not know that appellant intended to argue that the district court 'did not have the authority to "require" the remittitur'" and, therefore, respondent had not designated that portion of the transcript containing statements in open court by petitioner's counsel, which not only agreed that the trial judge had this authority, but even told the court that it would be his "responsibility and duty to write it down to the point where it does meet with your own conscience." At page 171 of respondent's brief in the Fifth Circuit, he set forth direct quotations from statements made by petitioner's attorneys at the hearing:

> "I understand Your Honor perfectly. . . . if in your own conscience you feel that this verdict is excessive, then in that situation you have the right and, as Judge Hutcheson said, the duty to change that verdict. . . . If the verdict is ex-

> cessive, you have the responsibility and the duty, to use the lawyers' expression, to write it down to the point where it does meet with your conscience. . . ."

In view of petitioner's position and statements made in open court, and having obtained the reduction it was seeking from the district court (which at the time was questioning its right to order a remittitur), this contention should receive the same treatment given it by the Court of Appeals.

THIRD: Petitioner argues here that the amount of the remittitur is repugnant to the Constitution and that it "impinges far too heavily and arbitrarily upon the freedom of the press to preserve the 'breathing space' required by the First Amendment freedom 'to survive.'" (p. 21). If the award of $400,000 in this case "impinges" as petitioner complains, how does petitioner explain its voluntary payment of $300,000 to Coach Paul Bryant without even a trial in this same matter? (R. 1456-57). How did that payment affect petitioner's "breathing space. . . . to survive?" Obviously petitioner did not consider its $300,000 payment to Coach Bryant would "put defendant out of business" or would affect its "breathing space to survive." Furthermore, what about the effect of petitioner's malicious libel upon respondent's "breathing space to survive" and its effect on "putting Wally Butts out of business?"

Is the Constitution to be construed and applied so as to safeguard only "the breathing space to survive" and the financial interests of that portion of the public press represented by petitioner and not to safeguard

and protect those same factors as to an individual who is subjected to such a malicious libelous attack?

At this point we respectfully refer the Court to the Editor's block written by "The Editors" of the *Post* and superimposed on the picture on the first page of the article. (R. 1407). That editorial was not written by the author of the article but was signed and admittedly written by "The Editors" of the *Post*. It expressed the venom of petitioner's Editors — presumably all of them. There, the Editors did not raise the question of *whether* Wallace Butts had "fixed" and "rigged" the game referred to — the Editors stated unequivocally as a *fact* that he had "fixed" and "rigged" the game. The Editors said Wallace Butts was corrupt. They evaluated him as a fixer and a rigger. They *tried* him in absentia. They *found him guilty* and then sentenced him for the remaining days of his life to public hate, scorn, ridicule and oblivion with, in their own words, a "ruined career."

Petitioner argues further than an award of punitive damages must bear a reasonable relationship to the allowance of actual damages. It has always been the law in Georgia that nominal damages will support punitive damages and that no relationship is required. *Sikes v. Foster*, 74 Ga. App. 350 (39 S.E. 2d 585) and reverse title, 202 Ga. 122 (42 S.E. 2d 441). In the federal courts, punitive damages need not bear any relationship to actual damages. In *Selalise v. National Utility Service, Inc.*, 120 F. 2d 938 (C.A. 5, 1941) it was said:

> "In Florida, *as in the Federal courts,* the giving of punitive damages is not dependent upon, nor must it bear any relation to, the

> allowance of actual damages." (Emphasis added).

and in *Wardman-Justice Motors v. Petrie*, 39 F. 2d 512, 516 (D.C. Cir., 1930) the court stated:

> "In many states the rule prevails that actual damages must be established as a basis for the assessment of punitive damages, but this is not the Federal rule nor the rule applied in this district."

Attention is also called to the case of *Reynolds v. Pegler*, 233 F. 2d 429 (C.A. 2 1955), *cert. den.*, 350 U.S. 846 (1955), which upheld an award of $1.00 compensatory damages and $175,000 punitive damages, a ratio of one hundred seventy-five thousand to one.

CONCLUSION

The Court of Appeals stated in its decision rendered in this case July 16, 1965:

> "We think that Curtis has had its day in Court." (351 F.2d 702, 719; Pet. for Cert., App. B, p. 33a).

For the reasons which prompted the Court of Appeals to that conclusion and for the foregoing reasons, the petition for writ of certiorari should be denied.

William H. Schroder
Allen E. Lockerman
Robert S. Sams
Tench C. Coxe
Milton A. Carlton, Jr.
Gerald P. Thurmond

Of Counsel:
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APPENDIX A.

STATUTORY PROVISIONS INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE.
RULE 51.

INSTRUCTIONS TO JURY: OBJECTION. "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

GEORGIA CODE ANNOTATED.

§ 32-152.

ATHLETIC ASSOCIATIONS OF UNIVERSITY OF GEORGIA AND GEORGIA SCHOOL OF TECHNOLOGY DECLARED TO BE CORPORATIONS. — "The Athletic Associations of the University of Georgia and the Georgia School of Technology are hereby declared to be corporations, incorporated under charter

issued by the superior court of the county in which said associations are located. (Acts 1949, p. 29.)"

§ 32-153.

ASSOCIATIONS AS NOT STATE AGENCIES: FINANCIAL OPERATION RULES AND REGULATIONS. — "The Associations named are hereby declared not to be agencies of the State and not subject to the limitations, restrictions and laws of general application imposed on State agencies by the Constitution of Georgia and the laws enacted by the General Assembly of Georgia in compliance with the Constitution of Georgia, and the Associations are authorized under their corporate charter issued by the superior court to make such rules and regulations for the financial operations of the Associations as they deem necessary: Provided, however, that this resolution shall not apply to any tax money appropriated by the State of Georgia. (Acts 1949, p. 29.)"

§ 105-709.

PRIVILEGED COMMUNICATIONS. — "The following are deemed privileged communications: . . .

"6. Comments upon the acts of public men in their public capacity and with reference thereto."

APPENDIX B

EXHIBIT "A"

Filed: Feb. 26, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

PAUL BRYANT,

Plaintiff,

versus Civil Action No. 63-2-W

THE CURTIS PUBLISHING COMPANY,
A Corporation, and
FURMAN BISHER,

Defendants.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiffs in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

EXHIBIT "B"

Filed: Apr. 30, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL BRYANT,

Plaintiff,

versus Civil Action No. 63-166

THE CURTIS PUBLISHING COMPANY,
A Corporation,

Defendant.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss this action because the complaint fails to state a claim against this defendant upon which re-

lief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of

Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing
Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

CERTIFICATE OF SERVICE

I do hereby certify that I am of counsel for Respondent in the above styled case and I have this day served a copy of the within and foregoing Response to Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Petitioner, Curtis Publishing Company, by mailing, in the United States Mail, a copy of same to its attorneys of record, HERBERT WECHSLER, ESQ., 435 West 116th Street, New York, New York 10027; PHILIP H. STRUBING, ESQ., PEPPER, HAMILTON & SCHEETZ, 123 South Broad Street, Philadelphia, Pennsylvania 19109 and KILPATRICK, CODY, ROGERS, McCLATCHEY & REGENSTEIN, 1045 Hurt Building, Atlanta, Georgia 30303, in an envelope properly addressed and with sufficient prepaid postage thereon, pursuant to Supreme Court Rule 33.

This _____ day of February 1966.

_____

Of Counsel for Respondent

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TABLE OF AUTHORITIES

All cases and authorities cited in this Further Response were referred to in the tables of the Initial Response, with the exception of Ga. Code Ann., §32-154, which is set out in Appendix A hereto.

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 814

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

FURTHER RESPONSE IN LIGHT OF ROSENBLATT V. BAER

Pursuant to the Court's request, this response is filed in light of the opinion in *Rosenblatt v. Baer*, No. 38, October Term, 1965, decided on February 21, 1966.

I.

The Instant Article Was Clearly Actionable And Aimed Unquestionably At Respondent Butts

In *Rosenblatt* this Court announced a twofold basis for reversal and the grant of a new trial:

(1) "the column on its face contains no clearly actionable statement," and

(2) "no reference is made to respondent." (Slip Opinion, p. 3).

The article in the instant case is replete with clearly actionable statements and specific references to respondent Butts. He is named repeatedly; his photograph appears in three places; he is charged with being "corrupt" three times in an editorial block signed "The Editors" and superimposed on the first page of the article (R. 1407), and the article itself was entitled in bold letters "THE STORY OF A COLLEGE FOOTBALL FIX — A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged A Game Last Fall."

The basis for the reversal in *Rosenblatt* does not exist in the instant case.

II.

There Was No Waiver In Rosenblatt

The Circuit Court here held there had been a waiver by petitioner of its constitutional defenses when it chose to rely on the sole defense of truth. The question of waiver was not involved in *Rosenblatt*.

III.

No Public Issue Was Involved In The Libel Here, Nor Was Butts A Public Official Within New York Times

This Court in *Rosenblatt* emphasizes the right of the public to discuss public issues and public officials who can significantly influence the resolution of those issues:

"The motivating force for the decision in *New*

> *York Times* was twofold. We expressed a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open *and* that [such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U.S. at 270 (Emphasis supplied). There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." (Slip Opinion, p. 9).

This Court next proceeded to make it clear that by "public issue" it meant an issue relating to government or a government operation, and that by "public official" it meant one responsible for government operations. Thus in that portion of *Rosenblatt* immediately following the language just quoted, the Court went on to say:

> "Criticism of *government* is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for *government operations* must be free, lest criticism of *government* itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of *government* employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of *governmental affairs*." (Slip Opinion, pp. 9-10) (Emphasis added).

The "sell-out" of which Butts was accused was alleged to have occurred while he was Athletic Director at the University of Georgia. He was hired as Athletic Director by the Athletic Association of the University of Georgia, a separate entity denominated a private corporation, not an agency of the State, in the legislation pursuant to which it was created (*Georgia Code*, §§32-152, 32-153, cited in Appendix A of respondent's initial response). Its accounts were not subject to audit by the State, "as is required . . . in connection with the financial operations of State agencies" (*Georgia Code*, §32-154). The Athletic Association was thus not an arm of government. How could its employee, Butts, be engaged in government while performing its functions?

Contrast the position occupied by Butts as Athletic Director at the University of Georgia with that occupied by Baer. There was doubt that Baer was a public official within *New York Times*. There can be no doubt about Butts. The trial judge, who had the benefit of this Court's opinion in *Times*, found that he was not a "public official" as envisioned by that case. (Pet. for Cert., App. B, pp. 95a-96a).

As stated by this Court in *Rosenblatt* in respect of Baer in his capacity as Supervisor of the County Recreation Area, a facility owned and operated by the county (Slip Opinion, p. 2):

> "Respondent was employed by and directly responsible to the Belknap County Commissioners, three elected officers of the County government. During the 1950's, a public controversy developed over the way Respondent

> and the Commissioners operated the Area; some protested that Respondent and the Commissioners had not developed Area's full potential, either as a resort for local residents or as a tourist attraction that might contribute to the County's taxes. The discussion culminated in 1959, when the New Hampshire Legislature enacted a law transferring control of the Area to a special five-man commission. At least in part to give this new regime a fresh start, Respondent was discharged."

The following distinctions stand out as between respondent Baer in *Rosenblatt* and respondent Butts here:

(1) Baer was hired by three elected county commissioners, who in their capacity as governors of the County were charged with the operation of its recreation area. Baer was their *alter ego* in this governmental operation. Butts was hired by a corporation, specifically declared in the legislation authorizing its existence not to be an arm of government, to operate an undertaking which therefore could not be classified as a government operation.

(2) A controversy had been in existence from 1950 to 1959, when Baer was discharged, as to the development and management of the County recreation area. There is no evidence of *any* issue in respect of Butts' performance of his duties as Athletic Director either before or after the publication of Curtis' article. As shown, there could have been no *public* issue.

When the instant article was published, however,

there was a *private issue* being debated in court between Curtis and Bryant growing out of a half million dollar libel suit which Bryant had only recently filed against Curtis because of a previous article concerning him.

While that private court debate was in progress, one of Curtis' attorneys in that case arranged (R. 497-99) for Curtis to *purchase* (for $5,000.00) (R. 501-02, 1380-81) from a hot check artist, then on probation (R. 911-13, 1016), an alleged story that he listened in on a telephone conversation in which Bryant and Butts "rigged and fixed" the up-coming game between Alabama and Georgia.

It is thus obvious that petitioner, in publishing in its *Saturday Evening Post* the article out of which grew the action under review, was not engaging in a *"debate on a public issue"* and clearly the article was not a "criticism of government." Curtis *had itself created the issue which was purely private* and it was engaged in career assassination for a purely private purpose.

Times, Garrison and *Rosenblatt* each involved *"debates on public issues"* and *"criticism of government."* This case did not, and is therefore totally unlike those cases and not subject to constitutional protection given to public issue debates.

(3) Any defamation which existed in *Rosenblatt* related to the manner in which the management of the Area had performed its duties. Curtis' defamation of Butts did not relate to his conduct of his duties as Athletic Director. He was charged with a "sell-out"

of information which was beyond the province of an Athletic Director to possess; according to the Record, he "had no idea about the game plan or the philosophy to be employed in the game" between Georgia and Alabama. (R. 682). The alleged sell-out pertained to matters handled by the football coach, not the Athletic Director (R. 681-82). Thus even if Butts had been a public official, the libel did not relate to his "official conduct" (376 U.S. at 706), and the *New York Times* rule does not apply.

The libel was simply a personal attack, charging that Butts and Bryant were "corrupt." Petitioner's charge of a "sell-out" by respondent Butts and that he and Bryant "fixed and rigged" a game (R. 681-82) was neither part of a debate of a governmental operation nor an attack on a public official within *New York Times*.

IV.

Actual Malice Within New York Times Was Conclusively Proven

While there was a serious question in *Rosenblatt* whether the alleged defamation even referred to Baer, rendering proof of malice difficult at the least, here actual malice within *New York Times* was conclusively proven. Thus even if Butts were a public official, nothing could be gained by sending the instant case back for a retrial. As stated by the trial judge (Pet. for Cert., App. B, p. 96a):

> "If it were conceded that plaintiff Butts was a 'public official,' the case of *New York Times Company v. Sullivan* would not permit the va-

> cating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice' — that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Emphasis supplied). In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

In reviewing the trial court's judgment, the Fifth Circuit, after giving "full consideration to the entire record," held that:

> "The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d 702, 719.

Any question this Court may have as to the basis upon which the jury, the trial judge and the Fifth Circuit Court of Appeals found such convincing proof of malice in this case may be resolved by reference to the fourteen recitals of proven malice within the meaning of *Times* as set out at pages 20-31 of respondent's Initial Response.

If the evidence in this case does not establish actual malice, then it is impossible to conceive of that which does.

V.

The Charge Affords No Basis For Granting Certiorari

Unless this Court should find that the libel in this case involved the discussion of governmental operations and that respondent was a public official within the meaning of *New York Times*, it is unnecessary to consider whether the trial court's charge in this case is constitutionally sufficient under *New York Times*.

This Court in *Rosenblatt* found the trial court's charge insufficient as permitting a finding of actual malice based on "mere negligence." This is not true of the trial court's charge in this case. While not in the identical words suggested in *New York Times*, the language was sufficient to submit the question of actual malice to the jury within the scope of the *Times* definition.

The Court will recall that the sole defense made in this case was the truth of the article. When the trial court's charge was given petitioner made no objection to the charge as to actual malice, as required by the Federal Rule of Civil Procedure 51. This rule is based on sound practice and it should not be here disregarded.

CONCLUSION

We call the Court's attention to the refusal of petitioner in the instant case to make any further investigation as to the truth of the charges it was preparing to publish against respondent, even though eleven days prior to publication it was informed by telegram and letter of the "absolute falsity of the charges." Petitioner thus recklessly and deliberately ignored the warning.

This publication involves no discussion of public issues but a plain and outright career assassination for profit. Petitioner is not entitled to the constitutional protection which it is now seeking.

William H. Schroder

Allen E. Lockerman

Robert S. Sams

Tench C. Coxe

Milton A. Carlton, Jr.

Gerald P. Thurmond

Of Counsel:

TROUTMAN, SAMS, SCHRODER & LOCKERMAN
1600 William-Oliver Building
Atlanta, Georgia 30303

APPENDIX A.

GEORGIA CODE ANNOTATED
§ 32-154

"32-154. Audit of accounts of Associations not required of State Auditor. — The State Auditor of Georgia is not required to make an audit of the accounts of the Association as is required of him in connection with the financial operations of State agencies. (Acts 1949, p. 29)."

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Further Response has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of April, 1966.

_____

Attorney for Wallace Butts,
Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1330~~ 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

WILLIAM P. ROGERS
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The Associated Press

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

THE ASSOCIATED PRESS,
Petitioner,
—*against*—
EDWIN A. WALKER,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas which was entered in the above entitled case on July 30, 1965, or, in the alternative, the order of the Supreme Court of Texas which denied a writ of error on February 9, 1966.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the trial court, contained in a letter to counsel dated July 29, 1964, is printed in Appendix B, pp. 31-35.

The opinion of the Texas Court of Civil Appeals dated July 30, 1965, reported at 393 S. W. 2d 671, is printed in Appendix B, pp. 3-30.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on July 30, 1965 (Appendix D, p. 118). An application for rehearing was denied on September 17, 1965 (Appendix D, p. 119).

Petitioner's application to the Supreme Court of Texas for a writ of error was denied on February 9, 1966 (Appendix D, p. 120). Petitioner's motion for a rehearing on its application for a writ of error was denied by the Supreme Court of Texas on March 23, 1966 (Appendix D, p. 121).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, is limited to public officials or applies to other persons or circumstances:

A. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports, made without actual malice, respecting events of profound political and social importance and national public interest, such as the riots resulting from the confrontation between Federal and State power which occurred at Oxford, Mississippi on September 30, 1962, particularly at the behest of one who, like General Edwin A. Walker, wilfully, aggressively and defiantly thrust himself into the vortex of that confrontation.

B. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state

libel laws may be applied to news reports, made without actual malice, respecting events of public interest and importance, such as the enforcement by the United States Government of judgments of United States courts and suppression of defiance thereof, particularly at the behest of one who, like General Edwin A. Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

C. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports made without actual malice concerning the public activities of persons like General Walker in connection with controversies of profound political and social importance and national public interest, such as those presented by the Oxford confrontation, where such persons are actively attempting to influence the outcome of such controversies and where such persons are, or are generally regarded as being, by virtue of their stature and activities, in a position significantly to influence the resolution of the issues thus presented.

2. Whether an award of general damages of $500,000 for the publication, without actual malice or any proof of pecuniary or other loss, of reports of newsworthy events is so oppressive that it inhibits freedom of expression to an extent which violates the First and Fourteenth Amendments to the Federal Constitution.

3. Whether the record in this case on the issues of "substantial truth" and "fair comment" is so lacking in evidentiary support for the judgment below that that judgment constitutes a denial of due process in violation of the Fourteenth Amendment to the Federal Constitution.

4. Whether the defense of "fair comment," as construed and applied by the Texas courts in this case, is so limited as to violate the First and Fourteenth Amendments to the Federal Constitution.

5. Whether the application of state libel laws to the publications here complained of and in the circumstances disclosed by this record constitutes a denial of the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment I and Amendment XIV, Section 1 to the United States Constitution and Vernon's Texas Civil Statutes, Title 88, Article 5431 and subsections 4 and 5 of Article 5432, the texts of which are reprinted in Appendix A, pp. 1-2.

STATEMENT OF THE CASE

On the night of September 30, 1962, there occurred in Oxford, Mississippi, a fateful confrontation between Federal and State power which arrested the attention of the entire nation, and which has become a milestone in the century-long battle for racial equality.

This confrontation was the culmination of events arising out of an attempt by a single Negro—James Meredith—to gain admission to the then all-white student body of the University of Mississippi (S.F. 9),* and the attempt by the State of Mississippi and its highest elected officials to

*All citations designated "S.F." are to the Statement of Facts, which consists of the minutes of the trial.

prevent such admission through invocation of the historically and judicially discredited doctrine of interposition (S.F. 810-811).*

The events surrounding this confrontation, now an important chapter in the nation's history, directly involved, at one time or another, the President of the United States (S.F. 866), the Justices of this Court (S.F. 767-768), the Judges of the Court of Appeals for the Fifth Circuit and the Southern District of Mississippi (S.F. 769), the Attorney General of the United States (S.F. 776), the Governor and Lieutenant Governor of Mississippi (S.F. 775), the Trustees of the University of Mississippi (S.F. 771), the United States Army (S.F. 782-783), the Mississippi National Guard (S.F. 870), over 150 United States Marshals (S.F. 368), the Mississippi State Highway Patrol (S.F. 276), and local law enforcement officials (S.F. 271).

A central figure in the confrontation was General Edwin A. Walker, Respondent here. General Walker—a former General Officer of the United States Army (S.F. 612-613), the commander of the troops at a similar confrontation in Little Rock in 1957 (S.F. 89, 612), a man who had resigned his commission in order to be free to engage in political controversy (S.F. 741) and who thereafter lectured widely on public issues (S.F. 743-746), a man who had but recently been a candidate for nomination for Governor of Texas (S.F. 752), a man who had achieved national status and was a self-admitted person of political prominence with an organized political following all his own named the "Friends of Walker" (S.F. 751)—delib-

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*_Meredith_ v. _Fair_, 199 F. Supp. 754 (S. D. Miss. 1961), _aff'd._ 298 F. 2d 696 (5th Cir. 1962); 202 F. Supp. 224 (S. D. Miss. 1962), _motion denied_ 305 F. 2d 341 (1962), _rev'd._ 305 F. 2d 343 (5th Cir. 1962), _stay vacated_ 306 F. 2d 374 (5th Cir. 1962), _cert. denied_ 371 U. S. 828, _stay vacated_ 83 Sup. Ct. 10; 313 F. 2d 532 (5th Cir. 1962), 313 F. 2d 534 (5th Cir. 1962), _cert. denied_ 372 U. S. 916.

erately and with as much fanfare as he could trumpet thrust himself into the very vortex of the confrontation at Oxford. Yet General Walker now seeks to collect an award of $500,000 in general damages (although he proved no actual damages at trial) because—according to the Texas state courts—the Petitioner, Associated Press, acting in good faith, reported in two respects incorrectly* General Walker's public activities on the occasion of that confrontation (Tr. pp. 59-60; Supp. Tr. pp. 1-4, Appendix B, pp. 31-35; Appendix B, pp. 7-8).**

The news reports upon which this action is based were prepared by Petitioner*** on the basis of information supplied to Petitioner by Van Savell, a local employee of Petitioner (S.F. 1069).

The dispatches read in full text (Pl. Ex. 1a and 1b, Tr. pp. 11-14):

> "October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'
>
> "October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the weekend battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of

*The finding that the article was inaccurate is not supported by the evidence. To the contrary, the evidence affirmatively and conclusively establishes that the statements complained of were substantially true.

**Citations designated "Tr." are to the Transcript. Citations designated "Supp. Tr." are to the Supplemental Transcript, which consists of the trial court's opinion.

***Petitioner is a nonprofit, membership corporation engaged in the gathering and dissemination of news to its membership, which consists of newspapers and broadcasting stations.

Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.'

" 'This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

" 'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" 'There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p.m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

" 'One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" 'This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.' "

The only statements in the foregoing dispatches which Walker ultimately asserted were libelous of him were:

1. "Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, . . ." (October 2, 1962 report); and

2. "Walker assumed command of the crowd . . ." (October 3, 1962 report).

As could reasonably be anticipated, the record presents considerable conflict as to what transpired on the campus at Ole Miss during the dark, bloody, riot-filled night of September 30, 1962. However, for purposes of this petition, we rely solely on the testimony of General Walker and testimony of the witnesses called on his behalf and for whose credibility he has vouched. They establish, beyond question and without reference to the testimony of the witnesses called by Petitioner, that the conclusory statements of which Walker complains are substantially true and constitute fair comment upon his activities.

Underlying all of the events which transpired is the naggingly persistent question: Why was General Walker of Dallas, Texas at the campus of the University of Mississippi on the night of September 30, 1962?

The answer, we submit, may be found in General Walker's own words and actions at the time:

On September 26, 1962, over radio station KWKH at Shreveport, Louisiana, General Walker issued the following call to arms:

> "It is time to move. We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court. Rise to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every state in the Union. Rally to the cause of freedom. The battle cry of the Republic. Barnett, Yes, Castro, No. Bring your flags, your tents, and your skillets. It is time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi. The last time in such a situation I was on the wrong side. That was in Little Rock, Arkansas, in 1957, and 1958. This time I am out of uniform and I am on the right side and I will be there." (S.F. 779-780; Def. Ex. 7).

Walker reiterated his call the next morning in a television broadcast from Dallas, during which the following colloquy took place:

Unidentified Voice:

> "General, if forces go, will you lead this force?"

General Walker:

> "This is a cause for freedom. This is Americans, patriotic Americans from all over the nation. It is a movement for Freedom. And I will be there. Rise to a stand beside Governor Ross Barnett at Jackson,

Mississippi. Now is the time to be heard. Thousands strong from every state in the union. Rally to the cause of freedom." (S.F. 787-788).

The next evening, on September 28, 1962, General Walker took to the air from New Orleans (S.F. 803):

"INTERVIEWER: Do you have plans, sir, for rallies, if and when the Federal troops are entered into Mississippi, of a certain point in the state where all your followers will then meet with you to protest the integration if it does come about?

"GENERAL WALKER: I intend to join the movement. There are thousands of people, I am sure, already in Mississippi—probably hundreds of thousands there—that are already standing beside their Governor Barnett, The best place to do this would, of course, be at the capitol or at Oxford, at the University, since that is where the issue is involved, and I am sure that that is where most of the movement will move to, to show the grass roots of movement in this issue."

On September 29, 1962, the day before the riots, and with full knowledge that Governor Barnett had then been held in contempt by the Court of Appeals for the Fifth Circuit (S.F. 762-763) but was continuing his course of opposition to the admission of James Meredith (S.F. 841), Walker proceeded to Jackson, Mississippi, where he held yet another press and television conference and said:

"I am in Mississippi—beside Governor Ross Barnett.

"I call for a national protest against the conspiracy from within.

"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.

"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies. This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a nation." (Def. Ex. 8, S.F. 789, 790)

The next day—September 30, 1962—General Walker arrived at Oxford, and, consistent with his stated purpose to "stand beside Governor Barnett," volunteered his services to the County Sheriff (S.F. 839-840). At the time he made this offer, he knew that the Sheriff was under the jurisdiction of the Governor; that the Governor had previously used the police forces of the state, including the Sheriff, to prevent the admission of Meredith to the University; and that the Governor had not since changed his position (S.F. 840-841).

Late on the afternoon of September 30, 1962, at the Ole Miss Motel in Oxford, General Walker held still another press conference, during which he once again urged defiance of the orders of the Courts and of the Federal Government:

"As the forces of the New Frontier assemble to the north, let history be witness to the courage and determination that calls us to Oxford to support a courageous Governor. His lawful stand for state sovereignty is supported by thousands of people

beyond the state borders now on their way to join you at Oxford." (Def. Ex. 11, S.F. 794-795).*

While eating dinner that evening in a restaurant in downtown Oxford, General Walker listened to President Kennedy's speech announcing that James Meredith was in residence on the campus of the University and calling upon the people of Mississippi to preserve law and order (S.F. 868 *et seq.*). General Walker's reaction: "Nauseating, nauseating" (S.F. 874-875).

Promptly on learning that there was "trouble" on the campus, Walker hurried there (S.F. 663-664).

"Trouble" was, to say the least, an understatement. By the time the General arrived at the campus, violent, widespread rioting was in progress (S.F. 162, 169, 192, 206, 294, 295-297, 420, 477). The riot, which was to rage throughout the night, resulted in the deaths of two persons and injuries to at least 50 others, the destruction of 16 automobiles, and the arrest of 160 rioters (S.F. 296, 939, 1349, 1350).

The crowd, which at times had the earmarks of a lynch mob (S.F. 258), engaged in an almost continuous series of furious physical attacks on the Federal marshals who were guarding the Lyceum, the school's administration building (S.F. 295-297). The marshals were attacked with sticks, bricks, bottles, stones, rocks, pieces of concrete benches and

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*The General has also admitted that, during the week preceding his expedition to Oxford, he "probably" made the following statement when asked if he recommended that his volunteers go armed:

> "The Administration has indicated that it will do whatever is necessary to enforce this unconstitutional action. I have stated that whatever is necessary to oppose that enforcement and stand behind Governor Barnett should be done." (S.F. 828).

The General also admits that he "may" have said:

> "The decision for force will be made in Washington. Evidently it has not been made yet. When and if it is, it's their decision to make. We will move with the punches." (S.F. 829).

even "Molotov cocktails" (S.F. 158, 201, 373, 488, 555, 925, 1291) and were forced to defend themselves with tear gas. Gunfire eventually broke out (S.F. 480-481, 531, 556, 1352-1353) and the campus, in the words of one of Walker's witnesses, became "a battlefield" (S.F. 261).

Later that evening, as the rioting and wild confusion intensified, the mob attempted to charge the marshals with a firetruck and then a bulldozer (S.F. 703-705).

It was into this melee that General Walker voluntarily thrust himself, as he had promised he would (S.F. 800). So anxious was General Walker to be present in an official capacity, if possible, that, even after he had seen for himself the catastrophic results of the defiance of the Federal Government, he requested a Deputy Sheriff, whom he met on the campus by chance, to deputize him on the spot (S.F. 299-300, 886).

Is it any wonder, in the light of his widely publicized and highly intemperate and inflammatory statements, that the rioting students believed Walker had come to assist them and hailed him as their leader: "We have a leader" . . . "General, will you lead us up to the steps?" . . . "Will you get us organized, will you lead us?" (S.F. 882-883)*

And is it any wonder, when General Walker delivered a speech from the Confederate Monument to the assembled mob (S.F. 686) and offered expert advice on how to combat the tear gas with which the Federal marshals were then defending themselves (S.F. 919-920), that Van Savell concluded that Walker had indeed "assumed command of the crowd" which had so assiduously sought his leadership?

At the trial, General Walker purported to justify his speech as an attempt to calm the crowd (S.F. 687). Yet the General himself admits that when an Episcopalian minister, the Reverend Duncan Gray, pleaded with him to help

*It is conceded that General Walker was an object of attention (S.F. 419, 586, 675), and that, wherever he went, the crowds followed him and sought his advice (S.F. 373).

stop the riot, he declined, telling Reverend Gray to his face that the minister's attitude made him ashamed to be an Episcopalian (S.F. 680, 897).

General Walker also admits that, in his speech, he congratulated the students on their "protest" (S.F. 918), telling them they had a right to "protest" (S.F. 913), could continue to "protest" (S.F. 902), and should "stand by your Governor" (S.F. 917-918)—all this at a time when Walker well knew that the "protest" consisted of a series of violent physical attacks on the Federal marshals (S.F. 917). He also admits telling the rioters that Colonel Birdsong, head of the Mississippi Highway Patrol, had betrayed them—a sentiment clearly calculated to incite and inflame his audience. Walker even went so far as to absolve the mob from responsibility for the havoc they were then creating: He told them that Governor Barnett had not abandoned them (S.F. 905), thus creating an aura of legality for their actions under the so-called interposition doctrine; that the responsibility for the violence was "on the hands of the Federal Government" (S.F. 902); and that the forces carrying out the mandate of the Federal Court should have been sent to Cuba, not Oxford (S.F. 422, 455, 479, 687).

Respondent's own witnesses further testified that General Walker also said "Protest, protest, all you want to, you have a right to protest and they may run out of gas" (S.F. 371); that he urged the crowd to continue their protest at a time when they were throwing Molotov cocktails and setting cars on fire (S.F. 373); and that he said "You may not win but you will be heard" (S.F. 1025-1026) and "Help is on the way, thousands are coming" (S.F. 371).*

We need not speculate as to whether other portions of the speech deprecating violence were merely *pro forma*

*Presumably the "thousands" to whom Walker referred were those whom Walker himself had previously summoned to Oxford with their "flags, tents and skillets" to stand beside Governor Barnett.

statements for the record or "aesopian" restatements of Walker's claim that responsibility for the violence rested with the Federal Government. Overall, at least, Walker's statements—even his version of them—could reasonably have been interpreted as a call to renewed and increased violence, and many of those present obviously considered it such.

By virtue of his status as a former United States Major General who had commanded the Federal troops at Little Rock and because of the inflammatory nature of his widely publicized statements in support of Governor Barnett, General Walker, simply by his presence on the campus, became a central figure to whom the rioters looked for leadership. For this reason, the delivery of a speech such as that which even General Walker concedes he made, whether treated separately or taken in conjunction with his admitted conduct before and afterwards, establishes, we believe, the substantial truth and fairness of the conclusion that Walker "assumed command" of the crowd.

The second statement on which the $500,000 jury verdict was predicated was the statement that "Walker . . . led a charge" against the marshals. The trial court defined the term "charge" to mean "A movement toward the marshals, or a group or body of people moving toward an objective", and the term "led" to mean "Activities by a person who directs, moves to action, or encourages in some action or movement" (Tr. p. 59).

Measured by these definitions and giving to General Walker the benefit of every reasonable inference, the evidence in this case plainly establishes that on more than one occasion General Walker led a charge.*

*There are almost as many versions of the "charge" as there are witnesses. But this is to be expected in a situation where, as here, numerous witnesses attempt to recollect events which occurred in murky darkness, and in the midst of violence, bloodshed, tear gas and general confusion.

General Walker himself concedes that on at least two occasions during the evening he moved in a westerly direction from the area of the Confederate Monument toward the area of the flagpole (S.F. 676, 693-695). Since the Lyceum (where the Federal marshals were gathered) is west of the flagpole, it is obvious that on at least two occasions General Walker advanced toward the Federal marshals.

General Walker denied at trial (S.F. 696) that he was on either occasion "leading a charge", but here is what his own witnesses had to say on that subject:

Talmage Witt, a Deputy Sheriff who was called by the Plaintiff and who was with Walker substantially all of the time Walker was on the campus (S.F. 371-372), testified that Walker advanced toward the flagpole on two occasions. On the first occasion, prior to the speech, a small crowd followed him until they were dispersed by tear gas (S.F. 341).

The second occasion is succinctly described in Witt's written statement, which reads in relevant part (Def. Ex. 1):

> "After some of the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: 'Keep protesting and see if we can get closer.' He then started towards the marshals and the crowd of at least a thousand by that time, followed him. This crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them. At all times during this, I was near or in sight of General Walker

and stayed in sight of him until about 5 a.m. the next morning."

And further (*ibid.*):

> "On a number of occasions Walker would walk towards the marshals, or in that general direction, and whenever he did, a large crowd would fall in behind and follow him. In fact, wherever Walker went, the crowd followed. During the time after the first march towards the marshals with Walker in or near the lead, I heard different statements, many of which I cannot remember, but at one time, in talking with a group about the protest they were making, he said, 'good, good, keep it up.' I heard people asking how to snuff out or counteract the tear gas, and Walker told them to use water, and right after that they got a fire truck and hose and began to try to use that to stop the gas."

Charles May, another of Plaintiff's witnesses, testified that he saw Walker walking toward the flagpole with a crowd surrounding him (S.F 1231).

Danny Lee Hunter, who was called on behalf of the Plaintiff, testified that when Walker finished the speech at the Confederate Monument he exhorted his listeners: "Come on, let's go," or "Let's go up and see," and started walking toward the flagpole with practically the entire crowd—estimated at approximately 200 people—following him (S.F. 1050-1052).

Plaintiff's witness Edwin Leon Jackson testified that the General walked to the vicinity of the flagpole; that ten or fifteen people followed him; that twenty-five were with him; and that those in front of him were throwing rocks (S.F. 1020-1023).

Plaintiff's witness Henry Edwards testified that Walker approached the flagpole, accompanied by some fifty or sixty people (S.F. 597).

Plaintiff's witness Cecil Cox testified that Walker was in the middle of a group of about twenty-five or thirty people who walked up towards the marshals, some waving a flag of truce and demanding "we want that nigger" (S.F. 247, 250, 258). Following the speech at the Confederate Monument, Cox saw the General and fifteen or twenty others start toward the Lyceum building.

Richard Harvey Sweat, another witness for the Plaintiff, testified that Walker walked toward the Lyceum building before his speech with students around him (S.F. 168-170) and that he walked toward the flagpole a second time after his speech with about fifteen people, including some who had missiles in their hands (S.F. 221-231).

Finally, there is the testimony of Alfred Kuettner, a reporter for United Press International. His testimony is particularly significant because Respondent, at the trial, sought to contrast the "unfair" treatment accorded to him by Petitioner with the "fair" treatment accorded him by UPI (S.F. 1872; Tr. p. 19). Yet the UPI reporter, testifying for Plaintiff, said that Walker was "more than an interested observer" when he came onto the campus (S.F. 1289); that he gave advice to the rioters and was the focal point of student activity (S.F. 1292); and that he, Kuettner, personally saw Walker advance on the Lyceum with two men, one on each side of him (S.F. 1272-1273).

The inescapable conclusion which emerges from the welter of testimony is this: Whether Walker advanced toward the marshals with a small group or a large one, whether the mob was hurling missiles at the marshals or demanding "that nigger" under a flag of truce, whether the advance proceeded at slow march or double-time, it is beyond dispute, even on the testimony offered by the Plaintiff, that Walker, during the four to five hours he was on the

campus (S.F. 279-280), did, in fact, lead at least two charges on the Federal marshals.*

Notwithstanding the foregoing, the jury returned a verdict for Respondent for $500,000 in general damages and $300,000 in punitive damages (Tr. pp. 61-62).

The trial court, however, finding that there was no evidence of malice, set aside the jury's verdict so far as related to punitive damages and entered judgment in favor of Respondent for $500,000 (Tr. p. 71).

An appeal to the Texas Court of Civil Appeals followed, where the judgment was affirmed *per curiam* (Appendix D, p. 118), 393 S. W. 2d 671 (1965), and an application for rehearing was denied (Appendix D, p. 119), 393 S. W. 2d 671 (1965).

An application for a writ of error was thereafter filed with, and duly denied by, the Supreme Court of Texas, the court finding no reversible error (Appendix D, p. 120). An application for rehearing in the Supreme Court of Texas was also denied (Appendix D, p. 121).

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*In view of the resolution of the factual issues in the Plaintiff's favor, we have not heretofore adverted to the testimony of the Defendant's witnesses; but we note, in passing, that this testimony not only corroborates but amplifies the conclusion that General Walker did, in fact, "lead a charge" and "assume command of the crowd" (See e.g. S.F. 1615, 1620-1623, 1669-1670, 1692).

This testimony discloses, for example, that Walker, on arriving at the campus, agreed to lead the rioters in protesting (S.F. 1646-1647); that he called upon them to "riot, riot" (S.F. 1406-1407); and that he told them reinforcements were on the way to help them, and said there was "no stopping point" (S.F. 1414-1415). Defendant's witnesses also testified that Walker, using pronouns which would identify himself with the rioters, assured the mob that "we have got more people coming" (S.F. 1612), and that the reinforcements he had promised were "around town" and "we can bring them in if we need them" (S.F. 1726). Walker also told the rioters that there were "thousands" behind them and that they would "win in the end" (S.F. 1548), and that they should "give them protest" and "give them casualties" (S.F. 1729). Walker's general attitude on the occasion of the riots is evidenced by his comment on learning of the beating of a newspaper man: "Good, good" (S.F. 1612).

Throughout the proceedings, Petitioner has asserted its rights under the First and Fourteenth Amendments to the Federal Constitution. Petitioner first raised the constitutional issues in its pleading (Tr. p. 35; Appendix C, pp. 36-47). It reasserted its rights in motions to the trial court for judgment notwithstanding the verdict (Tr. p. 66; Appendix C, pp. 48-49) and for a new trial (Tr. pp. 73, 78, 80; Appendix C, pp. 50-52); on appeal to the Court of Civil Appeals (Br. pp. 9 and 73-85 and Rep. Br. pp. 6-8 and 19-24; Appendix C, pp. 53-72); in its application for writ of error to the Supreme Court of Texas (Appl. pp. 1-46; Appendix C, pp. 75-115); and in the applications for rehearing (Appendix C, pp. 73-74 and 116-117). Those portions of the record wherein such questions were raised are set forth in Appendix C.

Petitioner's constitutional claims were uniformly rejected below. Since the Supreme Court of Texas rendered no opinion, we briefly advert, so far as relevant to the constitutional questions here presented, to the opinions of the trial court and the Texas Court of Civil Appeals.

The opinion of the trial court is set forth in a letter to counsel dated July 29, 1964, and poses the constitutional question as follows (Appendix B, p. 34):

> "Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant."

In holding the *Sullivan* doctrine inapplicable, the trial court said (Appendix B, pp. 34-35):

"The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.

"Freedom of the Press is perhaps the most important protection against tryanny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.

"However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case."

The Texas Court of Civil Appeals affirmed, relying, as to the constitutional issues, solely on the authority of a thirty-seven year old law review article and some cases cited to support the proposition that the right of a citizen to defend his reputation "is zealously guarded". The Court said (Appendix B, pp. 21-22):

"We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution.

* * *

"We find no application of the authorities cited by the appellant to the facts of this case."

Moreover, the Court held inapplicable the defenses of "substantial truth" and "fair comment", characterizing the latter defense as a "weak defense . . . subject to so many limitations that it is seldom completely applicable." (Appendix B, p. 19).

The Supreme Court of Texas declined even to hear the case, finding no reversible error in any of the rulings below (Appendix D, p. 120).

It is in this posture that the case comes to this Court.

REASONS FOR GRANTING THE WRIT

1. This case represents one of the most serious—and to date successful—attacks ever made on freedom of the press. What is here at stake is nothing less than the fundamental right of news media to publish and disseminate, without fear or favor, good faith reports and comment concerning events of national significance and of persons of political prominence who are involved and who involve themselves in such events.

This is but one of at least fifteen cases brought by General Walker against the Associated Press, its members, or both, arising out of news reports identical or similar to those now before this Court. In those fifteen cases, listed in Appendix F, Respondent seeks damages aggregating some $33,250,000.

These cases were for the most part filed in forums in Southern or border states where it could reasonably be anticipated that juries would share the belief, widely held in the South, that the South's position in the segregation controversy had been grossly falsified and maliciously reported by national news media, and would therefore be inclined, in determining the issues of liability and damages, to be influenced by the general feeling that "irresponsible outsiders" should be taught a lesson.

That this is what in fact occurred is demonstrated by this very case, in which the jury awarded some $300,000 in punitive damages on a record which the courts thereafter held, as a matter of law, was wholly devoid of any evidence of malice and by the further award of some $500,000 in general damages, although not one penny of actual damages was established or even claimed.

In the only other case heretofore tried—that in the Louisiana state courts—the jury returned a verdict of $3,000,000, although Respondent himself had only sought damages of $2,250,000* and punitive damages are not allowable in a civil action in Louisiana.**

Thus, these cases are shocking examples of the effectiveness of the technique of converting the libel laws into weapons to punish those disseminating information about public controversies which arouse deep emotions—in this case the attempts by hard-core segregationists, in public office and out, to perpetuate a system of racial segregation which is patently unconstitutional.***

The resultant threat to fundamental freedoms of speech and press is self-evident. As this Court said in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 278, in speaking of a libel award against the New York Times in Alabama, also for half a million dollars:

---

*The judgment, reduced to the amount demanded, has been appealed.

**See, *e.g., Gugert* v. *New Orleans Independent Laundries,* 181 So. 653 (La. Ct. App., 1938) (not officially reported); *Heeb* v. *Codifer & Bonnabel,* 162 La. 139, 110 So. 178 (1926); *Brian* v. *Harper,* 144 La. 585, 588, 80 So. 885, 886 (1919); *Universal C. I. T. Credit Corp.* v. *Jones,* 47 So. 2d 359 (La. Ct. App., 1950) (not officially reported).

***This technique is not novel. It is patterned, apparently, on that adopted by Alabama and its officials in attempting to punish the New York Times and the Columbia Broadcasting System for criticizing Alabama's conduct in the desegregation controversy (See *New York Times* v. *Sullivan,* 376 U. S. 254, 292).

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

2. The fundamental constitutional holding of the courts below is that *Sullivan* (376 U. S. 254) is "limited in its application to public officials." There is thus presented for decision the very question which this Court left open in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (fn. 12), namely:

> ". . . whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

One can scarcely imagine a factual situation which would present more clearly than this case the question thus left open. Here, not only did General Walker "thrust himself into the vortex" of the Oxford confrontation; by his intemperate statements and actions immediately preceding that confrontation, he became, in fact, a catalyst for the tragic events which occurred there.

It is of great national interest and significance—for many reasons—that a person of nationwide political prominence, a former general officer of the United States Army, still addressed as "General" even by court and counsel (See e.g. S.F. 7, 56, 87, 391, 973, 1244, 1509), had publicly called upon his fellow citizens to register their defiance of the Federal Government and had thereafter attended and encouraged violent acts of defiance. If the activities of General Walker in such a situation can be "blacked out" through an application of the libel laws, then the unconsti-

tutionally inhibiting effects upon freedom of speech and press are, we believe, self-evident.

Finally, we observe that, since Governor Barnett and virtually all of the other principal participants in the Oxford confrontation are clearly within the ambit of the *Sullivan* doctrine, it would be a constitutional paradox to hold that a public figure* like General Walker, who openly rose to stand beside Governor Barnett in that same controversy, seeking with equal vigor and effect to rally public support for the Governor's cause, was not.

Such an anomaly could hardly be said to comport with the principle of "uninhibited, robust and wide-open" debate which, in *Sullivan,* this Court sought to assure. Accord, *Garrison* v. *Louisiana,* 379 U. S. 64, 75. As the Court of Appeals for the Second Circuit said in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659, 671 (2d Cir. 1964), *cert. denied* 379 U. S. 968:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had

*The trial court observed that General Walker's status as a public figure at the time of the riots was "undisputed" (Supp. Tr. p. 3).

> 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line. The 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' now applied to confer immunity on 'vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,' 376 U. S. at 270, 84 S. Ct. at 721, may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The question whether the holding of this Court in *Sullivan* (376 U. S. 254) is limited in application to public officials or applies to other persons or circumstances is of vital importance and should, we submit, now be resolved by this Court.

3. The decision below is in direct conflict with the following decisions of Federal and state courts: *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky., 1965), *app. pend'g; Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2nd Dept., 1964), *aff'd.* 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965); *Pauling* v. *National Review, Inc.*, Misc. 2d , N. Y. S. 2d (Sup. Ct. N. Y. Co. 1966) (not yet reported); *Pearson* v. *Fairbanks Publishing Co.* (Super Ct., Alaska, 4th Dist., 1964) (unreported), *aff'd. on other*

grounds, Alaska (April 28, 1966) (not yet reported), and *Brennan* v. *Associated Press,* F. Supp. (D. Conn. 1966) (not yet reported).*

A more direct conflict between the decisions below and the decision of the District Court in the *Courier-Journal* case, *supra,* is almost impossible to imagine. Both cases involve the same plaintiff—General Walker—and the same subject matter, reports of General Walker's activities at Oxford, Mississippi, during the night of September 30, 1962. While the courts below rejected the *Sullivan* doctrine as wholly inapplicable, the District Court in the *Courier Journal* case reached the "inescapable conclusion" that *Sullivan* did, in fact, apply, saying (246 F. Supp. 233-234):

> "The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General, and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.
>
> "Had not Plaintiff thereby become a 'public man'? Could he not have reasonably foreseen that his being

*Since three of the five opinions are unpublished and may not, therefore, be readily available, we have for the convenience of the Court annexed hereto as Appendix E the texts of all five opinions.

a person of 'political prominence' his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported? This Court so believes.

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in New York Times v. Sullivan is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.' "

And further (246 F. Supp. 234):

". . . I am perhaps 'plowing new ground' in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the Times Opinion which I believe to be a '. . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open . . .' Public debate cannot be 'unhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of national prominence and influence (not 'public officials') who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any

> person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.
>
> "This is particularly so here where open riot and turmoil with accompanying destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night."

The constitutional issues here presented have been the subject of widespread speculation and debate by bench and bar alike,* and this fact attests to the vital importance of those issues and the urgency of their resolution. This Court is the only tribunal which ultimately can resolve the conflict.

4. Petitioner contended throughout the proceedings below that the conclusory statements which were held to be libelous constituted "fair comment" on the activities of General Walker at Oxford. The Texas courts, however, have held otherwise. In so holding, those courts so truncated the doctrine of fair comment as to leave it meaningless.

---

*See, *e.g.*, Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L. Q. 581 (1964); Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191; Berney, *Libel and the First Amendment—a New Constitutional Privilege*, 51 Va. L. Rev. 1 (1965); Comment, *The Scope of First Amendment Protection for Good Faith Defamatory Error*, 75 Yale L. J. 642 (1966); 19 Sw. L. J. 399 (1965); 9 Vill. L. Rev. 534 (1964); 16 Syracuse L. Rev. 132 (1964).

They thus violated the First Amendment to the Federal Constitution.

The relevant facts as set forth above, despite some conflict as to the details, are essentially undisputed. If on the basis of those facts a news medium cannot make the comment in good faith that General Walker "assumed command of the crowd" and "led a charge" of students on the Federal marshals without risking a libel judgment of $500,000, then the freedoms of press and speech guaranteed by the Federal Constitution become illusory.

It is no answer to assert, as have the courts below, that a news medium need have no fears if it but accurately reports the "facts." In this case, there was no finding that any of the underlying facts set forth in the articles were false, but rather that Petitioner's conclusion or opinion of Walker's role, based on the facts contained in the articles and developed at trial, was not a "fair comment." Obviously, any comment critical of Walker would not have been considered "fair" by a jury under all the circumstances of the trial.

Where, as here, the defense of "fair comment" is rejected by the Texas Court of Civil Appeals as a "weak defense . . . subject to so many limitations that it is seldom completely applicable," and where, as here, such limitations are invoked to impose a liability of half a million dollars, it is obvious that the libel laws have been used to achieve a result which the Federal Constitution prohibits.

If this decision is permitted to stand, the only prudent course for the press to follow would be to refrain from commenting on events—however significant and newsworthy—where such comments may reflect unfavorably upon a participant in a public controversy arousing deep emotional responses which differ in the various regions of our country. For all practical purposes, the doctrine of fair

comment would be of no avail and useless as a protection to news media involved in such controversies.

This Court has already indicated that there are Federal Constitutional boundaries limiting the extent to which the states can circumscribe the availability and applicability of the defense of "fair comment." See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 292. This case clearly raises the question whether those boundaries have here been violated.

5. Apart from the other constitutional questions which permeate this case, the fact remains that there is no more support for the jury's finding of falsity than there was for its finding of malice. To award half a million dollars where there is no evidence establishing the underlying cause of action is, of course, a denial of due process—indeed, one of the most obvious denials of due process that can be imagined. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87; *Garner* v. *Louisiana,* 368 U. S. 157; *Thompson* v. *Louisville,* 362 U. S. 199. There is only one tribunal which can now restore to petitioner the constitutional rights which the Texas courts have so clearly denied it. We respectfully submit that this Court, as the ultimate guardian of the rights guaranteed by the Constitution, should grant certiorari to correct this grave injustice.

6. One of the most shocking features of this case is the inordinate and unconscionable size of the verdict—half a million dollars in "general" damages where no actual pecuniary or other damage was or could be shown.

Obviously, the $500,000 verdict was intended, not to compensate, but to punish and deter. Permitted to stand, it will, indeed, deter and prevent news gathering and disseminating institutions from performing the function,

vital to any democratic form of government, of disclosure and discussion on controversial public issues and personalities. For what newspaper, what magazine, what wire service would, as a practical matter, disseminate a report unfavorable to General Walker or any other controversial political personality if the risk involved is a judgment for half a million dollars?

We respectfully submit that the inexplicably high verdict itself presents a substantial constitutional question under the First and Fourteenth Amendments. For the repressive effect of such an award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument and discussion so plain, the punishment for such a presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. *Cf. New York Times Co.* v. *Sullivan,* 376 U. S. 254; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717; *Shelton* v. *Tucker,* 364 U. S. 479; *Speiser* v. *Randall,* 357 U. S. 513.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted the petition for writ of certiorari should be granted.

Respectfully submitted,

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MAY 18 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1220~~ 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

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APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Civil Statutes, Article 5431

In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in

mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action.

Vernon's Texas Civil Statutes, Article 5432, Subsections 4 and 5

The publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel.

* * *

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

5. The privilege provided under Sections 1, 2, 3, and 4, of this article shall extend to any first publication of such privileged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any re-publication of such privileged matter, after the same has ceased to be a matter of such public concern, shall not be deemed privileged, and may be made the basis of an action for libel upon proof that such matter had ceased to be of such public concern and that same was published with actual malice.

APPENDIX B

Opinions of the Courts Below

Opinion of the Texas Court of Civil Appeals

IN THE

Court of Civil Appeals

FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16624

THE ASSOCIATED PRESS,
Appellant,

vs.

EDWIN A. WALKER,
Appellee.

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This is a libel suit. The parties will be designated as they were in the court below or The Associated Press as the A. P. and Walker by name.

The following are the reports of which Walker complained:

"October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole

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Miss Campus, was arrested on four counts including insurrection against the United States.'

"October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.'

" 'This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

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Opinion of the Texas Court of Civil Appeals

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes —toward the clustered marshals.

" 'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

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" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" 'There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

" 'One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" ' "This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged

by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.' "

The only two statements of the above quoted reports which were complained of by Walker as being libelous and which form the basis of special issues submitted by the Court were: (1) "Walker, who Sunday led a charge of students against federal marshals on the Ole Miss Campus" (October 2, 1962 report), and (2) "Walker assumed command of the crowd" (October 3, 1962 report). For the sake of brevity these two statements will hereinafter be referred to as the "charge" and "command" statements respectively.

In answer to special issues one through four, the jury found that the "charge" statement was not "substantially true", did not constitute fair comment, was not made in good faith and was actuated by malice. It found to the same effect in response to similar issues five through eight concerning the "command" statement.

In answer to issue No. 9 the jury found damages in the sum of $500,000.00 and having found that A. P. was actuated by malice in answer to special issues Nos. four and eight the jury, in response to special issues Nos. ten and eleven found that exemplary damages should be awarded and in the amount of $300,000.00.

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Based upon the verdict of the jury, judgment was entered for Walker and against the A. P. in the sum of $500,000. The judgment recited that there is no evidence to support the jury's findings of malice and $300,000 for exemplary damages.

Appellant contends that the court erred in rendering judgment for appellee rather than it because (1) as a matter of law the evidence conclusively established that the "charge" and "command" statements were substantially true; (2) each statement was a fair comment about a matter of public concern published for general information and thus privileged under the provisions of Art. 5432, V. A. C. S.; (3) such statements made without malice are protected by the First and Fourteenth Amendments to the Constitution of the United States; (4) over objection appellee was permitted to testify that he did not assume command; (5) it held as a matter of law that the "charge" and "command" statements were libelous rather than submitting issues as to each; (6) the evidence conclusively established as a matter of law that the "charge" and "command" statements were made in good faith with reference to matters it had a duty to report to its members and thence to the public; (7) the amount of damages found were so grossly excessive as to be patently wrong and unjust and the findings in response to the damage issue No. 9 and to special issues one, two, three, five, six and seven are so against the weight and preponderance of the evidence as to be manifestly wrong and unjust and thus insufficient to support such answers; and (8) the evidence conclusively established as a matter of law that the jury was guilty of material misconduct which probably resulted in injury to the defendant.

We affirm.

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EVIDENCE

In discussing the points relating to the quantity and quality of the evidence we have examined the complaints of the appellant in the light of the Article by Chief Justice Robert W. Calvert entitled, " 'No Evidence' and 'Insufficient Evidence' Points of Error", 38 Tex. Law Rev. 361 and authorities therein cited.

The evidence considered in its most favorable light in support of the findings of the jury and the judgment of the court is in essence as follows: At approximately 4:00 P. M. of the day in question, a ring of Federal marshals had encircled the Lyceum Building. Walker arrived on the campus about 8:45 P. M. At that time a loud, violent riot was in progress in an area of the campus known as the Circle. A crowd assembled in the Circle area, began taunting and jeering the marshals. By 8:00 P. M. a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks and other missiles. The rioters attempted to charge the marshals with a fire truck and then with a bulldozer. "Molotov cocktails" were hurled at the marshals. Finally rifle fire erupted. The next morning the campus looked like a battlefield. Soon after his arrival, Walker, after some urging to say a few words, spoke from the steps of the Confederate Monument. While there is some dispute as to what he said, there is testimony that he told the assembled groups that while they had a right to protest that violence was not the answer. He was "booed" or "jeered" at this time and again when urging a cessation of violence. He and others walked in the direction of the Lyceum Building where the marshals

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were stationed but he never came closer to the marshals than the monument or the length of a football field. He was there to watch what happened. He wanted a peaceful demonstration as a protest. His presence there was not illegal or unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and to report. He was one of the crowd. He was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherewise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk; described as strolling, ambling, or "moseying" along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: "You don't."

Throughout the trial Walker maintained the firm position that because of his opposition to the use of Federal troops within a State, and his personal knowledge of the deviation between the occurrences at Little Rock where he was indeed in command and the newspaper stories of those occurrences, that he was at Oxford to see for himself at firsthand what was actually going on. He maintained that he did not assume command of the crowd, did not lead a charge, and did not participate in the rioting. He was present for the sole purpose of observing. The jury saw

him, observed his demeanor, heard what he said, and believed him.

"'No evidence' points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact." 38 Tex. Law Review, pp. 361, 362, supra.

Subdivisions (a) and (b) above have no application to the record or the facts in this case. As to (c) we have viewed the evidence in its most favorable light in support of the findings of the jury upon which the judgment of the Court is based, considering only the evidence and the inferences which support the findings and rejecting the evidence and the inferences which are contrary to the findings. In the application of this test we have determined that all of the findings of the jury, upon which the Court based its judgment, are supported by ample evidence. Having reached this conclusion it follows that we find no merit in the appellant's contention that the evidence establishes conclusively the opposite of what the jury found. We find that none of the situations discussed by Judge Calvert under (a), (b), (c) or (d) is disclosed by the record. Further we have concluded from our study and examination of the entire record that the findings of the jury upon which the Court based its judgment is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust.

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Jurors are the exclusive judges of the controverted issues of fact raised by the evidence, of the weight to be given the evidence, and the inferences to be drawn therefrom. They are the exclusive judges of the credibility of the witnesses. "The law does not attempt to tell jurors what amount or kind of evidence ought to produce a belief in their minds. They may believe a witness although he has been contradicted. They may believe the testimony of one witness and reject the testimony of other witnesses. They may accept part of the testimony of one witness and disregard the remainder." McCormick & Ray, Texas Law of Evidence, § 3; Austin Fire Ins. Co. v. Adams-Childers Co., 246 S. W. 365 (Tex. Com. App., 1923).

"The mere fact that a verdict is against the preponderance of the evidence will not authorize a reviewing court to set it aside, if there is some evidence to support it, or evidence that would support a verdict either way. The court of civil appeals will set aside the verdict and findings of a jury only in cases where they are so against such a preponderance of the evidence as to be manifestly unjust or clearly wrong, or where they show clearly that the finding or verdict was the result of passion, prejudice, or improper motive, or in such obvious conflict with the justice of the case as to render it unconscionable." 4 Tex. Jur. 2d, p. 395, § 838, and authorities cited therein.

"Where evidence is conflicting, a reviewing court will not disturb the jury's verdict or findings if there is evidence of probative value to support them, unless the evidence is so overwhelming against the verdict or findings as to shock the conscience or show clearly that the conclusion reached was wrong or was the result of passion, prejudice or improper motive.

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"The findings on conflicting evidence are usually regarded as 'conclusive,' 'binding,' or 'decisive,' and will be 'adopted' or 'accepted' as the findings of the appellate court, unless some good reason is presented that would justify the court in taking some other view.

"A jury finding on facts will not be set aside because it does not appear to be clearly right; it must appear to be clearly wrong before the appellate court will disturb it.

"The fact that the appellate court would not have found as the jury did is not the test to be applied on appeal. The true test is that made by the jury, on firsthand evidence, adduced before them from living witnesses whose credibility and the weight to be given their testimony were determinable by the jury. Where the jury's findings are in accord with the testimony of different disinterested witnesses, the fact that there is other testimony to the contrary does not authorize the appellate court to overturn the verdict. . . ." 4 Tex. Jur. 2d 390, § 837, and authorities cited therein.

In the application of the rules of law and the authorities above referred to, we overrule all points of error relating to the quantity or quality of the evidence supporting the findings of the jury upon which the Court based its judgment.

We find no error on the part of the Court in permitting Walker to testify that he did not assume command of the crowd.

He testified that he became a professional soldier upon completing four years at West Point in 1931 when he was commissioned as a Second Lieutenant. He had combat experience in the Mediterranean, European and Asiatic Theatres during World War II and in Korea. He finally

attained the rank of Major General. During the course of the trial Walker testified on several occasions without objection that during the Little Rock matter he took command of the troops, was assigned as commander or that the troops were under his command. In connection with the occasion in question at Ole Miss he was asked if he, "participated in any way in any activity of the crowd that was throwing things at the Marshals?" He answered without objection that he had not participated in any way. He was then asked if he assumed "any command over this crowd." Objection was made on the ground that the answer would be a conclusion on the part of the witness. The Court permitted Walker to answer and he stated, "I certainly did not" and in response to another question he answered without objection that he certainly knew what it meant to assume command. The news item in question had identified Walker as the former Major General who commanded the 101st Airborne Division at Little Rock followed by the statement, "Walker assumed command of the crowd."

The Article in question stated as a fact that Walker had "assumed command of the crowd." We think that Walker, subject of this remark, had the right to deny or affirm the truth of it. We think that the opinion in Goode v. Ramey, 48 S. W. 2d 719 (El Paso Civ. App., 1932, refused), is applicable. Therein it was stated, "We are not prepared to say under the record, as presented here, that it was error to admit the statement of the witness. The issue sought to be proved was not a mixed question of law and fact, but purely a fact question. We think the issue was one upon which a witness in possession of all the facts may properly state his opinion or conclusion to which such facts would fairly lead, notwithstanding the

witness' answer may embrace the very issue to be submitted to the jury. The conclusion of the witness is then testified to like any other fact to be considered by the jury for what they may believe it to be worth. Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314; Adkins-Polk Co. v. John Barkley & Co. (Tex. Civ. App.) 297 S. W. 757; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11."

If we are mistaken in holding that the testimony of Walker was admissible we nevertheless overrule the point of error because we are of the opinion that the error, if any, in admitting the testimony, was harmless within the meaning of Rules 434 and 503, T. R. C. P.; Dallas Railway & Terminal Co. v. Bailey, 250 S. W. 2d 379, 151 Tex. 359 (Sup. Ct., 1952).

Fair Comment

The appellant contends that the "charge" and "command" statements constituted fair comment and thus were privileged under the provisions of Art. 5432, V. A. C. S. We find and hold that both the "charge" and the "command" statements were statements of fact and not of comment. *"Walker, who Sunday night led a charge of students against federal marshalls . . . ."* and *"Walker assumed command of the crowd . . . ."*, (emphasis added) are positive statements of fact. Truth of the statements would constitute a complete defense. Appellant failed in its effort to establish this defense to the satisfaction of the jury which found that neither of the statements were substantially true.

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In an article on "Fair Comment" by John E. Hallen, 8 Tex. Law Review 41 (1929-30), the author in discussing Art. 5432, V. A. C. S., states: "The 1927 Libel Law provides:

"'The publications of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel . . . .

"'4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.'

"Paragraph 4 was in no way changed by the 1927 amendments and has appeared exactly in that form since 1901.

". . . the right of fair comment was not created by the statute. It is well recognized by the common law. Every one has the right to comment on matters of public interest and general concern and within limits is not liable for stating his real opinion on such subjects, however severe the criticism may be. It is immaterial whether or not the criticism is sound, or whether the court or jury would agree with it, so long as it represents the honest opinion of the speaker upon a matter of recognized public interest.

"The statute expressly declares that fair comment by newspaper and periodicals is privileged. But since this right was enjoyed by everyone at common law, the statute gives the newspaper no added privileges. Nor is it to be construed as taking away the common law defense of individuals. . . . (p. 41)

"It should be remembered that there is a distinction between comment or criticism, which is the opinion of the

speaker or writer upon certain facts, and the facts upon which that opinion is based. A misstatement of fact cannot ordinarily be justified by a plea of fair comment. . . . (p. 43)

"It has already been said that fair comment is a criticism, discussion, or expression of opinion upon existing facts and does not protect against a misstatement of the facts themselves. The question of what should be called fact and what comment is difficult. . . ." (p. 53)

"Texas has swung from its early holding in the Copeland Case (Express Printing Co. v. Copeland, 64 Tex. 354 (1885) that an untrue charge of crime, honestly and reasonably made, about a public officer, is privileged, to its present position that such a charge cannot be justified by a newspaper. In following its present doctrine Texas is supported by the weight of authority, and there are strong reasons for its holding." (p. 99)

An article under the heading of "Libel and Slander—Fair Comment—Statements of Opinion" by Tom J. Mays appears in 16 Tex. Law Review 87 (1937-38). He commences with, "A judicial warning to the press with respect to comment and criticism upon matters of public interest is discernable in the recent decision of Houston Printing Co. v. Hunter." 105 S. W. 2d 312 (Fort Worth Civ. App., 1937), affirmed 106 S. W. 2d 1043 (Tex. Sup., 1937). The article continues, "That fair comment and criticism upon such matters is qualifiedly privileged is quite generally recognized both at common law and in Texas by statute. On the other hand, where false allegations of fact are made regarding matters of public concern, the courts are not in accord. Perhaps a majority of the courts hold that false allegations of fact are not entitled to immunity even though

made in good faith and without malice. . . . . Texas is clearly in line with the majority, holding that falsification of the facts is never privileged.

"Although the distinction between statements of fact and statements of opinion or comment has been freely recognized, it is generally conceded that distinguishing the two becomes a difficult problem in many cases." (p. 88)

"Most of the cases, it seems, wherein the words are held actionable as statements of fact, have found imputation of malfeasance, misconduct, or corruption in office, or imputations of evil or corrupt motives in the administration of duties. These being treated as statements of fact, then certainly a false imputation of crime committed by a public officer or candidate would be actionable as a statement of fact in Texas. (pp. 89-90) . . .

"It is manifest that some method is needed by which to distinguish between statements of fact and comment; and it is equally certain that no absolute test can be laid down. But it is submitted that more desirable and satisfactory results can be reached." (p. 90)

The author suggests the following test by which to distinguish statements of fact from comment, "Where the statements alleged to be libelous can be reasonably construed by the reader as an expression of opinion only, on the basis of facts either already known to the reader or else reasonably assumed by the person writing the statement to be known to the reader, then it should be regarded as fair comment. Where, however, the statement alleged to be libelous, as reasonably construed, conveys to the reader not only an expression of the writer's opinion, but also certain supposed information, and this information conveyed does not accord with the true facts, it is not comment, but should be treated as a statement of fact.

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"Under this test, whether a publication will be treated as a statement of fact and libelous, if untrue, will depend upon the surrounding circumstances of each particular case. Under such a guidance, even an imputation of crime might be held to be merely an expression of opinion and not actionable." (p. 91)

In, "The Press and the Law in Texas" by Norris G. Davis, University of Texas Press, Austin, 1956, it is stated that, ". . . the right of fair comment is a weak defense in most libel suits. It is subject to so many limitations that it is seldom completely applicable. There are three groups of limitations. First, the comment must be limited to matters of public concern. Second, the article must be a statement of opinion—or comment—rather than a statement of fact, a very difficult distinction to make. Finally, the comment must be reasonable and fair and made in good faith, and this limitation is also difficult to define." (p. 65)

"Even if the subject matter and the person concerned are clearly matters of public concern, there remains two severe limitations. One of these, the requirement that the story or article must be comment, not a statement of fact, has caused by far the most trouble. The separation of comment from factual statements in most stories and articles is extremely difficult, and Court decisions have shown confusion on the point." (p. 67) "One important rule developed for separation of fact and comment is the theory that imputation of dishonest motives to a public official or imputation of an act constituting a crime under the law is a statement of fact and cannot be considered fair comment." (p. 68) San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574 (CCA of Texas, 1908, Ref.); Forke v. Homann, 39 S. W. 210 (CCA of Texas, 1896, ref.). The author in reference to the article by Mays in 16 Tex. Law Review 87

(1937-38), states: "One writer who has studied the fair-comment cases in Texas and has found the same confusion illustrated here has offered the following definitions of 'opinion statements' and 'fact statements.'" (p. 73) He then quotes the test suggested by Mays and continues: "Certainly the courts should become aware of the need to distinguish statements of fact from opinion on a less arbitrary basis than is now customary. If the Supreme Court would adopt such a definition as the one quoted above, it would do much toward creating such an awareness. Actual differentiation of fact and opinion would still be difficult, but court decisions would be more just. (p. 74)

"Actually, it is clear that almost any story, editorial, or other type of news article must be a mixture of statements of fact and comment, even though the writer attempts to confine himself to comment. Any type of comment, in implication at least, must be based on fact; and newsmen know that the most effective comment is that based on startling and important statements of fact. Newsmen should therefore be prepared to prove the truth of any statement of fact and to rely on fair comment as defense only for the conclusions drawn from these true facts. They should strongly urge the courts also to make the distinction between fact and opinion rather than, as they so often do, plead all defenses to all parts of a story alleged to be libelous." (p. 74)

In our opinion the test suggested by Mr. Mays and favorably commented on by Mr. Davis is a good one. We think that its application to the facts in this case support our holding that the statements involved were statements of fact and that the appellant was not prepared to prove the truth of either statement. The information conveyed was not in accord with the true facts. Reference is made to the

complete text of the articles above referred to and the authorities cited therein. See also 36 Tex. Jur. 2d Libel and Slander, §§ 87, 89, 92 and 171 together with cases cited under each.

We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution. These Amendments prohibit Congress from making laws abridging freedom of speech and of the press and the State from making or enforcing laws of similar nature.

"The interest of the public in obtaining information about public affairs and of the defendant in discussing such matters is often brought directly in conflict with the plaintiff's claim to his own good name, and the law must draw a line between them. . . . (8 Tex. Law Rev. 41, p. 98)

"It is not true that false and derogatory statements about a man's character are today always actionable. If they were, the whole defense of privilege would be swept away. Nor is it true that everything may be justified under a defense of free speech or press. These rights as embodied in constitutions and statutes, were designed primarily to prevent interference by the government with a man's talking or writing, and not to do away with responsibility for what was said. If 'Freedom of the Press' always furnished a complete defense there could be no such tort as libel. . . ." (8 Tex. Law Rev. 56)

"It is submitted that any decision based entirely upon the right to an inviolate character or freedom of speech is unsound. Either doctrine given full sway would annihilate the other. . . ." (8 Tex. Law. Rev. 61)

"Articles 5430, 5431, 5432, and 5433, Vernon's Texas Civil Statutes, 1948, clearly declare the policy of this State

regarding the question of libel. The law protects the right of a citizen to defend his reputation and good name from libelous publications, and this right is zealously guarded. Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197; Belo & Co. v. Looney, 112 Tex. 160, 246 S. W. 777; Express Pub. Co. v. Keeran, Tex. Com. App., 284 S. W. 913." Fitzjarrald v. Panhandle Pub. Co., 228 S. W. 2d 503 (Tex. Sup., 1950).

We find no application of the authorities cited by the appellant to the facts of this case.

LIBELOUS PER SE

Did the Court commit error in holding as a matter of law that the "charge" and "command" statements were libelous per se, rather than to submit same to the jury for its determination? We think not. The language contained in the statements is not ambiguous. There can be no doubt as to the meaning of either.

Each of the statements imputed to Walker the crime of insurrection against the United States. It is undisputed that the crowd on the Ole Miss Campus was engaged in rioting and by force intefering (*sic*) with the efforts of U. S. marshals to enforce an executive order of the President of the United States issued under sanction of law and of applicable statutes. Insurrection is punishable by fine or imprisonment or both.

The statements further imputed to Walker responsibility for the death of two men and of the wanton destruction of property, all accomplished by students and others under his leadership and direction. The onslaught of the riotous crowd "led" by Walker who had "assumed com-

mand" was such that Van Savell considered he was, "lucky to have been arrested and glad to be behind closed, heavily guarded doors."

It imputed that Walker, who "advised on several tactics," none of which were ever specified, directed or advised on the making and use of the molotov cocktails (gasoline bombs) and other offensive weapons used by the rioters.

"The court should construe the meaning of unambiguous language, pass on its defamatory character, and instruct the jury accordingly. But where the language is ambiguous or of doubtful meaning there is a question for the jury." 36 Tex. Jur. 2d 496, § 166; p. 482, § 156 of the same text and cases cited under each. Fitzjarrald v. Panhandle Pub. Co., supra.

"To charge a person with or impute to him the commission of any crime for which punishment by imprisonment in jail or the penitentiary may be imposed is slanderous or libelous per se." 36 Tex. Jur. 2d 288, § 7; H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515.

"Any written or printed language tending to degrade a person in the estimation of honorable people, or imputing to him disgraceful or dishonorable acts, is libelous per se." 36 Tex. Jur. 2d 297, § 13.

"The language claimed to be defamatory must be taken as a whole. Thus, a newspaper article must be considered in its entirety in determining the sense in which its language is used, and whether the article, or a particular statement therein, is libelous." 36 Tex. Jur. 2d 313, § 27.

" 'Libelous per se' means that written or printed words are so obviously hurtful to person aggrieved by them that

they require no proof of their injurious character to make them actionable." Rawlins v. McKee, 327 S. W. 2d 633 (Texarkana Civ. App., 1959, ref., n.r.e.).

"Defamatory language may be actionable per se, that is, in itself, or may be actionable per quod, that is, only on allegation and proof of special damages. The distinction is based on a rule of evidence, the difference between them lying in the proof of the resulting injury. Language that necessarily, in fact or by a presumption of evidence, causes injury to a person to whom it refers is actionable per se. In other words, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. Where the language is actionable per se damages are conclusively presumed and need not be proved." 36 Tex. Jur. 2d 280, § 2.

"To be libelous a publication must be defamatory in its nature, and must tend to injure or impeach the reputation of the person claimed to have been libeled. The language used, taken in connection with the facts and circumstances alleged by way of innuendo, must be reasonably calculated to produce one or more of the results mentioned in the statutory definition; that is, it must have the effect of injuring or tending to injure the person to whom it refers to the extent of exposing him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty, integrity, or virtue.

"It is not necessary, however, that the language have all the injurious or pernicious tendencies enumerated in the statute; it is actionable if it has any of them. . . .

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"A publication that tends to subject the plaintiff to public contempt, or that impeaches his integrity or reputation, is libelous though it does not charge him with a crime.

"The term 'public hatred,' as found in the statutory definition, signifies public or general dislike or antipathy." 36 Tex. Jur. 2d 285, § 6.

DAMAGES

In connection with special issue No. 9 the jury was instructed that it may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained as a direct and proximate result of the statements inquired about. The jury awarded $500,000.00.

From our investigation and study of the record we are unable to find any legal justification to disturb the award of damages. If any improper influences were present they do not appear from the record. Under the pleadings the appellee sought damages, including exemplary damages, in the sum of $2,000,000.

"Mental suffering on the part of the person defamed is one of the direct results of a libel or slander. Accordingly, injury to the feelings, humiliation, and anguish of mind are proper elements of compensatory damages, provided they are the direct and proximate result of the defamation. This suffering is classed as general damages, that are presumed to have been sustained, and that, in actions for libel, are recoverable under a general averment, without specific proof that they were incurred, and, by virtue of statute, regardless of whether there was any other injury or damage,

even though the publication was not libelous per se." 36 Tex. Jur. 2d 402, § 98.

"The plaintiff is entitled to compensation for injury to his character or reputation caused by the defamation. . . . It follows that the jury, in fixing the amount of recovery, may consider the loss of, or injury to, character or reputation, even though there is no proof thereof nor any proof of good character. . . ." 36 Tex. Jur. 2d 400 § 97.

"In other words, a general allegation of damages will admit evidence of those damages naturally and necessarily resulting from the defamation charged. It is unnecessary to itemize the elements of general damages; rather, the amount may be alleged in the aggregate. Thus, the plaintiff need not aver the nature, character or extent of the mental suffering caused, or even that he thereby suffered any agony, but it is sufficient to aver the damages he sustained by reason thereof. . . ." 36 Tex. Jur. 2d 445, § 126.

"Generally speaking, the damages resulting from a libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, or the court in a case tried without a jury, and an appellate court will not disturb the verdict or award unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. . . .

"In fixing the amount the jury may take into consideration the motives of the defendant, and the mode and extent of publication. . . ." 36 Tex. Jur. 2d 405, § 102.

EXEMPLARY DAMAGES

By counter-points the appellee contends the court erred in setting aside the findings of the jury in response to

special issues Nos. 4, 8, 10 and 11, which related to malice and exemplary damages.

Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, "you are instructed that by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above definition before he was entitled to a finding of malice and exemplary damages.

The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings.

We think there is yet another reason to support the Court's action in disregarding the jury's answers to the issue relating to malice and exemplary damages, namely, the lack of necessary pleadings and proof required under the holdings in Western Union Tel. Co. v. Brown, 58 Tex. 170 (Tex. Sup., 1882); Wortham-Carter Pub. Co. v. Littlepage, 223 S. W. 1043, p. 1046 (Fort Worth Civ. App. 1920, no writ hist.), and Fort Worth Elevators Co. v. Russell, 70 S. W. 2d 397 (Tex. Sup., 1934).

The record leaves some doubt as to whether A. P. is an incorporated or an unincorporated association. It does

appear, however, that its composition, the manner in which it functions, and its organizational set-up is more akin to a corporation than not and that the holdings in the above cited cases would be applicable.

We think the record in this case will support our view. Certainly, A. P. is not an individual. Having no mind and being an entity only by a fiction of law, it must be held incapable of entertaining actual or express malice unless the requirements of the holdings in Fort Worth Elevators Co. v. Russell, Western Union Tel. Co. v. Brown and Worthan-Carter Publishing Co. v. Littlepage, supra, are complied with. A. P. is referred to as a corporation in the appellee's brief.

Jury Misconduct

We find no error in the action of the Court in overruling the appellant's amended motion for new trial because of alleged misconduct of the jury.

During a general discussion of the case a juror remarked that the A. P. (or news media generally) was always hurting someone by the printing of false or malicious reports or words to this effect. There was considerable discrepancy in the testimony of the five jurors called to testify on the motion for new trial as to whether the reference was to the A. P. or to news media generally. It was a casual statement. "Nobody made any comment at all" about it. It is undisputed that it was quickly dropped. Who made the statement, which jurors or how many probably heard it or specifically at what stage in the proceedings the statement was made was not shown. It was dropped and not again mentioned. The jury discussed and answered the

issues in order. They were 11 to 1 on the issues preceding those relating to malice and exemplary damages. While discussing these issues a remark was made that the full amount should be awarded because the A. P. had plenty of money and it was mentioned "about the Georgia football coach (Wally Butts) collecting." The jurors were in dispute as to whether the statement concerning Butts was ever made. It is without dispute that the statements were made after the jury had already found damages in the sum of $500,000 and were considering the issues on malice and exemplary damages.

The juror who was the last to agree on the $500,000 was the juror who stopped the discussion as to how much money the Press had. He pointed out that it did not make any difference and was out of order. The matter was promptly dropped. The only answers which could have been influenced or affected by such statements, if any, were those to the issues on malice and exemplary damages and these findings of the jury were disregarded by the Court on other grounds in the rendition of judgment.

In order to justify a new trial under Rule 327, T. R. C. P., the movant has the burden of establishing to the satisfaction of the Court that it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted by reason of the alleged jury misconduct. The appellant failed to meet its burden under this rule.

The trial court in its findings of fact and conclusions of law found that none of the statements singly or collectively induced any juror to change an answer or vote differently than he would otherwise have done. That there

was no showing of probable injury to the appellant because of such statements.

"When a trial court hears the testimony of jurors on an issue of misconduct, alleged to have occurred during the jury's deliberation upon its verdict, he is accorded the same latitude in passing upon the credibility of the witnesses and of the weight to be given to their testimony as the jury had upon the trial of the original cause. If there be any inconsistencies or contradictions in the testimony of a witness upon the hearing of a motion for new trial, it rests within the sound discretion of the trial court to harmonize and reconcile such conflicts so far as possible. A juror's testimony upon such hearing may be so contradictory and inconsistent that the trial court in exercising its privilege to pass upon the credibility of the witness may be justified in disregarding his entire testimony. Carl Construction Co. v. Bain, 235 Ky. 833, 32 S. W. (2d) 414." Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S. W. 2d 770 (1932).

In our opinion the alleged improper statements, when viewed in the light of the evidence on the motion for new trial and on the trial of the case and on the record as a whole, did not probably result in injury to defendant. Rules 327 and 434 T. R. C. P.

Having considered each of the appellant's points of error and the cross-points raised by the appellee and having concluded that each should be they are each and all accordingly overruled, and the judgment of the trial court is affirmed.

Per Curiam

July 30, 1965

APPENDIX B

Opinion of the Trial Court

CHAS. J. MURRAY
District Judge
17th Judicial District of Texas
Civil Courts Building
Fort Worth 2, Texas

July 29, 1964

Mr. C. J. Watts, Attorney
219 Couch Drive
Oklahoma City, Oklahoma

Mr. William Andress, Jr., Attorney
627 Fidelity Union Life Building
Dallas 1, Texas

Mr. J. A. Gooch, Attorney
1800 First National Bank Building
Fort Worth, Texas

Gentlemen:

I am entering judgment for the plaintiff on the jury verdict as to special issues one, two, three, five, six, seven and nine, and judgment for the defendant as to issues four, eight, ten and eleven.

At the time the charge to the jury was being prepared, you will recall I expressed the opinion that the alleged libelous statements contained in special issues one and five were statements of fact and not opinion, and, at least as to the statement set out in issue number one, was a charge of a commission of a crime. I submitted the defense of truth as to the statements, and the jury found that they were not substantially true. I believe there is evidence to support these findings. I now have some doubt as to whether I should

have submitted the statement, "Walker assumed command of the crowd," because it does not accuse Walker of the commission of a crime. However, in view of my decision as to special issue number one, this is immaterial.

I submitted issues as to fair comment and good faith (despite my then expressed opinion that they did not constitute defenses to a statement of fact charging the plaintiff with commission of a crime) so as to get jury findings and thus avoid a new trial in the event an appellate court disagreed with my conclusions. Since the jury answered issues two, three, six and seven as they did, I concur with these answers as a matter of law.

Turning now to issues four, eight, ten and eleven, I find there is no evidence to support the jury's answers that there was actual malice by Associated Press in publishing the stories of October 2 and 3, 1962. As you will recall, I also expressed doubt when the charge was being prepared as to whether I should even submit malice and did so only to get a jury finding as I did on the defendant's claimed defenses of fair comment and good faith.

Under Texas Law, the news stories complained of are not of themselves evidence of malice without further proof. Plaintiff claims that malice is shown by the failure of the Associated Press to check the story written by its young reporter, Van Savell, because there was a conflict between the story as written, and as related by Savell to Thomas, an AP employee in its Atlanta office. This alleged conflict related only to whether General Walker led a charge against the federal marshals *before* rather than *after* his speech to the students on the Confederate Monument. I fail to ascertain how the failure to check such a minor discrepancy could be construed as that *entire want of care* which would

amount to a *conscious indifference* to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice. Wisdom and good judgment do not necessarily come with age, nor are they necessarily denied youth. In my opinion New York Times vs. Sullivan, 11 L. ed. 2nd 686; Wortham-Carter Publishing Company vs. Littlepage, 223 SW 1043 and Fitzjarrald vs. Panhandle Publishing Company, 228 SW 2nd 499, support these conclusions.

Plaintiff's (*sic*) urge that this case is comparable to United Press International, Inc. vs, Mohs (Eastland Court of Civil Appeals—unreported) decided on June 26, 1964. I do not agree. In the UPI case, Miller, the night editor of UPI, *knew* that another story had been written at and sent from his UPI office the same night as the second story found to be libelous. The first story contained no statement that Mohs had been ordered arrested and handcuffed; that Mohs had been caught lying or that he had been charged with any offense for landing his plane on White Rock Lake in Dallas. Between the time this first story was written and sent from UPI's office, someone in this office called the police headquarters and learned that as far as the police knew, Mohs had not been charged with any offense. Miller himself, nor anyone in his office, made any attempt to verify the facts of the landing on the lake, other than the call to police headquarters, yet Miller then distributed the second story which said that Mohs had been arrested, handcuffed and charged with violation of a city ordinance for landing on the lake. None of this was true. This second story was based on information received from one DeHarrow. Miller knew the story (the first one) previously written in his office was materially different from the story related by

DeHarrow (the second story). He had many reasons to question the truth of the story attributed to DeHarrow, but made no attempt to check it. The Eastland Court found that these facts raised jury issues "as to whether there was such a want of care as could raise the belief that his acts (and thus the acts of UPI) were the result of a conscious indifference to the rights of Mohs."

As I have stated above, in the Walker case the only discrepancy was whether Walker led a charge before or after his speech on the monument, and not whether he did or did not lead a charge at all. This evidence falls short of that set out in the UPI vs. Mohs opinion.

Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant.

The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.

Freedom of the Press is perhaps the most important protection against tyranny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.

Appendix B
Opinion of the Trial Court

However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case.

Jury findings as to issues four, eight, ten and eleven are set aside, and judgment will be entered for the plaintiff in the amount of $500,000.00 and costs.

Very truly yours,

/s/ CHAS. J. MURRAY
Charles J. Murray, Judge
17th District Court

CJM: oec

APPENDIX C

Portions of Record Raising Constitutional Questions Below

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, THE ASSOCIATED PRESS

Now comes defendant, The Associated Press, and makes and files this its Second Amended Original Answer directed to Plaintiff's Second Amended Petition, and says:

* * *

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15. (Transcript, pp. 21 and 26-35)

III.

By way of further answer herein, and without waiving any of the foregoing pleas, defendant, The Associated Press, would respectfully show to the Court and the jury that the plaintiff is not entitled to recover damages in this cause of any nature for each and all of the following reasons considering all the material facts and circumstances surrounding the plaintiff's alleged claim of damage:

(1)

Plaintiff by his own statements in pleadings filed in this cause has alleged that he resigned his Army Commission in order to speak out and install himself as a leader and public figure. Plaintiff, Edwin A. Walker, voluntarily injected himself into a situation of turmoil, resentment and excitement in Mississippi and of great national publicity and interest everywhere at the time he uttered certain public statements, more fully hereinafter alleged, on television, radio and to newsmen and by his subsequent trip to Jackson, Mississippi, and Oxford, Mississippi, at the very height of such tension and turmoil between September 10 and October 1, 1962.

(2)

The publications complained of in this action insofar as the same consist of comments were and are fair comments made in good faith upon facts which related to matters that were and are affairs of public interest, importance and concern and related to acts and utterances of plaintiff, a public figure, in public places and at public meetings.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(a) The background and events into which Walker injected himself are set forth in the following paragraphs.

(b) On or about May 31, 1961, one James H. Meredith, a colored person, filed a complaint in the United States District Court, Southern District of Mississippi, and on behalf of himself and all other colored students in the State of Mississippi similarly situated, against Charles D. Fair, President of the Board of Trustees of the State Institutions of Higher Learning in the State of Mississippi, and others connected with the University of Mississippi, seeking admission to said University. Thereafter, and on or about February 3, 1962, the United States District Court for the Southern District of Mississippi rendered a decision reported in 202 F. Supp. 224, denying Meredith rights of admission to the University of Mississippi.

Thereupon Meredith appealed to the United States Court of Appeals for the 5th Circuit, at New Orleans, and on or about June 25, 1962, said Court rendered a decision (*305 F. 2d 343*) in which said Court reversed the decision of the United States District Court, thereupon remanding said action, with directions to the United States District Court for the Southern District of Mississippi to grant forthwith the relief prayed for by Meredith and to issue a permanent injunction against each and all of the defendants in said suit and all persons acting in concert with them, as well as all persons having knowledge of said decree, and directing and compelling admission of the said Meredith to the University of Mississippi as a student.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(c) Thereafter, and on or about July 26, 1962, the United States Court of Appeals, 5th Circuit, at New Orleans, vacated certain stay orders signed by Federal Judge Ben F. Cameron, and further directed the U. S. District Court for the Southern District of Mississippi to enter the judgment and the injunction as theretofore ordered (306 F. 2d 374). On July 28, 1962, the said United States Court of Appeals for the 5th Circuit, at New Orleans, also entered a certain interim order to the same effect.

(d) Subsequently Judge Ben F. Cameron issued three other successive stays of execution of the mandate of the United States Court of Appeals, 5th Circuit, which ordered the admission of Meredith to the University of Mississippi, said stays to operate pending an appeal to the Supreme Court of the United States. On or about September 10, 1962, Mr. Justice Black of the U. S. Supreme Court entered an order (1) to vacate the orders of Judge Ben F. Cameron, and (2) that the judgment and mandate of the Court of Appeals for the 5th Circuit at New Orleans should be obeyed and immediately carried out, and (3) that pending any appeal, the parties were enjoined from taking any steps to prevent enforcement of the Court of Appeals, 5th Circuit, judgment and mandate.

(e) On or about September 13, 1962, the United States Court for the Southern District of Mississippi as directed by the U. S. Court of Appeals, 5th Circuit, at New Orleans, issued an injunction and ordered that the said Meredith be admitted to the University of Mississippi forthwith.

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(f) On or about September 20, 1962, the said Meredith appeared on the campus of the University of Mississippi accompained by U. S. Marshals for the purpose of registering as a student pursuant to the orders of the United States Courts above set forth, but the Governor of Mississippi, the Honorable Ross Barnett, then and there rejected the application of the said Meredith to the University of Mississippi.

(g) Again, and on or about September 25, 1962, the said Meredith appeared at the offices of the Board of Trustees of State Institutions of Higher Learning, at Jackson, Mississippi, for the purpose of registering as a student pursuant to the prior orders of the United States Courts. When Meredith sought to enter the offices, as aforesaid, the Honorable Ross Barnett, Governor of the State of Mississippi, and certain officers acting under his direction, again barred the said Meredith and denied him admission to the University of Mississippi. On or about September 26, 1962, the said Meredith sought to enter the campus of the University of Mississippi where he was barred from so entering by the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, and certain state police acting under his orders, thereby denying the aforesaid Meredith admission to the University of Mississippi. On September 25, 1962, the United States Court of Appeals for the 5th Circuit, at New Orleans, entered another restraining order against the Honorable Ross Barnett, Governor of the State of Mississippi, and other named officials in said State, and all persons in active concert or in partic-

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ipation therewith, from interfering with or obstructing in any manner the admission of the said Meredith to the University of Mississippi.

(h) Thereafter, on the same day, the United States Court of Appeals for the 5th Circuit issued its orders requiring the aforesaid Ross Barnett, Governor of the State of Mississippi, and the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, to appear before said Court and show cause why they should not be held in civil contempt for willfully disobeying the orders of the United States Courts and barring the admission of Meredith to the University of Mississippi, and on or about September 28 the said Court entered its judgment and order adjudging the said Ross Barnett and Paul B. Johnson, Jr. guilty of civil contempt and levied fines to continue on a daily basis unless on or before October 2, the said Governor and Lt. Governor should show to the Court that they had fully complied with all restraining orders of all the United States Courts, and that they had notified enforcement officers in the State of Mississippi to cease and desist from interfering with the orders of the aforesaid Courts and to cooperate with the officers and agents of the United States in the execution of all orders and injunctions to the end that Meredith would be permitted to register as a student at the University of Mississippi.

(i) That the attempts of the said James H. Meredith to enter the University of Mississippi and the actions of the authorities in Mississippi preventing his entry, and the actions of the various United States Courts in making and

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

entering said injunctions and mandates, as above set forth in the preceding paragraphs, had all been given wide publicity throughout the United States by newspapers, radio and television, and were matters of general knowledge and affairs of great public interest and concern prior to September 30, 1962. The plaintiff in this cause knew, or reasonably should have known of the court orders, injunctions and mandates herein pleaded based on knowledge acquired from an ordinary reading of the newspapers and reports from other news media and he also knew of the defiance of Governor Ross Barnett, Governor of the State of Mississippi, and of the Lt. Governor towards the fulfillment of the court orders of the United States Courts above set forth.

(3)

The plaintiff, the former Major General of the Army of the United States, following his resignation therefrom for the stated purpose of speaking out in protest as a private citizen, had made frequent public statements and had made an unsuccessful venture into politics as a candidate for Governor of the State of Texas.

Plaintiff was a well known public figure because of his long military career, his commands and duties with the Army of the United States, his role as Commanding General of the troops in the Little Rock, Arkansas, integration crisis in 1957, his resignation from the Army of the United States with the rank of Major General with the avowed statement and purpose of being able to protest and take a

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

stand and position in matters of public interest and affairs, and his candidacy for Governor of the State of Texas in 1962. With such background as a public figure, the plaintiff, during the critical times involved herein, between September 10, 1962 and October 1, 1962, injected himself into the Mississippi crisis with the request and/or notice for frequent press releases or conferences, from Dallas, Texas, Jackson and Oxford, Mississippi, and thereby invited comment as to his activities. His public utterances and statements were all in protest and opposition to duly constituted governmental and judicial authority and relating to the admission of Meredith to the University of Mississippi, and were in violation of the injunctive decrees issued by the United States Courts, as herein set forth, and in favor of the positions then being taken by Governor Ross Barnett and other officials in Mississippi who were seeking to obstruct Meredith's entry as a student at the University of Mississippi.

Notwithstanding such knowledge, the plaintiff by radio and other news media, beginning on or about September 27, 1962, and thereafter, called for Americans 10,000 strong from every State in the Union to go to Mississippi and rally behind Governor Barnett in his stand against admitting Meredith, saying, among other things, "It is now or never. Bring your flag, your tent and your skillet."

The plaintiff, Edwin A. Walker, further injected himself into the crisis in Mississippi by proceeding to Jackson, Mississippi, on or about September 29, 1962, when he made further press releases and statements, and by then proceed-

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ing to Oxford, Miss., where he held a further press conference on September 30, 1962, at all of which he reiterated his previous position.

At about 4:30 P. M. on the afternoon of September 30, 1962, the U. S. Marshals under orders to enforce the judgments, injunctions and mandates of the United States Courts for the enrollment of Meredith as a student at the University of Mississippi, proceeded on to the campus at Oxford, setting up a ring substantially around or in front of the Lyceum Building on the campus. At about the same time, Meredith was escorted to another part of the campus. Immediately after the arrival of the Marshals, students and others began to congregate in the Circle and in the streets adjacent to the Lyceum Building, facing the Marshals, at first taunting them with jeers and remarks, subsequently throwing lighted cigarettes and missiles at the Marshals and at the vehicles in which they arrived. The temper of the crowd became worse and more unruly, and at about 8:00 o'clock P. M. tear gas was fired. Thereafter, the rioting increased by the hour as the night progressed, resulting in injuries to many persons and much property damage to personal property, automobiles and to the campus itself.

While the plaintiff was in Oxford, Mississippi, and on or about September 30, 1962, at about 8:00 o'clock P. M., a proclamation was made by the then President of the United States to the effect that the Governor of the State of Mississippi and certain other officials and other persons had been and were willfully opposing and obstructing the enforcement of the injunctions, orders and judgments of the United

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

States Courts and the President thereupon commanded all persons engaged in such obstruction of court orders to cease and desist and to disperse and retire peaceably forthwith. In addition, the President of the United States made a TV and radio appearance on the same date at about 8 o'clock P. M. in which he sought in substance the same compliance with court orders. Notwithstanding said proclamation of the President of the United States and the appeal of the President, the said plaintiff immediately thereafter proceeded to the campus of the University of Mississippi, at Oxford, arriving there at approximately 8:45 P. M. on the night of September 30 and stayed on said campus for a period of several hours thereafter. Following the widespread dissemination of plaintiff Walker's statements in the press, TV and radio, not only in Mississippi but elsewhere, the plaintiff's very presence on the campus tended to increase the emotional excitement, the explosive condition, the courage, fervor and rage of the mob, thereby increasing the dangers and damage from what at first had been a demonstration, to a riot, mob violence, and to more organized and determined attacks upon the U. S. Marshals. At the time of the arrival of the plaintiff on the campus, there had already been violence and injury to persons and property, all of which was known to the plaintiff or should have been known in the exercise of ordinary observation on the campus. On the occasion in question, the plaintiff was welcomed by the crowd as its leader and he then and there made a speech which further excited and enraged the mob and, at least on one occasion, the plaintiff did proceed as a part of a

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Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

generalized movement towards the Marshals at the Lyceum Building accompanied or followed by a crowd of students and others shouting and yelling defiance, some of whom when close enough to the Marshals hurled missiles toward them. On many occasions during the night in question, plaintiff would move back and forth through the Circle (an area in the vicinity of and near the front of the Lyceum Building where the Marshals were stationed). He also offered advice on how to make the tear gas bombs ineffective, and otherwise complimented, encouraged and urged on the crowd of rioters to further protest and to keep up what they were doing, all of which resulted in continual opposition to duly constituted governmental and judicial authority including violation of the injunctive decrees heretofore referred to.

Therefore, each and all of the statements complained of by plaintiff herein are fair comment and are privileged.

* * *

V.

By way of further answer herein and adopting all the allegations heretofore made herein, this defendant, The Associated Press, denies that any malice was involved or intended on the part of this defendant in the publication of any one or all of the articles or dispatches complained of, but was occasioned only by an effort in good faith—actuated solely by a sense of duty growing out of the occasion—to report to its members and to the public what this defendant believed to be an accurate report of the plaintiff's activities in the Mississippi crisis, and to make fair comment thereon, all of which is privileged.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

VI.

By way of further answer herein and adopting all of the allegations heretofore made herein, this defendant denies that it was or is guilty of any conduct which would authorize the allowance of any damages, punitive or otherwise, but would further say that the allowance of any damages herein would amount to a restraint and deterrent to the publication of news and the freedom of the press as required by the First and Fourteenth Amendments to the Constitution of the United States. The publications complained of were published and circulated by the defendant among the general public; the information contained therein is true; it concerns the plaintiff, a public figure, and was related to public affairs and matters of great public concern, and the publication was made so that the public should be informed, and the same was made in good faith and without malice, so that the same is privileged. Further, the allowance of any damages under and by virtue of any rule of law as applied by the courts of the State of Texas would be in violation of the foregoing Constitutional safeguards and would be constitutionally deficient for failure to permit freedom of speech and press which are guaranteed by the Constitution of the United States. The allowance of any damages herein also would be violative of the Constitution of the State of Texas which prohibits the abridgement of the freedom of the press in Article I, Paragraph 8 thereof.

APPENDIX C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

ASSOCIATED PRESS

DEFENDANT'S MOTION TO DISREGARD THE JURY'S VERDICT AND FOR JUDGMENT NOTWITHSTANDING SAID VERDICT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, Associated Press, and moves the Court to set aside and disregard the verdict of the jury and each and every finding therein, and to render judgment for the defendant and against the plaintiff notwithstanding such verdict, and as grounds therefor would respectfully show as follows:

* * *

Appendix C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

16.

Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Defendant's Original Motion for New Trial, p. 1
(Transcript, p. 73)

IN THE

DISTRICT COURT OF
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT
No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant Associated Press, after entry of judgment herein on August 3, 1964, and makes and files this its Orginal Motion for New Trial, and moves the Court to set aside the judgment heretofore rendered against it and to grant a new trial herein, upon the following grounds, to-wit:

1.

The Court erred in overruling the motion for instructed verdict made by defendant after plaintiff had rested.

2.

The Court erred in overruling the motion for instructed verdict made by defendant after both sides had rested.

3.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of defendant's motion to disregard the jury's verdict, and for judgment notwithstanding said verdict.

APPENDIX C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C.

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, The Associated Press, and with leave of the Court first had and obtained makes and files this its Amended Motion for New Trial, and would respectfully show as follows:

I.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of Defendant's Motion to Disregard the Jury's Verdict and for Judgment Nothwithstand-

Appendix C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

ing such Verdict for each and all of the reasons therein set forth, which said Grounds read as follows:

* * *

(16) Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Brief of Appellant The Associated Press in the Texas Court of Civil Appeals, pp. 1, 9 and 73-85

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICAL DISTRICT OF TEXAS
AT FORT WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

FROM THE 17TH DISTRICT COURT OF
TARRANT COUNTY, TEXAS

APPELLANT'S BRIEF

* * *

POINTS OF ERROR

* * *

5.

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder.

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(Page 73-85)

* * *

FIFTH POINT OF ERROR (Restated)

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder. (Germane to Ground I(16) of the Amended Motion for New Trial).

ARGUMENT AND AUTHORITIES

Wide-Open Debate—A Profound National Commitment

In a series of public statements, already quoted in this brief, General Walker appealed to the world at large to rise and stand by Governor Barnett in Mississippi. When we are thus solicited by radio and television to help defy a court order and are informed that the Supreme Court of the United States consists of anti-Christ conspirators who have betrayed the Nation, we are not to suppose that this is double-barreled insurrection and calumny of the most dangerous and irresponsible sort. It is only General Walker exercising his constitutional rights to say what he pleases about others.

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But any comment on his activities provokes the indignant cry of "foul", and it is then that we are to forget and ignore the public battle of national controversy into which he charged, calling with caustic invective for others to follow, and are to concentrate instead on the wounds with which he says he emerged from it.

And it is just such a claim to unilateral privilege of expression that is repugnant to, and underscores the wisdom of, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R. 2d 1412; *Garrison* v. *Louisiana,* . . . . . U. S. . . . . , 13 L. Ed. 125, 85 S. Ct. . . . . .

In the *Times* and *Garrison* cases, supra, the Supreme Court of the United States in 1964 held that truth may not be the subject of either civil or criminal sanctions where a discussion of public affairs is concerned. The court recognized that erroneous statement is inevitable in free debate, that it must be protected if the freedoms of expression are to survive, and that only false statements made with a high degree of awareness of their probable falsity may be the subject of either civil or criminal sanctions.

In the *Garrison* case, the Supreme Court, in applying its decision in the *Times* case to a criminal libel conviction, said, at page 133:

> ". . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since . . . erroneous statement is inevitable in free debate, and . . . it must be pro-

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> tected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .,' 376 U.S. at 271-272, 11 L. ed. 2d at 701, 95 ALR 2d 1412, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."

In the case at bar, there is no evidence of malice, and the trial court correctly so held. The court erred, however, in refusing to apply the *Times* rule and render judgment for defendant regardless of the jury findings as to the truth of the statements in question. The trial judge was of the view that the *Times* rule is limited to statements about public officials, and hence did not apply to the case at bar (Supp. Tr.). In this conclusion, we respectfully submit, the court erred.

The decision of the Supreme Court in *Garrison* v. *Louisiana*, rendered in November of 1964, was not before the trial court when it rendered judgment in the present action.

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials since the persons alleged to have been libeled in those cases were public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

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The touchstone of the *Times* and *Garrison* decisions was the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses. Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing

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> majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the individual's claim for libel is pre-empted by the paramount public need for uninhibited debate on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 98 P. 281, leaves no doubt that the decision ex-

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tends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723.

In *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding, that although the public official is the strongest case for the constitutional compulsion of the *Times* privilege with respect to the discussion of matters of public importance and concern, a candidate for public office would seem an inevitable candidate for extension, and that once that extension was made, the participant in public debate on an issue of grave public concern would be next in line.

In its opinion, the court said, at page 671:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot

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> prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely, but without malice, that in saying all this Dr. Pauling was following the Communist line."

In *Gilberg* v. *Goffi*, 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.*, (Superior Court of Alaska. Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate."

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The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public figure (S.F. 331, 486, 516) and a recent candidate for public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

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If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy. As we have pointed out on pages 18-20 of this brief, prior to September 30, 1962 the U.S. Court of Appeals had rendered its judgment ordering the admission of James H. Meredith to the University of Mississippi. In furtherance thereof an injunction had been issued enjoining the school officials and all persons acting in concert with them, as well as all persons having knowledge of such decree, from interfering with Meredith's admission.

Despite these restraining orders, Governor Barnett continued to oppose the admission of Meredith to the University.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which

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he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the *area of public debate and to those who participate in it.*

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it. Such an anomaly can hardly be said to comport with the principle of uninhibited debate.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule.* If the people are to be free to criticize the Government and those who comprise it, they must be free to

criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could conceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *Shelton* v. *Tucker,* 364 U.S. 470 (1960); *Speiser* v. *Randall,* 357 U.S. 513 (1958).

Finally, on this point, the import of the trial court's opinion is that though free press is important, so is accuracy, and that the need for accuracy "imposes a great duty and responsibility" on the press, in default of the discharge of which it forfeits its constitutional protection. (Supp. Tr.) We were unable to ascertain any rational basis for distingu-

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ishing between "irresponsibility"—short of actual malice—in reporting on public officials and in reporting on other participants in public debate on public issues.

Moreover, while accuracy and responsibility of reporting are unquestionably desirable, they are not prerequisites to First Amendment protection. As the court said in *New York Times*:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially not one that puts the burden of proving truth on the speaker. * * * The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' "

The trial court's thesis would be persuasive if the press operated by license of the Government. The argument, however, overlooks the fact that we are concerned here with basic and fundamental constitutional rights that may not be forfeited, like a taxicab franchise, upon a supposed showing that a "great duty and responsibility" have not been discharged.

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No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

AT FORTH WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

REPLY BRIEF FOR APPELLANT

May It Please the Court:

* * *

Among other irrelevances, plaintiff seeks to bolster his argument on this and other points by revealing to the Court that defendant is a corporation that makes money, a state of affairs something less, we believe, than sinister, even if it were accurate, which it is not. Should the Court be interested in the organization and financial situation of the defendant, the cases in the margin explain that it is a member-

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ship corporation, whose members are the newspapers that subscribe to its services, and that it is not operated for profit.[1]

The point is really immaterial, however, because even if The Associated Press were a profit making corporation, that would have absolutely no bearing on any of the points involved in this litigation. Although the point plaintiff is trying to make is admittedly fuzzy in this regard, apparently plaintiff is attempting to infer that anyone who makes a profit from distributing news must be denied both the fair comment defense and the constitutional protection. Though, of course most everything that is written or published, including most of plaintiff's speeches, is for profit and, indeed, some publications even enjoy copyright protection, those facts have never had any bearing on the fair comment defense and the constitutional protection. Newspapers are sold like any other commodity, yet even plaintiff concedes that they are protected by Article 5432 and the Constitution. Just how or why it is the plaintiff regards The Associated Press as being in some unique category we cannot understand, and plaintiff does not explain. As the Supreme Court of the United States said in *New York Times* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."

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[1] *National Labor Relations Board* v. *Associated Press*, 85 F. 2d 56, affirmed 301 U. S. 103, 81 L. Ed. 953; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183; the Opinion of the District Court in *United States* v. *Associated Press*, 52 F. Supp. 362, which was affirmed in 326 U. S. 1, 89 L. Ed. 2013; and *International News Service* v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211.

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So, in the instant case, the fact, if it be a fact, that The Associated Press was paid for its news releases is as immaterial as is the fact that newspaper reporters are paid by the newspaper, or that the author of a magazine article is paid by the magazine.

If, as plaintiff would have it (Brief 3), defendant is in the same category as the supplier of printing ink to the newspaper, then of course defendant, like the ink supplier, would not be responsible for the publication by the newspaper of which plaintiff complains.

* * *

The Constitutional Protection

In his argument on the constitutional question, plaintiff continues his insistence that the defendant is without the scope of the First and Fourteenth Amendment protection because it receives compensation for its news releases. This point has already been discussed earlier in this reply, and we will not here elaborate on it beyond pointing out that the fact that news may be treated as a commodity, for some purposes at least, is as irrelevant here as is the fact that newspapers, books, and magazines are also commodities.

At page 47 of his brief, appellee reminds us again that The Associated Press is not engaged in the publication of anything, which again is completely irrelevant to the constitutional protection that is afforded to free expression of thought. That The Associated Press is the author, rather than the publisher, of the two reports in question has nothing to do with the constitutional questions involved.

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In our main brief, we attempted to analyze the *Times* and *Garrison* cases[2], and we predicated our argument upon the *reasoning* employed by the court in both cases. As we there pointed out, the underlying basis for both decisions was the premise that the purpose and philosophy of the First Amendment was to insure free and uninhibited exchange of ideas on issues of public importance and concern.

In response, plaintiff merely extracts from each opinion every reference to public officials and official conduct and parrots them in his brief. Plaintiff, of course, is entitled to argue that both decisions are inapplicable here, but the argument finds no support in the fact that the phrases "public officials" and "official conduct" appear frequently in the opinions. Such an argument is roughly analogous to contending that a case involving a super market has no application to a department store because of the frequent references in the opinion to super markets. We respectfully submit that one must at least examine the *reasoning* in any case to determine its applicability in another, and that plaintiff in this case has done nothing more than emphasize that public officials were involved in both the *Times* and *Garrison* cases, which hardly requires the three pages of brief that plaintiff devotes to it.

Plaintiff not only utterly ignores the rationale and the basis for the holdings in both cases, he affirmatively misstates the holding in *Garrison* when he states on page 51 of his brief that the court there held that "neither the court nor

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[2]*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412; *Garrison* v. *Louisiana*, ... U. S. ...., 13 L. Ed. 125, 85 S. Ct.

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the Constitution protected libelous publications, even in the case of public officials." It is obvious from a cursory inspection of either opinion that the court in each case held that the Constitution does protect libelous publications made about public officials, and indeed that that was the precise holding in each case. The only limitation suggested by the majority in both cases was that the Constitution does not protect *malicious* false statements, i.e., "false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* . . ."; *Garrison* at page 133.

Moreover, in neither case did the court "draw the line" at public officials, as plaintiff tells us at page 53 of his brief, nor was the constitutional protection "strictly limited" to public officials, as plaintiff asserts at page 52 of his brief. Obviously, the court was not required to draw any lines because only public officials were involved in both cases. Courts draw lines in cases that involve situations determined to be beyond the scope of the concept involved.

We respectfully submit that this Court cannot read the opinions in *Times* and *Garrison*, and particularly the thorough and painstaking analysis of the historical background of free speech and press, without being deeply impressed with the Supreme Court's zealous determination to insure the preservation of one of the most fundamental and sacred safeguards that forms part of the very bedrock of this Republic. It is scarcely conceivable that one could study those opinions and find no more substance, no more depth, and no more principle in them than plaintiff professes in his brief to have discovered. That which plaintiff has missed

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has not escaped the attention of the courts in *Pauling v. News Syndicate Co.*, 335 F. 2d 659 (2 Cir. 1964), *Gilberg v. Goffi*, 251 NYS 2d 823, and *Pearson v. Fairbanks Publishing Co., Inc.* (not yet reported), all cited in our main brief.

The *Times* and *Garrison* opinions expound the Supreme Court's recognition of the absolute necessity for free and uninhibited exchanges of ideas on matters of public concern, particularly those involving government and the conduct of government, no matter how erroneous the ideas may be, in the absence of the known and deliberate lie. Stable self-government depends upon the freedom to comment on matters of public concern and persons who attempt to influence the course and destiny of the government, whether they be public officials or public interlopers. Such a concept does not and could not embrace baseball players, Beatles, and Fat Stock Show winners, as plaintiff suggests at page 52 of his brief. Being merely in the public eye, as plaintiff puts it, is not the same at all as attempting publicly to rally public support in a controversy involving the very essence of the respective powers and authorities of the United States, a State and the Federal Courts.

Obviously, a public official by virtue of his office can and does have a direct influence upon the government, but to contend that public officials are the only ones in that position is to ignore reality.

As the Second Circuit Court of Appeals observed in the *Pauling* case, it would be anomalous to hold that a newspaper which reported falsely, but without malice, that a public official had been bribed would not be liable for de-

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famation to the official, but would be liable to the person who reportedly bribed him.

In the instant case, plaintiff summoned the world at large to join plaintiff in rising to a stand beside Governor Barnett. There could be no possible reason or consistency whatever, and plaintiff suggests none, for holding that statements about Governor Barnett are within the *Times* rule, but that statements about those who rise to stand beside him are not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, and the potential influence and effect on the outcome of the controversy is the same.

To illustrate the point we are making, suppose that the Governor of a State should determine that the State would secede from the Union. Surely private citizens who publicly solicited and sought to raise armies in support of such a movement would be subject to the same law of libel as the Governor.

Perhaps we have overlabored the point, but we trust that this Court will recognize that there is more involved here than plaintiff's assertion that we are contending for some sort of license to "peddle prevarication with impunity" (Brief 56), or that "anyone can be vilified for free". We are urging this Court's serious consideration of the constitutional thesis which applies the same law of libel to those who actively and publicly assist public officials as is applied to the public officials.

APPENDIX C

Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

AT FORT WORTH

THE ASSOCIATED PRESS,
Appellant,

vs.

EDWIN A. WALKER,
Appellee.

From the 17th District Court
of Tarrant County, Texas

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now comes The Associated Press, the appellant in the above entitled and numbered cause, and respectfully moves the Court to set aside its judgment and opinion rendered herein on the 30th day of July, 1965, and to grant appellant

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Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

a rehearing, and upon such rehearing to reverse the judgment of the District Court and render judgment for appellant in all respects, or, in the alternative, to remand the case for a new trial, and as grounds therefor respectfully says:

* * *

The Court of Civil Appeals erred in overruling Appellant's Fifth Point of Error, which reads as follows:

> "The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder."

APPENDIX C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

No. A-11,069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Application for Writ of Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Forth Worth, to correct errors of law in the judgment and opinion of said Court in Cause No. 16,624, styled The Associated Press, Appellant v. Edwin A. Walker, Appellee, wherein the Court of Civil Appeals affirmed the judgment of the 17th District Court of Tarrant County, Texas.

Nomenclature

In this Application the parties will be designated either by name or as they appeared in the trial court.

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Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Statement of The Case

The *per curiam* opinion of the Fort Worth Court, affirming a half million dollar judgment against defendant, correctly states the nature and the result of this libel suit, and it accurately quotes from *Texas Jurisprudence* and the *Texas Law Review.* It ignores virtually all of the facts, most of which are undisputed, and in so doing fails even to recognize, much less analyze, the serious Federal Constitutional question that was presented. The length of this Application is due in large part to the necessity for setting out the undisputed facts that are omitted in the opinion of the court below.

The two news stories in question are correctly set forth in the opinion below. They were prepared by defendant and published by the Fort Worth Star-Telegram. They described plaintiff's participation in a riot of several thousand persons that occurred during most of the evening of Sunday, September 30, 1962, and the pre-dawn hours of the following Monday, on the campus of the University of Mississippi, at Oxford, in opposition to the efforts of United States marshals to secure the enrollment of a Negro in that university, pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit.

The plaintiff's presence in the midst of the riot for more than four hours is undisputed, as is also the incessant radio and television appeal with which he heralded his coming and summoned 500,000 volunteers to help protect the Nation against enforcement of the law of the land by assisting the Governor of Mississippi in pursuing a course

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that had already led him, to plaintiff's knowledge, in contempt of the Fifth Circuit Court for having personally and physically obstructed the execution of its mandate.

In this Application we shall demonstrate, among other things, that the evidence conclusively established, as a matter of law, (1) that both statements* were substantially true; (2) that both were fair comment, and thus privileged by applicable Texas statutes; and (3) that in any event the defendant's news releases describing, as they did, a state of affairs in Mississippi that was of grave national interest and concern, involving issues of the utmost public importance, are protected by the First and Fourteenth Amendments to the Constitution of the United States against the claim of libel by this particular plaintiff, who the evidence conclusively establishes was, and for considerable time had been, a vociferous, publicity-seeking, prominent political figure and who, with clamorous public fanfare in advance, deliberately injected himself and his sentiments into the fray in Mississippi and into the limelight of public scrutiny that he knew was focused upon it.

* * *

Points of Error Relied Upon

1.

The News reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and

*i.e., the "charge" and "command" statements as quoted in the opinion below.

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Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary.

* * *

First Point of Error Restated

1.

The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary. (Germane to Ground 5 of Defendant's Motion for Rehearing.)

Preliminary Statement

Ordinarily, accepted briefing practice would dictate that a resume of the pertinent facts should precede the argument and authorities, because the Court, being generally familiar with the law, can readily determine the nature of the contention from the point of error, and should first have the facts in mind before attempting to apply the law.

Here, however, the point of error raises questions involving Federal Constitutional limitations in the field of libel under the First and Fourteenth Amendments that have

been announced only recently by the Supreme Court of the United States, and accordingly this is a case of first impression in this Court. In addition, we have here the rare instance in which the same point has been decided by another court in a case involving the same plaintiff and the same subject matter.

We believe, therefore, that the Constitutional issue that we presented in the courts below, and are raising here, can best be demonstrated at the outset by quoting substantial portions of the opinion of the United States District Court, Western District of Kentucky, in *Walker* v. *Courier-Journal et al*, . . . F. Supp. . . , decided September 23, 1965.* We think more extensive quotation than usual is warranted here and will be helpful, because the case is not yet reported, and also because it is more than directly in point—it is virtually the same case, except insofar as the question of actual malice is concerned. The defendant here was not a party to that case, but the news reports are substantially the same. We respectfully ask the Court's indulgence in this departure from ordinary practice, believing it will be helpful to the Court in understanding the issue. Argument and additional authorities will follow.

The following is quoted from the opinion of the Court in *Walker* v. *Courier-Journal et al:*

> "This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

*The entire opinion is reproduced in the Appendix.

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"On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

"The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

"The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a 'trouble maker', that he was 'participating' in the occurrences taking place in Oxford, all in the context

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used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

"This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

"Following the filing of this action the Supreme Court of the United States handed down its Opinion in *New York Times Company* v. *Sullivan,* 376 U.S. 254 (October Term, 1963) wherein said Court in legal effect federally preempted the law of libel in matters of 'grave national concern' involving 'public officials' with the announced doctrine that

> '. . . Constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was or not.'

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"There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Government were locked in conflict as to the educational integration of the races was a matter of 'grave national concern.' The Supreme Court of the United States has classified the integration struggle as 'one of the major political issues of our time.'

"Thus, it can be seen that had the Plaintiff, Walker, been a 'public official' at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with 'actual malice', that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

"However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of 'actual malice' in the *Times* case, the Supreme Court quoted with approval from the case of *Coleman* vs. *McLennan*, 78 Kans. 711, 98 P. 281 (1908) as follows:

> 'This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office.' (Emphasis added)

and in conclusion the Court stated:

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> 'We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.' (Page 283)

"In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> 'We have no occasion here . . . to specify categories of persons who would or would not be included.'

"From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to 'public officials' only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to 'public officials' only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this Court as

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giving special significance to the broad language adopted in arriving at its decision.

"The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

"Had not Plaintiff thereby become a 'public man'? Could he not have reasonably foreseen that his being a person of 'political prominence' his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported? This Court so believes.

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"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in *Sullivan* v. *New York Times* is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.'

"My application of the doctrine of *New York Times* v. *Sullivan* to the facts here in issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also *Gilberg* v. *Goffi,* 251 N.Y.S. 2d 823 (1964); *Pearson* v. *Fairbanks Publishing Co.,* (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, *Freedom of the Press and the Law of Libel,* 49 Cornell L.Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

"I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps 'plowing new ground' in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the

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Times Opinion which I believe to be a '. . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open . . .' Public debate cannot be 'uninhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not 'public officials') who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

"This is particularly so here where open riot and turmoil with accompanying destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night."

The Federal Court then proceeded to consider the question of the existence of actual malice on the part of the defendants and, concluding that there was none, dismissed the complaint with prejudice.

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In marked contrast to the logical and analytical treatment of this serious, and we believe determinative, Constitutional question by the Federal Court in the above case is the opinion of the Fort Worth Court, wherein that court, presented with the same argument, authorities and set of facts, took no apparent notice of the significant, recent holdings of the Supreme Court of the United States, but resurrected instead, as the basis for its summary disposal of the question, a 1929 Law Review article written by a tort professor on the subject of fair comment. The critical facts of which the Federal Court took judicial notice upon motion to dismiss were not noticed at all by the Fort Worth Court, though they were undisputed in the record before it. This signal failure of the Texas intermediate court to come to grips with a crucial and timely Constitutional question requires, we respectfully submit, that this Court grant the writ of error upon the basis of the undisputed facts and the authorities that now follow.

The Undisputed Evidence

Background of the Mississippi Crisis

On June 25, 1962, the United States Court of Appeals for the Fifth Circuit, reversing the District Court for the Southern District of Mississippi, directed the lower court to issue an injunction compelling the admission of James H. Meredith, a Negro, into the University of Mississippi. *Meredith* v. *Fair,* 305 F. 2d 343. The history of that litigation is set out in some detail in the opinion by Judge Wisdom. On July 17 the mandate of the Circuit Court issued,

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and on July 18 Judge Cameron of that Court signed an order staying the execution and enforcement of the mandate. (Def. Ex. 3).

On July 27, 1962, the Fifth Circuit Court entered an order vacating the stay order theretofore signed by Judge Cameron, and recalling the mandate for the purpose of clarifying it by amending it to provide that the injunction be issued *forthwith* by the District Court compelling the immediate admission of Meredith to the University (Def. Ex. 3).

On September 10, 1962, Associate Justice Hugo L. Black of the Supreme Court of the United States entered an order which (1) vacated Judge Cameron's stay order of July 18, as well as subsequent stay orders of July 28, July 31, and August 6, 1962, by the same circuit judge, and (2) ordered that the school officials be enjoined from preventing the enforcement of the Fifth Circuit's mandate (Def. Ex. 4). On September 13, 1962, the District Court for the Southern District of Mississippi, pursuant to the mandate of the Fifth Circuit and the mandate of Mr. Justice Black, granted permanent injunction commanding the immediate admission of Meredith into the University and enjoining the school officials from interfering with his admission (Def. Ex. 5).

On September 28, 1962, the Fifth Circuit Court, sitting *en banc,* rendered a judgment holding Ross R. Barnett, the Governor of Mississippi, in civil contempt of that court, and in the judgment recited findings of fact to the effect (1) that since the issuance of the injunction on September 13,

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1962, Ross R. Barnett, as Governor of the State of Mississippi, had issued a series of proclamations calling upon all officials of the State to prevent and obstruct the carrying out of the court orders; (2) that on September 25, 1962, the Fifth Circuit Court had entered temporary restraining orders restraining Barnett from interfering with or obstructing the court's order and the injunction of the District Court; (3) that at approximately 4:30 P.M. on September 25, 1962, the said Barnett, having full knowledge of the Fifth Circuit Court's temporary restraining orders, had confronted Meredith when he sought to enter the office where he was to enroll, had deliberately prevented him from entering, and had told him that his application for enrollment was denied by Barnett; and (4) that on September 26, 1962, Meredith sought to enter the campus of the University of Mississippi at Oxford, where he was denied entry by the Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Governor Barnett (Def. Ex. 6).

According to the plaintiff's testimony and that of his witnesses, Governor Barnett, despite the restraining orders and the contempt judgment, was continuing to oppose the entry of Meredith into the University at the time of the riot on the campus, and his instructions to that effect, directed to the local sheriffs and the Mississippi Highway Patrol, continued in force (S.F. 840-841). According to plaintiff's evidence, the orders of the Fifth Circuit and the actions of Governor Barnett in opposition thereto were widely discussed (S.F. 759) and were known to plaintiff (S.F. 760-762, 809-810), and the integration question was a subject of national interest and national controversy (S.F. 759).

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Background of General Walker

According to the testimony of the plaintiff: He is a graduate of the United States Military Academy (S.F. 730, 734), and, until his resignation from the Army in 1961, he was a career soldier, having risen to the rank of Major General (S.F. 734). In 1957 he commanded the federal troops that were called into Little Rock, Arkansas, by President Eisenhower to enforce the integration of the Little Rock High School, as ordered by the Federal Courts (S.F. 611, 739). In 1959 he was ordered to Germany to assume command of the 24th Infantry Division (S.F. 617). While in Germany he was involved in an incident that resulted in his receiving national publicity (S.F. 617). He was relieved of command, and an investigation was conducted, which resulted in neither charges nor punishment (S.F. 620). Thereafter, the Army wanted him to retire, but ininstead he resigned (S.F. 740). By resigning, instead of retiring, he forfeited benefits amounting to approximately $15,000 per year (S.F. 626, 740). His purpose in resigning, thereby losing his retirement benefits, was to be able to speak out on matters of public importance and to be free to say whatever he chose without any strings attached (S.F. 741). At the time of his resignation in the fall of 1961 he received considerable publicity concerning his resignation and the events leading up thereto (S.F. 743). He decided to speak and talk to people, and he expected to receive some kind of remuneration for his speaking engagements (S.F. 743).

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His first speech after leaving the Army was in Dallas in December, 1961, for which he received remuneration (S.F. 744, 745). Since then he has been making speeches all over the country and there is a constant demand on his time for speaking engagements (S.F. 745).

He has been a member of the John Birch Society since 1958 or 1959 (S.F.749). Since his resignation from the Army he has also done a good deal of writing, and he sells what he writes (S.F. 749). He and another person operate the American Eagle Publishing Company in Dallas, which has some 250 or 300 regular subscribers, and the publications are sent to others who plaintiff feels might be interested (S.F. 750-751). His followers include an organization known as "Friends of Walker" throughout the Nation, and some of these groups make financial contributions to him (S.F. 751-752).

In the spring of 1962 he announced his candidacy for Governor of Texas and made an extensive campaign, receiving broad press coverage concerning his ideologies and ideas about the governorship (S.F. 752-753). Although the news media does not always print everything he has to say, he has been able, basically, to get press conferences whenever he wanted them. (S.F. 758).

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General Walker and the Mississippi Crisis

(The Crisis Did Not Come to Him)

In the latter part of September, 1962, as it became apparent that a crisis was developing over the admission of Meredith to the University, General Walker began to move. From his home in Dallas on Wednesday, September 26, 1962, he issued over Radio Station KWKH at Shreveport, Louisiana, the following statement to the world at large:

> **"It is time to move. We have talked, listened, and been pushed around far too much by the anti-Christ Supreme Court. Rise . . . to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every State in the Union. Rally to the cause of freedom. The Battle Cry of the Republic. Barnett, Yes! Castro, No! Bring your flag, your tent, and your skillet. It's time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi.**
>
> **"The last time—in such a situation—I was on the wrong side. That was in Little Rock, Arkansas in 1957 and 1958. This time I am out of uniform and I am on the right side. And I will be there." (S.F. 778-780; Def. Ex. 7).**

His selection of the Shreveport station was no happenstance. Broadcasts from the station reached over into Mississippi. (S.F. 834).

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The next night, September 27, 1962, General Walker appeared on television at his home in Dallas and reiterated substantially the same statement as quoted above (S.F. 787). On that occasion, in addition to the prepared text the following colloquy occurred between General Walker and the interviewer:

Interviewer:

"General, if forces go, will you lead this force?"

General Walker:

"This is a cause for freedom. This is Americans, patriotic Americans, from all over the Nation. It is a movement for freedom. And I will be there. Rise to a stand beside Governor Barnett at Jackson, Mississippi. Now is the time to be heard. Thousands strong from every State in the Union. Rally to the cause of freedom." (S.F. 787-788)

The next evening, September 28, 1962, over Radio Station WNOE of New Orleans, Louisiana, he asserted that there is no law that requires integration (S.F. 801), and he reported that he had been swamped with telephone calls from persons offering help and assistance and notifying him that people were moving to Mississippi to assist in any way possible (S.F. 802). Asked if there was a particular point in Mississippi where all of his followers would meet he replied that he intended to join the movement, that there are thousands of people, probably hundreds of thousands,

in Mississippi standing beside Governor Barnett, and that the best place to assemble would be at the Capitol at Jackson, or at the University of Mississippi in Oxford (S.F. 803).

The next day, September 29, 1962, with full knowledge that Governor Barnett by then had been held in contempt of the Fifth Circuit Court (S.F. 762), but was continuing his course of opposition to its mandate (S.F. 841), General Walker proceeded by private plane to Jackson, Mississippi, where he held another press and television conference at the Sun & Sands Motel*. There, over television for all to hear who cared to listen, he said:

> **"I am in Mississippi—beside Governor Ross Barnett.**
>
> **"I call for a national protest against the conspiracy from within.**
>
> **"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.**
>
> **"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies.**
>
> **"This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a Nation." (Def. Ex. 8, S.F. 789, 790)**

*He was not staying at the motel, but went there to meet the press.

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At the same press conference he was asked if he had been in contact with Governor Barnett, and he replied that he had been in contact with the Governor's office and hoped to see the Governor while in Jackson (S.F. 790-791).

That afternoon, General Walker began to hear reports that Meredith was being moved into the campus that day, and that military forces were being committed (S.F. 640). He canceled his plans to attend a football game that night in Jackson (S.F. 640), and proceeded by automobile to Oxford, Mississippi, with his fan Louis Leman, where he was registered in a motel under the name John Waters after a midnight drive through the campus (S.F. 648-649).

The next day, Sunday September 30, 1962, he went to the Sheriff's office in Oxford and offered to assist the Sheriff in any way he could (S.W. 839). At that time he knew that the Sheriff was under the jurisdiction of the Governor (S.F. 840); that the Governor had used the police forces of the State, including the Sheriff, to prevent the entrance of Meredith into the University, and that the Governor had not changed his position (S.F. 841).

At lunch that day in downtown Oxford, several reporters asked him for a statement, and he finally agreed to hold a press conference late that afternoon at the Ole Miss Motel where the reporters were staying (S.F. 656). As fortune would have it, he happened to have lying around an old speech that he had prepared by 9 o'clock that morning (S.F. 849), and it suited the occasion perfectly. That afternoon he delivered it to the press conference. Short and to the point, he said:

"As the forces of the New Frontier assemble to the North, let history be witness to the cour-

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age and determination that calls us to Oxford to support a courageous Governor. His lawful stand for State Sovereignty is supported by thousands of people beyond the State borders now on the way to join you at Oxford." (Def. Ex. 11, S.F. 794).

At the same press conference he learned that U. S. Marshals and Meredith were on the campus (S.F. 658, 865).

Thus, for several days down to and including the day of the riot, General Walker had been quite vocal in the press, and was anxious to get his message out to those who cared to listen (S.F. 833-834).

That evening, September 30, 1962, about 8 o'clock, he and Louis Leman ate dinner in a downtown Oxford cafe, where they listened to President Kennedy's speech (S.F. 850) in which the President announced that Meredith was in residence on the campus of the University, and called upon the people to preserve law and peace. The President also stated that he had federalized the Mississippi National Guard as the most appropriate instrument to preserve law and order, if needed, to back up the United States marshals (S.F. 868, et seq.). Upon the conclusion of the President's speech, General Walker's comment was "Nauseating, Nauseating" (S.F. 874), which expressed his feelings toward the Federal Administration (S.F. 875).

He had finished dinner and was leaving the restaurant with Leman when he heard that there was trouble on the campus (S.F. 663-664). He and Leman then drove to the campus (S.F. 664).

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The Riot

General Walker and Louis Leman arrived on the campus about 8:45 that evening (S.F. 446), at which time a loud, violent riot was in progress in an area of the campus that is known as the Circle (S.F. 162, 169, 192, 206, 294, 295, 297, 420, 477), sometimes inaccurately referred to in the testimony as the Grove (Actually, the Grove is another area that lies to the northeast of the Circle). To assist the Court in following the evidence, we have attached a plot plan of the area to this Application. It is a reduced partial reproduction of Plaintiff's Exhibit 11.

As may be seen from the plot plan, University Avenue enters the campus from the east and then divides to form encircling drives around the Circle. At the east end of the Circle is a Confederate Monument referred to throughout the testimony as the Monument or the Statue. At the west end of the Circle and across the drive is the Lyceum Building. It is the center or the headquarters of the University (S.F. 1391). Slightly west of the center of the Circle is the flagpole, and it forms the intersection of crosswalks that traverse the Circle in North-South and East-West directions. The distance from the monument to the Lyceum Building is approximately 525 feet. The flagpole is approximately 275 feet west of the monument on a direct line between it and the Lyceum Building. Proceeding clockwise from the Lyceum Building, and to the north of the Circle, are Peabody Hall, the Fine Arts Building, and the Y. M. C. A. Building. Moving counter-clockwise from the Lyceum Building, and to the south of the Circle, are the

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Chemistry Building, Carrier Hall (the Engineering Building), and Hume Hall (the Science Building), which was under construction at the time of the riot.

By approximately 4 o'clock that afternoon a ring of federal marshals had encircled the Lyceum Building (S.F. 151), where Justice Department officials and for a time the head of the Mississippi Highway Patrol, a Colonel Birdsong, were located (S.F. 1368). A crowd had assembled in the Circle area and began taunting and jeering the marshals. Mississippi Highway Patrolmen stood between the marshals and the crowd in the Circle until the riot started. By approximately 8 o'clock that evening a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50, and result in the arrest of 160 persons, including the plaintiff (S.F. 228, 296, 1349, 1350, 714).

By all accounts, including General Walker's, the riot was serious and violent by the time he arrived, and it got worse as the night wore on. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks, and other missiles before being repulsed by the tear gas (S.F. 158, 201, 488, 555, 1291). As described by plaintiff's witness Kuettner, it was a full scale riot and a dangerous situation. (S.F. 1278); the movement of the crowd was an ebb and flow kind of surging, accompanied by loud cursing and yelling (S.F. 1290). Newsmen were also a target of the crowd's wrath (S.F. 193). Later in the evening, the rioters attempted to charge the marshals with a fire truck and then with a bulldozer (S.F. 1283-1285), both of which attacks were without

success. At one point, according to General Walker's own testimony, someone queried him as to how to combat the tear gas, and he advised to use sand (S.F. 919), but stated "Where would you get sand?" (S.F. 920). The rioters would hurl "Molotov cocktails" at the marshals (S.F. 1294). These were soft drink bottles filled with gasoline and equipped with burning fuses (S.F. 1294). Walker was in the vicinity of the Molotov cocktails (S.F. 363). The bricks, stones, and other missiles were, for the most part, obtained from construction materials at the site of the new Science Building southeast of the Circle (S.F. 1215). The charges toward the marshals would originate near the monument, close to the supply of ammunition, and would proceed west toward the marshals.

Finally, rifle fire erupted, and by the following morning there were some 7 to 10 bullet holes in the front of the Lyceum Building (S.F. 1352-1353). The next morning the campus looked like a battle field (S.F. 1296, 261, Def. Ex. 20, 21, 23, 24, 25, 28). Concrete benches in the Circle along the sidewalks had been broken and used as missiles (S.F. 295).

General Walker and Leman had left the car several blocks east of the Circle (S.F. 875) and walked down University Avenue in a westerly direction toward the monument (S.F. 876), arriving, as hereinabove stated, about 8:45 P.M. According to General Walker's own testimony, as he approached the Circle from the east, people were moving along the sidewalks and he said to them "Come on", and waved across the street to a group that recognized him (S.F. 878). By the time he reached the monument he began

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hearing students saying "We have a leader" (S.F. 882), and asking him "Will you lead us up to the steps; will you get us organized; will you lead us?"; and that was the predominant question on the campus at that time, according to General Walker (S.F. 883). About that same time he met a deputy sheriff named Talmage Witt and requested the sheriff to deputize him, but the sheriff refused (S.F. 885, 886). Witt, who appeared at the trial as a plaintiff's witness, is 5'-11" tall and weighs 275 pounds (S.F. 314), and fits the description of the "portly" man described in the story by defendant's reporter, Savell.

Other evidence which occupies literally hundreds of pages of the Statement of Facts, and which will be discussed under subsequent points of error, conclusively establishes as a matter of law that, applying correct principles of Texas law, both the "command" and "charge" statements were substantially true and were fair comment. Generally, such evidence shows without dispute that upon his arrival at the scene of the riot General Walker was hailed by the rioters as their leader, that he delivered at least one speech to the rioters in which he told them that they had a right to continue protesting, and that he moved toward the federal marshals on one or more occasions surrounded by rioters. However, for the purpose of argument under this point of error, the truth or falsity of the statements is immaterial because the First and Fourteenth Amendment protection under the rule laid down in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct. ...., does not depend upon truth or falsity.

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Argument and Authorities

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials, since the persons alleged to have been libeled in those cases *were* public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the area of public debate and to those who participate in it.

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The question before this Court, then, is whether the *Times* and *Garrison* cases laid down a narrow, technical rule, strictly limited to public officials, as held by the trial court and apparently by the Court of Civil Appeals, or whether they announced a broad constitutional policy of real substance which applies to matters of serious public concern and to public men of political prominence who inject themselves into political controversies seeking to sway public opinion and gain public support for their cause, as held by the Federal Court in the *Courier-Journal* case.

A question of equal significance is whether the severe limitations upon the defenses of substantial truth and fair comment, as enunciated and applied by the court below, afford the safeguards for freedom of speech and press required by the *Times* and *Garrison* decisions.

In this argument we will show that the philosophy and reasoning underlying the *Times* and *Garrison* opinions, the holdings and statements by other courts that have considered the question subsequent to those decisions, and the great weight of comment by legal writers, clearly support the holding of the Federal Court in the *Courier-Journal* case; and that the restrictive interpretation of the defenses of substantial truth and fair comment as applied by the court below would, if permitted to stand, effectively inhibit and preclude the various news media from reporting, in good faith, events of profound national significance, thus creating a form of censorship through fear of libel actions that is the direct antithesis of the spirit and holding of the *Times* and *Garrison* cases.

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The touchstone of the *Times* and *Garrison* decisions was the Supreme Court's recognition of the existence and wisdom of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", and the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses.

Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels

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> is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the indi-

vidual's claim for libel is pre-empted by the paramount public need for information on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan,* 98 P. 281, leaves no doubt that the decision extends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723. (Emphasis added)

In *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made,

> the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line." (671)

In *Gilberg* v. *Goffi*, 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.* (Superior Court of Alaska, Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate." The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an

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opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public political figure (S.F. 331, 486, 516) and a recent candidate for high public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The

publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy.

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule*. If the people are to be free to criticize the Government and those who comprise it, they must be free to criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could con-

ceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961); *Shelton* v. *Tucker,* 364 U. S. 470 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958).

In a comment at 19 *Southwestern Law Journal* 399, concerning the *Times* and *Garrison* cases, the author, discussing the scope of the protection afforded by those cases, concluded as follows:

> "Frequently, protection of statements made against controversial public figures is more important than protection of those made against public

officials. Discussion concerning particular minor officials is much less significant than discussion concerning important public figures, such as corporation executives. Thus, protection of statements against all public officials, whatever the echelon, seems unnecessary, while protection of statements against some controversial public figures seems highly desirable. Thus, a rule strictly applicable only to defamation against public officials seems unwise. A more appropriate solution would be to apply the rule when the public interest in the dissemination of truth requires it, whether the individual is a public official or a private citizen. The public interest is the correct test, not the popularity or notoriety of the individual involved. The social utility in protecting statements made against popular entertainers would be very slight. On the other hand, there would seem to be a great utility in protecting statements made against labor leaders, who, though not so well known, are closely connected with governmental affairs." (407)

It would be difficult, if not impossible, to conceive of a matter in which the public would have a greater interest than in reports on the activities of a person, already politically prominent, who has taken to the airwaves and called for tens of thousands of persons to leave their homes and join him at a scene of civil disorder and crisis in a distant State, there to stand beside and assist another political leader who is openly defying the orders of the Federal

Courts. There could be no possible reason or consistency whatever in holding that Governor Barnett is within the *Times* rule, but that one who rises to stand beside him is not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, the potential influence and effect on the outcome of the controversy are the same, and consequently the interest of the public is the same. A distinction based merely upon the fact that the one holds office and the other does not would have no reason and would serve no purpose that can be imagined.

Similar comment by legal writers can be found in 9 *Villanova Law Review* 534, 537; 48 *Marquette Law Review* 128, 133; 10 *New York Law Forum* 249; 42 *Texas Law Review* 1080, 1084; 16 *Syracuse Law Review* 132, 135; 26 *Montana Law Review* 110, 115; 39 *Tulane Law Review* 355, 362; and 49 *Cornell Law Quarterly* 581.*

It is beyond dispute that General Walker publicly summoned his followers to journey to Oxford, with their flags, tents and skillets, to record their opposition to and demonstrate against federal authority; that in the very shadow of the Mississippi State capitol, he announced, at a nationally televised press conference, that he was in Mississippi to stand "beside Governor Ross Barnett" in his defiance of the President and the Federal Courts; that he thereafter arrived at the "Ole Miss" campus at a time when violent rioting was already in progress;

*We suggest that legal commentary written *after* the *Times* and *Garrison* decisions is more profitable reading in considering the question at hand than the article relied on by the Court of Civil Appeals, which pre-dated those decisions by over a third of a century.

that, upon his arrival, General Walker was hailed by the rioters as their "leader"; that he condemned an Episcopal minister for trying to persuade the rioters to disperse; that he gave advice to the rioters on how to combat the tear gas which the federal marshals had used to defend themselves; that he delivered a speech to the rioters in which he told them, by his own admission, that they had a right to protest and that they should continue to protest —this at a time when he had personally observed scores of rioters throwing rocks and bricks at the federal marshals; that he had approached the Lyceum Building—where federal marshals were defending themselves—surrounded by rioters (See pp. 50-77, infra).

If, upon these facts and the hysteria and confusion surrounding the event, a news medium cannot, without risk of a $500,000 libel judgment, report that General Walker "assumed command" of the crowd and "led a charge" on the Lyceum Building, then the Constitutional freedoms contained in the First and Fourteenth Amendments are rendered virtually meaningless; for, if such reporting, in good faith, is not to be protected by the defenses of substantial truth or fair comment, or both, then a news medium's only prudent recourse is to refrain altogether from reporting significant, news-worthy events, even those which arrest the attention of the entire nation.

Plainly, the holding below constitutes a substantial encroachment upon freedom of speech and consequent freedom of debate on the many issues posed by events such as those which occurred at Oxford.

It is no answer to any of the foregoing to assert, as does the plaintiff (and, apparently, the court below), that

a reporter need have no fears if he reports only the "facts". In the pressure of events and the time limitations inherent in the transmission of news, it would manifestly be impractical—even if possible—to report a myriad of "facts", as contrasted with conclusions of fact based on the rapidly unfolding panorama of events and sensations.

Even assuming that a reporter, in the heat and confusion of the moment, could comprehend and apply a distinction difficult of application even for trained lawyers and judges in an atmosphere far removed from the events themselves, imposition of such restrictions and limitations would virtually prohibit the reporting of the event itself. It is like saying that the A.P. can report the detailed events of a battle—so long as it makes no errors—but if it transmits the conclusion of fact that the battle was lost, it does so only at the risk of suits by the Commanding General.

It is of great national interest and significance—for many reasons—that a former General Officer in the United States Army, the Commander of the troops at Little Rock, and one who had but recently campaigned for high public office, had publicly called upon his fellow citizens to register their defiance of Federal authority and had thereafter, at least apparently, participated in and encouraged violent acts of defiance themselves. If the ostensible activities of General Walker in this situation can be "blacked out" or censored through application of the law of libel, coupled with a restrictive interpretation of the defenses of substantial truth and fair comment, then the unconstitutionally inhibiting effects of the libel laws upon news media, and upon freedom of speech and press generally, are self-evi-

dent. It would be impossible, in reporting a riot, to distinguish with precision those persons who were moving toward the objective in a charge from those who were moving toward the objective just to "watch what happened," particularly where, as in this case, both movements appeared identical and charges of that very kind were occurring all night and were the rule, not the exception.

It is significant that, outlining the scope of the "fair comment" defense in Texas, the starting point of the Fort Worth Court's analysis was the proposition that a charge, made in good faith and without malice, that a public official is guilty of a crime is actionable under the libel laws. (Opin. pp. 13-14). Thus, the very keystone of that court's opinion is in direct and irreconcilable conflict with the holding in *Times* and *Garrison*.

Nor is it wholly without significance that the defense of "fair comment" which was raised in the *Times* case appears to have been substantially identical to that enunciated by the Court of Civil Appeals here. See *New York Times Co.* v. *Sullivan, supra.*, p. 267.

Where, as here, the defense of "fair comment" is so truncated as to make it, in the adopted words of the court below, a "weak defense" . . . "subject to so many limitations that it is seldom completely applicable," and where, as here, such limitations are invoked to impose a liability of half a million dollars for reporting in good faith the facts as they appeared to be, it becomes obvious that the libel laws are here being used to achieve a result which the Federal Constitution prohibits.

Under the rule of the *Times* and *Garrison* cases, the constitutional protection can be denied only upon a show-

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ing of actual malice, i.e., a showing that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. As correctly held by both courts below, there is no evidence of malice in the case at bar. Indeed, the trial court, by written opinion, expressly recognized that since there was no actual malice the rule of the *Times* case, if applicable, would require that judgment be rendered for the defendant (Supp. Tr.) The trial court's error was in holding that the rule of the *Times* case was limited to public officials. Since the *Times* case cannot be so limited, and since there was no evidence of actual malice, judgment should now be rendered for defendant.

APPENDIX C

Motion of Petitioner The Associated Press for Rehearing in the Supreme Court of Texas, pp. 1-2

No. A-11069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner

vs.

EDWIN A. WALKER,
Respondent

PETITIONER'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Motion for rehearing and reconsideration of its Application for Writ of Error heretofore filed herein, and which was refused, no reversible error, by this Court on February 9, 1966, and as grounds therefor respectfully shows as follows:

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1.

This Court erred in overruling Petitioner's First Point of Error, which reads as follows:

> "The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary."

because the publications here in question are privileged and protected under the First and Fourteenth Amendments to the Constitution of the United States as interpreted in the cases of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412, and *Garrison* v *Louisiana,* 379 U. S. 64, 13 L. Ed. 2d 125, 85 S. Ct.

* * *

APPENDIX D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
16624
vs.
EDWIN A. WALKER

(No. 31,741-C)
July 30, 1965

From the District Court of Tarrant County.

Opinion Per Curiam.

This cause came on to be heard on the transcript of the record and the same having been reviewed, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellee, Edwin A. Walker, do have and recover of and from appellant, The Associated Press, and its surety on its supersedeas bond, Houston Fire and Casualty Insurance Company, the amount adjudged below, with interest thereon at the rate of six per cent per annum from August 3, 1965, together with all costs in this behalf expended, both in this Court and in the trial court, for which let execution issue, and that this decision be certified below for observance.

Appendix D

Judgment of the Texas Court of Civil Appeals

THE ASSOCIATED PRESS
17887-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellant for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

THE ASSOCIATED PRESS
17888-16624
vs.
EDWIN A. WALKER

September 17, 1965

This day came on to be heard the motion by appellees (*sic*) for a rehearing in this cause and said motion having been duly considered by the Court is hereby overruled.

Appendix D

Judgment of the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

February 9, 1966

From Tarrant County, Second District.

Application of The Associated Press, as well as the conditional application of Edwin A. Walker, for writs of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that same present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicant, The Associated Press, and its surety, Houston Fire & Casualty Insurance Company, and applicant, Edwin A. Walker, each pay all costs incurred on their respective applications for writs of error.

Appendix D

Judgment of the Supreme Court of Texas

No. A-11,069
THE ASSOCIATED PRESS
vs.
EDWIN A. WALKER

March 23, 1966

From Tarrant County, Second District.

Motion of The Associated Press for rehearing of its application for writ of error having been duly considered, it is ordered that such motion be, and hereby is, overruled.

APPENDIX E

Conflicting Opinions

1. *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky., 1965)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

EDWIN A. WALKER *Plaintiff* *vs.* COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, INC. WHAS, INC. *Defendants*	Civil Action No. 4639

OPINION

This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

Appendix E

Walker v. *Courier-Journal and Louisville Times Co.*

The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a "trouble maker", that he was "participating" in the occurrences taking place in Oxford, all in the context used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

Following the filing of this action the Supreme Court of the United States handed down its Opinion in New York Times Company v. Sullivan, 376 U. S. 254 (October Term,

1963) wherein said Court in legal effect federally pre-empted the law of libel in matters of "grave national concern" involving "public officials" with the announced doctrine that

> ". . . . Constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was or not."

There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Govenment were locked in conflict as to the educational integration of the races was a matter of "grave national concern." The Supreme Court of the United States has classified the integration struggle as "one of the major political issues of our time."

Thus, it can be seen that had the Plaintiff, Walker, been a "public official" at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with "actual malice", that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of "actual malice" in the Times case, the Supreme Court quoted with approval from the case of Coleman v. McLennan, 78 Kans. 711, 98 P. 281 (1908) as follows:

> "This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office." (Emphasis added)

and in conclusion the Court stated:

> "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable." (Page 283)

In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> "We have no occasion here . . . to specify categories of persons who would or would not be included."

From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to "public officials" only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to "public officials" only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this

Court as giving special significance to the broad language adopted in arriving at its decision.

The Plaintiff, Walker, is of course not a "public official" within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of "political prominence." This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

Had not Plaintiff thereby become a "public man"? Could he not have reasonably foreseen that his being a person of "political prominence" his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be "erroneously" reported? This Court so believes.

I therefore reach the inescapable conclusion that the protective "public official" doctrine of "actual malice" announced in Sullivan v. New York Times is in common reason and should be applicable to a "public man" as well, and

that the Plaintiff, Walker, was such a "public man" under the circumstances involved here. "Public men are, as it were, public property."

My application of the doctrine of New York Times v. Sullivan to the facts herein issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in Pauling v. News Syndicate Company, 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also Gilberg v. Goff, 251 N. Y. S. 2d 823 (1964); Pearson v. Fairbanks Publishing Co. (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, Freedom of the Press and the Law of Libel, 49 Cornell L. Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps "plowing new ground" in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the Times Opinion which I believe to be a ". . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. . . ." Public debate cannot be "uninhibited, robust and wide open" if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not "public officials") who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of

thinking. If any person seeks the "spotlight" of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

This is particularly so here where open riot and turmoil with accompanyiig destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night.

Therefore, having applied the doctrine of the Times case to this action, this Court moves on to a consideration of this record, upon the sole remaining question: whether or not these defendants have been guilty of "actual malice" in their publications of data furnished them by national news gathering agencies.

Plaintiff, Walker, is bound to show that the defamatory falsehoods relied upon were not just that "erroneous statement. . . . inevitable in free debate" noted by Justice Brennan, New York Times v. Sullivan, supra at 271-272) but that they were made with knowledge that they were false or with a reckless disregard of their falsity. The question of the existence of actual malice from the facts taken as true is a matter of law to be determined by the Court.

An examination of the record reflects that the information published by Defendants was furnished to them by national news gathering agencies to which they subscribed and was furnished in the ordinary course of news dis-

semination and published routinely by defendants in the ordinary course of their business endeavors—the dissemination of news to the general public.

Everyone knows that news of any matter of public concern possesses a limited lifetime for to be news it must be published with promptness and dispatch in order that the public be kept informed as to the actions of "public men" and their activities in connection with "matters of public concern." There is just no such thing as interesting and saleable *old* news.

This Court is of the opinion that the Defendants had the right to rely upon the reputable national news sources which furnished them the news items in issue here, and further that the republication of those items by the Defendants, with the errors therein, within the time limits and under the circumstances (ordinary course of dissemination) was not unreasonable. Defendants, in their newspaper and radio and television publications, could not be deemed in reasonableness by the Plaintiff or the public to be warranting the authenticity of the republication of events transpiring from places *far distant,* nor to be assuming the burden of verifying in advance the items reported to them from an *atmosphere of violence and turmoil* by established news gathering agencies, while at the same time meeting the public need and demand for prompt publication and dissemination of news on matters of "public concern."

We must have an informed society. The reliance upon or republications by defendants of the reports of national news gathering agencies as here occurred is, in this Court's opinion, insufficient to establish a "reckless" disregard of the facts, or knowledge of falsity, now *Constitutionally*

necessary to support an action for libel of the kind stated herein.

Indeed, the Plaintiff's very actions have established the facts negativing that "actual malice" which is required to sustain his action. This Court cannot be deemed not to know that which is known widely and generally to the public at large.

This Plaintiff has filed actions, seeking recovery for libels substantially similar to those alleged here, against the Associated Press in Texas, Colorado, Louisiana and Mississippi; against newspapers in Texas, Louisiana, Georgia, Florida, Missouri, Colorado and Wisconsin; and against Newsweek Magazine in Oklahoma.

Furthermore, the news stories complained of were furnished by national news gathering agencies to, and republished by, the principal newspapers, news magazines and radio and television stations throughout the United States.

In addition to the Court's judicial notice, the geographical scope and number of Plaintiff's suits and the virtual universality of the publication of the stories complained of, is proof positive of the extensive republication by news sources throughout the Country of the releases challenged here.

These facts clearly negative the possible attribution of "actual malice" to any single publisher.

If, possession of contrary information in the New York Times' own files would support "at most a finding of negligence in failing to discover the misstatements, and is Constitutionally insufficient to show the recklessness that is required for a finding of actual malice", I can conceive of no basis for a finding of actual malice in the reliance upon and

republication of news reports supplied here by reputable news gathering agencies. At most, such reliance could only be that "Constitutionally insufficient" negligence referred to by the Court. New York Times v. Sullivan, 376 US 254, at 287-288, 84 S. Ct. 710. Consistent with the later statement of the Supreme Court in Garrison v. State of Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed.2d 125 at 133 (1964), I find that under the facts alleged here the statements in issue cannot have been "made with the high degree of awareness of their probable falsity demanded by New York Times."

Accordingly, it is this Court's opinion that the doctrine proclaimed by the New York Times case is dispositive of all the issues here presented and, therefore, Defendants' Motion to Dismiss is sustained and the Plaintiff's Complaint is dismissed with prejudice, by separate Order contemporaneously issued herewith.

September 23, 1965.

JAMES F. GORDON
James F. Gordon, Judge
United States District Court

For the Plaintiff:

Mr. Richard C. Oldham
Mr. Clinton R. Burroughs
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Louisville, Kentucky-40202

For the Defendants:

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APPENDIX E

2. *Pauling* v. *National Review, Inc.*
(Not yet reported)

SUPREME COURT
NEW YORK COUNTY
SPECIAL AND TRIAL TERM—PART X
(Feb. Term, Cont'd.)

LINUS C. PAULING,

Plaintiff,

—against—

NATIONAL REVIEW, INC., WILLIAM A. RUSHER, and WILLIAM F. BUCKLEY, JR.,

Defendants.

SILVERMAN, J.:

This is a motion to dismiss the complaint at the close of the plaintiff's case in the trial of an action for libel.

Plaintiff, Dr. Linus C. Pauling, is a world famous scientist, winner of a Nobel Prize for chemistry and of a Nobel Peace Prize. Defendants are the corporate owner, and the individual publisher and editor of a fortnightly magazine called National Review.

There are two causes of action based on two articles, one in the National Review of July 17, 1962 and one in the issue of September 25, 1962.

The first article says, among other things:

> *"The Collaborators*
>
> What are we going to do about those of our fellow citizens who persist in a course of collaboration with the enemy who has sworn to bury us?
>
> * * *

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"Take, second, Professor Linus Pauling of the California Institute of Technology, once more acting as megaphone for Soviet policy by touting the World Peace Conference that the Communists have called for this summer in Moscow, just as year after year since time immemorial he has given his name, energy, voice and pen to one after another Soviet-serving enterprise. Or * * * Or * * * who a couple of months ago, along with Linus Pauling and a dozen others, attached their signatures to one more in a decades-long series of Communist-aiding fronts: this time, an Open Letter not only calling for the liquidation of South Vietnam's President Ngo Dinh Diem but condemning the presence of American personnel in that country as imperialist aggression (hence, by implication, more than justifying the Vietcong for killing Americans).

"Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense. But whether they are Communists are not in the legal sense, the objective fact is that these persons we have named, and many others like them, have given aid and comfort to the enemies of this country. They have done so not once or twice, by what might have been a special impulse, quirk or personal attachment, but time and again, over a period of years and decades; and some of these acts are saved from falling under the constitutional definition of treason only by the historical chance that our government has not yet

"

decided to give direct legal recognition to the fact that our present enemies are our enemies, and that we are at war.

"So we repeat: what are we going to do about these people? If it is proper that for the time being they should be immune from legal sanction, does it also follow that they should continue to receive public respect, honor and rewards?

* * *

"This soft and complacent public attitude toward the collaborators amounts, at bottom, to a general collusion in the sabotage of the nation's will, and in the moral nihilism that their actions express. If our standards have so far dissolved that there is no longer *anyone* on whom we will turn our backs, then we as a people are ready for suicide."

The second article sued on reads, in part, as follows:

"Are You Being Sued
By Linus Pauling?

We are (or so his lawyer tells us). And so are other well-behaved papers and people throughout the country.

* * *

"Dr. Pauling is chasing after all kinds of people, even the formidable Sam Newhouse, owner of twenty-odd daily newspapers. His victory signal is the check or two he has wrested from publishers—who may indeed have libeled him, in which case they should pay up; but who may simply have been too pusillanimous to fight back against what some will view as brazen attempts at intimidation of the free press by one of the nation's leading fellow-travelers."

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Approximately a year and a half after this suit was instituted, the United States Supreme Court in New York Times v. Sullivan, 376 U. S. 254 (1964) enunciated a new doctrine in the law of libel, as affected by the First Amendment. And the critical question on the present motion is whether that doctrine should be extended to apply to the present case, and, if so, whether plaintiff has proved a prima facie case under that doctrine.

In New York Times v. Sullivan, supra, the Supreme Court held that:

> "The constitutional guarantees [of the First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U. S. at p. 279.)

Plaintiff is not a public official, and so the first question is whether New York Times v. Sullivan has any applicability to his case at all. The Supreme Court has certainly not excluded that possibility. In the New York Times case it said (376 U. S. at 283, Fn. 23):

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included*" (Italics added).

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In its last pronouncement on the point, the Supreme Court said:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern. *Cf. Salinger* v. *Cowles,* 195 Iowa 873, 889, 191 N. W. 167, 173-174 (1922); *Peck* v. *Coos Bay Times Publishing Co.,* 122 Ore. 408, 420-421, 259 P. 307, 311-312 (1927); *Coleman* v. *MacLennan,* 78 Kan. 711, 723-724, 98 P. 281, 285-286 (1908); *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (C. A. 2d Cir. 1965)." Rosenblatt v. Baer, decided February 21, 1966, Fn. 12 to Opinion of Brennan, J., 86 S. Ct. 669, 676.

The underlying policy adopted by the Supreme Court in the New York Times case would seem to favor extending the doctrine of that case at least to a private person who "has thrust himself into the vortex of the discussion of a question of pressing public concern".

In Rosenblatt v. Baer (supra), Mr. Justice Brennan, speaking for the court, said:

> "The motivating force for the decision in *New York Times* was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

> open *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' 376 U. S., at 270. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. * * * (86 S.Ct. at 675)
>
> * * *
>
> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. * * *" (86 S.Ct. at 676)

In determining the relative importance and protection to be given to the interest in public discussion, on the one hand, and the safeguarding of individual reputation on the other, the Supreme Court, in the New York Times case, has shifted the balance sharply in favor of the freedom of public discussion. Logically, of course, limitations on the law of libel as a protection of public persons may discourage private persons (viewed as possible libel plaintiffs) from speaking out on issues when to do so may expose them to attacks on their own reputation. But, conversely, viewing these speakers as possible defendants in libel suits, such limitations may encourage them to speak out. And

the Supreme Court apparently believes that the latter consideration outweighs the former. In New York Times v. Sullivan, 376 U. S. at 271, the Court quoted with approval the following from Cantwell v. Connecticut, 310 U. S. 296, 310:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

In Gilberg v. Goffi, 21 A D 2d 517, 527 (1964), affirmed 15 N Y 2d 1023 (1965), the Appellate Division, Second Department, applying New York Times v. Sullivan, said:

> "Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic government is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated * * * ."

The Supreme Court, in the New York Times case, quoted Beauharnais v. Illinois, 343 U. S. 250, 263, that

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"public men, are, as it were, public property" (376 U. S. 268).

Again, referring to the risk of successive libel judgments against a newspaper, the Court said, at 376 U. S. 278:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.".

These considerations, stated by the Court with reference to public officials, would seem to be equally applicable to a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions.

In Gilberg v. Goffi, 21 A D 2d 517 (1964), affirmed 15 N Y 2d 1023 (1965), the New York State courts applied the New York Times doctrine to a law partner of the mayor of a city, who sued a rival candidate for mayor, for libel, when the latter said that the mayor's law firm (of which plaintiff was, of course, a partner) was practicing law under conditions which showed a conflict of interest. The Court said that, although plaintiff was not a public official, "plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative" (21 A D 2d at 520). Cases in other jurisdictions have applied the New York Times doctrine to private persons who actively engage in a public controversy. (See, e.g., Walker v. Courier-Journal, 246 F. Supp. 231 [W. D. Ky. 1965].)

Finally, the United States Court of Appeals for the Second Circuit has indicated very strongly its view that Dr. Pauling is a person to whom the rule of New York Times

v. Sullivan should apply. In Pauling v. News Syndicate Company, 335 F. 2d 659, 671 (C. A. 2, 1964), the Court said, with reference to the doctrine of the New York Times case:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; * * * . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line."

In the case at bar, Dr. Pauling testified that after he read the Smythe Report on atomic energy, about 1946, he became greatly concerned about the destructive effects on our civilization of a possible nuclear war. He began to accept invitations as a speaker on this subject; he became interested in educating his fellow Americans as to this danger; he further testified that this has been a dominating interest with him for over twenty years and, during that

period, he has given some 750 addresses, lectures, talks, etc., with respect to atomic weapons, the need to control them, the need to prevent war, and the need for settling disputes by international law. He has traveled about the world and spoken on these subjects. He has pressed his views on heads of state, ambassadors, and other public officials. His efforts have gained him such prominence in this field that he was awarded the Nobel Peace Prize. By the same token, however, he has from time to time found himself—as was his right as a citizen—in public and active opposition to persons and policies that he deemed inconsistent with his views; and quite frequently his publicly-expressed views on many questions—not merely those relating to his efforts for world peace—have been contrary to those expressed by the more conservative or right-wing elements in this country. On June 8, 1962, he had joined in a call for a World Peace Conference to be held in Moscow that summer. A few months earlier he had joined in "An Open Letter to President John F. Kennedy against U. S. military intervention in South Vietnam", which letter was published as a paid advertisement in the New York Times.

The matters he has discussed are, of course, matters of the gravest and most widespread public importance; they concern the foreign policy of the United States, the military operations now going on, and the future of civilization itself. And at each step there have been many who disagree with Dr. Pauling.

It is clear that if any private citizen has, by his conduct, made himself a public figure engaged voluntarily in public discussion of matters of grave public concern and controversy, Dr. Pauling has done so.

Finally, the criticisms made of him in the alleged libelous articles are not criticisms of his private life; they are criti-

cisms of his public conduct and of the motives for that public conduct. This applies even to the intimation in the second article that by his libel suits he is attempting to intimidate the press; for the freedom of public discussion is itself a public issue and one that is properly a subject of public discussion.

Accordingly, I hold that, in order for Dr. Pauling to recover, it would be necessary for him to meet the standards of New York Times v. Sullivan.

The basic principle of New York Times v. Sullivan is that, in the cases to which it applies, there can be no recovery for even a defamatory falsehood unless the plaintiff proves that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not". (376 U. S. at 280.)

This kind of "actual malice" " 'is not presumed but is a matter for proof by the plaintiff' " (376 U. S. at 284; and see 376 U. S. at 279, quoted supra).

In the case at bar, there is no real evidence that defendants knew that the statements they made were false. A four-year-old conversation with an editor, who did not himself have anything to do with the writing of the allegedly libelous articles, is no more sufficient to show knowledge of falsity than were the new stories in the Times files in New York Times v. Sullivan. As the Court there said, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication" of the alleged libel (New York Times v. Sullivan, 376 U. S. at 287).

Plaintiff argues that he has shown "reckless disregard" by the defendants of whether the article "was false or not".

But all the plaintiff's evidence on this phase of the case amounts to, giving it the most favorable inferences, is that defendants relied on unreliable sources, and that if they had checked in a reasonable manner, they would have ascertained that their statements were false. Assuming these facts to be true, that is still not a showing of "reckless disregard of whether it was false or not", in the New York Times v. Sullivan sense. As the Supreme Court pointed out in Garrison v. Louisiana, 379 U. S. 64, 79 (1964):

> "The reasonable-belief standard * * * is not the same as the reckless-disregard-of-truth standard. * * * The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

Reckless disregard of whether a statement is false or not, in the New York Times sense, is to be contrasted with the "utterances honestly believed" (Garrison v. Louisiana, 379 U. S. at 73) which are to be protected. Such reckless disregard must be the equivalent of the "calculated falsehood" (ibid. at 75), which is not protected.

The evidence presented by plaintiff does not meet this standard.

In this aspect of the case, perhaps the most vulnerable passage in the libelous articles is this:

> "Are such persons Communists? Some such undoubtedly are, but there is not publicly at hand the full proof, of the kind demanded by the courts, that they are Communists in the total, deliberate, disciplined organizational sense."

Assuming that this could be read as referring to plaintiff, it could be argued that this is a charge that plaintiff is a Communist, with an admission that the writer has no evidence of it; and therefore that the charge is made with reckless disregard of whether it is false or not.

But of course the admission in the article that there is no legal evidence to support the charge—assuming it to apply to plaintiff—itself limits the charge. To hold that this statement is not protected under New York Times v. Sullivan would risk the very danger that the Supreme Court gave us a ground for rejecting a rule that defendants be required to prove truth:

> "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'. * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." N. Y. Times v. Sullivan, 376 U. S. at 279.

Neither knowledge of falsity nor reckless disregard of whether the statements were false or not has been shown with the "convincing clarity which the constitutional standard demands", and thus a judgment based on such evidence would not be permitted to stand (New York Times v. Sullivan, 376 U. S. at 285-286). And it is for the Judge in the first instance to decide whether that standard has been met (Ibid., and compare Rosenblatt v. Baer, 86 S. Ct. at 677, Feb 21, 1966, slip opinion, page 12).

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The record of this trial is extremely voluminous. So I should make clear that on the basis of pre-N. Y. Times v. Sullivan law, plaintiff would have proved a prima facie case. The articles on their face are libelous, i.e., defamatory if untrue; the defenses of truth, fair comment without malice, etc., to the extent thus far gone into, all present questions of fact for the jury. Publication of the article by the corporate defendant, with the active participation and approval of the individual defendant editor, are (*sic*) conceded. While the participation by the individual defendant-publisher, Mr. Rusher, is perhaps marginal, enough has been shown of his participation to present a question for the jury as to his responsibility. The suggestion that damage has been conclusively disproved by plaintiff's own reputation witnesses is unfounded; to begin with, that issue was not fully explored with those witnesses and properly so under Linehan v. Nelson, 197 N. Y. 482 (1910); and in any event the testimony of the reputation witnesses was limited to plaintiff's reputation in the academic and scientific communities and was not conclusive.

But, applying New York Times v. Sullivan, I hold that plaintiff has failed to prove a prima facie case, and the complaint must be dismissed.

Lest there be any misunderstanding, I do not hold that the charges against Dr. Pauling, made in the articles, are true or justified. It is clear that in all his actions Dr. Pauling acted well within his legal rights. And if his conscience required him to take the actions and pursue the course of conduct that he has pursued for the last twenty years, then he has acted in accordance with his moral duty. Accepting plaintiff's testimony, presumably his work for

public education and world peace has imposed certain sacrifices on Dr. Pauling. Dr. Pauling has added the prestige of his reputation to aid the causes in which he believes. I merely hold that by so doing he also limited his legal remedies for any claimed libel of his reputation. And perhaps this can be deemed another sacrifice that he is making for the things he believes in.

I should finally mention one matter of judicial economy. When plaintiff rested late Friday afternoon, and defendants moved to dismiss the complaint, I reserved decision and indicated that I was going to send the case to the jury ultimately. We were then in the sixth week of trial. (Actually, because of intervening religious holidays, etc., there had been about five weeks of testimony.) If I were to grant the motion to dismiss now, and an appellate court disagreed with me, the appellate court would have no choice but to order a new trial, and the weeks of trial that we have thus far had would have to be done over again. On the other hand, if I reserved decision on the motion to dismiss and let the case go to a jury verdict, then, even if I should thereafter dismiss the complaint, and the appellate court were to disagree with me, the appellate court would not have to order a new trial, but could merely enter the appropriate final judgment. Recognizing that the law in this area is still evolving and that the appellate courts might hold the New York Times case inapplicable, I thought it wiser to reserve decision and thus minimize the risk of retrial. But over the weekend I reconsidered this question, and, accordingly, I inquired of counsel as to how much longer the case would take, and I required them, as officers of the court, to make representations to me as to what additional evidence they expected to produce and by

what witnesses. Counsel's estimate as to the future length of the trial varied, but both sides agreed that there are still a number of weeks to go. My own guess is that probably the remainder of the case would take about as long to try as plaintiff's case has taken thus far. Thus, if I were now not to grant the motion to dismiss, but were to reserve decision, and the appellate courts should agree with me that the doctrine of *New York Times* v. *Sullivan* applies, I would have subjected the parties, the court, and the jurors to about as much additional unnecessary trial as I would if I were to grant the motion to dismiss, now, and the appellate courts disagreed with me. This seems to me too high a premium to pay as insurance against the ever-present risk of error on my part. It is for these reasons that I am not reserving decision.

The motion to dismiss the complaint is granted.

Dated, April 19, 1966.

S. J. SILVERMAN
J. S. C.

APPENDIX E

3. *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dept. 1964) *aff'd* 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965)

DAVID C. GILBERG, Respondent, *v.*

FERRER F. GOFFI, Appellant.

Second Department, July 9, 1964.

APPEAL from an order of the Supreme Court at Special Term (JOHN J. DILLON, J.), entered January 29, 1964 in Westchester County, which (1) denied plaintiff's motion for summary judgment and defendant's cross application for summary judgment, (2) struck the third defense and portions of the second defense, and otherwise denied the motion to strike defenses, and (3) limited the disclosure and discovery required of plantiff by defendant, and directed that such disclosure and discovery proceed. The appeal, as limited by defendant's brief, is from so much of said order as struck the third defense, and as denied defendant's cross application for summary judgment of dismissal of the complaint.

Harry Krauss for appellant.

David C. Gilberg, respondent in person.

SAMUEL RABIN, J. This appeal turns upon the extent of immunity to be accorded to the campaign utterances, oral and written, of a candidate for public office.

The learned Special Term held that the complaint stated a case for recovery in defamation, and that questions of fact were raised incident to the defenses of privilege and justification. In our opinion, the evidentiary showing made by each party establishes facts which are sufficient, under two landmark decisions rendered after the Special Term's decision, to warrant the granting of summary judgment in defendant's favor.

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By reason of these recent pronouncements, the issues at bar may no longer be evaluated solely by the prior controlling precedents in the law of defamation. Now, all utterances addressed to public officials, when challenged in a civil libel action, must be accorded the constitutional safeguards for freedom of speech inherent in the First and Fourteenth Amendments of the Federal Constitution (*New York Time Co.* v. *Sullivan*, 376 U. S. 254, 264-265). The privilege of a citizen to criticize official conduct is part of the evolving body of the law of libel which now recognizes that public officials, in the performance of their duties, enjoy a concomitant immunity when they speak out on matters of public concern, even if a particular citizen be defamed in the process (*Sheridan* v. *Crisona*, 14 N Y 2d 108). The threat of a damage suit should not be permitted to inhibit or curtail the freedom of expression of either the citizen or the public servant (*New York Times Co.* v. *Sullivan, supra*, pp. 282-283).

In the *New York Times* case, the following principles were authoritively declared:

(1) The ancient doctrine that the Constitution does not protect libelous publications may no longer be utilized where its application would serve to impose sanctions upon criticism of the official conduct of public officers (pp. 268-269);

(2) Expressions of grievance and protest on a public issue do not lose their constitutional protection by reason of a combination of falsity of factual statement and of defamatory content (p. 273);

(3) Public officials, like Judges, are expected to be "'men of fortitude'" when assailed by half-truth, misinformation, charges of gross incompetence, disregard of

public interest, communist sympathies, hints of bribery, embezzlement and the like, especially when such charges are hurled in the heat of a political campaign (pp. 272-273);

(4) In cases involving criticism of public officials, a new principle of qualified privilege in the law of libel is to be applied, namely (pp. 279-280): "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

(5) This new principle is to be tested by the facts of each particular case in order to ascertain whether the alleged libelous statements were prompted by actual malice (pp. 284-286);

(6) On weighing the evidence, the court is to avoid such result as might suggest " 'that prosecutions for libel on government have any place in the American system of jurisprudence' "(p. 291); and

(7) The court is likewise to avoid the thwarting of the free expression of impersonal attack on government by investing the remarks with a personal significance (p. 292).

In the *New York Times* case the plaintiff was a Police Commissioner who sought damages in libel by attributing to himself certain false statements which had been published in an advertisement in the *Times* newspaper with respect to the Montgomery (Alabama) local police force which he headed. Plaintiff's money judgment was reversed for lack of demonstration of direct reference to him in the publication and for lack of proof of defendants' actual malice.

Appendix E
Gilberg v. *Goffi*

In our opinion, the same deficiencies rendered insufficient the present plaintiff's cause of action. While the plaintiff claims that he was not a public official, it is our opinion, based upon the proof adduced on the defendant's cross motion for summary judgment, that plaintiff's action is so closely related to criticism of a public official that the *Times* case is determinative and that the plaintiff has no justiciable claim.

The pertinent facts here may be briefly stated:

The Mayor of the City of Mount Vernon was a reputable lawyer who assumed and functioned in his office of Mayor during the period 1960 to 1963. Since June 1, 1960, plaintiff, likewise a lawyer of good reputation and standing, has been a partner in the Mayor's law firm.

Before the Mayor assumed his office, and during his tenure, the *Daily Argus*, a newspaper published in the City of Mount Vernon, reported in various news articles that the question of the adoption and enforcement of municipal conflicts- of-interest rule had been locally advanced. In March and April, 1958, the *Argus* reported that Alderman Kendall had advocated passage of a local law dealing with conflicts of interest. In September, 1962, additional articles with reference to such a local law appeared in the *Argus*. In November, 1962, the *Argus* published a news article to the effect that one Bornstein, who had been feuding with the Mayor on municipal and political matters, had filed a "complaint" with this court in which he challenged the right of plaintiff Gilberg to represent clients in the local City Court while his law partner was Mayor of the City. In the same month, the *Argus* further reported that one Zimmerman had sent a letter to the local Common Council urging that a local law be adopted so as to bar a Mayor or his law firm

from practicing law in the City Court or before municipal agencies and that the Common Council had referred the letter to the local bar association.

In the Fall of 1963, the defendant, a faithful reader of the *Argus,* became an independent candidate for the office of alderman, election to which position would make him a member of the local Common Council. His rival candidates were two incumbent Republican Aldermen (one of whom was Alderman Kendall) and two Democratic candidates. In the ensuing election campaign the defendant was associated with Bornstein and other opponents of the Mayor who was seeking re-election to that office.

On the night of October 22, 1963, defendant together with Bornstein appeared on the public platform, and both made speeches before an audience. The defendant read his speech from a prepared typewritten manuscript, copies of which had been signed by him and distributed earlier to the press for publication. In his address, in the part now relevant, the defendant made the following remarks:

"One of my opponents claimed credit for being the sponsor of a Conflicts of Interests code. We read in the papers of the charges that the mayor's law firm was practicing in the City Court of Mount Vernon, under conditions which show a clear conflict of interests. Yet, neither of them called for any investigation. Is it that they did not care or that they did not dare?

"They have failed to show any courage as aldermen. There has not been a dissenting vote among them in so long a time that it is difficult to remember when any such thing happened. No group can think so much alike for so long a time on so many subjects.

"It would seem as though someone else is doing the thinking for them and that they are merely the 'Yes' men

for this individual. By being 'Yes' men, they have allowed our city to become disgraced among all of the cities of our nation.

"Of my Democratic opponents, both are lackeys of the Democratic mayoralty candidate * * *

"Our mayoralty candidate * * * is a man of recognized decency and integrity. He is our one hope to bring back our city to the sphere of respectability. To do this, he needs aldermen who are prepared to act for him when action is necessary. As members of his team, my running mate and I will see to it that he gets the legislation he needs to carry out his purpose."

The defendant's address was reported in the *Daily Argus* in its issue of October 23, 1963. Orally on the following day, and by copy of a letter sent to such newspaper on October 25, 1963, the plaintiff informed defendant that his (defendant's) statements about the Mayor's law firm were false and defamatory; and plaintiff called upon defendant either to justify publicly his remarks or to avow his error. Plaintiff's written communication stated that he was not a "politician"; that he sought no public office; that no law, rule or regulation prohibited his law firm from practicing in the City Court; and that his firm had appeared in no case "where a conflict of interests may or might arise."

Defendant proffered no formal retraction. In lieu thereof, on October 28, 1963 he sent a letter to the *Argus*, the substance of which it printed in a news article. In such letter defendant referred to the publication in the *Argus* on November 19, 1962 of an article reciting the filing of the Bornstein "complaint" to this court, and then went on to state:

"This fully supports my statement. I have no interest in Mr. Gilberg's method of practicing law, except insofar as it concerns the conduct of the Common Council. I have said and still argue that it was the duty of the Common Council, who on previous occasions, had voiced itself as in favor of a strong conflict of interests law, to have instituted an investigation of the matter. * * * If Mr. Bornstein's charges are sustained in an investigation by the Common Council, it would fall upon that body to adopt appropriate rules for correcting the situation.

"As a candidate for the office of Alderman, it is my privilege and duty to present the issues to the people, and in that sense, I have brought this forth as such an issue."

The instant action was thereafter commenced on the theory that the oral address of October 22 which had been reduced to writing, and the writing of October 28, constituted both a slander and a libel of the plaintiff. In his complaint, plaintiff charges in substance that defendant uttered false statements to the effect that the law firm, of which plaintiff is a partner, had practiced law in the local City Court under conditions which showed a conflict of interests; and that, by innuendo, the defendant had suggested that the law firm had thereby violated some precept which precluded its practice in that court. The complaint neither pleads special damages, nor avers that the defendant's impugning remarks were uttered with malice.

In his answer, the defendant pleaded a general denial, and, *inter alia*, defenses of lack of malice, qualified privilege, and justification. He also set out the various mentioned publications of the *Daily Argus* relating to a municipal conflicts-of-interest law and the presentations made thereon to this court and to the Common Council; and pleaded that his

campaign remarks were not aimed at plaintiff but at his incumbent aldermanic adversaries for the purpose of drawing to the attention of the voters their failure to proceed "with relation to the charge publicly made by the said Bornstein."

In support of his second defense of justification, defendant pleaded that the Mayor's official status as a Magistrate empowered him to act in the City Court and to appoint an acting City Court Judge. Defendant also referred to the Mayor's power of appointment of the Corporation Counsel and various other municipal functionaries, including the local Police Commissioner, and pleaded that these latter appointees appeared in the City Court in the prosecution or defense of divers actions involving the municipality and local law enforcement.

Upon the motions of the respective parties* for summary judgment, the Special Term held that the evidentiary showing as to the defenses of qualified privilege and justification (as corrected) entitled defendant to a trial. The Special Term further held that the issue was not whether defendant had read something in a newspaper, but whether his charge of conflict of interests was objectively true.

On the present appeal, only the defendant seeks review of the denial of summary judgment in his favor. If defendant is correct in his contention that he was entitled to summary judgment on the evidentiary showings, his appeal from so much of the order under review as struck out the defense of truth is moot.

Under the current practice, a motion for summary judgment should be granted where, on the papers and proof

*Defendant did not by cross notice formally move for summary judgment in his favor. He requested such judgment, however, in his affidavit in opposition to plaintiff's motion for summary judgment.

submitted, a cause of action or defense "shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party;" and the motion should be denied where any party shows the existence of any issue of fact, other than an issue as to the amount or extent of damages, sufficient to require a trial (CPLR 3212, subds. [b], [c]). In effect, defendant's cross motion for summary judgment was a motion to dismiss the complaint for failing, on an evidentiary showing, to *state* a cause of action (CPLR 3211, subd. [a], par. 7). The plaintiff's motion for summary judgment, in effect, was an application to dismiss the pleaded defenses for want of substance (CPLR 3211, subd. [b]).

Applying the principles of the *New York Times* case (376 U. S. 254, *supra*) to the facts and pleadings at bar, it is patent first and foremost that the alleged defamatory words of defendant's October 22, 1963 address, set out in paragraph 12 of the complaint, contain no direct reference to plaintiff Gilberg either by name or association with the Mayor's law firm. Construed in the context of indulging in "a clear conflict of interests," defendant's said speech and his press release thereon were limited to practice in the City Court by "The Mayor's law firm." The only proof in this record that such words were susceptible of reference to the plaintiff personally lies in plaintiff's subjective interpretation of the words and in the alleged coincidence that, on October 23, 1963, plaintiff received a number of unidentified telephone messages calling attention to the newspaper article published that day "and the implication of the statement, as the same affected the ethics and legality of law practice in the City Court on my part, [and] my being a member of the 'Mayor's law firm'." Plaintiff's proof on this issue is

therefore precisely the same as the complaint's evidence in the *New York Times* case (*supra*). As there stated, the alleged defamatory words "did not on their face make even an oblique reference" to the complainant "as an individual"; and any proof "that he had in fact been so involved" rested "solely on the unsupported assumption that, because of his official position, he must have been" (*New York Times Co.* v. *Sullivan, supra,* p. 289).

In the *Times* case, the position of the complainant was even stronger, since presumably everybody in the City of Montgomery knew or should have known that he was the Commissioner in charge of the police department; and yet the innuendo that the alleged defamatory matter assailing the police applied to him individually was rejected as unavailing on the "assumption" that he was personally involved in any generic criticism of police action. At bar, although plaintiff stated that his position as the active partner of the Mayor's law firm in charge of City Court cases, was known to Bench and Bar and to most litigants, proof is lacking that defendant knew of this situation or that he even knew the plaintiff. In fact, the proof is that plaintiff and the defendant had never met, and that defendant was attacking the Common Council and his incumbent rivals for membership in that body.

Plaintiff's proof utterly fails to connect the defendant with knowledge, actual or constructive, that plaintiff was a member of the "Mayor's law firm." In the absence of proof of such knowledge and in the absence of specific reference in the alleged defamatory statements to the actual name of such law firm or to the particular individuals who comprised it, it is our opinion that plaintiff has failed at the outset to establish that he was personally included in the

law firm claimed to have been defamed by defendant. Paraphrasing the language of Mr. Justice BRENNAN in the *New York Times* case (*supra*), the proof adduced as to defendant's utterances of October 22 may be taken as referring to "the Mayor's law firm," but they did not on their face "make even an oblique reference" to plaintiff as an individual; and support for such conclusion rests only on plaintiff's "assumption" and those of his unidentified telephone informants—assumptions that cannot properly be drawn directly from the specific words used in the defendant's text.

Nor is plaintiff's case for personal calumny in any way aided by defendant's writing issued on October 28, 1963 to the *Daily Argus* in lieu of a personal retraction to plaintiff and in justification of his October 22 speech and press release. This later writing mentions plaintiff specifically by name for the first time; but, in our opinion, it does not, by reason of such identification, serve to strengthen the plaintiff's case, as urged by plaintiff. That later writing of October 28 made no charge of any unprofessional activity against the plaintiff personally. It merely emphasized defendant's reliance: (a) upon the *Daily Argus'* publication concerning Bornstein's complaint to this court which "had challenged the right of Mr. Gilberg to represent clients in City Court while his law partner is Mayor of the City;" and (b) upon the fact that such complaint constituted a proper reason why the Common Council should have inquired into the necessity for a code of ethics.

Accordingly, on the proof adduced, we are of the opinion that plaintiff has failed to establish that he had been personally vilified for a lack of professional propriety by any utterance, oral or written, ascribable to the defendant. Plaintiff has established only that the "Mayor's law firm"

had been impugned by defendant on a pre-existing claim of conflict of interests which had already appeared in the public press.

In view of the fact that defendant was a candidate for public office; that he was talking about another office-holder's law firm; and that he was calling upon the Common Council to investigate Bornstein's and Zimmerman's pre-existing charges, as already published, with respect to such law firm, it is our opinion that defendant's utterances can fairly be construed only as part and parcel of a debate on the public issue as to whether Mount Vernon required a code of ethics to govern the practice of law in the City Court by a firm, or a member thereof, in which a partner occupied the office of Mayor. The statement by the defendant that Bornstein's and Zimmerman's presentations of that issue had been published in the papers and that he (the defendant) had read the published article was not false, but in fact true.

Nor is it of any avail to plaintiff to claim that he was not a candidate for any public office and that he was outside the political arena. Obviously the law firm, of which he was a member, had generated the public issue on which the the defendant made comment. In our opinion, having entered the fray as champion of that law firm, plaintiff made himself as much a part of the local political campaign as did his law partner, the Mayor. It would be anomalous to hold that the Mayor, as a public office holder, was precluded by the *New York Times* case from suing in libel on a conflict of interest issue affecting his law firm, but that his law partner was individually free to do so on the same subject matter.

Upon the basis of all the proof adduced, it is our opinion that the doctrine proclaimed in the *New York Times* case is

dispositive of all the legal issues, actual or potential, here presented. Accordingly, invoking such doctrine, we may summarily dispose of those issues.

On the issue of malice, the plaintiff was bound to show that the defamatory falsehood relied upon, growing out of the Mayor's conduct as a public official, was made with "actual malice." Plaintiff was required to show that the defendant's utterances were made with knowledge that they were false or with a reckless disregard as to their falsity. Examining the proof tendered on this issue, it is our view that plaintiff produced no evidence that defendant was aware of any erroneous statements or that he was in any way reckless in that regard. At best, it might be said that defendant was negligent in failing to ascertain the truth or accuracy of the details supporting the prior claims of Bornstein and Zimmerman to the effect that the Mayor's law firm had indulged in the practice of law in circumstances involving a conflict of interests. However, as noted in the *Times* case, a finding of negligence in failing to discover misstatements is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice" (376 U. S. 254, 288).

On the issue of privilege, as previously indicated it is plaintiff's contention that defendant could derive no immunity for his utterances, since plaintiff was neither a public officer nor a political candidate. But that contention, as already noted, is untenable. It is our opinion: (a) that in submitting "the Mayor's law firm" as an actionable issue, plaintiff has inextricably interwoven his personal and individual status with that of the firm; (b) that the firm was a proper subject for comment in the public domain; and (c) that in the context of the utterances made, plaintiff and the firm necessarily constituted one and the same juridical person.

Appendix E
Gilberg v. *Goffi*

Accordingly, and solely because the plaintiff's papers fail to make out an actionable wrong, it is our conclusion that the defendant's cross motion for summary judgment should be granted. We see no need, therefore, to discuss defendant's alternative point that his third defense of truth was erroneously dismissed.

In reaching this conclusion, we express no opinion on the underlying controversy which plaintiff has sought to bring to the surface, i.e., the charge that the Mayor's law firm had offended any professional standards of conduct. In our opinion, the propriety of the firm's conduct, or of plaintiff's individual conduct, is not a question for judicial determination in the instant action. The only justiciable questions properly here are: (a) whether such conduct had become a public question; and (b) whether, within the limitations laid down in the *Times* case, the defendant as a candidate had the right to comment thereon as he did. It appears to us that the defendant had such right, and that plaintiff and his law firm must find solace in the philosophy that men in public life must be "men of fortitude" who must endure exposure to the vicissitudes of argument in the public forum, where half-truths, misinformation, and worse, are not uncommon in the furor and in the tempo of a political campaign. In sum, it is our view that discussion of a need for a municipal code of ethics to bar certain activities on the part of a public official and his associates is not tantamount to saying that the activities sought to be prohibited are, prior to the adoption of such code, wrongful per se. In that light, plaintiff's failure to prove his individual defamation and defendant's actual malice are omissions which are fatal to plaintiff's case.

Within the periphery of the new body of case law, we hold, on a balancing of interests, that democratic govern-

ment is best served when citizens, and especially public officials and those who aspire to public office, may freely speak out on questions of public concern, even if thereby some individual be wrongly calumniated (*Sheridan* v. *Crisona*, 14 N Y 2d 108, *supra*; *Spalding* v *Vilas*, 161 U.S. 483, 498; *Matson* v. *Margiotti*, 371 Pa. 188; *Manceri* v. *City of New York*, 12 A D 2d 895). If by reason of such utterances a defendant is immune from liability, he does not lose his immunity when the utterances are passed on to the press for publication in the same text as previously delivered (*Barr* v. *Matteo*, 360 U.S. 564, 574-575; *Mellon* v. *Brewer*, 18 F. 2d 168; *Glass* v. *Ickes*, 117 F. 2d 273).

Accordingly, the order under review, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, should be reversed, without costs; such cross motion should be granted, dismissing the complaint; and the appeal, insofar as it relates to the plaintiff's motion to strike out the third defense should be dismissed as moot.

CHRIST, BRENNAN and HOPKINS, JJ., concur with RABIN, J.; BELDOCK, P. J., dissents and votes to affirm the order, with the following memorandum: In my opinion, the decision in *New York Times Co.* v. *Sullivan* (376 U. S. 254) is distinguishable from the case at bar. That case concerned the alleged criticism of the official conduct of a public official. The instant case concerns criticism of a public official's private practice of the law. That the plaintiff here was known by the defendant to be a law partner of the public official, clearly appears from the fact that plaintiff's name was included in the name of the law firm and from the fact that the November 19, 1962 article which appeared in the

Daily Argus, and which was defendant's basis for his October 22, 1963 speech, specifically mentioned plaintiff by name. In my opinion, defendant's speech accuses the Mayor and his law partners of unethical conduct in their practice of law. Therefore, it was sufficient to defeat defendant's cross motion for summary judgment dismissing the complaint.

Order, insofar as appealed from and insofar as it denied defendant's cross motion for summary judgment, reversed, without costs; such cross motion granted and the complaint dismissed, without costs. Appeal, insofar as it relates to the plaintiff's motion to strike out the third defense, dismissed as moot.

APPENDIX E

4. *Pearson* v. *Fairbanks Publishing Co.* (unreported), *aff'd on other grounds* Alaska (1966)

IN THE

SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DREW PEARSON,
Plaintiff,
—*vs*—
FAIRBANKS PUBLISHING CO., INC. and C. W. SNEDDEN,
Defendants.

No. 10,209

MEMORANDUM OPINION

Warren A. Taylor and Robert A. Parrish, Fairbanks, Alaska, for plaintiff.

Robert J. McNealy, Fairbanks, Alaska, and Henry J. Camarot, Springfield, Oregon, for defendants.

Plaintiff Drew Pearson is and has been at all times pertinent herein the author of an internationally published column entitled the Washington-Merry-Go-Round. Defendants Fairbanks Publishing Co., Inc. and C. W. Snedden are and have been at all times pertinent herein a newspaper printing company and publisher respectively of a Fairbanks newspaper entitled The Daily News Miner. Plaintiff complains in this action that defendants libeled him in two editorials, published July 8 and August 15, 1958, wherein plaintiff was called the "Garbage Man of the Fourth

Estate." The defendants defend principally upon true fact and fair comment. The pertinent Pearson column and the News Miner editorials are set out in the appendix to this opinion.

At the outset of this opinion the Court desires to point up a difference in the respective parties (*sic*) theory as to the controlling factors of the suit. Plaintiff contends that the four corners of the alleged libelous publication alone constitute the yardstick for fact finding; that the words "Garbage Man of the Fourth Estate" are defamatory and libelous per se (supporting presumed substantial damages). Plaintiff then proceeded to adduce proofs that he is a man of good international reputation, that he routed crooks and misfits out of government, sponsored charity projects of large proportion, and generally bent his efforts to effect good will of mankind; that his few errors bore insignificant relation to the thirty odd thousand columns that he had authored, and that generally the designation of "The Garbage Man of the Fourth Estate" could not truthfully or fairly characterize one of such standing, asserting in this regard that such label has grave personal connotation over and above any technical application by the working press.

Defendants on the other hand offer a very broad base for fact finding, asserting and endeavoring to prove that plaintiff is a public figure of international proportion, is a controversial figure, has a reputation among the working press of publishing leftovers and inaccurate material, that he injects himself, however subtly, into local political arenas and did so in the matter at bar, that the word garbage is generally understood as a literary designation of trash and has no personal connotation; and besides, defendants sum

up— "how many garbage pails must a person empty to be called a garbage man".

The foregoing summary is necessarily an over simplification of the extensive matters actually presented during the eight day trial, in which, incidentally, the orderly processing of each side was hopelessly overwhelmed by the accommodation to out of town and out of state witnesses (the plaintiff himself left the Court and the State before the trial was half finished) all of which made evidence relevancy a meaningless phrase and materiality an indefinable term. However shaded in grays most of the propositions appear, certain significant facts can be considered as established:

(1.) There was a political atmosphere in the Territory of Alaska at the times of the plaintiff's column and the defendant's editorial comment. (July-August 1958)

(2.) That plaintiff's column contained political implications of supporting Democrat Ernest Gruening for political office. (See Appendix A)

(3.) That defendant's editorials contained political implications of supporting Republican Mike Stepovich for political office. (See Appendix B)

From the foregoing alone it would be accurate to conclude that at least eventually these two members of the working press, Mr. Pearson and Mr. Snedden, would come to contest. And literary weapons usually include name calling. Apparently the Court is asked to decide not only under rule of privilege who is entitled to the first hurl but also the delicacy (or extravagance) the rule of fair comment dictates. These are not easy decisions.

Appendix E
Pearson v. *Fairbanks Publishing Co.*

I am further disheartened with a growing acceptance of incredulity that once proud and fierce free press advocates should succumb to judicial determination of controversies between themselves. The fact of this lawsuit seems to be the most difficult fact of all to reconcile. It precipitates speculation as to what the plaintiff contended the law was or should be in those many suits wherein he was defendant, (see Defendant Exhibit I, entitled "Confessions of an S.O.B."); interesting however scandulous (*sic*) herein.

What is the law of libel as applied herein? Plaintiff urges *Reynolds* v. *Pegler* 223 F2d 429. Defendant urges *Pauling* v. *News Syndicate Co., Inc.* (No. 301 Sept. term 1963, U. S. Court of Appeals 2nd Circuit). This Court is most strongly attracted to *New York Times* v. *Sullivan* 376 U S 254, 84 S. Ct. 710, 11 L. ed (*sic*) 2d 686 (1963) which contains an amazing collection of authoritative statements concerning libel and the freedom of the press on matters of public concern. A study of this material could scarely leave doubt as to the historical and contemporary attitudes on this subject, as for example in 1794 (pg. 703).

> "In every State, probably in the Union, the press has exerted a freedom of canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of common law. On this footing the freedom of the press has stood; on this foundation it yet stands".

and again later,

> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields

> the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in the church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. (310 U. S. 296)"

While the above historical references had application primarily to public officials, this category has been extended to candidates for public office[1] and this Court finds no reasonable basis to exempt those who presume to speak for such candidates, particularly those public figures of international stature. Restated with facts at bar the plaintiff Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting[2]. There can be little question that candidate Gruening could have been so assailed with impunity.

The foregoing is an application of State and Federal constitutional protection of free speech and press given to the publication. I also hold that the case law, developed

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[1]See *Bingham* v. *Buckley*—NY 2d—(Sup. Ct. July 30, 1964)

[2]For example as to a candidate see *Phoenix* v. *Choisser*, 82 Ariz. 271, 276, 277, 312 P. 2d 150, 154 (1957), *Coleman* v. *MacLannen* 78 Kans. 711, 98 P. 281 (1908).

prior to the Times case, leads with persuasive logic to the same result.

Turning to the evidence I find that the innuendoes of fact in the editorial are false.[3] However these statements are privileged.

The restatement of torts provides in section 598 that:

> An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that,
>
> (a) facts exist which affect a sufficiently important public interest, and
>
> (b) the public interest requires the comunication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true.

The evidence indicates that Mr. Snedden, who caused the offending editorials to be published, honestly believed that Mr. Pearson was inaccurate. The occasion for the first publication has been explained. If Senator Gruening could be attacked, so could one of his outspoken supporters.

As previously mentioned, Mr. Pearson interjected himself into Alaskan politics; his reputation for accurate analysis was accordingly a matter of public concern. The July 8th editorial was related to this area of public con-

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[3]July 8, 1958. Statements of fact include "almost everything he has said about Alaska has been inaccurate either in whole or in detail". August 15, 1958. "He is careless with the facts". The Court cannot separate these facts from the editorial expression of opinion. The entire editorial suggests that the publisher is presenting his opinion rather than objective findings.

cern as was the August 15th editorial, the latter also citing the reason for dropping the column.

Restatement of torts § 606 (1) applies to public figures:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon,
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public and
>
> (b) represents the actual opinion of the critic, and
>
> (c) is not made solely for purpose of causing harm to the other.

If the phrase "Garbage Man of the Fourth Estate" disparages the private character of the author in the mind of the reader then the rule provides:

> (2) Criticism of the private conduct or character of another who is engaged in the activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of sub-section (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.

Another relevant Restatement of torts right in point is Sect. 610 (3) and comments f and g:

(3) The privilege of criticism stated in § 606 includes criticism of another's participation in public activities.

(f) One who as a citizen or as a representative of some voluntary group or association participates in matters of public concern and importance is subject to criticism and comment which is privileged under the rule stated in § 606. So too, one who by his activities and by written or spoken language attempts to influence public opinion in any way is subject to the free and honest criticism of his efforts by members of the public. Thus, lobbyists and other persons attempting to influence prospective legislation, propagandists seeking public support for their causes, and various persons who participate in civic and state activities, not as office holders or candidates therefor, but merely as private citizens, are subject to the free expression of the opinion of those comentators who honestly but disparagingly pass judgment upon their activities.

(g) A man may, by writing letters or articles for newspapers or magazines, appeal to the public either to expose what he regards as abuses on the part of governmental officials or others or to direct attention to real or supposed grievances of himself, a third person or a class. Under such circumstances, his conduct in making such an appeal is exposed to the judgment of the public, and, having started a newspaper war, he cannot complain if he gets

> the worst of it, so long as the expression of opinion, however disparaging, is honestly given. So too, a critic who attacks a book, play or public institution must expect that his criticism will in turn become the object of counter attacks.

The following are some of the cases that the Court relied on to illustrate the Restatement policy. *Fetens* v. *Sokolsky* 51 N. Y. S. 2d 240 (1944) which held that when a writers (*sic*) work is submitted to the public, caustic criticism is privileged. Such attacks may be fantastic and still privileged. *Berg* v. *Printers Ink,* 54 F Supp 795 (1943). An opinion must however be published in good faith and not for the sole purpose of harming the author. *Parmalee* v. *Hearst Publishing Co.,* 93 N E 2d 512, 515 (1950). To say plaintiff wrote disgusting and depraved books is fair comment; *Reynolds* v. *Pegler* 223 F 2d 429, 433 (1955) (good faith test applied).

Fair comment exists here since there was a legitimate interest in a reporters (*sic*) accuracy and the publication was in part:

> "for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff". Prosser on Torts (2nd Ed) pg. 623.

In conclusion, while reasonable men may find this editorial to be false and in bad style, this does not mean it is unfair. It has been held to be no libel to call a newspaper "the most vulgar, ignorant and scurrilous journal ever pub-

lished" *Great Britain Hariot* v. *Stewart,* cited in *Cherry* v. *Des Moines Leader,* 86 N W 323, 325 (Iowa 1901). (A drama critic in describing a performance wrote "Effie is an old jade, Addie a capering monster. . . . Strange creatures with painted faces and hideous mien.["] This was fair comment.)

The defendant's editorial was privileged, and as held by our Supreme Court and the Supreme Court of the United States, the privilege aforementioned is lost only by a showing of actual malice. Plaintiff contends evil motives, ill will and emnity are the only reasonable motivations that could attend the publishing of such otherwise purposeless name calling, not calculable under any stretch of the imagination to correct believed misstatement of fact concerning Gruening and Stepovich; that the use of the term "Garbage Man of the Fourth Estate", imputing as it is contended the lowest form of human endeavors, inherently establishes malice, all, a priori, indelibly impressed by a repeated publication in the same language.

In connection with purposelessness this Court believes it reasonable to infer that to strike down ones lauder is to strike down the lauded and this defeats the conclusiveness of plaintiff's first contention, i.e., there could have been constructive purpose. In connection with the imputation of "Garbage Man of the Fourth Estate" this Court accepts the defendant's definition of garbage as literary trash which definition is both reasonable and accruate, however inappropriate for the purposes sought to be achieved by its use. Such definition hardly supports the contention of inherent malice. The fact of repeating the use of this phrase a month later, while outraging all sense of propriety and pur-

pose, must necessarily be accepted and judged by the same standard and test as the first publication; it also falls short of stripping the privilege the Constitution and common law affords. As a parting comment on this last subject the Court finds, when coupled with the matter of the telegrams, sufficient reason and basis to refuse defendant's request for attorney fees and costs. It may well be that this "one for good measure" constituted such "salt in the wound" as to have precipitated this lawsuit. Accordingly, each party shall bear its own costs and attorney fees.

Let findings of fact and conclusions of law and judgment be drawn by defendant not inconsistent with this opinion.

DATED at Fairbanks, Alaska this 25th day of November, 1964.

EVERETT W. HAPP
Superior Court Judge

Appendix E

"Appendix A" to Opinion in *Rearson* v. *Fairbanks Publishing Co.*

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following column appeared in the Fairbanks Daily News Miner—Monday, July 7, 1958

Drew Pearson's WASHINGTON
Merry-go round. . . . .

WASHINGTON—A lot of Johnny-come-latelies such as Gov. Mike Stepovich are now claiming credit for making Alaska the 49th state in the Union. But the man who unobtrusively, but consistently, badgered senators, buttonholed congressmen, maneuvered in the smoke-filled rooms to bring statehood to Alaska is an ex-newspaperman named Ernest Gruening. He more than anyone else is the father of the 49th state.

Gruening first came to Washington in 1933 as chief of insular affairs division of the Interior Department organized under the late great Harold Ickes. As such, he guided the destinies of such American stepchildren as the Virgin Islands, Puerto Rico, Hawaii and Alaska.

Gruening had taken a degree at Harvard Medical School, but spent much of his time as a newspaperman, and was editing the Portland, Maine, Evening Express when he came to Washington to nurse American territories. After battling their causes before Congress, he was made governor of Alaska in 1939, and as such did a revolutionary thing.

He went all over that far flung territory, visiting every Eskimo village, every island in the Aleutians, every backwoods settlement, getting to know the people and their

Appendix E
"Appendix A" to Opinion in *Pearson* v.
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problems. By a rickety plane, and even by canoe, he toured the northwest territory.

Back in Washington when Congress was in session, he called on congressmen to plead for Alaskan problems. For 14 years, longer than any other man in history, he remained the governor of Alaska. Then when Eisenhower failed to reappoint him in 1953, the people of Alaska elected him unofficial senator and he moved to Washington to undertake a 24-hour-a-day lobbying campaign for the territorys (*sic*) statehood.

Shortly before this, however, a great tragedy struck Ernest Gruening's family which, though it brought grief to him, probably hastened the day when Alaska became the 49th state.

His son, Peter, a correspondent for the United Press, was killed in Australia, and his grief-stricken father more than ever threw all his heart and soul into the battle for Alaskan statehood. In effect he made Alaska his child.

That is the real story of the No. 1 lobbyist for Alaska and how statehoood was achieved.

In some respects the state of Texas probably had most to lose by admission of Alaska as the 49th state. But Sen. Lyndon Johnson put national interest ahead of state interest and worked quietly behind the scenes for Alaska. Without his potent support the bill would have been delayed.

Alaska, with 587,000 square miles against Texas' 267,000, now becomes the biggest state in the Union. California can no longer boast the highest peak in the U. S. A., for Mt. McKinley in Alaska is 6000 feet higher than Mt. Whitney in California. And Yellowstone is no longer the biggest national park. McKinley National Park is the biggest.

Finally, a new crop of Texas jokes will have to be told.

Appendix E

"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

Pearson v. Fairbanks Publishing Co.

Civil Case No. 10,209

The following editorial appeared in the Fairbanks Daily News Miner—Tuesday, July 8, 1958

GARBAGE MAN OF THE FOURTH ESTATE

Drew Pearson irritates us often. On days like yesterday he infuriates us. It isn't so much because of his opinions, which frequently are so biased they almost tilt out of the page, as it is because his facts are so cockeyed.

In yesterday's Washington-Merry-Go-Round column printed on the News Miner's editorial page, Mr. Pearson credited Ernest Gruening with being "more than any one else the father of the 49th state." This is a matter of opinion. We think Drew Pearson is not in the best of all possible positions to draw such a conclusion. Without wishing in the least to deprecate the fine contribution of former governor Gruening, we feel that the columnist is somewhat off the beam there. That, of course is our opinion.

But in describing the statehood efforts of our former governor—real and imaginary—we think it was wholly unnecessary for Mr. Pearson to start his piece by describing our present governor as a "Johnny-come-lately" and stating that Governor Stepovich is "now claiming credit for making Alaska the 49th state".

Mike Stepovich, born in Fairbanks, can hardly be described accurately as a Johnny-come-lately. He has too much of an understanding of the cooperative endeavor which the gaining of statehood was, and too much to do, to be claiming credit for that accomplishment. To the best of

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"Appendix B" to Opinion in *Pearson* v.
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our knowledge, Mike Stepovich hasn't been claiming a thing.

No one can dispute that Ernest Gruening, over a long period of years, was dedicated to the statehood cause. It is true he threw himself heart and soul into the battle. In fact, he threw himself in on many occasions when it would have served the cause of statehood vastly better for him to have kept himself out.

We are reminded here of a description given by one who is familiar with the Washington scene as Drew Pearson—and immensely more familiar with the details of the Alaska statehood struggle there. This man said, "It's a good thing the people of Alaska sent down two other Tennessee Plan representatives, and had Bob Bartlett on the job, because it has taken practically the full time efforts of three men for the past two years patching up the damage Gruening did."

One word in Mr. Pearson's column about Ernest Gruening sticks out like a sore thumb. The word says he worked "unobtrusively" in Washington. It sticks out because it is so devastatingly inappropriate. If you ever see anybody being unobtrusive, you won't have to ask his name to be sure it is not Ernest Gruening.

It is too bad that Drew Pearson was stimulated to write the things he did about our former governor and our present one, because they are going to hurt Mr. Gruening in Washington and in Alaska, where he is all too well known.

Yesterday's column deepens a doubt we already had in our mind about the usefulness of Drew Pearson on the national scene. Almost every single thing he ever said about

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"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

Alaska has been inaccurate either in whole or in detail. Long before yesterday this raised for us the question of whether he is as irresponsible in all fields and on all subjects as he is in respect to Alaska. If he is, he is doing a distinct dis-service to the American republic, which being a democracy can only function wisely to the extent its citizens are well and fairly informed by the press.

Does Mr. Pearson so inform his readers? Not on matters Alaskan, of our certain knowledge; and not on much of anything else, in the opinion of his Washington colleagues, one of whom the other day described him as "the garbage man of the fourth estate."

This would seem to raise the point—which frankly has bothered us from time to time in the past—of why we should give space in our newspaper to the printing of garbage. We have worried about that. Even though the Washington Merry-Go-Round is the most popular and widely read column sent out from Washington, the question worries us right now.

For the time being we'll get a clothespin for our editorial nose while we decide what to do about this free-wheeling garbage man of the fourth estate.

The following editorial appeared in the Fairbanks Daily News Miner—Friday, August 15, 1965

EXIT DREW PEARSON

For some years the News-Miner has carried the Washington column by Drew Pearson called "Washington Merry-Go-Round". Since Aug. 1 it has not appeared in our paper and several subscribers have telephoned or written to ask what happened to Pearson.

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"Appendix B" to Opinion in *Pearson* v. *Fairbanks Publishing Co.*

The Pearson column has been discontinued. This was not an action which we took lightly or without a good deal of thought, as the "Washington Merry-Go-Round["] is undeniably a popular feature in many newspapers.

We have known for a long time that on subjects having to do with Alaska Mr. Pearson has been so inaccurate as to be very disturbing to us. It was not until the publisher of the News-Miner recently spent several months in Washington, however, that the general reputation of this columnist was fully appreciated.

That reputation is summed up in the comment of a member of the working press in the nation's capital that Pearson is "the garbage man of the fourth estate."

Not wishing to distribute garbage with our newspaper, we have dropped Pearson. We will not be parties to publishing what we know to be inaccurate and misleading.

Since the early part of this year, while our publisher and other Alaskans have been in Washington in connection with the statehood bill, they have observed at first hand some of the happenings on which Drew Pearson commented i. his column. We do not mean things connected with statehood, but other events in Washington. We are sorry to have to say that, in our opinion, Pearson's accounts were not very closely related to the real events.

It is not because Mr. Pearson is allegedly "liberal" or "anti-Republican" that we are dropping him. It is just because he is so everlastingly careless with the facts.

Another Washington column, whose writer deals accurately with the great problems of the day in our nation, will soon start in the News-Miner.

APPENDIX E

5. *Brennan* v. *Associated Press (not yet reported)*

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

E. GAYNOR BRENNAN,
Plaintiff,
—*against*—
THE ASSOCIATED PRESS,
Defendant.

Civil Action
No. 7728

Before: HON. LEONARD P. MOORE, *U. S. C. J.**

Appearances:

Philip R. Shiff, New Haven, Connecticut, for the Plaintiff.

Curtiss K. Thompson of Thompson, Weir & Barclay, New Haven, Connecticut (William M. Mack of New Haven, Connecticut, and Arthur Moynihan and Nicholas Vazzana, both of New York, New York, of counsel on the brief), for the Defendant.

MOORE, *Circuit Judge*

This is a libel action arising out of an allegedly defamatory account in a news dispatch of what took place at a public hearing before the liquor control committee of the Connecticut legislature on March 14, 1957.

*Of the Second Circuit, sitting by designation.

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The plaintiff, E. Gaynor Brennan, was and is a successful lawyer living in Stamford. He had served in both houses of the Connecticut legislature, having been elected to the House in 1933 and to the Senate in 1935 and 1937. In 1939 he had been appointed Chairman of the Liquor Control Commission, in which capacity he served until 1941 or 1942. He had been prominent in the Republican Party of Connecticut, having been chairman of its platform committee in 1938. He had held numerous other positions in the state and municipal governments, including the offices of prosecutor of the City Court of Stamford from 1933 to 1937 and Judge of the same court from 1937 to 1939.

Brennan appeared at the hearing on March 14, 1957 as a representative of the Connecticut Wholesale Liquor Dealers Association. Before appearing, he fully complied with the laws of Connecticut pertaining to such appearances by filing with the Secretary of State the name of his principal and a brief description of the legislation in connection with which he was to appear.

During the course of the Committee hearing, William H. Veale, secretary of the United Temperance Society, addressed the Committee in part as follows:

> "Our program is one of education. We don't try to pull any political pressure upon you. We condemned in 1955 the fact that two members of the law firm of the State Democratic Chairman registered as liquor lobbyists and we're condemning in this assembly that a brother of a Republican county leader in Fairfield is registered as a liquor lobbist."

Veale's remarks were apparently directed towards the plaintiff Brennan, whose brother at the time was County Chairman of the Republican Party in Fairfield County.

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Brennan spoke next. After identifying the capacity in which he appeared, he said:

> "... I could assure the previous speaker that as a counsel and member of the bar, I am certainly aware of the ethics of my profession and know that I would not appear here if any member of my family were a member of the General Assembly. I would feel disqualified. My position with the Connecticut Wholesale Liquor Dealers Association is on a contract to see that they obey the law. I resent the remarks of the last speaker and I condemn his ignorance."

A representative of the defendant, The Associated Press (AP), a New York corporation with its principal place of business in New York, was present at the hearing. He subsequently prepared a news dispatch describing the hearing, for publication in defendant's member papers on the morning of March 15, 1957. Plaintiff does not claim that this dispatch, which is set forth as Appendix A to this opinion, is libelous of him.

On the night of March 14-15, 1957, the original dispatch was rewritten in defendant's New Haven office for publication in defendant's member papers in Connecticut on the afternoon of March 15. Defendant's rewrite editor did not know Brennan personally, though he may have read about him in Connecticut newspapers in the brief period since the rewrite editor moved to defendant's New Haven office from defendant's New York office in January 1957. The purpose of the rewrite editor was to give the original

dispatch a new freshness, so that the afternoon papers would not be running word for word the same story that had appeared in the morning papers. The rewritten story is reproduced as Appendix B to this opinion.

The principal change made by the rewrite editor was in the lead paragraph. Instead of describing the interchange between Veale and Brennan as a clash "on the issue of whether there is a tie-up between political leaders and the liquor industry," as the original dispatch had done, the rewrite began:

> "A charge of illicit lobbying was hurled at a lawyer for the Connecticut Wholesale Liquor Dealers Assn. at a state capitol public hearing yesterday."

It is this lead paragraph, published in the afternoon editions of five Connecticut newspapers with an aggregate circulation of approximately 103,000, which underlies the present suit.

Brennan never asked AP to retract or correct the rewrite. Instead, he brought suit against AP in the Fairfield County Superior Court on February 25, 1959, nearly two years after the publication of the rewrite. The action was subsequently removed to this court upon petition by the defendant.

The essence of the complaint is that the rewrite was false and malicious, in that no one ever accused Brennan of "illicit lobbying" at the hearing. In his original complaint, Brennan alleged that "his practice of law has diminished, whereby he has sustained heavy pecuniary loss," and that "he has been irreparably injured in his profession as a practising attorney." Both allegations were withdrawn

by subsequent amendments. No actual damages were alleged in the complaint as amended for trial, and none were proven at trial.

Plaintiff maintains that he can recover without proof of actual damages, on the grounds that the rewritten story was libelous per se, both because it indicated falsely that he had been accused of a crime involving moral turpitude and because it tended to injure him in the practice of his profession as a lawyer. Brennan relies for the first proposition on two Connecticut criminal statutes which make certain kinds of lobbying illegal, and which provide for fines and imprisonment (up to one year under one statute; up to five years, under the other), in case of violation. Conn. Gen. Stat. § 2-45 (1958); § 53-150 (1958). See also Conn. Gen. Stat. § 53-152 (1958). For his second proposition, Brennan relies on Canon 26 of the Connecticut Canons of Professional Ethics, which indicates that certain kinds of lobbying by an attorney are "unprofessional" and would be grounds for disbarment.

Had AP made the charge that Brennan was an "illicit lobbyist", without qualification, the various dictionary synonyms probably would not have saved the words from being libelous per se. The reading public would more than likely attribute the connotation of "illegal" to "illicit" rather than "unauthorized" or "improper". However, these two words cannot be taken out of the entire article, divorced from it and made the sole foundation of a liability claim. Although Veale did not at any time call Brennan an "illicit lobbyist", the article in its entirety makes it abundantly clear what Veale was condemning in Brennan's appearance before the Committee, namely, the fact that Brennan and a political leader were brothers.

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There was nothing in Veale's remarks, as quoted at length in the AP story, from which it could be inferred that Brennan had failed to register as a lobbyist, had violated any provision of the lobbying laws or had offended against any canon of professional ethics. Veale's sole criticism as revealed by the article was limited to the brotherly relationship. Brennan, as an experienced and skillful lawyer, could hardly have thought that "as a result thereof that plaintiff [he] was subject to criminal prosecution and disbarment proceedings." There was no suggestion of any such consequence in the article and no proof of even such a possibility produced upon the trial.

Whether a given statement is defamatory or not often turns on the context of the statement. To call a merchant a "crook", without qualification, might well be slanderous per se, because the imputation of dishonesty would tend to injure him in the practice of his livelihood. But to say that a merchant is a crook, because he owes money, is not slanderous per se, since "the appellation is explained away by a specification which does not support the charge." *Herman* v. *Post,* 98 Conn. 792, 793-94, 120 Atl. 606 (1923). See *Yakavicze* v. *Valentukevicious,* 84 Conn. 350, 353-54, 80 Atl. 94, 95-96 (1911). The same principle applies equally to libel:

> "The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts."

Rose v. *Indianapolis Newspapers, Inc.,* 213 F. 2d 227, 229 (7th Cir. 1954). See also *Schy* v. *Hearst Publ. Co.,* 205 F. 2d 750, 752 (7th Cir. 1953); *Dorney* v. *Dairymen's League*

Co-op Ass'n., 149 F. Supp. 615, 619 (D. N. J. 1957); *Paris* v. *New York Times Co.*, 170 Misc. 215, 9 N. Y. S. 2d 689 (Sup. Ct. 1939), *affirmed without opinion*, 259 App. Div. 1007, 21 N. Y. S. 2d 512 (1940); *Restatement*, Torts § 563, comment *d* (1938).

Here, as in *Herman* v. *Post* and *Paris* v. *New York Times Co., supra*, the context clarifies and removes any misapprehension which might have been caused by the initial statement, so that there is no defamation per se. This being so, the absence of any allegation or proof of actual damages is fatal to the plaintiff's case under general principles of the law of defamation. See *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 72 A. 2d 820 (1950).

Even if Brennan had been able to demonstrate the existence of libel per se, Conn. Gen. Stat. 52-237 (1958) permits the plaintiff in a libel action to recover only "such actual damage as he may have specially alleged and proved" unless the plaintiff proves either "malice in fact" on the part of the defendant, or failure by the defendant to withdraw the libelous charge upon plaintiff's timely request. Since the plaintiff here did not request a retraction of the statement complained of, and since he neither pleaded nor proved special damages, he can recover only upon proof of malice in fact. *Sandora* v. *Times Co., supra; Wynne* v. *Parsons*, 57 Conn. 73, 17 Atl. 362 (1888).

> "This expression 'malice in fact,' however, does not necessarily mean hatred, spite or ill-will against the plaintiffs, but that there must have been some improper or unjustifiable motive in publishing the article. The defendant must have been actuated from some other motive than a bona fide intention

> of printing an article merely as news in which it believed the public was interested. It is not for the defendant to establish any want of such improper motive on his part. The burden is upon the plaintiffs to establish by a fair preponderance of the evidence such improper or unjustifiable motive on the part of the defendant, ..."

Sandora v. *Times Co.*, 113 Conn. 574, 580, 155 Atl. 819, 822; see *Proto* v. *Bridgeport Herald Corp., supra.*

Upon all the facts and appropriate inferences therefrom, I find that the plaintiff has not sustained his burden of proving that the defendant acted for "some improper or unjustifiable motive." The purpose of defendant's rewrite editor was to give the story a new freshness for the afternoon papers. This purpose may be contrasted with the purpose of the defendants in *Hogan* v. *New York Times Co.*, 313 F. 2d 354 (2d Cir. 1963) (purpose to ridicule plaintiffs for the entertainment of the public); *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 72 A. 2d 820 (1950) (apparent intent to ridicule plaintiff); and *Wynne* v. *Parsons*, 57 Conn. 73, 17 Atl. 362 (1888) (purpose "to incite the plaintiff to pay [a] claim, and to amuse the public").

The rewrite editor may well have been careless in his choice of words in rewriting the story. "Improper lobbying" would have been a fair characterization of Veale's charges against the plaintiff; "illicit lobbying" was not. But this carelessness did not rise to the level of a reckless indifference to truth or falsity, sufficient to show malice or abuse of privilege. See *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 116 A. 2d 440 (1955). This is

not a case in which a newspaper printed a story without making adequate inquiry of eye-witnesses, as was true in *Hogan* v. *New York Times Co., supra,* and *Corsello* v. *Emerson Bros.,* 106 Conn. 127, 137 Atl. 390 (1927). The rewrite was based on an eyewitness account: that of the writer of the original dispatch. As a result, there would have been little or no point in checking the story out with Veale or with the plaintiff. The only negligence on the part of the defendant was in Bender's choice of the word "illicit", and this choice was not so inaccurate as to be reckless.

Similarly, the plaintiff has not proven actual malice within the meaning of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), which held that the Constitution:

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U. S. at 279-80.

A preliminary problem under the *Times* case is whether the plaintiff is sufficiently akin to a "public official" so that he cannot recover without proof of actual malice. This question may be definitively answered when the Supreme Court decides *Rosenblatt* v. *Baer,* 106 N. H. 26, 203 A. 2d 723 (1964), *cert. granted,* 380 U. S. 941 (1965). However, such cases as have now been decided under *Times* suggest that the defendant may invoke the protection of the *Times* rule. Judge Friendly in *Pauling* v. *News Syndicate Co.,* 335

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F. 2d 659, 671 (2d Cir. 1964), *cert. denied,* 379 U. S. 968 (1965), indicated that it would be easy to extend the *Times* privilege from attacks on public officials to attacks on candidates for public office and thence to participants in public debate on issues of grave public concern. In *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dep't 1964), *aff'd without opinion,* 15 N. Y. 2d 1023, 260 N. Y. S. 2d 29 (1965), a New York court held within the scope of the *Times* rule a lawyer in practice with a town mayor, where the allegedly defamatory statement charged that the mayor's law firm was practising in the town under circumstances showing a conflict of interest. Another New York court has held that a police lieutenant charged with needlessly killing a colored boy in a case which attracted widespread public attention was a "public official," and therefore had to prove actual malice before he could recover for libel. *Gilligan* v. *King,* 34 U. S. L. Week 2243 (N. Y. Sup. Ct. Oct. 29, 1965). In *Walker* v. *Courier-Journal,* 34 U. S. L. Week 2176 (Sep. 23, 1965), the District Court for the Western District of Kentucky held that General Edwin A. Walker, who had gone to the University of Mississippi during racial disorders there after making public appeals for support, became sufficiently a public figure so that he could recover for inaccurate reporting of his activities there only upon proof of actual malice. See also *Nusbaum* v. *Newark Morning Ledger Co.,* 86 N. J. Super. 132, 206 A. 2d 185 (1965) (raising but not deciding the issue whether a private witness who had voluntarily appeared before a congressional subcommittee investigating a matter of public concern could recover for inaccurate reporting of events related to that investigation without proof of actual malice). But see *Fignole* v.

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Curtis Publishing Co., 34 U. S. Law Week 2297 (S. D. N. Y. Nov. 23, 1965) (*Times* rule does not apply to Haitian politician); *Clark* v. *Pearson*, 34 U. S. L. Week 2338 (D. D. C. Dec. 20, 1965) (lobbyist need not prove malice in libel action against columnist).

The Supreme Court in the *Times* case stressed "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." 376 U. S. at 270. The public interest in full and free reporting of the activities of lobbyists need not be belabored. The plaintiff had gone before the state legislature as a paid representative of a group who would be affected by proposed legislation in order to voice the opinion of that group as to the proposed legislation. There is no question as to the legality of the plaintiff's conduct. Enlightened law-making can result only from a full presentation of the views of all interested parties. But there is a strong public interest which requires that this presentation of views be freely reported, to minimize the danger of clandestine influence, and to inform the public of this important stage of the legislative process. To paraphrase the *Times* opinion, a rule compelling the reporter of legislative hearings to guarantee the truth of all his assertions upon pain of libel judgments would deter the making of honest characterizations of lobbying activity which the public had a right to hear. A description of the behavior of lobbyists at a legislative hearing, in short, is qualitatively different from descriptions of activities not closely related to government, which classification, if inaccurate, may serve as the basis for damage recovery without proof of actual malice. See *Butts v. Curtis Publishing Co.*, 242 F. Supp. 390 (N. D.

Ga. 1964) (football coach at state university held not a public officer); *Faulk v. AWARE, Inc.*, 14 N. Y. 2d 954, 253 N. Y. S. 2d 990 (1964), *cert. denied*, 380 U. S. 916 (1965) (radio and television performer held not a public officer under the *Times* case).

As we have seen, the rewrite editor's choice of words may well have been careless. But as the Supreme Court said in *Garrison v. Louisiana*, 379 U. S. 64, 79 (1964), "the test . . . laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." The *Times* case itself tells us that proof of malice must be made "with convincing clarity." 376 U. S. at 285-86 (1964). Such proof is lacking here. Defendant's rewriter intended to freshen the original story for the afternoon papers; and if he erred in his nocturnal zeal, and unjustly cast aspersions on the plaintiff, his error was not of the magnitude to serve as the basis for the recovery of damages.

Judgment for the defendant. The findings of fact and conclusions of law appearing herein shall constitute the findings and conclusions as required by Rule 52(a) of the Rules of Civil Procedure.

APPENDIX F

Libel Suits Brought by General Walker Arising Out Of News Reports Identical Or Similar To Reports Here Complained Of

Name of case	Court in which filed and docket number	Damages demanded in complaint
I. Cases Naming Associated Press as a Defendant		
Walker v. The Associated Press	District Court, Tarrant County, Texas, No. 16624	$2,000,000
Walker v. The Associated Press	Circuit Court of Duval County, Florida, Civil Action No. 64-246-L; removed to U. S. District Court, Middle District of Florida, No. 64-267-Civil-J	$2,000,000
Walker v. The Associated Press	Circuit Court of Pulaski County, Arkansas, No. 58859; removed to U. S. District Court, Eastern District of Arkansas, No. LR-65-C-178	$1,000,000
Walker v. Associated Press and Times-Picayune Publishing Corporation	District Court, Caddo Parish, Louisiana, Number 160,536	$2,250,000
Walker v. The Denver Post, Inc. and The Associated Press	District Court, City and County of Denver, Colorado, Civ. No. B66072	$1,000,000
Walker v. The Kansas City Star Company and The Associated Press	Circuit Court, Jackson County, Missouri, No. 133,768	$1,000,000
Walker v. Savell and The Associated Press*	Circuit Court, Lafayette County, Mississippi, No. 7137; removed to U. S. District Court, Northern District of Mississippi, No. W-C-34-62	$2,000,000

*Subsequently dismissed as to Associated Press for lack of jurisdiction.

Appendix F

Name of case	Court in which filed and docket number	Damages demanded in complaint
II CASES NOT NAMING ASSOCIATED PRESS AS A DEFENDANT		
Walker v. Courier-Journal and Louisville Times Company, Inc. and WHAS, Inc.	U. S. District Court, Western District of Kentucky, Civil Action 4639	$2,000,000
Walker v. Times Publishing Company	Circuit Court, Pinellas County, Florida, No. 17,694-L	$2,000,000
Walker v. The Pulitzer Publishing Company	U. S. District Court, Eastern District of Missouri, Eastern Division, No. 63 C 361(1)	$2,000,000
Walker v. Atlanta Newspapers, Inc. and Ralph McGill	U. S. District Court, Northern District of Georgia, Civ. No. 8590	$10,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-270	$2,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-276	$2,000,000
Walker v. The Gazette Publishing Company, Inc.	Circuit Court, Pulaski County, Arkansas, Civ. No. 58857	$1,000,000
Walker v. Arkansas Democrat Company	Circuit Court, Pulaski County, Arkansas, Civil No. 58858	$1,000,000
	Total	$33,250,000

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 17 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1965

No. ~~1950~~ 150

THE ASSOCIATED PRESS,

Petitioner,

against

EDWIN A. WALKER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM 1965

THE ASSOCIATED PRESS,

Petitioner,

against

EDWIN A. WALKER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully responds to the Petition for Writ of Certiorari by The Associated Press as follows:

JURISDICTION

Jurisdiction under 28 U.S.C. 1257(3) should not permit re-examination of questions of fact decided by a jury in the trial court as to the truth or falsity of Petitioner's publication that Respondent had committed a crime, and as to measure of damage. *Norton Company v. Department of Revenue*, 340 U.S. 534, 538, 95 L. Ed. 517; *Pennekamp v. Florida*, 328 U.S. 331, 345, 90 L. Ed. 1295.

Petitioner published, as an "eye-witness report" by its Newsman ("who was on the scene and saw what happened"), a report that Respondent "assumed command of

a mob" and "led a charge against U. S. Marshals" * * * criminal acts, in violation of Federal Statutes. A jury has specifically found that the report was false. The jurisdictional question is whether such a false report, knowingly made by an eye-witness, is privileged under Constitutional Freedom of the Press, and whether Texas Law may be applied to redress the wrong.

STATEMENT OF CASE

As part of its reporting of events involved in the riot upon the campus of Mississippi University on the night of September 30, 1962, Petitioner published, over its world wide wire service, reports that Respondent had committed criminal acts * * * assuming command of a riotous mob and leading a charge against U. S. Marshals. These reports by a self-styled eye-witness, employee of Petitioner, were found by the jury to be false.

The defamatory reports, quoted in full in the Associated Press Petition herein, included detailed, sensational and dramatic statements, as follows:

> "October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'
>
> "October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, * * * was eating dinner Sunday night * * * was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.

"This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

* * * * *

"The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.
" 'Two men took Walker by the arms and they headed

for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

"'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

"'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

"'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

"'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

"'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed half-way up the Confederate monument and addressed the crowd.

"'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

* * * * *

"There were cheers. It was apparent that Walker had complete command over the group.

"'By this time, it was nearly 11:00 p.m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics."

After hearing all evidence of Petitioner as to the truth of the above reports, and the evidence of Respondent as to the falsity thereof, the jury returned its verdict as follows (Respondent's Appendix A):

Special Issue No. 1:

"Question: Do you find from a preponderance of the evidence that the statement 'Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus' was substantially true?

Answer: No.

Special Issue No. 2:

"Question: Do you find from a preponderance of the evidence that the statement 'Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus', complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer: No.

Special Issue No. 3:

"Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer: No.

Special Issue No. 5:

"Question: Do you find from a preponderance of the evidence that the statement 'Walker assumed command of the crowd' was substantially true?

Answer: No.

Special Issue No. 6:

"Question: Do you find from a preponderance of the evidence that the statement 'Walker assumed command of the crowd' complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer: No.

Special Issue No. 7:

"Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer: No.

I. The lengthy background and intemperate statements which Petitioner includes in its petition, for the twenty pages of its "Statement of the Case", do not present a constitutional issue; and merely show that the trial jury, charged with final determination of disputed facts, could have believed the Associated Press witnesses. But the jury did not believe the Associated Press. They were not presented with all the facts by the Associated Press, which elected to try the case without Van Savell, who wrote the false story, or any other of its employees appearing before the jury; and the supported decision of the jury on the facts is final under our ancient right of Trial by Jury, as cherished constitutionally as Freedom of Speech and Freedom of the Press.

Petitioner's somewhat extravagant "Statement of the Case," at page 20 of its Petition, includes the following:

"The inescapable conclusion which emerges from the welter of testimony is this: whether Walker advanced

toward the marshals with a small group or a large one, whether the mob was hurling missiles at the marshals or demanding 'that nigger' under a flag of truce, whether the advance proceeded at slow march or double-time, it is beyond dispute, even on the testimony offered by the plaintiff that Walker, during the four to five hours he was on the campus (S.F. 279-280), did, in fact, lead at least two charges on the federal marshals."

There was practically nothing undisputed in this lengthy record, replete with eye-witness accounts of a hectic night. Throughout the Petition, the Associated Press makes continuous use of the terms "unequivocal", 'uncontradicted," and "undisputed". Respondent challenges every such use of the terms, because very little was undisputed and the jury with ample evidence to decide found that Petitioner's report was false, that it was not fair comment, that it was not published in good faith.

The great weight and preponderance of the evidence is that:

(1) Walker was on the Campus on the night in question;

(2) He was an "observer", not a "participant" in the riots;

(3) On the few occasions when he mingled with the crowd, he did not "lead a charge";

(4) He did not "assume command of the crowd";

(5) The jury's findings were based upon evidence reasonably supporting its verdict;

(6) Petitioner's claim that "it is beyond dispute that Walker did, in fact, lead at least two charges on the Federal Marshals" is not supported by the evidence. In fact, a view of the evidence will overwhelmingly repel

such a conclusion. In order to conclude that Walker "assumed command" and "led a charge", completely overturning the jury's verdict, this Honorable Court, on Petition for Certiorari must disregard evidence as follows:

(a) Walker (S.F. 605-976): Testified in great detail as to his every action on the campus; and, in answer to repeated questions as to whether he "led anybody" his answers were, "No, I certainly did not". His answers to extensive questions on direct, and piercing cross-examination, were consistently that he was on the campus only to observe, and not to participate in the activities of the crowd. He refused requests of the students to "be our leader". He never got out of a walk during the entire night. In his language, "I never have had anything to do with the activities of the students toward the Marshals". (S.F. 706). When the Highway Patrol started to leave, the students became excited, with cries, "Barnett has sold us out". At this point, he agreed, for the first time, to speak, and advise the crowd that Barnett had not sold them out, that the Highway Patrol Chief, Birdsong, had let Meredith on the campus. He further advised them that "Nobody came to Mississippi for violence, No violence was intended." (At which time, the students began to 'boo'.) He further told them "You can protest, you have a right to protest, but this is not the place for violence" (All of which was in accord with the United Press report). After the speech, the crowd dispersed, and he moved slowly up near the flagpole in the center of the University Circle. (S.F. 684-700). He specifically described the "sporadic" activity of the crowd at the times when Petitioner contends that "it is beyond dispute that Walker did, in fact, lead two charges"; and, when asked, "Did you participate in any activities of the crowd", his answer was, "I certainly did not". (S.F. 700.) In order to accept Petitioner's assertion that Walker, beyond dispute led two charges, this Honorable

Court must assume that he deliberately lied, under oath, in the presence of the jury, and that the testimony of defendant's witnesses, which included neither Savell nor any other employee of Petitioner, "corroborated and amplified the conclusion that Walker did, in fact, lead a charge and assume command of the crowd, as argued at Page 21 of the Petition, and this, without hearing such witnesses, observing their demeanor, and feeling the impact of conflicts in their evidence.

(b) Gwinn Cole: Assistant Director, Miss. Highway Patrol, testified that there was no violence until the U. S. Marshals fired tear gas into the backs of the Highway Patrol, who were separating students from the Marshals, and into the face of the students; and that, thereafter, there was no "organized charge", but only sporadic activity, with small groups, not more than 7 or 8, coming out of the crowd and throwing missiles toward the Marshals, until the time he left at 9:50, which was coincident with the timing of Walker's speech from the Monument. (S.F. 1332, 1333).

(c) Louis Leman: A responsible young businessman, of Houston, Texas, who was with Walker the entire evening, and testified, positively, that Walker, at no time, participated in the activity of the crowd, assumed command, or led a charge. He covered the speech on the Monument, and described Walker's actions, both before and after, including his refusal to "lead the students," and his demeanor, which included at no time any movement faster than a slow walk. (S.F. 394-468).

(d) Cecil Holland: A reporter for the Washington Star, with 30 years experience. Testified that he was in the vicinity of the Campus Circle, and near the Marshals. He described sporadic activity of the crowd. He saw Walker at one time southwest of the Monument. He saw him lead no charge, or

participate in any other activity of the crowd. In fairness, however, the witness did not testify that his visibility was such that he must necessarily have seen him. (S.F. 491-549).

(e) Al Kuettner: Testified that he was United Press newsman, at a point east of the Monument on University Avenue, as Walker was entering the Campus about 9:00 p.m. He saw him again on the Monument, and heard his speech. After hearing the speech, he reported, over the United Press Wire Service that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate Statue on the Campus and begged the students to avoid their violence." He also stated that Walker's speech was met with jeers. He described the events involved in the riot, but saw Walker take no part therein. (Again, he was not keeping a constant watch; but it is significant that, if anything so sensational as a charge having been led by a former Major General in the United States Army had occurred, no such report appeared upon the wire service of United Press.) (S.F. 1242-1304). When he saw Walker come on the Campus, with two men abreast, it was when he first arrived, and the witness did not say that the other persons, ahead of him and behind him, appeared to be in his party. (S.F. 1303-1304).

(f) Talmage Witt: A Deputy Sheriff of Pontotoc County, Mississippi, was with Walker practically all of the time involved. He testified postively that Walker took no part in any of the violence. (S.F. 383). He also described Walker's activities, as walking slowly about the Campus, without leading the charges on the Marshals or participating in the activities of the crowd. He refuted a portion of a written statement that had been given to one of the AP counsel, at a time when that counsel was representing him in a legal matter, and testified,

positively, under oath, that Walker never did lead a charge, or participate in any act of violence. (S.F. 270-382).

(g) Ben Thomas: An AP newsman, who took the original telephone report from Savell. He testified postively that Savell had reported only sporadic activity **before** Walker's speech from the Monument, and that Walker got down from the Monument **after completing his speech,** and then led a charge against the Marshals. (S.F. 121-138).

(h) Other witnesses: Plaintiff offered the testimony of witnesses, Sweatt (S.F. 140), Cox (S.F. 245) May (S.F. 1198) Hunter (S.F. 1027) Carrington (S.F. 549), MacFarland (S.F. 554), Watkins (S.F. 564), McRae (S:F. 576), Snyder (S.F. 582), Edwards (S.F. 584), whose testimony completely accounted for all of the time that Walker was on the Campus, and effectively refuted defendant's contention that Savell was "substantially" telling the truth when he reported that he had seen Walker assume command of the crowd and lead a charge. Although the Savell report, and his testimony by deposition, fixed the time of the charge as before Walker's speech from the Monument, the witnesses all testified positively that Walker led no charge and had no command over the crowd, either before or after the speech.

II. Associated Press did not bring to Court its "eye-witness" Van Savell, so that the jury could compare, from the witness stand, his sincerity, demeanor, and candor with that of the respondent, Walker, as part of its necessary evaluation as to who was telling the truth. He was not there to tell the jury by way of explanation that perhaps he was excited and upset during the midst of the riot, that he did the best that he could, and that if he misinterpreted what

General Walker did, it was an honest misinterpretation on his part. It is generally held that when a party fails to produce a witness who is under its control, that failure may be considered as evidence against it, and the jury may properly infer that he was not produced because his testimony would have been harmful, and that general rule prevails in Texas. *Davis v. Etter & Curtis,* (Tex. Civ. App., no writ. history), 243 S.W. 603. With "malice" defined as "knowingly false" or in "reckless disregard of the truth" if Savell, claiming to have been less than six feet from Walker, reported that he saw "two men take him by the arms and they headed for the federal marshals", the report was either true or knowingly false. Without Savell having appeared, the jury found the report false. Petitioner claims a Constitutional right to publish the false report, accusing Respondent of a crime."

III. At page 10 of its Petition the Associated Press asks the "naggingly persistent" question: "Why was General Walker of Dallas, Texas, at the campus of the University of Mississippi?" and thereupon proceeds to recite public statements of Respondent on prior occasions which were used before the jury in an obvious attempt to prejudice the Respondent's case to the point of obscuring the real issues. These statements, though appearing intemperate in retrospect, provide no proof, as a matter of law, that Respondent assumed command of the mob or led a charge. Furthermore, they are not pertinent to any defense of "fair comment", which was found against the Associated Press, because the deposition of the youth who wrote the story admits that he

was not familiar with what had been going on, did not even know about Walker's prior statements, and so he could not be actuated by them at all (S.F. 1072, 1125).

The "question" as propounded by Petitioner at page 2 is "whether State libel laws may be applied to this case * * * particularly at the behest of General Walker." The answer is that this Honorable Court, committed by tradition and precedent to equal justice under the law, will ignore this emotional appeal to prejudice and consider solely the legal issue as to whether Petitioner has been deprived of its Constitutional Freedom of the Press, whether Associated Press is immune from liability for publishing as a fact this false report of its newsman that he saw Walker committing a crime, which the jury has found that Walker did not commit.

Walker himself explained why he was there, and without contradiction. He said that before he resigned from the Army he had been in command of the troops at Little Rock, and that the news stories of the events up there were so distorted and bore so little resemblance to the facts, that he wanted to see for himself what was actually occurring in Mississippi rather than relying upon the press. If the public statement should be considered as debate, "uninhibited, robust and wide open", and if Walker's presence in Mississippi should be considered, as obviously intended, as his "demonstration" against the use of troops in Mississippi, then in fairness to the record his sworn testimony as to this purpose in going to Mississippi becomes material:

> "Q. (by Mr. Gooch) Now, General, just what was your purpose in going to Mississippi?

"A. I thought it was absolutely wrong to use military forces, troops, American troops in a strictly civilian problem.

"Q. All right.

"Mr. Watts: Let him finish.

"A. And I wanted to see for myself exactly what happened. I wanted to know from first hand information. And I did not trust the press reporting of it in any form, since I had been at Little Rock and seen that exaggerated out of all proportions, and I intended to see for myself." (S.F. 805).

It is respectfully suggested that, except for the purpose of slanting the evidence, Walker's "purpose" in going to Mississippi is not material and provides no basis for overturning the verdict of the jury, which specifically found that: 1) Walker did not "assume command of the crowd" or "lead a charge against federal marshals"; 2) the statements were not fair comment; 3) such statements were not made in "good faith" by petitioner.

The issue that was decided by the jury, upon sharply conflicting evidence, involved Walker's actions, not his purpose in going to Mississippi. His purpose could involve a right or freedom, equally important, under the Constitution, as the Freedom of the Press. His actions, however, if in violation of the criminal statutes, as falsely charged by Associated Press, could result in arrest and imprisonment. The Constitutional question herein presented, and the only one, is whether the Press is immune from liability under state law for falsely reporting that "I saw Walker commit a crime," which a jury of 12 American Citizens has found that he did not commit. In

short, the Press has a Constitutional right to report the news, but not to make the news. Inaccuracy in good faith in reporting the news is protected. A known falsehood in making the news is not. Savell "was there and saw what happened." His report was either true or knowingly false. At six feet an "honest mistake" is incredible.

QUESTIONS PRESENTED

At pages 2 through 4 of its Petition, Associated Press presents purported questions involved in this proceeding. Respondent respectfully suggests that the questions, themselves, are slanted to be "self-answering" and are not decisive of the real issues in this case. Respondent suggests alternate questions conforming to the record as follows: (Petitioner's questions are in regular type, Respondent's suggested questions are in heavier type)

1. Whether the doctrine enunciated in * * * Sullivan, is limited to public officials or applies to other persons or circumstances:

1. This Question is Proper.

A. Whether, consistent with * * * constitution, state libel laws may be applied to news reports, made without malice, respecting events of profound * * * importance * * *, such as riots * * * at Oxford 1 , particularly at the behest of one who, like General Walker, wilfully, aggressively, and defiantly thrust himself into the vortex of that confrontation.

A. Whether the common law of libel may be applied in a State Court to a news agency which sells knowingly false stories imputing

treasonable activities to a private citizen who is exercising his same right to informed observation of events of public interest as is the news agency.

B. Whether, consistent with * * * constitution, state libel laws may be applied to news reports, made without actual malice, respecting events of public * * * importance, such as enforcement * * * of judgments of U. S. Courts * * *, particularly at behest of one who, like General Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

B. Does the Constitution relieve the press from liability for libel, where a jury has found that the defamatory statement accusing Respondent of a crime was false, was not fair comment, and was not made in good faith?

C. Whether, consistent with the * * * constitution, state libel laws may be applied to news reports made without actual malice concerning public activities of persons like General Walker in connection with controversies of profound * * * national interest * * *, where such persons are actively attempting to influence the outcome of such controversies and * * * are regarded * * * by virtue of their stature and activities, in a position significantly to influence the resolution of the issues thus presented.

C. Whether, when a jury has found that Walker did not lead a charge nor assume command of the mob, and that such charges were false, not fair comment, and not made in good faith, the Associated Press can use disputed fact issues found against it to misrepresent to this Court that Walker was actively attempting to influence the outcome of such controversies.

2. Whether an award of general damages of $500,000.00 for the publication, without actual malice or any proof of pecuniary or other loss, of reports of newsworthy events is so oppressive that it inhibits freedom of expression to an extent which violates the * * * constitution.

2. Is a $500,000.00 verdict for damages for libel constitutionally oppressive, where the defendant the largest and most powerful news media on earth has knowingly and falsely charged Respondent with sedition and insurrection against the government that he had sworn to defend, which resulted in his arrest and imprisonment in a mental prison, and the creation of a false public image around the world as a lunatic and criminal, after having risen to the rank of Major General in the U. S. Army, with background as an effective combat Commander.

3. Whether the record in this case on the issues of "substantial truth" and "fair comment" is so lacking in evidentiary support for the judgment below that that judgment constitutes a denial of due process in violation of the Fourteenth Amendment to the federal Constitution.

3. Whether the record contains competent evidence supporting the jury's verdict that the defamatory statements were false, not fair comment, and not made in good faith.

4. Whether the defense of "fair comment", as construed and applied by the Texas Courts in this case, is so limited as to violate the First and Fourteenth Amendments to the Constitution.

4. Under the guise of "fair comment", can the Press publish with immunity a false report that a person had been actually seen committing a crime?

5. Whether the application of State Libel Laws to the publications here complained of and in the circumstances disclosed by this record constitutes a denial of the freedoms of speech and press guaranteed by the * * * Constitution.

5. Does the constitutional freedom of the press to "report the news" permit it, with immunity to "make the news" by publication of an alleged eyewitness report that a person committed a crime that he did not commit?

REASONS FOR DENYING THE WRIT

I.

The Constitution, as interpreted by this Honorable Court, does not extend to the Press immunity from the Law of Libel for defamatory invasion of the Civil Rights of a citizen to his good reputation, by falsely and in bad faith accusing him of a crime, even though he may be a "public figure", involved in matters of public concern.

II.

The jury's verdict and the trial court's judgment in this case are supported by the evidence in the record.

III.

The verdict was reasonable under the circumstances, and certainly does not violate the Constitution.

IV.

The Sullivan rule does not apply when the defamed individual falsely accused of crime is not a public official, but is a private citizen, even though he is a figure of public interest.

ARGUMENT

I

The Constitution, as interpreted by this Honorable Court, does not extend to the Press immunity from the Law of Libel for defamatory invasion of the Civil Rights of a citizen to his good reputation, by falsely and in bad faith accusing him of a crime, even though he may be a "public figure", involved in matters of public concern.

The Petition in the instant case seeks to extend the perimeter of two vital decisions by this Honorable Court.

New York Times v. Sullivan, (1964) 376 U.S. 254, 11 L. Ed. 2d 686

"* * debate on public issues should be uninhibited, robust, and wide open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * *"

Garrison v. Louisiana, (1964) 379 U.S. 64, 13 L. Ed. 2d 125

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not

follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.

"Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

In simple and stark reality, the Associated Press pleads for a Constitutional Right to publish with impunity, and around the world, a statement that its newsman had seen Walker commit a crime that he did not commit, according to the verdicts of two juries.* In the instant case, after an extended trial involving sharply conflicting evidence, the jury found that the Associated Press report, that Walker assumed command of the crowd and led a charge against U.S. Marshals" was: 1) False, 2) Not fair comment, 3) Not made in good faith.

The Associated Press, "dealing in a highly salable commodity * * * NEWS, published, for hire and around the world, the sensational report of its newsman, Van Savell, 21, "who was on the scene and saw what happened". Savell, who, as we have said, did not appear in Court to testify, wrote a dramatic, sensational and detailed report that Walker, under arrest for insurrection and seditious conspiracy, had entered the campus, assumed command of the crowd, led a charge against U.S. Marshals, and then made an inflammatory speech to the crowd.

Under the trial court's instructions, which fully protected Petitioner from liability for an "honest mistake" of its reporter, the element of "malice" is implicit in the jury's verdict.

* See p. 25, of Petition for Writ, referring to Louisiana Case.

If the report was false, as the jury found, it was also, by definition and of necessity, **knowingly false.**

Either Savell saw Walker "assume command of the crowd and lead a charge", or he did not * * * there is no middle ground for this newsman of the Associated Press, who purports to have reported what he had actually seen, from a distance of six feet. If the report was false, neither Savell, nor his employer, Associated Press, who for profit was willing to malign around the world the reputation of an outstanding American soldier and citizen upon the unsupported statement of its inexperienced 21 year old newsman, can contend that the statements therein were other than **knowingly false.** Under the circumstances presented by the record in this case, either Walker assumed command of the crowd and led a charge, or Savell and Associated Press have falsely and deliberately accused him of a crime. If, as the jury found, Walker had not assumed command of the crowd and had not led a charge, and Savell and Petitioner falsely reported that he had done so, the Court is confronted with a deliberate misstatement * * * not an "erroneous" misstatement, within the protection of the First Amendment, as construed by this Honorable Court, hereafter discussed.

In addition to the issue as to whether the report was "knowingly false", the record supports a finding that the publication by Associated Press of the Savell report was in reckless disregard of the truth. Testimony of the Associated Press newsman, B. R. Thomas, by deposition, was that Savell had first reported to him, at the newsroom in New Orleans, that Walker had made a speech to the students from the

monument, stating that "if they retreated and went home, they would be cowards, that they should stand up and fight", and that Walker then got down from the monument and "led the group of yelling, screaming, brick throwing" (S.F. 134, 138) students as close to the marshals as they could get, until they were turned back by tear gas.

Savell's "eye-witness" report, and his testimony by deposition, outlined in striking detail the actions of Walker in assuming command of the crowd and leading a charge before the speech on the monument.

In addition to the above notice to Associated Press that Savell was at least mixed up in the timing of his report, Associated Press also had access to the report of United Press that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to avoid their violence. He was met with one massive jeer." (S.F. 1249).

After the Associated Press senior newsman, Relman Morin, arrived in Oxford on the day after the riots, he, also, wrote a dramatic story about Walker leading a charge against the marshals. (S.F. 1113). He was forced to admit that the only source of his information was Savell. (S.F. 1108).

The question as to whether this performance by the most powerful news media in America would amount to "reckless disregard for the truth" seems self-answering.

The far flung and powerful facilities of the Associated Press are supported by the American people at a cost approximating forty million dollars per year to provide a source

of current and reliable news. Its mission is to assemble, collate and disseminate accurate information. Its resources have extended almost to the point of monopoly. *Associated Press v. Taft-Ingalls Corporation*, (6 Cir. 65), 340 F. 2d. 753, 766.

Such power implies an equivalent duty, with commensurate standards of accuracy and integrity. It should not be a violation of the Constitution that reasonable standards, which would preclude falsely charging a citizen with commission of a crime, should be recognized by law, rather than left to the whim of Associated Press. In fact, such a legal duty may enhance public confidence in the Associated Press, which may have been shaken by recent events.

In *Clark v. Drew Pearson (USDC, Dist. of Col. 1965)*, 248 Fed. Supp. 188, District Judge Holtzoff, has presented a most scholarly analysis of the importance of the Law of Libel as a safeguard of the civil rights of a citizen as against an all powerful press. Pertinent language is as follows:

> "The arguments * * * included a plea for drastic changes in the law of libel, in a manner that would radically devitalize and impair the protection that it affords against defamatory publications. In view of this circumstance, it seems appropriate to make a few observations on the basic status of the law of libel in Anglo-American jurisprudence.
>
> "The common law sedulously guarantees to every individual various civil rights, such as the right of personal freedom, the right of personal safety, and the right of property. Another civil right safeguarded by the common law is the right to one's reputation. * * * (248 F. Supp. 190-191)

"The current trend in the law is to enhance and augment the protection of individual civil rights. No reason appears for making an exception as to the right to reputation. * * Most civil actions relate only to money, while actions for libel or slander involve honor and reputation, which are to be considered on a higher level. . . . (248 F. Supp. 191)

"Counsel for the defendants in this case urge the Court, however, *to apply the principle of the Sullivan case to all public figures* or public persons, including those in private life, *and* to abrogate the limitation to public officials. *In effect, they seek to transform two specific exceptions carved out by a process of erosion into an extensive demolition and destruction of the law by an act of avulsion. This Court perceives no reason in principle or in justice for radically undermining the law of libel,* in this manner, nor does it find any precedents for doing so. *The law of libel, as has been shown, is a vital and important aspect of the law of torts. It is one of the branches of law that safeguard individual civil rights. It should not be whittled away.* (Emphasis added) * * *

If the wire services, Associated Press and United Press engage in open competition, with salability of their news product related to its sensational and dramatic content, and with no legal responsibility to those victimized by false defamation, the efforts of competing newsmen will inevitably be directed more to sensation than to accuracy, with the result that public confidence in the news would eventually be undermined.

It does not seem an undue hardship, and certainly not deprivation of a constitutional right, that a wire service should be required to defend, in Court, a report that its newsman had actually seen a citizen committing a crime.

The reciprocal hardship upon the citizen, facing criminal prosecution because of such false reports, without legal remedy, would involve the loss of his most precious rights, his liberty and good reputation, without due process of law.

Such Freedom of the Press, without legal responsibility, could deteriorate into a license to destroy reputations and careers and rigidly control the development of political and governmental leadership.

It would appear that, in the instant case, the submission to the jury by the trial court of the question of substantial truth, fair comment, and good faith should have been amply sufficient to protect the constitutional freedom of Petitioner from responsibility for false statements that were not knowingly made or made in reckless disregard for the truth.

It is respectfully submitted that Petitioner's constitutional rights were protected in the trial of this case, and that it has not been held liable for a good faith comment upon facts which were substantially true.

II.

The jury's verdict and the trial court's judgment in this case are supported by the evidence in the record.

Under Question No. 3, Petitioner raises the issue as to whether the record before the trial court involving "substantial truth" and "fair comment" is so lacking in evidentiary support that the trial court's judgment constitutes a denial of due process of law. Under "Reasons for Granting

the Writ", Petitioner asserts that Respondent's case represents one of the most "serious and successful attacks ever made on the freedom of the press," with the fundamental right of the news media "to publish and disseminate, without fear or favor, good faith reports and comment concerning events of national significance and persons of political prominence".

At the start of this issue, it is respectfully suggested to the Court that the State procedure involves not only the answering of special issues by unanimous verdict of a jury, but review of the jury's verdict by a Court of Civil Appeals, which is required to search and review the record to ascertain if the verdict is "against the weight and preponderance of the evidence and is manifestly unjust". See *in re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660; *Burt v. Lochhausen*, 151 Tex. 289, 249 S.W. 2d 194.

In *Associated Press v. Walker*, 393 S.W. 2d 671, the Court of Civil Appeals, Second Supreme Judicial District of Texas, reviewed and affirmed the findings of fact by the jury and the trial court. Even a casual review of the record which was available to that Court will reveal that these appellate courts did not lightly put their stamp of approval upon a judgment and verdict so lacking in evidentiary support as to constitute a denial of due process of law.

As set forth in Respondent's summary of evidence, supra, there is massive evidence in the record that Respondent was, at most, an observer of the events upon the campus, and did not participate in the violent activities of the crowd. Comparison of the purported summary of evidence

under Petitioner's "Statement of the Case" with the citations to the record will reveal that, when the statements are read in their true perspective, without slanting and in proper sequence and the context, the overwhelming weight of the evidence is that Walker did not assume command of the crowd, and did not lead a charge, and that the jury's finding that such statements by Petitioner were not "substantially true" is supported by the record.

The purported summary of the evidence at pages 11-24 of the Petition for Writ leads off with Walker's public statements, obviously providing no proof as to his actions on the campus, and, at most, providing a prejudicial background for the subsequent summary of the facts and evidence.

At pages 14 and 15, the background of the riot is summarized from the witness Cox as including violence, in which the evidence referred to in the record conclusively establishes Walker had no participation (S.F. 258; Petition, page 14). But this same witness, Cox on re-direct examination testified.

"Q. During the time you saw him, did you see him lead a charge?

"A: No, sir."

Another typical example of distortion of the evidence appears at page 19 of the Petition, where the statement of the witness, Charles May (S.F. 1231), that he saw Walker "walking toward the flag pole with a crowd surrounding him" is presented as indicating that Walker was leading a charge. A review of the complete testimony of this witness reveals that his testimony was specific that Walker did not

lead a charge. Typical is the statement of this witness (S.F. 1213): "A. I asked him, I said, 'General Walker, do you think if you were in charge here, you could stop the riot?' and he said, 'hell, if I had been in charge here we wouldn't have had a riot'. Well, anyway, he was moving around at this time, **sort of moseying back and forth** in front of the statue." A fair appraisal of the entire testimony of this witness is that he described Walker as merely "walking around the area, shaking hands, and observing."

The witness, Hunter, (P. 19, Petition) is referred to as having testified that Walker 'exhorted his listeners: 'come on, let's go' or 'let's go up and see,'. The actual testimony of the witness was:

> "A. Yes, sir, right after making a speech, he stepped down and people were still shaking hands with him and talking to him and he talked to a few of them and came over in the direction where I was and he says, 'let's walk up here and see what's going on' or something like that." (S.F. 1040, 1050)

(This is typical of the evidence relied upon by Petitioner to establish that Walker "led a charge".)

The testimony of the witness, Jackson, is also cited (Petition, 19) as indicating that Walker "led a charge". The statements relied upon being that "the General walked to the vicinity of the flag pole; that 10 or 15 people followed him; that 25 were with him; and that those in front of him were throwing rocks."

The witness actually testified that he and other students had requested Walker to lead them, that Walker had re-

fused to answer, and walked with them, at a very slow gait, to the vicinity of the flag pole in the center of the circle (S.F. 1007-8). The witness was asked if Walker participated in the riot in any way, and answered "no, sir." (S.F. 1010-1011). He also testified that Walker "stood there and looked several minutes, just at the marshals. He stood there." (S.F. 1008). He testified that the students around Walker were not close enough to throw a missile at the marshals (S.F. 1011). From the entire testimony of this witnes, it is obvious the reference in the Petition, "that those in front of him were throwing rocks" did not involve any one close to Walker, and that this statement is made by Petitioner, completely out of context.

Again, at page 20, Petitioner referred to the testimony of the witness, Edwards (S.F. 597) as establishing that "Walker approached the flag pole, accompanied by some fifty or sixty people." The testimony of this witness, immediately following that referred to by the Petitioner was:

> "Q. Did that fifty or sixty go with him?
>
> "A. They weren't following him. He wasn't leading any group."

This witness testified (S.F. 588) that Walker remained near the monument for some ten/twenty minutes, after his speech, which squarely contradicted testimony of several of the Petitioner's witnesses, that Walker moved toward the Lyceum immediately after the speech. He described Walker's movement as a "slow casual walk up there". The tenor of the entire testimony of this witness was that Walker participated in no way in the violent activities of the crowd.

Also at page 20 of the Petition, testimony of the witness, Cox, is summarized as having Walker in the middle of a group walking toward the Marshals, some waving a flag of truce and demanding, "we want that nigger". A review of the actual testimony of this witness (S.F. 247) will reveal that this movement toward the marshals had nothing whatever to do with Walker, and that the students who went on forward were endeavoring to talk with the marshals, but were not in any way associated with Walker. The comment about the "nigger" is obviously another attempt to inject a sly element of prejudice against Respondent, in no way supported by the evidence.

Again, at page 20 of the Petition, the testimony of the witness, Sweat, is referred to as supporting the conclusion that Walker "led a charge," in that he "walked toward the flag pole a second time after his speech with about fifteen people, including some who had missiles in their hands." Without further encumbering this already lengthy discussion, Respondent respectfully suggests that, if the entire testimony of this witness, Sweat, can reasonably be construed to establish that Walker actually led a charge or charges against the U. S. marshals, the argument of Petitioner is sound. On the other hand, if the testimony of this typical witness can reasonably be construed as evidence that Walker did not assume command of the crowd or lead a charge against the marshals, there must, of necessity, be sufficient evidence after review of the entire record to support the verdict of the jury, and the judgment of the trial court, affirmed by the Court of Civil Appeals. We respectfully invite

the attention of the Court to the entire testimony of this witness, (S.F. 140-244) as typical of the evidence offered by Respondent to refute the charges by Petitioner that Respondent had assumed command of the crowd and led a charge.

Respondent respectfully submits that the evidence in the record supports the verdict of the jury that: 1) the publication of Petitioner that Walker assumed command of the crowd and led a charge against U. S. marshals was not substantially true, 2) that the publication did not constitute "fair comment", 3) that the publication was not made in good faith.

III.

The verdict was reasonable under the circumstances, and certainly does not violate the Constitution.

As pointed out in the trial of this case, the issues involved are even bigger than the parties. The largest news media on earth published, around the world, a false statement that Respondent, a man of international reputation, had committed an act of sedition and insurrection against the government which he had sworn to defend, as a Major General in the United States army. The Respondent, as a result of the false charge, will bear to his grave a public image as a criminal and a lunatic. In addition, he suffered for six dismal days and nights imprisonment in a mental prison hospital, amid an atmosphere of criminal insanity. His long-time comrade in arms, Colonel Dornblaser testified that, when he read of Walker leading

a charge of students against U. S. marshals, he thought he had "really lost his marbles" and that "an army officer that had been trained as he, with his reputation, could not possibly have led a bunch of unarmed students against armed marshals."

The Associated Press had gambled, by releasing the report of its newsman, before Walker had been charged by federal authorities with a crime, for the highest stakes known to human conflict * * * human reputation and liberty. They lost, when their premature publication was not later supported by an arrest, trial, and conviction of Walker.

The frustration, degradation and humiliation incident to this publication was a proper element of consideration by the jury.

The amount of damages to an individual similarly situated to Respondent is almost beyond measure in dollars and cents. It is the end of Justice that no one shall suffer wrong. Respondent has suffered. Petitioner has properly been required to compensate.

Certainly, for an organization as wide spread and powerful as the Associated Press, the damages do not represent a ruinous amount.

As to the contention that such an award of damage would preclude the news media from fairly and accurately reporting the news, it is respectfully submitted that the Associated General Walker, simply, thoroughly, and accurately that Press could have reported the events at Oxford involving

* * * 1) Walker issued public statements, 2) he came to the campus during the riot, 3) he mingled with the crowd, 4) he made a speech, 5) he remained in the area after the speech.

If Walker had actually assumed command of the crowd and led a charge, as reported by the Associated Press, and if the government had charged him with a crime, the Petitioner could have reported such facts, after the charge, with immunity and privilege. Where they elected, however, to publish upon the unsupported statement of a 21 year old boy, whose reports were conflicting in time and fact as they came into the New Orleans news room, that Walker had committed a crime, they gambled human liberty and reputation against a highly sensational and salable news story. Had the government indicted and convicted Walker, their gamble would have paid off. Without such indictment and conviction, however, the Associated Press was properly required to answer in a Court of Justice and Law as to the accuracy and good faith of its reporter.

That the jury has returned a verdict of $500,000.00, affirmed by two appellate courts, is no ground for a judicial determination that the hasty, irresponsible and improvident action of Associated Press should be protected by a constitutional shield to be created for its benefit, at the expense of the rights of an American citizen, If verdicts of this size for defamation will hamper free dissemination of the news, the answer is very simple—don't lie.

It is respectfully submitted, that the verdict of the jury in this case, in amount, does not invade the constitutional rights of Petitioner.

IV.

The Sullivan rule does not apply when the defamed individual falsely accused of crime is not a public official, but is a private citizen, even though he is a figure of public interest.

It is now determined by all of the Courts in Texas, that under the common law rules of libel, which were not codified into statutes until 1901, the Associated Press is guilty per se in charging Walker, a private citizen, a resigned Major General drawing no government retirement pay, with insurrection and inciting a riot against the United States marshals, statutory crimes under the Acts of Congress sounding in treason. Unless that determination of the Texas Courts under common law libel is in conflict with the constitution of the United States, that sovereign determination should not be disturbed, and this Court should not exercise its jurisdiction to overturn the Texas construction of the common law as adopted in Texas.

Under 18 U.S.C. §§2383 and 2384, the chapter pertaining to rebellion, insurrection, and seditious conspiracy, one guilty of opposing by force the authority of the federal government or using force to prevent, hinder, or delay the execution of the laws of the United States, is subject to fines ranging from $10,000.00 to $20,000.00, or imprisonment ranging from 10 to 20 years, or both, and becomes incapable of holding any office under the United States.

The libelous story of the Associated Press, after accusing Walker of assuming command of a mob rioting against the marshals, and leading a charge, mentions his arrest on charges of inciting insurrection and seditious conspiracy.

Imputation of crime is libel per se in almost every English speaking jurisdiction, and the cases are collated in 33 Am. Jur. 44, Libel & Slander, §11. The rule was recognized by this Court in *Pollard v. Lyon*, 91 U.S. 225, 23 Law Ed. 308, and *Washington Post Company v. Chaloner*, 250 U.S. 290, 63 Law Ed. 987.

The libel laws of Texas were first enacted into statute in 1901, and did no more than codify the historical definitions of libel under the common law, which had been adopted in Texas on 20 January 1840, by Article 1 of the Statutes. *Renfro Drug Company v. Lawson*, 144 S.W. 2d 417 (Tex. Civ. App., no writ history).

In other words, the respondent here does not rely upon any statute peculiar to Texas, but only upon the common law, which creates a distinction, as we shall hereinafter point out, with such cases as the Sullivan case relied upon by the petitioner.

The petitioner presents five questions for review, but then relies almost entirely upon imploring this Court to change its construction of *New York Times Company v. Sullivan*, 376 U.S. 254, 11 Law Ed. 2d 686, as repeated in *Garrison v. Louisiana*, 379 U.S. 64, 13 Law Ed. 2d 125, and *Rosenblatt v. Baer*, 383 U.S. 75, 15 Law Ed. 2d 597.

But there are at least four major distinctions between this case and *Sullivan*, distinctions which by their nature would inhibit rather than enlarge *Sullivan*. Let us state them, and then return to argue them.

First and foremost, *Sullivan* was confined to public officials exclusively, and this respondent is a private citizen who, by his outstanding military career and his outspoken convictions and principles, is concededly a figure of public interest.

Second, *Sullivan* did not impute a crime, a libel per se under general principles of law, but here a resigned Major General was charged with insurrection against his country.

Third, in *Sullivan* the defendant was a newspaper, with the normal privileges of the press. Here, the Associated Press is not a newspaper, but a merchant of news selling its commodity, its stock in trade, and not producing a periodical for public persual within the definition of a newspaper or the press.

Fourth, and finally, in *Sullivan* the statutes of Alabama inhibited the Freedom of the Press by the creation of presumptions and changing the burden of proof facilitating recovery by plaintiff. No such situation exists here, and there is no action by the State of Texas in any manner infringing the Fourteenth Amendment, but the Texas Courts simply follow the common law of libel.

With regard to the fact that the respondent is not a public official, and therefore not within the scope of *Sullivan*, we must reluctantly impose upon the Court's patience by

repeating what it has seen many times before: excerpts from *Sullivan, Garrison, and Rosenblatt.* The emphasis has been added by us throughout.

> "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to avoid damages in a libel action brought by a **public official against critics of his official conduct.**" 376 U.S. 256.
>
> "We hold that the rule of law applied by the Alabama Courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a **public official against critics of his official conduct.**" Page 264.
>
> "The question before us is whether this rule of liability, as applied to an action brought by a **public official against critics of his official conduct,** abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments." Page 268.
>
> "The right of free public discussion of the **stewardship of public officials** was thus, in Madison's view a fundamental principle of the American form of government." Page 275.
>
> "A rule compelling the **critic of official conduct** to guarantee the truth of all of his factual assertions * * *" Page 279.
>
> "Under such a rule, would be **critics of official conduct** may be deterred from voicing their criticism * * *" Page 279.
>
> "The constitutional guarantees require, we think, a federal rule that prohibits a **public official** from recovering damages for a defamatory falsehood relating to his **official conduct** unless he proves that the state—

ment was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Page 279.

"Such a privilege for criticism of **official conduct** is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen." Page 281.

"It would give **public servants** an unjustified preference over the public they serve, if critics of **official conduct** did not have a fair equivalent of the immunity granted to the officials themselves." Page 282.

"We hold today that the Constitution limits a State's power to award damages for libel in actions brought by **public officials** against critics of their **official conduct.** Since this is such an action, the rule requiring proof of actual malice is applicable." Page 283.

"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposess of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the 'official conduct' concept. **It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official,** and that the allegations in the advertisement concerned what was allegedly his official conduct as commissioner in charge of the police department." Page 283.

Shortly thereafter Mr. Justice Brennan wrote the opinion in *Garrison*, and reiterated the *Sullivan* doctrine, expressly stating that it was limited to a public official:

"In New York Times Company vs. Sullivan, * * * we held that the Constitution limits State power in a civil action brought by a **public official** for criticism of his **official conduct,** to an award of damages for the false statement 'made with actual malice—that is

with knowledge that it was false or not.' At the outset, we must decide whether in view of the differing history and purposes of criminal libel, the New York Times rule also limits State power to impose criminal sanctions for criticism of the **official conduct of public officials.** We hold that it does." 379 U.S. 67.

"We held in New York Times that a **public official** might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." Page 74.

Then, in order to cover a situation just exactly like the instant case, Justice Brennan repeated what the Supreme Court had already said some time before, saying:

"For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be affected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *" Chaplinsky vs. New Hampshire, 315 U.S. 568, 572, 86 L. Ed. 1031, 1035, 62 S. Court 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Page 75.

In *Rosenblatt* Mr. Justice Brennan speaking for the Court once again reiterated the limitation of *Sullivan* to public officials:

"We there held that under the First and Fourteenth Amendments a State cannot award damages to a **public official** for defamatory falsehood relating to his **official conduct** unless the official proves actual malice." 15 Law Ed. 600.

In this case "we granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a **'public official'** under New York Times and under our decision in Garrison vs. Louisiana." Page 601.

"The question is presented, however, whether that theory of recovery is precluded by our holding in New York Times that in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on **government operations** cannot be utilized to establish a libel of those administering the operations." Page 602.

"To allow the jury to connect the statements with Sullivan on that presumption alone was, in our view, to invite the spectre of prosecutions for **libel on government**, which the Constitution does not tolerate in any form." Page 603.

"A theory that the column cast indiscriminate suspicion on members of the group responsible for the conduct of this **governmental operation** is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient." Page 604.

"Even accepting respondent's reading, the column manifestly discusses the conduct of **operations of government.**" Page 604.

"The question is squarely presented whether the **'public official'** designation under New York Times applies." Page 604.

"'We held in New York Times that a **public official** might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.' Garrison." Page 604.

"Turning, then, to the question whether respondent was a **'public official'** within New York Times, we reject at the outset his suggestion that it should be

answered by reference to State law standards." Page 604.

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for **government operations** must be free, lest criticism of government itself be penalized. It is clear, therefore, that the **'public official'** designation applies at the very least to those among the hierarchy of **government employees** who have, or appear to the public to have, substantial responsibility for or control over the conduct of **governmental affairs.**" Page 605.

Because the case was tried before *Sullivan*, it was remanded to determine whether the plaintiff was a public official, and whether there was a jury question of malice.

In a concurring opinion Mr. Justice Stewart said that the *Sullivan* rule should not be applied "except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars." He then went on to make clear, that "the preventive effect of liability for defamation serves an important public purpose, for the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."

To use Mr. Justice Stewart's language, the Associated Press just plain lied about Respondent. When they said that he led a charge, that was false, and the jury found it was false. When they said that he assumed command of

a rioting crowd in insurrection against the authority he had respected all of his life, that was false, and the jury found it was not even substantially true.

The Associated Press says that the First and Fourteenth Amendments gave them a license to tell these lies about Respondent, because he was in the public eye, even though their mendacious reporter didn't know it. The Associated Press says that unless they are free to "criticize" Walker by making false statements about him, the public policy will be destroyed and the purpose of the First and Fourteenth Amendments will fail. This suit does not inhibit fair criticism of Edwin A. Walker or of any other person. It does prohibit the Associated Press from making false statements of fact about Walker and other persons, but not their criticism or fair comment on the true facts. The First and Fourteenth Amendments do not give the Associated Press a license to lie, and they never have. Falsification of the facts is never privileged. The statement in the Associated Press story that Savell, claiming to have been less than six feet from Walker, reported that he saw "two men take him by the arms and they headed for the federal marshals" was either true or knowingly false. It is not comment—it is a statement of facts, and it could not be accidentally made.

The fallacy of the contention that *Sullivan* should be extended to all persons in the public eye is very obvious when its logical extreme is considered. Could the Associated Press defend charging Willie Mays falsely with taking a bribe to throw a baseball game because he is constantly in the press as a public figure and each new home run adds to a National

League record? Could they defend on a charge that Zsa Zsa Gabor was compelled to get married quickly, merely because, although she is a private citizen, she is such a public figure that her marital status is of such tremendous public interest that she can be lied about with impunity? The fallacy reveals itself promptly.

With reference to the second distinction, in neither *Sullivan* nor *Rosenblatt* was the plaintiff mentioned by name. In each instance the reference was to the holder of an official position, and the ancient innuendoes came into play to show who was meant. The defamatory statements did not charge the plaintiff with having committed any kind of crime specifically, but again by innuendo charged them with malfeasance in office.

But in the instant case, Walker by name and by the courtesy title of General still appurtenant after his resignation, was specifically charged with crimes defined in the federal statutes, 18 U. S. C., §§2383-4, Insurrection & Seditious Conspiracy. These constitute libel per se at common law, and do not require any State statute to implement them. Under almost universal principles of law, damages are presumed to flow from libels per se, and they are compensable as such without the necessity of showing malice. Respondent's right of recovery, then, was not dependent upon any State action or State statute. It is the action of the State that is inhibited under the Fourteenth Amendment.

Regarding our third distinction, in *Sullivan* the defendant was the New York Times, undoubtedly one of the outstanding newspapers in the country. While that fact did not appear to have much bearing upon the decision, it was pointed out

that, in a large newspaper, management and the editorial staff could have no great knowledge of the contents of advertising offered to the business office, which was the substance of the libel. In Texas, by statute, certain additional privileges are granted to newspapers, the Texas statute as enacted in 1901 being substantially the *Sullivan* rule. Article 5432, Vernon's Annotated Civil Statutes of Texas, provides that "the publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel: * * * 4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information."

The Associated Press is not a newspaper nor is it a periodical. As its long time general manager, Kent Cooper, said in his book *Barriers Down*, "the prime business of news agencies is to collect and distribute news to newspapers."

This Court has discussed at length the nature of the corporate business of the Associated Press and the selling of its commodity, news. *International News Service v. Associated Press*, 248 U.S. 215, 63 Law Ed. 211; *Associated Press v. United States*, 326 U. S. 1, 89 Law Ed. 2013.

As a merchant of news, therefore, although that is one of the components essential to its customers, and also its member newspapers, the Associated Press has no greater right to falsify about outsiders than would the merchants supplying newspapers with their rolls of newsprint, or the manufacturers of type-setting machines and printing presses, and the

Associated Press has no greater exemption from defamation or negligence in the sale of its products than would they.

When the Associated Press sent out false statements over the entire world, as it did on June 6 of this year, reporting that James Meredith had been shot and murdered in Mississippi, or as it did in October of 1962, reporting to the entire world that "General Walker had led a charge against the marshals and assumed command of a "rioting mob," it is responsible for those injured as a result. The Associated Press prides itself upon the fact that the world depends upon it for news, but the world depends upon it for true news, and there is an obligation of accuracy. Otherwise, we are susceptible to the Big Lie technique perfected by Goebbels when he managed a similar news agency for Hitler in the Third Reich. A responsible press is as essential to a democracy as a free press, and the way to keep it responsible is to make it answerable for its falsehoods.

The fourth distinction is that in *Sullivan* there was considerable reliance upon the fact that the Alabama law created presumptions and burdens of proof in favor of the plaintiff and against the defendant which inhibited open criticism of official conduct. In the instant case we have no State action at all. None of the respondent's right to recovery here is based upon any State statute which alters the ancient common law rules fundamental in almost every American jurisdiction. The only State action was the furnishing of a court room and a judge for the determination of the rights, and even the definitions given to the jury were those requested by the Associated Press and not necessarily prescribed by Texas law. (See Appendix A.)

The Fourteenth Amendment applies to action by a State, and there has been no action by the State in this case other than the providing of a forum for trial and appeal.

The second, third, fourth, and fifth questions presented at pages 3 and 4 of the petition in an attempt to bring this case within the Procrustean bed of the *Sullivan* case rather remind us of the physician who superinduced pneumonia in his cold patient because he could cure pneumonia but couldn't cure a cold. It would be a novel construction indeed of the Fourteenth Amendment if the action of twelve citizens comprising a jury without instruction limiting their determination of damages could constitute a violation of the Fourteenth Amendment.

As a practical matter, this Court has set up the only sane line of demarcation: that between public official and private citizen. If the contention of the Associated Press is sustained, and if the *Sullivan* rule is extended to private citizens merely because they are figures of public interest, we have wiped out any fixed rule of law, any firm standard by which one may know in advance what his rights are, and substituted instead a fluid and fluctuating basis. How much public interest must a figure excite before he can be lied about with impunity. If the Associated Press can lie about a national figure as it did in 1962 about Walker and again in 1966 about Meredith, can the Possum Hollow Weekly lie about the winner of a spelling bee at the school house because she is a figure of public interest in the village? That way madness lies!

We respectfully submit that this Court should stand its ground and limit the *Sullivan* doctrine to public officials.

CONCLUSION

The Petition should therefore be denied, because there is no true constitutional question. No portion of the Constitution protects the perpetrator of the known falsehood from financial responsibility for his wrongdoing. There is no State action infringing the Constitution when a State Court upholds the common law, and a jury verdict pursuant to the constitutional right of trial by jury does not infringe the Constitution. The decisions of this Court do not protect knowingly false statements about a private citizen neither holding nor offering for public office.

Accordingly, this Court should not exercise any jurisdiction, and we therefore respectfully pray that the writ sought be denied.

Respectfully submitted,

WILLIAM ANDRESS, JR.,
627 Fidelity Union Life
Building,
Dallas, Texas,

CLYDE J. WATTS,
219 Couch Drive,
Oklahoma City, Oklahoma.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served by depositing a copy of the same in a United States mail box with air mail postage prepaid addressed to William P. Rogers, Leo P. Larkin, Jr., and Stanley Godofsky, 200 Park Avenue, New York, New York 10017, and to Arthur Moynihan, 50 Rockefeller Plaza, New York, New York 10020; and with first class postage prepaid addressed to J. A. Gooch and Sloan B. Blair, 1800 First National Building, Fort Worth, Texas 76102, Counsel of record for Petitioner on June ....., 1966.

.....

Of Counsel

APPENDIX A

Charge and Verdict of the Jury

No. 31,741-C

In the

DISTRICT COURT OF TARRANT COUNTY, TEXAS,
17th JUDICIAL DISTRICT.

EDWIN A. WALKER

v.

ASSOCIATED PRESS

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

This case is submitted to you in the form of questions which are called special issues. You are to answer these questions by unanimous consent.

Do not let bias, prejudice, sympathy, resentment, or any other such emotion play any part in your deliberations.

During your deliberations be careful not to mention or discuss any personal knowledge you may have about the facts in the case. *Your duty is to answer these questions from the evidence you have heard in this trial and from that alone.*

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

Do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result.

Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

Do not decide who you think should win and then try to answer the questions accordingly. If you do this your verdict will be worthless.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge.

The following definitions are given you by the Court. Whenever any of the terms so defined are used in any of the special issues, you will refer to the appropriate definition and be guided thereby in considering your answer:

By the term PREPONDERANCE OF THE EVIDENCE is meant the greater weight and degree of the credible evidence before you.

DEFINITIONS

In answer to Special Issue No. 1 you are instructed that by the term "led" is meant activities by a person who directs, moves to action, or encourages in some action or movement, and that by the term "charge" is meant a movement toward the marshals, or a group or body of people moving toward an objective.

In answering the issues in this charge in which the term "substantially true" is used, you are instructed that in order for a statement to be "substantially true" it is not necessary that the exact facts or the most minute details of the plaintiff's activities be completely accurate. Mere inaccuracies not affecting the substance of the report of plaintiff's activities are immaterial. You are further instructed that in answering special issues in which the term "substantially true" is used that the publication must be considered as a whole, giving to all the words contained therein (except those hereinabove defined for you) their ordinary meaning as read and understood by the average reader.

In answering the issues in these instructions in which the term "fair comment" is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable comments thereon. You are further instructed that by said term is meant a statement which represents the

honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon.

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss Campus", complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 3:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined.

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 8:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements, if any, inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinabove set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00.

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law at your discretion, and any amount which you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00.

/s/ CHARLES J. MURRAY

Judge presiding.

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return same into court as our verdict.

.....

Foreman.

FILED
JUL 11 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. [redacted]150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1330

THE ASSOCIATED PRESS,

Petitioner,

—against—

EDWIN A. WALKER,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Preliminary Statement

We deem it both inappropriate and unnecessary to direct specific attention to the misstatements of fact and misquotations contained in the Response filed in opposition to the Petition for Certiorari. We think it equally unnecessary, in this Court, to demonstrate how frivolous are Respondent's contentions of law (a) that the judgment below does not constitute "state action" (Resp. pp. 45-46) and (b) that the First Amendment is inapplicable because Petitioner is "not a newspaper" but "merely a merchant of news." (Resp. pp. 44-45).

There exists one contention in the Response, however, which is so startlingly erroneous, so often repeated and so basic to Respondent's argument that we feel compelled to reply: Responent's claim that the *Sullivan* doctrine is here inapplicable because the jury found against Petitioner on the issue of malice.

I.

Respondent correctly asserts, and it is beyond dispute, that the jury found that Petitioner had acted with "malice," albeit under a definition of "malice" more favorable to Respondent than that which the Federal Constitution permits. But nowhere in his forty-seven page Response does Respondent even advert to the fact that this very finding of malice on which he so heavily and repeatedly relies was overturned by the trial court for lack of evidence and that the trial court's ruling on that issue has since been upheld by every court which has reviewed the question.

A. The issue was squarely presented to the trial court when the jury returned a verdict of $300,000 in punitive damages, based upon the determination that Petitioner had acted with "malice." In setting aside the verdict the trial court held (App. B. p. 32a):

> "Turning now to issues four, eight, ten and eleven, I find there is no evidence to support the jury's answers that there was actual malice by Associated Press in publishing the stories of October 2 and 3, 1962."

B. In sustaining the ruling of the trial court on this point, the Texas Court of Civil Appeals held (App. B. p. 27a):

> "Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, 'you are

instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.'

"The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above definition before he was entitled to a finding of malice and exemplary damages.

"The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

"In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings."

Respondent's motion for rehearing on the issue of malice was denied by the Texas Court of Civil Appeals on September 17, 1965 (App. D. p. 119a).

C. Respondent thereafter conditionally applied to the Supreme Court of Texas for writ of error on the issue of malice. The writ of error was refused (App. D. p. 120a). Respondent did not move for rehearing in the Supreme Court of Texas nor did he file a petition for certiorari.

In this posture of the record, we find plaintiff's reliance on the jury's now discredited finding of "malice" almost as inexplicable as his failure to advise this Court that that finding had, in fact, been overturned.

II.

Since the filing of the Petition, the United States Court of Appeals for the Eighth Circuit has rendered an opinion in *Pauling* v. *Globe-Democrat Publishing Company* (June 21, 1966) squarely holding that the *Sullivan* doctrine is applicable to persons such as Respondent, who, though not elected public officials, are prominent personalities voluntarily involved in a matter of widespread political and public interest.* The new *Pauling* case, like the cases cited at pages 28-30 of the Petition, is squarely in conflict with the rulings of the Courts below and thus constitutes an additional reason for the granting of the writ.

Respectfully submitted,

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The Associated Press

*Since *Pauling* has not yet been reported, the text of the opinion is annexed hereto as Appendix 1.

Appendix 1

Pauling v. Globe-Democrat Publishing Company

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,082

LINUS PAULING,
Appellant,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 21, 1966.]

Before VOGEL, Chief Judge, and BLACKMUN and GIBSON, Circuit Judges.

BLACKMUN, Circuit Judge.

A jury returned a verdict for the defendant in this diversity civil libel action instituted in September 1961 by Linus Pauling against the corporation which publishes the newspaper known as the St. Louis Globe-Democrat. The plaintiff appeals.

Pauling, for many years a professor of Chemistry at the California Institute of Technology, is a man of international repute. His status as a scholar and as a scientist

is not questioned. His awards include many honorary degrees, recognition by the United States government for meritorious service during World War II, the 1954 Nobel Prize in Chemistry, and, more recently, the Nobel Peace Prize.

The alleged libel grew out of a controversy over Pauling's efforts to promote a nuclear test ban treaty. The libel is claimed to exist in the following three sentences of the defendant newspaper's editorial, entitled "Glorification of Deceit", published in its issues of October 10, 1960, in respect to an appearance by Pauling before a subcommittee of the United States Senate's Committee on the Judiciary:

> "Pauling contemptuously refused to testify and was cited for contempt of Congress. He appealed to the United States District Court to rid him of the contempt citation, which that Court refused to do. The appeal from the lower court's affirmation of contempt is expected to be handed down by the Supreme Court today."

The defendant's editorial in its entirety is attached as an appendix to this opinion.

A review of some of the factual background culminating in the challenged editorial may be enlightening:

Prior to 1960 Professor Pauling evinced concern about nuclear testing. In January 1958, he submitted to the United Nations a petition "urging that an international agreement to stop the testing of nuclear bombs be made now". This was prepared and signed by Pauling and had appended to it a list of the names of 9,234 other scientists from throughout the world. An additional list of 1,803

was submitted by him in July. The two lists, with Pauling, made a total of 11,038 names. The original signatures were retained by Pauling and did not accompany the petition.

Also, about this time, the professor and other United States citizens and some non-resident aliens sought, in the United States District Court for the District of Columbia, to enjoin the Secretary of Defense and the Atomic Energy Commission from detonating nuclear weapons. Judge Keech dismissed the complaints on the grounds that they failed to state a justiciable controversy and that none of the plaintiffs had standing to sue. *Pauling* v. *McElroy*, 164 F. Supp. 390 (D.D.C. 1958). The Court of Appeals affirmed, 278 F. 2d 252 (D.C. Cir. 1960). The Supreme Court denied certiorari, 364 U.S. 835.

Dr. Pauling's efforts in this direction came to be a matter of interest to the Judiciary Committee's Subcommittee on Internal Security. Hearings on his activity were held on June 21 and October 11, 1960. Pauling was subpoenaed and testified on both occasions.[1]

At the June 21 hearing the subcommittee manifested a desire to obtain three things from Dr. Pauling: The signatures to the petition; the names of the persons to whom Pauling had written requesting assistance in obtaining signatures; and the letters with which the signatures were transmitted to Pauling. Although he agreed to produce the signatures and a list of the persons to whom he had written for assistance in their collection, he refused a request to supply a list of persons who had transmitted signatures to him. His refusal was essentially on the

1. Reports of these hearings were made and printed for the use of the Committee on the Judiciary. The Report of the June 21, 1960, hearing contains, at pp. 79,355, the 11,038 names on the two lists.

Appendix 1

Pauling v. *Globe-Democrat Publishing Company*

grounds that this would expose the participants to reprisals and would violate a trust they had reposed in him. At the conclusion of the hearing on June 21 the subcommittee ordered Dr. Pauling to appear on August 9 and to bring with him all signatures to the petition presented to the United Nations and all letters of transmittal with which those signatures came to him. The hearing so scheduled for August 9 was thereafter postponed to October 11.

In the meantime, Pauling instituted an action in the United States District Court for the District of Columbia against Senators Eastland and Dodd (the subcommittee's chairman and vice-chairman, respectively), the United States Attorney for the District of Columbia, and the Sergeant-at-Arms of the Senate. In his complaint Pauling alleged that the subcommittee's order of June 21 was violative of his rights under the First and Fourth Amendments and called for the production of papers not pertinent to any lawful inquiry; he expressed willingness, however, to produce the signatures of United States residents who had signed the petition. Pauling requested a declaratory judgment as to his rights and duties with respect to the subcommittee's order and as to its validity. He also sought injunctive relief against enforcement of the order and against his being prosecuted for any failure to comply with it. Judge McGarraghy, on August 23, 1960, granted the defense motion to dismiss. He did so on the grounds that the challenged order was not subject to judicial review in that action; that the plaintiff had an adequate remedy at law in the event of proceedings against him; and that the relief sought would require an

unauthorized interference with the legislative branch. Again the Court of Appeals affirmed, *Pauling* v. *Eastland*, 288 F.2d 126 (D. C. Cir. 1960), and the Supreme Court denied certiorari, 364 U.S. 900.

While that appeal was pending Pauling advised the Court of Appeals by letter that he was ready to submit the original signatures to the subcommittee. During the pendency of the petition for certiorari a request was made that the subcommittee postpone further hearing until the Supreme Court acted. This request was denied and the second hearing took place on October 11. At that time Dr. Pauling produced the signatures. A week earlier he had sent the subcommittee a list of the persons, about 1200 in number, whose assistance he had requested. He continued to refuse, however, to comply with that part of the order which called for the production of the transmittal letters. He renewed his contention that to do so would subject the participants to reprisals. At the end of the hearing Dr. Pauling was excused from the subpoena.

At this point we note, parenthetically, that Pauling, together with over 100 United States nationals and more than 100 aliens, subsequently insituted still another suit in the United States District Court for the District of Columbia to restrain the Secretary of Defense and the Atomic Energy Commission from detonating any nuclear weapon. This time Judge McLaughlin granted the defense motion to dismiss. He did so on the grounds that the plaintiffs had no standing to sue; that the complaint failed to state a justiciable controversy; that the actions and powers challenged were plainly authorized by law and the Constitution; and that the matter was res judicata by the earlier holding in *Pauling* v. *McElroy*, supra. The Court of Appeals, in a

vigorous opinion, affirmed and said that the district court "was plainly correct on all points". *Pauling* v. *McNamara*, 331 F.2d 796, 798 (D. C. Cir. 1963). Certiorari was denied, 377 U. S. 933.

We now return to the present case. The plaintiff by his complaint asserts that the statements in the editorial's three sentences quoted above were false in that Pauling was not cited for contempt of Congress, in that he did not appeal to any court to rid himself of any contempt citation, and in that no appeal from a court's affirmation of contempt was expected because there had been no such affirmation. Pauling also alleges that the defendant published the quoted statements when it knew or should have known that they were false. He seeks both compensatory and punitive damages.

The defendant newspaper, by its amended answer, admits that Pauling had not been cited for contempt of Congress and had not appealed to any court to rid himself of a contempt citation, and that the editorial's contrary statements "are literally false", but it denies that in "the context in which they appeared they were false in substance and effect." The defendant further alleges "that the gist and thrust" of the publication was that Pauling "was contemptuous of the authority of the Congress of the United States" in that he had contemptuously refused to testify as to the identity of the persons who had helped him collect the petition; that he had unsuccessfully invoked federal judicial power to prevent his being punished for his contemptuous actions; that "the gist and thrust of the publication was and is true"; and [as amended at the trial] that Pauling "voluntarily sought public expression of his views on national policy and invited public comment thereon".

Appendix 1
Pauling v. *Globe-Democrat Publishing Company*

Pauling's motions for summary judgment and for a directed verdict on the issue of liability were denied. As above noted, the case was submitted to the jury and the jury brought in a general verdict for the defendant.

On this appeal Pauling renews his argument that the defendant is liable as a matter of law and that the trial court should have instructed the jury to that effect and allowed it to pass only on the issue of damages. Pauling also urges error in the instructions, in the admission of evidence, and in other aspects of the conduct of the trial.

The defendant in response argues that the trial court's refusal to grant the plaintiff a summary judgment or directed verdict on the issue of liability was proper because this was prohibited under the terms of the Missouri Constitution, Article I, § 8, and by the First Amendment; there was a genuine issue of substantial truth; the subject of the challenged publication was a matter of grave national interest; and the essential ingredient of defendant's liability, namely, actual malice, was not alleged and was insufficiently proved. It also argues that there was no reversible error in the instructions, in the admission of evidence, or in the trial's conduct. It finally urges a failure to plead and prove a claim for relief for libel under constitutional standards recently enunciated by the Supreme Court.

We go directly to this last argument of the defense. The trial in the district court took place March 16-19, 1964. Seven days before the trial began the Supreme Court decided *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). It is obvious from the record that it was because of the promulgation of the opinions in *New York Times* that the defendant further amended its answer, by leave during the trial, to add the allegation, above noted, that

Appendix 1
Pauling v. *Globe-Democrat Publishing Company*

Pauling "voluntarily sought public expression of his views on national policy and invited public comment thereon"; indeed, the *New York Times* decision was specifically pleaded. The district court refused to instruct the jury on the *New York Times* issue but allowed the amendment in order to preserve the point for appeal.

New York Times reaches the question whether the freedom of speech and of the press guarantees of the First and Fourteenth Amendments limit state power to award damages to a "public official" for defamatory falsehood relating to his official conduct. The answer is that the amendments do limit such state power unless the plaintiff "proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". Pp. 279-80 of 376 U. S.

The advertisement which was the subject of that litigation is really not dissimilar to the editorial with which we are now concerned. Both bore upon controversial public issues. Each was generally true; each was partially false. The Alabama courts had held that the statements in the advertisement were "libelous per se" against a Montgomery city commissioner charged with the supervision of the police department, and the Alabama jury was so instructed. The Supreme Court held, pp. 269-88 of 376 U. S., that libel, as such, is not immune from constitutional limitations but "must be measured by standards that satisfy the First Amendment"; that there has been "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; that constitutional protection does not turn upon the truth or

popularity of the ideas and beliefs offered; that erroneous statement is "inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' "; that neither factual error nor defamatory content removes "the constitutional shield from criticism of official conduct"; that the allowance of the defense of truth does not save the state libel rule; that public discussion of official conduct enjoys a privilege under the First and Fourteenth Amendments in the absence of actual malice; that the Alabama rule which presumes malice, where general damages are concerned, is inconsistent with constitutional limitations; that the Court had the duty to review the evidence to see whether it could constitutionally support a finding of actual malice; that a statement by the newspaper's officer that he thought the advertisement was substantially correct was at least a reasonable opinion and there was no evidence to impeach his good faith in holding it; that under the circumstances the failure to retract was not adequate evidence of malice for constitutional purposes; and that the evidence at most supported a finding of negligence which fell short of actual malice. At footnote 23, on p. 283 of 376 U. S., the Court significantly observed:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo,* 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner

> clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department."

Mr. Justice Black, with Mr. Justice Douglas joining him, concurred separately on the ground that the First and Fourteenth Amendments "completely prohibit" a state from awarding damages to public officials against critics of their official conduct and that the defendants "had an absolute, unconditional constitutional right to publish . . . their criticisms of the . . . agencies and officials". P. 293 of 376 U.S. Mr. Justice Goldberg, with Mr. Justice Douglas joining him, separately concurred and stated his "belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism". P. 298 of 376 U.S. Yet he carefully pointed out, p. 301, that "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or a private citizen".

The companion question as to whether the rule of *New York Times* "also limits state power to impose criminal sanctions for criticism of the official conduct of public officials" promptly presented itself in *Garrison* v. *Louisiana*, 379 U.S. 64, 67 (1964). That case concerned remarks made by a district attorney about judges of the criminal district court of his Louisiana parish. The Court's answer to the question was flatly in the affirmative:

> "The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. . . . [O]nly those false state-

ments made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. . . .

"The use of calculated falsehood, however, would put a different cast on the constitutional question. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Pp. 74-75 of 379 U.S.

In answering the suggestion that the alleged defamatory statement was an attack upon the judges' personal integrity, rather than on their official conduct, the Court held that the rule of *New York Times* "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed". P. 77 of 379 U. S. Justices Black, Douglas, and Goldberg each filed a concurring opinion reflecting views about as expressed in *New York Times.*

The Court made the same ruling in *Moity* v. *Louisiana,* 379 U. S. 201 (1964), concerning alleged defamation of a district attorney of a Louisiana parish (see *State* v. *Moity,* 245 La. 546, 159 So. 2d 149 (1963)), and in *Henry* v. *Collins,* 380 U. S. 356 (1965), concerning a statement relating to a Mississippi county attorney and chief of police.

The Supreme Court's most recent expression on this subject is *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966). This was a New Hampshire civil libel action against the author

of a newspaper column for allegedly defamatory and false comment concerning the plaintiff's performance when he was a supervisor of a county recreation area. The plaintiff was employed by elected county commissioners. The trial antedated the Supreme Court's decision in *New York Times.*

The Court held that the question whether the plaintiff was a "public official" within *New York Times* was not to be answered under state law standards. It made specific reference to its footnote 23 in *New York Times* and here, too, observed that "No precise lines need be drawn for the purposes of this case" in determining the reach of the "public official" concept. It stated,

> "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. . . . It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [footnote omitted] P. 85 of 383 U. S.

The Court noted, p. 86, the tension between society's interest in preventing and redressing attacks upon reputation, on the one hand, and, on the other, "the values nurtured by the First and Fourteenth Amendments" and stated that "when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation". Because *New York Times* had

not been decided when Baer's case went to trial, the Court felt his presentation was not shaped to the "public official" issue. The case, accordingly, was remanded and Baer was given an opportunity to prove that he was outside *New York Times* or, if not, that he presented a jury question of malice. Again, a significant feature is the Court's footnote 12 on p. 86 of 383 U. S.:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

Mr. Justice Clark, without comment, concurred in the result. Mr. Justice Douglas separately concurred and said, p. 90, "I cannot relate [the term 'public official'] only to those who, by the Court's standard, are deemed to hold public office"; he asked the question, "But since freedom of speech is now the guideline, do state libel laws have any place at all in our constitutional system, at least when it comes to public issues?" Mr. Justice Stewart separately concurrred with the observation that this and the *New York Times* and *Garrison* cases turn on the proposition that state defamation laws cannot constitutionally be converted into laws against seditious libel but that the First Amendment is not "the only guidepost in the area of state defamation laws". Pp. 91-92. Mr. Justice Black, with Mr. Justice

Douglas joining him, concurred in the reversal but dissented as to the new trial direction. He repeated his observation in *New York Times* that "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment". He would not allow "the right to criticize a public agent engaged in public activities" to depend upon his being "arbitrarily labeled a 'public official' ". P. 95. Mr. Justice Harlan dissented from a part of the opinion with which we are not here concerned. Mr. Justice Fortas dissented on the ground that the writ of certiorari had been improvidently granted.

It is of interest to note that the *New York Times* principle was extended by the Court through the path of preemption into the field of labor relations in a case decided the same day as *Rosenblatt* v. *Baer*. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 65 (1966).

We feel that the majority opinions in these Supreme Court cases (all of which were written by Mr. Justice Brennan except, possibly, the per curiams in *Moity* v. *Louisiana* and *Henry* v. *Collins*) establish for us the following: (1) The Court recognizes as a national "principle" the desirability of uninhibited debate about public issues. (2) It also recognizes "a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". (3) In the absence of malice, the First and Fourteenth Amendments afford a privilege to public discussion of official conduct even though it has some factually erroneous or defamatory content. (4) Malice, in this connection, equates with knowledge of the falsity of the statement or with reckless

disregard of whether it is false or not. (5) The Court thus far has specifically refrained from fixing a limit for its concept of "public official", either among the ranks of government employees "or otherwise". (6) It has, however, included within the term a city commissioner, a trial judge, a prosecutor, and a chief of police, and it has not excluded a recreation supervisor appointed by elected county commissioners. (7) Similarly, the Court has not yet fixed a boundary for its "official conduct" concept. (8) At least two present members of the Court feel that the majority's standard for privilege falls short of appropriate constitutional protection. (9) The Court thus far has also refrained from expressing a view as to "whether there are other bases" for applying the standards of *New York Times,* specifying, as a possible example, the subject who "has thrust himself into the vortex of the discussion of a question of pressing public concern". (10) The Court has applied the *New York Times* principle by analogy in the labor field.

These Supreme Court cases, therefore, may not take us so far as the facts of the present case or provide incontestably controlling precedent for us here; rather, we are concerned with the express reservations of the *New York Times* and *Rosenblatt* footnotes. Concededly, Dr. Pauling was not a public official and the Globe-Democrat editorial, therefore, was not one in criticism of official conduct in the governmental sense.

We feel, however, that the implications of the Supreme Court's majority opinions are clear. Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very "vortex of the discussion of a question of pressing public

concern". He was attempting to influence the resolution of an issue which was important, which was of profound effect, which was public and which was internationally controversial. Because of his world prominence—a factor stressed by his counsel in the present case—he was in a position of some influence on the problem's resolution. He obviously deemed himself influential and he was undertaking to provide leadership among academic and scientific people and to bring forces from many nations of differing political ideologies to bear upon the problem. Although Dr. Pauling did not take the stand himself, the record here clearly establishes, by evidence adduced primarily by the plaintiff, his preparation of the petition to the United Nations, his taking the lead in soliciting supporting signatures, his devotion of a substantial portion, "perhaps a third", of his time to attracting public attention to the problems of nuclear testing, his speaking and writing widely on the subject, and even his participation in sign carrying and picketing on the issue near the White House and elsewhere. His instigation of the several lawsuits we have described above is a self-evident additional factor.

We recognize that it is arguable that the *New York Times* rule should not be extended beyond governmental officials. One may point out that many public officials enjoy either an absolute or conditional privilege as to statements made in the line of duty and that the Supreme Court recognized this in *New York Times,* p. 282 of 376 U.S., and in *Garrison,* p. 74 of 379 U.S., and used it in support of its conclusions in those cases, namely, to avoid giving "public servants an unjustified preference over the public they serve". One may say, too, that, while the public interest requires free and open discussion of the

qualifications, conduct and views of public officials, there is no comparable need as to the attributes of private citizens, however much public attention they have succeeded in acquiring. We feel, however, that the Supreme Court's use of the undesirable preference argument is not a significant part of the rationale of its cases and that it was employed only as a final or clinching factor. Indeed, in *Rosenblatt* v. *Baer*, footnote 10, pp. 84-85 of 383 U.S., the Court specifically denies that it ties the *New York Times* rule to the rule of official privilege. "The public interests protected . . . are interests in discussion, not retaliation. . . ." And the Court itself has pointed out that the reciprocal privileges are not congruent.

We also feel that a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of national policy will be less important to the public interest than will criticism of government officials. A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official who is clearly subject to *New York Times*. It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office.

We hold that the principle of *New York Times* and its companion cases is applicable here and that these particular activities of this particular plaintiff fall into that area where the First and the Fourteenth Amendments of the

Appendix 1
Pauling v. *Globe-Democrat Publishing Company*

Constitution of the United States afford privilege to critical comment which is free from malice.

We note nothing significantly to the contrary to all this in the developing law in the state and lower federal courts. The application of the *New York Times* principle seems to be an expanding and not a restricting one. It has been applied, over opposition, to appointed as well as to elected officials. *Rosenblatt* v. *Baer,* supra (semble); *Pape* v. *Time, Inc.,* 354 F.2d 558, 559-60 (7 Cir. 1965), cert. denied ... U.S. ... (deputy chief of detectives and lieutenant of police); *Gilligan* v. *King,* 48 Misc.2d 212, 264 N.Y.S.2d 309 (Sup. 1965) (police lieutenant); *Thompson* v. *St. Amant,* 184 So.2d 314, 321 (La. App. 1966) (deputy sheriff); *McNabb* v *Tennessean Newspapers, Inc.,* ... Tenn. App. ..., 400 S.W.2d 871 (1965) (chairman of County Democratic Primary Board); Rives, C.J., dissenting in *Curtis Publishing Co.* v. *Butts,* 351 F.2d 702, 721 (5 Cir. 1965), petition for cert. pending. See *Application of Levine,* 97 Ariz. 88, 397 P.2d 205, 211 (1964) (director of the FBI). *Contra, Butts* v. *Curtis Publishing Co.,* 242 F.Supp. 390, 394 (N.D. Ga. 1964) (university athletic director), affirmed on other grounds, *Curtis Publishing Co.* v. *Butts,* supra, pp. 709-13 of 351 F.2d.

It has been applied to candidates for office as well as to incumbents. *Block* v. *Benton,* 44 Misc.2d 1053, 255 N.Y.S.2d 767 (Sup. 1964); *State* v. *Browne,* 86 N.J. Super. 217, 206 A.2d 591, 598-99 (App. Div. 1965). See *Pauling* v *News Syndicate Co.,* 335 F.2d 659, 671 (2 Cir. 1964), cert. denied 379 U.S. 968; *Gilberg* v. *Goffi,* 21 App. Div.2d 517, 251 N.Y.S.2d 823 (Sup. 1964), aff'd 15 N.Y.2d 1023, 207

N.E.2d 620, 260 N.Y.S.2d 29 (1965); *Clark* v. *Allen*, 415 Pa. 484, 204 A.2d 42, 44 (1964). This view is afforded substance by the quotations from *Coleman* v. *MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), which appear in the *New York Times* opinion itself, pp. 280-82 of 376 U.S.

And the principle has also been applied to persons in their private capacities. Two cases concerning private citizens arose out of an election contest and affected the plaintiff by virtue of his relationship to the candidate. *Gilberg* v. *Goffi*, supra (partner in mayor's law firm), and, as a matter of state common law, *Pearson* v. *Fairbanks Publishing Co.*, ... Alaska ..., 413 P.2d 711, 714 (1966). Compare, however, *Powell* v. *Monitor Publishing Co.*, ... N.H. ..., 217 A.2d 193 (1966). But there are at least two flat holdings that the principle applies where a person of prominence involves himself in a matter of great public concern. *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F.Supp. 231 (W.D. Ky. 1965); *Pauling* v. *National Review, Inc.*, ... Misc.2d ..., 269 N.Y.S.2d 11 (Sup. 1966). Judge Friendly's dictum in *Pauling* v. *News Syndicate Co.*, supra, p. 671 of 335 F.2d, displays the logical application of the principle to this situation. Compare *Nusbaum* v. *Newark Morning Ledger Co.*, 86 N.J. Super. 132, 206 A.2d 185, 198-99 (App. Div. 1965). *Contra, Associated Press* v. *Walker*, 393 S.W.2d 671, 680 (Tex. Civ. App. 1965), an opinion with no citation of *New York Times*. Negative implications also appear to be present in *Clark* v. *Pearson*, 248 F.Supp. 188, 195 (D.D.C. 1965), and in *Harper* v. *National Review, Inc.*, 33 L.W. 2341 (N.Y. Sup. 1964), aff'd 263 N.Y.S.2d 292 (App. Div. 1965).

Appendix 1

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There are, of course, fact situations where the courts understandably have refused to apply the principle. These include cases where the subject, although perhaps a public figure, did not conduct himself or speak out on a matter of public import, *Dempsey* v. *Time, Inc.*, 43 Misc. 2d 754, 252 N. Y. S. 2d 186, 189 (Sup. 1964), aff'd 22 App. Div. 2d 854, 254 N. Y. S. 2d 80 (1964) (prizefighter); *Spahn* v. *Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N. Y. S. 2d 529, 535 (Sup. 1964), aff'd 23 App. Div. 216, 260 N.Y.S. 2d 451 (1965) (baseball pitcher); *Faulk* v. *Aware, Inc.*, 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), cert. denied 380 U.S. 916 (radio and television performer); *Lorillard* v. *Field Enterprises, Inc.*, 65 Ill.App.2d 65, 213 N.E.2d 1, 7 (1965) (socialite), or where the subject was a person prominent only in another country, *Pignole* v. *Curtis Publishing Co.*, 247 F.Supp. 595 (S.D.N.Y. 1965) (Haitian political figure); *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 48 Misc.2d 700, 265 N.Y.S.2d 754, 756-59 (Sup. 1965) (Russian political figure). Some of these cases assume an invasion of privacy posture.

As indicated above, however, once the principle of *New York Times* is accepted—and our only choice is to accept it—logic commands that it be applied to a person such as Dr. Pauling when, as here, he has projected himself into the arena of public policy, public controversy, and "pressing public concern".

This brings us to the issue of malice in the present case. As has been noted, *New York Times* has an exception and affords no protection for a false statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not", pp. 279-80 of 376 U.S., or, as said in *Garrison* v. *Louisiana*,

p. 74 of 379 U.S., "with the high degree of awareness of [its] probable falsity demanded by *New York Times*".

Does the record here conclusively reveal this type of malice, or if not, does justice require that the case be remanded for a new trial as the Supreme Court ordered in *Rosenblatt* v. *Baer, supra?* We arrive at a negative answer to both questions.

First, we repeat our observation that, although at the time of the trial of this case *New York Times* had just been decided, it nevertheless had appeared before the trial began and its presence was known to both counsel and to the trial court. The defendant newspaper, at the commencement of the trial, moved to amend its answer to incorporate a defense based on *New York Times*. Prior to the submission of the case to the jury this motion was granted. The answer, as then amended, made specific reference to the *New York Times* decision and its controlling precedent in the absence of actual malice. The district court stated that, although it felt *New York Times* was not applicable here, the amendment would serve to preserve the point for appeal. The issue, therefore, was obviously before court and counsel at the trial and we cannot assume that the case was not framed and tried, or need not have been so framed and tried, under the hovering presence of *New York Times*.

Further, the plaintiff asserts that he alleged and proved malice. The complaint did refer to malice, although perhaps only in the pre-*New York Times* and state law sense. It described the accused editorial as "malicious" and it asserted that it was published "when defendant knew or should have known that [its accused statements] were false". Plaintiff's counsel referred to malice in his opening statement and in his argument to the jury. The claimed proof of malice con-

sisted of the defendant's publication in its newspaper of letters to the editor, a cartoon, and a series of adverse editorial comments on Dr. Pauling both before and after the editorial of October 10; a deposition concession by the defendant's editor that "We felt he was about to be cited, he wasn't"; and the fact the accused material was an editorial rather than a paid advertisement, as in *New York Times*, or something furnished by a national agency, as in *Walker*, supra.

Our conclusion is that these factors of asserted proof add up to something far less than the definition of actual malice prescribed for the *New York Times* exception and fall short of "the convincing clarity which the constitutional standard demands". Pp. 285-86 of 376 U.S. Singly or in the aggregate, these factors might possibly be found to constitute reportorial negligence or antagonism or contempt for Dr. Pauling and his views and methods. Yet, each and all of these have been held to be less than "actual malice". *New York Times*, p. 288 of 376 U.S. (negligence); *Garrison* v. *Louisiana*, pp. 73 and 78-79 of 379 U.S. (hatred, ill will, negligence); *Henry* v. *Collins*, p. 357 of 380 U.S. (intent to inflict harm); *Rosenblatt* v. *Baer*, p. 84 of 383 U.S. (negligence).

In any event, the jury returned a verdict in favor of the defendant and did so on instructions more favorable to the plaintiff than instructions based on *New York Times* could have been.[2] The instructions given were based on the

[2]The court instructed the jury that the offending statement was susceptible of two meanings; that the jury was to determine which of the two meanings an ordinary reader would give the material; that under the first possible meaning, if the statement did not directly impute a crime, then, for the publication to be libelous,

> "you must also find that the article was a malicious defamation of the plaintiff. . . . By malice is meant malice in fact as dis-

pre- and ex-*New York Times* Missouri law of libel. See *Riss* v. *Anderson*, 304 F.2d 188, 194-95, 198 (8 Cir. 1962) and cases cited. The burden of proof, of course, is on Pauling. *New York Times*, p. 284 of 376 U.S.; *Pape* v. *Time, Inc.*, supra, p. 560 of 354 F.2d. The jury by its verdict has found that this burden was not sustained even on the less stringent standards enunciated by the trial court.

We therefore find on this record nothing parallel to the factors which prompted the Supreme Court to remand *Rosenblatt* v. *Baer* for a new trial. This case was tried after *New York Times*. The exception to the rule was there for the plaintiff to see and to meet if he could, was apparent

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tinguished from presumed malice, that is, the actual presence of an improper motive on the part of the defendant implying the purpose and desire to injure. It may, and in common acceptation does, denote that the defendant was actuated by spite or ill will towards the plaintiff, but in its legal significance such degree of personal hostility is not in all events essential. On the contrary, it is the willfullness or evil intent of the act—the wanton disregard of the rights and interests of the party injured—which suffices to render the act malicious in its legal sense; and hence the usual definition that by malice is meant the intentional doing of a wrongful act without just cause or excuse. It is likewise a wrong motive, which would tend to show malice to state something as the truth without knowing whether it is true, recklessly, and without any reasonable attempt to find out about it or with complete disregard of other known facts";

that under the second possible meaning, namely, a violation of 2 U.S.C. § 192, the statement was libelous per se by directly imputing a crime; and that then "The Court further instructs the jury that it is libelous to maliciously defame any person by publishing falsely in a newspaper of and concerning such person that he has been cited for contempt of Congress, and that there has been an affirmation of contempt of Congress by a United States Court. Such a publication is said to be actionable per se or of itself. By this is meant that such publication if false is presumed to be malicious, and it is not necessary to prove any express malice in order to warrant a verdict for the plaintiff . . ."

and known by counsel, and, by the jury's verdict, was not met.

This makes it unnecessary for us to consider the plaintiff's claimed errors as to instructions, evidence, and trial conduct. The judgment dismissing the action on the merits is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX

Saint Louis Globe-Democrat editorial in its issues of October 10, 1960:

"GLORIFICATION OF DECEIT.

"The petition of 140 members of the Washington University faculty in support of the defiance of Linus Pauling of the United States Senate dangerously compromises the good name and patriotism of that great University.

"As might be expected, among the first 16 organizers and signers are Edward U. Condon, once described by a House Committee as the 'weakest link in America's security chain,' and Barry Commoner, a man who has consistently fought every attempt to keep America sufficiently strong in the nuclear field to maintain peace by deterring aggression.

"The background of the present attempt of the Senate to defend its own integrity and that of the nation is this: Three years ago, Pauling organized a petition which obtained a number of signatures calling for the United Nations to bar nuclear testing. At the very least, the peti-

tion was identical with Russian policy then and now, which calls for cessation of nuclear testing and disarmament without the safeguards of inspection.

"The United States national policy agrees on the desirability of both aims, but insists upon the wholly realistic safeguard of foolproof inspection. This same approach recognizes the utter folly of trusting the Russians to keep their word on anything, considering the overwhelming evidence of their consistent cheating on every commitment they have made in the past 40 years.

"The Senate Internal Security Subcommittee very properly felt that a movement of this sort, which if successful might have laid America and the Free World bare to attack and defeat by the Communists, might have been Communist inspired.

"The Senate subcommittee called Pauling to testify as to who helped him collect the petitions. Pauling contemptuously refused to testify and was cited for contempt of Congress. He appealed to the United States District Court to rid him of the contempt citation, which that Court refused to do. The appeal from the lower court's affirmation of contempt is expected to be handed down by the Supreme Court today.

"It would be idle to guess as to that decision, but we cannot but note that the Supreme Court has been woefully weak in upholding the basic right of the nation to defend itself against the Communist conspiracy in recent years.

"The basic issue, regardless of a Supreme Court decision which might, like others, have to be repaired by the

Congress, is whether Pauling or anyone else should testify as to his accomplices. Pauling insists that he is a better judge than the Congress or any court as to what is right and what is wrong. The Senate does not concur in this view.

"The Washington University group clothes their defense of Pauling in self-righteous and ringing phrases—'historic service to humanity,' 'highest patriotism,' 'constitutionally guaranteed freedoms' and 'civic duties.'

"These great words are, like the phrases of the Communists, a prostitution of the best and most meaningful words in our language in their present connection, for their own purposes.

"The basic question is whether the Senate can inquire into matters concerning the defense of the nation, and whether the United States should be able to defend itself by any and all means at its disposal against threats or the well-founded fears of threats against its own security.

"We believe it should. We believe that the Senate acted in good conscience in investigating a proposal which might have wrecked the strength and security of the state.

"Much is made of the fact that Pauling is a Nobel Prize winner. That is no guarantee of anything more than proficiency in chemistry. It certainly is no guarantee of either patriotism or correctness in foreign policy. It above all does not cloak him with an immunity to defy the Senate and to decide on his own prerogative what is best for America.

"A great St. Louis institution is being badly used, nor is it the first time, by a group which glorifies deceit and evasion in the outrageous guise of freedom of speech and conscience."

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 37.

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL STATEMENT OF PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 37.

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL STATEMENT OF PETITIONER.

In accordance with the request of the Court, communicated by the Clerk on August 4, petitioner submits this supplemental statement addressed to the bearing on petitioner's contentions of the decision and opinion of the Court in *Rosenblatt v. Baer*, 383 U.S. 75.

I.

The Publication Was Entitled to the Privilege Established by the Rule of New York Times, as Explained and Applied in Rosenblatt v. Baer.

The judgment was reversed in *Rosenblatt* on two distinct grounds: first, that the instructions of the trial court contravened the First Amendment in permitting the jury "to find liability merely on the basis of" the plaintiff's

"relationship to the government agency, the operations of which were the subject of discussion" and "without regard to evidence that the asserted implication of the column was made specifically of and concerning him" (383 U.S. at 82); and, second, that the plaintiff as Supervisor of the Belknap County Recreation Area, a facility owned and operated by the County principally as a ski resort, "may have held" a position as a "public official" (383 U.S. at 87), within the meaning of the *New York Times* rule, and thus be barred from a recovery for defamation by a publication critical of his performance of his duties, without proof of malice as defined by *New York Times*. Though the first ground of reversal is irrelevant, the second has important bearing on this cause.

First: We recognize that *Rosenblatt* did not definitively hold that if the publication implying dishonesty in the financial management of the Ski Area could be found to make a reference to Baer the privilege of *New York Times* must necessarily apply. What the opinion states explicitly is that Baer's theory "that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations"—the theory advanced at the trial to establish that the article referred to him—"at the least, raises a substantial argument that he was a public official", within the limitation of the rule of *New York Times* (383 U.S. at 87). How substantial that argument was thought to be is indicated, in our view, by the Court's statement that one of the reasons for not foreclosing Baer from "attempting retrial of his action" was that the record, made before the *New York Times* decision, left "open the possibility that respondent *could have* (emphasis supplied) adduced proofs to bring his claim outside the *New York Times* rule" (383 U.S. at 87). The "proofs" referred to must, we think, envisage evidence showing that the scope of Baer's responsibility was less extensive than he sought to show at the first trial.

The disposition is, therefore, instinct with affirmation that if Baer was, indeed, responsible for the management of the Ski Area, the privilege would apply to a publication that impugned his efficiency or honesty in the performance of that task.

No other view appears to us to be consistent with the general criteria embodied in the Court's opinion, namely, that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" (383 U.S. at 85); and that where "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees" (383 U.S. at 86), malice in the *New York Times* sense must be proved. It was not doubted that the operation of the publicly-owned Ski Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for the management of the Area, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees." Such reservation as there was in the Court's ruling must, therefore, be understood as a reflection of uncertainty as to whether and how far Baer was in fact involved in those aspects of the management of the Ski Area attacked by the challenged publication, not as a legal doubt that if he was responsibly involved he must prove malice to recover.

On this analysis, the *Rosenblatt* decision plainly supports petitioner's submission in this cause. Here, as in *Rosenblatt*, the official status of the plaintiff was not litigated as such at the trial. But there was no dispute, and could have been none, that as Athletic Director respondent

had, in his own words, "responsibility for . . . general supervision of the entire athletic program at the University of Georgia" (R. 654), including the "big business" (R. 655) of college football. If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that function, there can be no basis for a contrary result when the responsibility to which the charge relates entails the supervision of the program of athletics of a University established, maintained and supported by the State. There surely is no smaller or no less legitimate a public interest in the conduct of athletics as an aspect of a State-conducted public education program than in the use of public land and facilities for purposes of recreation. The "scope of the privilege is to be determined," as the Court said in *Rosenblatt* "by reference to the function that it serves" (383 U.S. at 85, n.). In the one case no less than in the other, the privilege is necessary to protect the freedom of the press to criticize the way in which a public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

Second: Respondent's answer to the patent parallel between this case and *Rosenblatt* is that he was not employed as Athletic Director by the Board of Regents of the University System, the governing body of the University (Ga. Const. Sec. IV, par. I; Ga. Code §§ 32-101, 32-104, 32-112, 32-113) but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni (R. 262, 1161-1165), which a statute of 1949 declares "not to be" an agency of the State and the accounts of which the statute exempts from the State audit required "in connection with the financial operations of State agencies" (Ga. Code §§ 32-153, 32-154). The Athletic Association, it is urged "was thus not an arm of government" and the respondent as its employee could not "be engaged in government while per-

forming its functions" (*Further Response of Respondent*, p. 14).

We submit that the distinction is without significance for purposes of measuring the ambit of the privilege established by the principle of *New York Times*. The statutory declaration that the Athletic Associations of the State Universities are "not to be agencies of the State" can obviously have no greater import in determining how far freedom to criticize their operations or the operations of their managerial employees is protected by the First Amendment than the State definitions of the term "public official," held to be irrelevant in *Rosenblatt v. Baer*. The one denomination no less than the other was developed "for local administrative purposes, not the purposes of a national constitutional protection", with the result that it is "at best accidental" if the State-law standard should "reflect the purposes of *New York Times*" (383 U.S. at 84).

That this State terminology is wholly unrelated to the purpose of the privilege is very clear. The fact that the Athletic Association or, as it is often called, Athletic Board, is exempted from State-imposed procedures governing expenditures, contracting and accounting (*e.g.*, Ga. Code § 40-1805, 1808, 1902, 1906.1, 1921.1, 2001) does not detract from the fact that its sole function is to play a part in the management and government of the State University, subject to the ultimate responsibility and control of the President and Board of Regents (R. 262). The athletic program, of which the detailed administration was governed by the Board, was the program of the University. The position of Director of Athletics, though the incumbent was chosen and paid, at least in major part,[1] by the Association, was that of Director of Athletics of the University of Georgia.

1. The record shows that respondent received a salary of $12,000 per annum from the Association (R. 1162, 1165). The President of the University testified, however, that "part of his salary was paid by the University and therefore that part was subject to teacher retirement" (R. 1123). The additional amount involved is not established on the record. A question by his counsel sought, however, to bring out that he received $6,500 a year from the Georgia Student

The role of the Association as an organ of administration of the University has not, indeed, significantly changed since the Board of Regents and the State contended in this Court that "public education is a governmental function" and that "the holding of athletic contests is an integral part of the program of public education conducted by Georgia" (*Allen v. Regents of the University System*, 304 U.S. 439, 449 ([1938])). The President of the University is Chairman *ex officio* of the Association and Chairman of the Executive Committee (R. 262, 1070, 1092, 1104, 1161-1163). The Comptroller and Treasurer of the University is Treasurer of the Association (R. 1153). A majority of the members of the Board are members of the faculty, as required by the Southeastern Athletic Conference[2] to which Georgia belongs, and they are chosen by the President (R. 783, 161, 1162). In short, nothing distinguishes the Athletic Association from any other entity responsible for the administration of the programs of the University except that it has a larger measure of financial autonomy and that there is minority participation of alumni. To accord these differentia constitutional signifi-

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Educational Fund (R. 1165). The State Department of Audits Report of Examination of the University of Georgia for the year ended June 30, 1963, a document that Georgia law requires to be filed for public information (Ga. Code § 40-1805(c)), shows (p. 211) payments by the University to respondent as Athletic Director of $1,666.64 for the eight months before his resignation.

2. This requirement tends to comply with the first recommendation of the Report of the Special Committee on Athletic Policy of the American Council on Education, approved by the Executive Committee of the Council in 1952, that as "in all other educational activities, the control of athletics should be held absolutely and completely by those responsible for the administration and operation of the institution." See *Council Action on Athletic Policy*, The Educational Record, vol. xxxiii, pp. 246, 249 (1952). A study by the Carnegie Foundation, published in 1929, listed Georgia as an institution in which "genuine faculty control" of the regulation of college athletics had been found. Savage, *American College Athletics*, p. 101 (Carnegie Bulletin No. 23).

cance would trivialize the principle of *New York Times.* The considerations that preclude a State from avoiding the limitations of the Fourteenth Amendment by the delegation of its public functions are even more plainly applicable here. *Cf. Burnet v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Evans v. Newton,* 382 U.S. 296 (1966).

Third: In his original response to the petition, respondent sought to draw strength from this Court's decision in the *Allen* case that State immunity to Federal taxation did not extend to gate receipts for public admission to athletic contests of the University, since the exhibition of such contests is "a business having the incidents of similar enterprises usually prosecuted for private gain" (304 U.S. at 452). *Response to Petition,* p. 24. The District Court accorded weight to this submission in denying the petitioner's motion for new trial (R. 1467; *Petition,* Appendix B, p. 95a).

It is enough to point to *Rosenblatt* to answer this contention. The conduct of a public recreation area, charging admission fees, also involves a "business comparable in all essentials to those usually conducted by private owners" (304 U.S. 439, 451), yet no importance was attributed to that fact in considering if *New York Times* applied. The reason is entirely obvious. The fact that government undertakes enterprise similar to that in which non-governmental entities engage does not diminish, and at times may well increase, the need for freedom of discussion of the way in which the public enterprise is run and of the honesty or the efficiency of those who have it in their charge. The policies that govern the extent of governmental tax immunity have no relationship at all to those that measure the extent of the protection conferred by the First Amendment.

Fourth: There is no greater merit in other distinctions the respondent seeks to draw between this case and *Rosenblatt.*

The suggestion (*Further Response,* p. 5) that there was no issue as to Butts' performance of his duties as Athletic Director prior to the instant publication is not true[3] and, even if it were, would be irrelevant. What is decisive is the scope of his responsibility for supervising the entire athletic program of the University. If that position was "one which would invite public scrutiny and discussion of the person holding it" (383 U.S. at 87, n.), as we submit it plainly was, the privilege must necessarily apply to the first published criticism of his official conduct, no less than to the later publication of a criticism previously made.

Nor is there force in the submission that the criticism here involved "did not relate to his conduct of his duties as Athletic Director" (*Further Response,* pp. 6-7) because the Football Coach, not the Director, was responsible for formulating the team's plan and strategy. It was because he was Director that respondent had access to the team's secret practice sessions (R. 405). It was as Director that he was responsible for scheduling the game with Alabama (R. 580) and, perforce, for safeguarding its full integrity as a scholastic competition. It might as well have been contended in *Garrison v. Louisiana,* 379 U. S. 64 (1964) that the defendant's insinuation that the judges were subject to "racketeer influences" (379 U.S. at 66) did not relate to their official conduct since they were not authorized by their commissions to pervert the course of justice.

Fifth: Our contention that respondent as Director of Athletics was a public official for the purpose of the rule of *New York Times* does not necessarily imply that every member of the faculty or of a State University is in the

3. Burnett reported his story to the University authorities before he disclosed it to petitioner and his charges were being investigated by a member of the Georgia Athletic Board, the President of the University, the Chancellor of the University System, the Chairman of the Board of Regents of the University system, the Commissioner of the Southeastern Athletic Conference and the President of the University of Alabama. R. 194, 259, 266-267, 1125, 1215-1216. See Appendix, *infra* pp. 28, 29, 31.

same position. For one thing, a member of the faculty is not as such charged with a supervisory or managerial responsibility to which the principle declared in *Rosenblatt* would easily apply. But more than this, freedom of teaching, research and scholarship is itself protected by the First Amendment. *Cf. Sweezy v. New Hampshire,* 354 U.S. 234, 250-251, 261-263 (1957). To the extent that liability for defamation unqualified by a privilege safeguards academic freedom in conducting such activity, it may be argued that it also serves "the values nurtured by the First and the Fourteenth Amendments" and may thus avoid the "thrust of *New York Times*" (383 U.S. at 86). That proposition must be weighed against the argument *per contra* that the accommodation that resolves the "tension" (383 U.S. at 86) between First Amendment values and the social interest in protecting reputation is no less appropriate in dealing, in addition, with conflicting interest in the freedom of expression. Weighing that dilemma it may still be the conclusion that the privilege applies to any statement challenged as a defamation if it relates to a subject on which freedom of expression is protected by the First Amendment. *Cf. Smith v. California,* 361 U.S. 147 (1959); *Speiser v. Randall,* 357 U.S. 513 (1958); *Coleman v. MacLennan,* 78 Kan. 711, 723 (1908); *Rosenblatt v. Baer,* 383 U.S. at 89 (concurring opinion).

For reasons previously stated, a less subtle problem is presented by this case. The respondent was responsible for supervision of the University's athletic program. Neither that program nor its supervision involves modes of self-expression comprehended in the freedom that the First Amendment guarantees. But since the management of a State University is plainly a governmental enterprise, criticism of the operation of the program of the quality or the integrity of its direction "is at the very center of the constitutionally protected area of free discussion" (383 U.S. at 85). The social "interest in preventing and redressing attacks upon reputation" must, accordingly, yield

place to the "values nurtured by the First and Fourteenth Amendments" (383 U.S. at 86) to the extent required by the privilege of *New York Times*.

Sixth: It should be added that the public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to invoke the privilege of *New York Times*. The integrity of college football, whoever the participants, is in itself a matter of important and legitimate concern, as an activity on public exhibition and a phase of higher education. This public interest in the subject matter of the publication would, we think, suffice to gain it the protection of the First Amendment, even if it were not otherwise within the rule of *New York Times*.

"Criticism of government is at the very center of the constitutionally protected area of free discussion" (383 U.S. at 85) but it is plain that this is not the only subject on which freedom of expression is protected by the First Amendment. We think the safeguard comprehends discussion of all public issues, in the sense of any subject as to which the public has important and legitimate concern. See, *e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 221; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581, 591-595 (1964); Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 661 (1966); *Coleman v. MacLennan*, 78 Kan. 711, 723 (1908). It was, indeed, said by the Court in New York Times, and repeated in the subsequent decisions, that our "profound national commitment" is to "the principle that debate on *public issues* (italics supplied) should be uninhibited, robust and wide-open . . ." (376 U.S. at 270).

That this publication was addressed to such a public issue, we submit is wholly clear. James Bryant Conant is not alone in the belief that the "strength of this republic is . . . intimately connected with the success or failure

of our system of public education" (*Education in a Divided World* (1948) p. 1). As President Kennedy stated in his Special Message to the Congress proposing the measure that became the Higher Education Facilities Act of 1963 (77 Stat. 363), "from every point of view, education is of paramount concern to the national interest as well as to each individual" (*Public Papers of the Presidents of the United States,* 1963, p. 106). Because of the magnitude of that concern, Congress, as President Kennedy put it in an earlier message (*id.,* 1962, p. 111), "has repeatedly recognized its responsibility to strengthen our educational system without weakening local responsibility," citing enactments reaching back to the Northwest Ordinance of 1787 and the Morrill Act of 1862.

To affirm public concern in education is, of course, to affirm such concern in all the problems it confronts, which never were of greater moment than they are in our time. The maintenance of the integrity of the athletic programs of the colleges and universities that engage in intercollegiate competition does not pose the largest issue in the field of higher education but it has presented an important problem through the years. Its importance is attested by the Report of the Special Committee on Athletic Policy of the American Council on Education, composed of eleven Presidents or Chancellors under the chairmanship of John A. Hannah of Michigan State, which was unanimously approved by the Executive Committee of the Council in 1952. The Report (*Council Action on Athletic Policy,* The Educational Record, vol. xxxiii, pp. 246-255) states, *inter alia*:

> American colleges and universities engage in intercollegiate athletics because of a deep conviction that when properly administered they make an important contribution to the total educational services of the institution. There is an increasingly widespread awareness, however, that athletics may become so severely infected with proselyting, subterfuge, and distorted purpose as to more than neutralize the benefits. Certainly the abuses and suspicion of abuse now

associated with the conduct of intercollegiate athletics foster moral apathy and cynicism in our students—those young men and women who increasingly share responsibility for this country's strength and freedom.

The urgency of the problem is even more apparent in the context of current external and internal threats to our society. In the last analysis, the strength of our free society depends not only upon armaments but also upon the integrity of our institutions and our people.

This committee, after consulting competent authorities, has reluctantly reached the conclusion that in intercollegiate athletics as now conducted, despite the adherence by many institutions to the highest standards, serious violations not only of sound educational policies but also of good moral conduct are not in fact uncommon. Wherever these exist, they can only be injurious to athletics, to our schools and colleges, and especially to our youth.

The present situation has been brought about by external pressures and internal weaknesses evident during a considerable period. The rewards in money and publicity held out to winning teams, particularly in football and basketball, and the desire of alumni, civic bodies, and other groups to see the institutions in which they are interested reap such rewards, have had a powerful influence on many colleges and universities. The influence has been magnified when control of athletic policy has been permitted to slip from the hands of the faculty and central administration.[4]

4. *Cf.* Savage, *op. cit. supra* note 2, p. 32: "Whatever the reason, it is certain that the seriousness with which college athletics are nowadays taken has driven certain well-recognized abuses under cover, but at the same time has propagated and intensified them." See also, *e.g.*, Miller, *The Truth About Big Time Football* (1953) *passim*; Guthrie, *No More Football for Us!*, Sat. Ev. Post, Oct. 13, 1951, p. 24.

We submit that an honest statement charging conduct constituting one of these abuses is protected by the First Amendment; and that the privilege this Court has deemed essential to safeguard the honest criticism of all governmental operations (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280) is no less required to protect a publication of this kind. In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the extent of public subsidy, it would be a grave misfortune if the freedom that the Constitution deems most vital for correction of abuses were confined by any artificial lines. *Cf. Associated Press v. Walker*, No. 150, October Term, 1966 (petition for certiorari filed May 18, 1966); *Time Inc. v. Hill*, No. 22, October Term, 1966, reargument ordered June 20, 1966, 384 U.S. 995.

II.

Respondent's Argument That "Actual Malice Within New York Times Was Conclusively Proven" Is Both Legally Immaterial and Wholly Unsupported by the Record.

In the effort to avoid review and reversal of this enormous judgment, respondent argues that malice in the sense of *New York Times* was "conclusively proven". *Further Response*, p. 7; *Response*, p. 26. The argument is legally immaterial and wholly unsupported by the record.

First: The argument is legally immaterial because, respondent notwithstanding (*Response*, p. 33; *Further Response*, p. 9), the instructions to the jury did not call on it to make a finding that comports with the requirements of *New York Times*.

As we pointed out in our petition, the District Court charged (R. 1356) that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others." It is too plain for argument that this statement does not

condition the punitive award on finding that a false statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 280) or make clear that "only those false statements made with the high degree of awareness demanded by *New York Times*" may be the basis of recovery. The charge, precisely like those held erroneous in *Times, Garrison, Henry v. Collins*, 380 U.S. 356 (1965) and *Rosenblatt* (383 U.S. at 83-84), allowed "recovery on a showing of intent to inflict harm rather than intent to inflict harm through falsehood"[5] (380 U.S. at 357) or even short of this, a merely "negligent misstatement" (383 U.S. at 84). The grounds for reversal in the previous decisions are, accordingly, presented here.

By the same token, it is wholly immaterial that the District Court gave as ground for the denial of the motion for new trial that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (R. 1467-1468, *Petition*, Appendix B, p. 96a), or that the majority of the Court of Appeals was "in complete accord" with that conclusion (*Petition*, Appendix B, p. 33a). The simple and decisive fact is that the question was, at most, for the decision of the jury under an appropriate instruction. It was not decided by the jury since no issue was submitted in these terms.

Second: There is no support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial.

We note *in limine* that this is an entirely paradoxical submission since, as we observed in our petition, the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant (R. 480-488) and its statement in the charge

5. That petitioner was well aware that the publication threatened harm to the respondent was, of course, readily admitted (R. 945, 1014).

that there "has been a sharp conflict in the testimony in this case" (R. 1360) applies *a fortiori* if the plaintiff must establish falsity and reckless disregard. Indeed, the syllogism is not only valid with respect to the issue of truth, as to which *Times* would shift the burden to the plaintiff. It is also valid on this record with respect to reckless disregard, since the defendant's evidence of truth was, apart from small detail, the very evidence that led the publisher to think the story true when it was published. How the same evidence that would have justified a jury verdict that the statement was essentially the truth could fail to justify the publisher's conviction of its truth, the respondent as yet has not explained.

It is, in short, entirely plain that on the record as evaluated by the courts below a jury correctly instructed as to the burden of proving falsity and the required proof of malice could have reasonably found for the defendant. Indeed, the record in this case, which we have summarized in the *Appendix*, yields a graphic demonstration of the difference in defending libel actions between the criterion of liability enunciated at the trial and that prescribed by *New York Times*.

For the reasons stated we believe reversal is required whether or not the evidence would have sustained a jury finding that the publication was malicious; and that the Court is not, therefore, obliged to make its own appraisal of the record. But were the evidence to be considered, we should strongly urge that far from the conclusive proof to which respondent has referred, it lack entirely "the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, 376 U.S. at 285-286).

As we show in detail in the *Appendix* (pp. 28-29, 40-44), petitioner in publishing the article relied essentially on Burnett's sworn statement as to what he had overheard and a number of circumstances tending to corroborate his story. Those circumstances were ascertained in the course of the Post's investigation prior to the publication, an investigation conducted by Frank Graham, an experienced sports

writer who subsequently wrote the article, and Furman Bisher, sports editor of the Atlanta Journal, who had independently called the attention of the Post to Burnett's charges.

Among the corroborating circumstances were the facts that Burnett before talking to the Post, and at a time when he had no motive to falsify, had reluctantly reported his charges to Coach Griffith and consented to Griffith's laying them before the University authorities, who had promptly initiated an investigation; that Milton Flack, whom Burnett claimed to have told about the conversation on the day that it occurred, confirmed that he had done so; that Burnett had voluntarily submitted to a lie detector test requested by the University authorities and passed; that the records of the Southern Bell Telephone Company confirmed the fact that a call had been made by Butts to Bryant on September 13, 1962;[6] that Burnett claimed to have taken notes while he listened to the conversation; that the notes had been seen by Flack and Griffith; that the notes, together with Burnett's charges, were believed by Coach Griffith to be sufficiently important to report them to the University authorities; that on the occasion when Burnett saw Griffith, Griffith indicated that he had a suspicion that someone had been giving information to Alabama; that when Butts was called before the University authorities he refused to take a lie detector test and the next day submitted his resignation as Director of Athletics (R. 915); that the Georgia-Alabama game was a fiasco for Georgia; that Furman Bisher, purporting to have talked to people at the University, called Graham on March 1 and reported statements that he claimed were made by Georgia player Babb, Georgia

6. At the trial it was established that the September 13 call lasted 15 minutes and 2 seconds and was charged to the credit card of the Georgia Athletic Association (R. 165-167). It was also proved that Bryant had called Butts at his home the following Sunday, as Burnett claimed he said he would, the call lasting 67 minutes and charged to the credit card of Bryant (R. 169, 300, 1417).

trainer Richwine, and Coach Griffith, all of which tended to support the proposition that the Alabama team was familiar with Georgia's plays and formations; that two weeks before the Post issue went on sale, the completed story was sent to Bisher by Graham and Bisher made no comments or suggestions.

On the basis of this information Clay Blair, Jr., the Post's then editor-in-chief, and Davis Thomas, its managing editor, whose testimony the respondent took by deposition, swore that they were satisfied of the truth of the assertions in the publication.

Against the foregoing circumstances of corroboration, the respondent points to the fact that no representative of the Post saw Burnett's notes before the article was published, efforts to obtain them from the University authorities proving unavailing; that the Post knew that at a meeting with the University authorities on February 21, 1963, Burnett was confronted with the fact that he had been convicted and placed on probation on a charge of cashing two checks totalling $45 against insufficient funds (a dereliction the respondent's counsel charitably asserts establishes that he was known "as a bad-check artist" [*Response*, p. 27]); that the Post did not interview John Carmichael, Burnett's office associate, to whom Burnett claimed he had reported the Butts-Bryant conversation immediately after overhearing it on September 13 (a report very substantially confirmed by Carmichael in his testimony at the trial), because it was known that Carmichael had opposed Burnett's disclosure and would not be cooperative; that the Post did not review the film of the Alabama-Georgia game, though its sports editor wished to do so; that neither Butts nor Bryant was interviewed in the Post's investigation; that some of the quotations of statements of Georgia players and football staff, given Graham by Furman Bisher, were used without interviewing the quoted parties, who denied at the trial that they had made them; that the Post

did not interview any coach or member of the Alabama team; that seven days before the publication date of the story, the respondent's counsel sent a telegram and letter to the Post stating without specification that the proposed content of the article was false; that during the week before the publication the respondent's daughter telephoned Clay Blair and tearfully requested him to forego publication; and, finally, that a demand for a retraction was presented and ignored.

We submit that this evidence affords no basis for concluding that petitioner's agents published the Graham article knowing that its essential statements were false or with a "high degree of awareness of their probable falsity". The important statements were derived in every instance from informants on whose truthfulness and accuracy the Post editors had reason to and did rely.

As another panel of the court below has recently observed in reversing a libel judgment, a "reporter . . . may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official" (*New York Times Co. v. Connor,* No. 22362, decided August 4, 1966, Slip Opinion, p. 22). It may be argued that the petitioner's investigation was in some respects inadequate. But even if the argument should be sustained, we think it clear that the inadequacy claimed shows negligence and nothing more.

Respondent's statement that "Curtis was informed of the falsity of the story" by his counsel's telegram and letter and his daughter's phone call (*Response,* p. 26), is, of course entirely disingenuous. If a denial unaccompanied by information or a mere appeal for sympathy suffices to defeat the privilege of *New York Times,* the great principle of that decision would be nullified at once in application. The opinion happily makes clear that it was not envisaged that such nullification should prevail (376 U.S. at 286-288).

It remains to add that the respondent drew great strength before the jury, and seeks to draw strength here, from statements by Clay Blair, Jr., the Post's editor-in-chief that he wished to change the image of the Post (R. 940) to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" (R. 943) and that in November, 1962 he had circulated a congratulatory staff memorandum stating that "the final yardstick" of this policy was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism" (P. 6, R. 1376, 946-947). He also described the issue containing the publication here involved, as "a step in the right direction", adding that with this issue "we have gone twenty-five per cent toward the goal of the magazine I envision" (R. 940).

This is admittedly language that invites inflammatory misconstruction. Read in connection with the evidence we have detailed, we do not think that it permits a finding that petitioner embarked on a policy of grave indifference to the truth and that the instant publication was a product of such reckless disregard. The "high degree of awareness" of the "probable falsity" of challenged statements, demanded by the rule of *New York Times* calls, in our submission, for a judgment based upon the sources of the publication and their actual impact on the minds of those responsible for the derogatory statements made. Judged in these terms, we think the evidence makes clear this was a wholly honest publication, reflecting the conviction of the agents of the Post that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

CONCLUSION.

For the foregoing reasons, as well as on the other grounds set forth in the petition for a writ of certiorari (pp. 17-21), the petition should be granted and the judgment be reversed. A summary reversal on the authority of *Rosenblatt v. Baer* would be a proper disposition.

Respectfully submitted,

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Appendix.

SUMMARY OF EVIDENCE.

1. The Butts-Bryant Telephone Conversation.

George Burnett, an Atlanta insurance man, testified that on Thursday, September 13, 1962, he was in the office of the Institute of Oral Hygiene on 11th Street in Atlanta, Georgia, attempting to call a business associate at the office of Communications International in the Rhodes-Haverty Building (R. 178), Jackson 5-3536 (R. 190-91). After four or five attempts, he heard "funny noises and electronic sounds" (R. 178), and then heard the operator say to a party whom she identified as Coach Butts:

> "Coach Bryant is out on the field but is on his way to the phone. Do you want to hold or do you want him to return the call?"
>
> "I will hold." Coach Butts replied (R. 178-179).

After a brief pause, a man, whom the operator identified as Coach Bryant, was heard on the line (R. 179). After the usual amenities (R. 179), Coach Bryant asked:

> "Do you have anything for me, Wally?" (R. 206).

Respondent then began to give Bryant information about the offensive and defensive plays to be used by the University of Georgia in its opening game with the University of Alabama on September 22 (R. 179, 205-206).

As the conversation progressed, Burnett began to make notes (R. 180, Def. Ex. 12, R. 1413), writing as he could get the words (R. 181), abbreviating as best he could (R. 185-86, 210), missing some portions of the conversation (R. 226-27).

According to Burnett, respondent told Bryant that Georgia lineman Reismueller was one of the best in the history of the school (R. 181), that Georgia's leading pass

receiver, end Mickey Babb (Griffith—R. 316; Pearce—R. 434), "catches everything they throw" (R. 188), and that halfback Don Porterfield was the best back at Georgia since Trippi (R. 186). Respondent said that Georgia safety-man Woodward committed himself fast on pass defense (R. 183), and that Georgia's pass defense was so weak that Alabama could pass in anybody's direction except Blackburn's (R. 184), Georgia's best defensive back (Griffith—R. 312).

One play was identified by a name (29-O Series) (R. 188), which was not recognized by the Georgia coaching staff (Griffith—R. 316, 359; Pearce—R. 474), but which was readily identified by Bill Hartman, respondent's former backfield coach (Hartman—R. 984, 989, 997-98), as an abbreviation of "29 overpass," the name of a play used by respondent during his tenure as head coach (Hartman—R. 997-98). Burnett quoted respondent as having said:

> "You remember my old 29-O series?" Butts asked. "Georgia uses that" (R. 188).

Burnett testified that respondent said that the formation Georgia played until they got close to the goal line was a slot to the right with the ends normal—split out about three yards (R. 186). Burnett did not remember what respondent said about "slot right, left end out 15 yards," other than what he wrote down (R. 189). These were the two basic offensive formations which were to be used by Georgia in the Alabama game (Griffith—R. 306-307, 317; Inman—R. 393; Pearce—R. 432-434). According to Burnett, Bryant was also told that when Georgia would get near the goal line "Baer (end Mickey Babb) goes on a hook" (R. 186).

Burnett further reported that respondent told Bryant that on "optional left pass," if Georgia can block the man on the corner, they keep running—if not, they will pass (R. 181). Although the optional left pass terminology has been originated by respondent during his tenure as head

coach (Griffith—R. 309-310; Butts—R. 662), Georgia had used that terminology only once since Johnny Griffith became head coach in 1961 (Griffith—R. 328), and it was not used in 1962 (Griffith—R. 309-10, 328; Pearce—R. 466).

On defense, Georgia would drop the end off and contain with its tackle, respondent said (Burnett—R. 189), and on sweeps (end runs) Georgia would pull its on side guard (R. 183). Assistant coach Pearce confirmed that on sweeps Georgia pulled its on side guard against certain defenses (R. 426, 428).

Burnett reported that at intervals during the conversation, Bryant asked respondent questions about the Georgia team (R. 190). One particular question which Burnett remembered was:

> "How about quick kicks?"
> "Don't be worried about—", Coach Butts said "Don't be worried about quick kicks, they haven't got anybody that can." (Burnett—R. 187-188).

In fact, the Georgia team did not have anyone who could quick kick from its normal offensive formation (Griffith—R. 314-15; Pearce—R. 434), although a substitute quarterback could quick kick from a special formation (Hartman—R. 982).

During the conversation, according to Burnett, respondent was unable to answer some of Bryant's questions, but replied:

> "I don't know."
> "Can you find out?" Bryant asked.
> "I will try." Butts replied (R. 204).

As the conversation ended, Bryant asked Butts:

> "Will you be home Sunday, Wally?"
> Butts replied, "Yes, I will."
> Bryant said, "I'll give you a call then."
> "All right." (Burnett—R. 189, 203).

Burnett testified that after the call ended, he remained on the line and spoke to the operator (R. 189). However, the court ruled that what Burnett said to the operator, as well as what the operator replied, would be hearsay, and sustained an objection to it (R. 189-90).

Burnett, a former navigator, made a notation of the time and date as a matter of habit—"641[1] Athletic Office, 10:40 A.M., September 13, 1962, Jackson 5-3536." (Burnett —R. 189-90, Def. Ex. 12, R. 1415). According to Burnett, he sat there for twenty or thirty seconds and then dialed the number which he had originally called, Jackson 5-3536, and spoke to Milton Flack at the office of Communications International (R. 191). Again, Burnett was prevented from testifying as to what he said to Flack on the ground it was hearsay (R. 191).

Records of the Southern Bell Telephone Company confirmed that the call had been made (Flemming—R. 165-67). The toll card (Def. Ex. 13, R. 1416) showed that a long distance call had been placed by Wallace Butts to Paul "Brince" at the Athletic Department of the University of Alabama in Tuscaloosa at 10:29 A. M. on the morning of September 13. The call lasted 15 minutes 2 seconds and was charged to the credit card of the University of Georgia Athletic Association (Flemming—R. 165-67).

Burnett stated that later on the same day he discussed what he had overheard with his two business associates, Milton Flack and John Carmichael and showed them his notes (R. 201).

Carmichael testified for respondent and denied parts of Burnett's story (R. 810-868). He stated he came into the office of the Institute of Oral Hygiene, which was his company, about 10:30 on the morning of September 13, 1962 (R. 812). He found Burnett at Carmichael's desk with the telephone to his ear (R. 813). When Burnett

1. This number was identified as one of Coach Bryant's extensions at the University of Alabama Athletic Department (Bryant—R. 563).

put his finger to his mouth, Carmichael walked outside the door to where there was a secretary's desk and began looking through the morning mail (R. 813). He was six to eight feet from where Burnett was seated (R. 814). After five or six minutes, during which there was no conversation by Burnett over the phone, Burnett called him into the office and said "John—I heard a conversation between Coach Wally Butts and Coach 'Bear' Bryant—and I made some notes about it." (R. 814-815). He stated that if Burnett had said anything into the phone receiver, he would have heard it (R. 815). He specifically denied that Burnett spoke to the operator, or Milton Flack or anyone else (R. 816).

Carmichael testified further that Burnett related that in the telephone conversation respondent had said that some football player was a great football player and that Georgia had two new coaches; and that Bryant had asked respondent if he was going to be home Sunday (R. 817-818). Outside of that, said Carmichael, there was nothing particularly involved in the Butts-Bryant conversation as reported by Burnett except general conversation (R. 818). Carmichael testified further that Burnett related the same thing to Milton Flack and himself that afternoon (R. 819-820); that Flack told Burnett he didn't think there was anything to it (R. 820); and that they both told Burnett to forget it (R. 820).

Carmichael also testified that the notes produced at the trial were not the notes shown him by Burnett on September 13 (R. 851, 1068).

On Sunday, September 16, 1962, Coach Bryant called respondent at his home in Athens. Although both respondent and Bryant testified that they were unable to remember the call (Bryant—R. 529; Butts—R. 776), long distance telephone records (R. 1417) showed that a call was placed from the University of Alabama at 8:51 p.m. and lasted for sixty-seven minutes (Flemming—R. 169). It was billed to the credit card of Paul W. Bryant (Flemming—R. 169; Gorday—R. 300).

Respondent testified he had known Bryant since Bryant was a player at Alabama (R. 643) and that he had talked to Bryant on numerous occasions (R. 645, 647). Specifically, he called Bryant in the summer of 1962 to inform him that respondent had learned that the enforcement of certain rules would be improved (R. 645). He had never turned down anyone who asked him a "coaching point" (R. 643-644). He talked to Bryant at least three times prior to and throughout the 1962 football season (R. 647). On many occasions he talked with other coaches (R. 652-654).

Respondent could not identify the telephone calls of September 13 and 16, 1962 (R. 648, 776). He emphatically denied that in the call of September 13 or at any other time, he gave Bryant information relating to secret plays, formations and defenses which the University of Georgia had in its game plan for the Alabama game (R. 647-648, 652). He stated he had never known the game plan of Coach Griffith for any game (R. 651).

The first time he learned of the September 13 call was when John Carmichael called him from Alabama when he was attending a funeral in Philadelphia, on January 30, 1963, (R. 648-650) to warn him that Burnett had told his story (Carmichael—R. 844-845). He had known Carmichael for a number of years (R. 650).

Respondent denied that he discussed with Bryant the subjects reflected in the notes produced by Burnett (R. 658-681). He said he did not know what plays or formations Georgia planned to use in the Alabama game (R. 681, 682).

Bryant had no recollection of whether respondent called him on September 13, nor, if the call was made, of what was said (R. 529). He flatly denied that respondent at any time gave him information relating to the plays, formations, or defenses to be used by Georgia against Alabama (R. 529-532). He also indicated that if respondent had given him such information, he would not have believed it (R. 532). Bryant further testified that Alabama was not properly prepared for one formation Georgia used

in the game (R. 542-545), and made no significant changes in Alabama's defensive plan between September 13 and the day of the game, September 22 (R. 547). He attacked Burnett's statement that the operator on the September 13 call said, "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?" by stating that the practice field at Alabama is three blocks from the office having extension 641, and morning practices had been discontinued by September 13 (R. 563-564). He pointed out that according to phone company records he had not only talked to respondent for 67 minutes on September 16, but also to the University of Texas coach for 37 minutes (R. 568). He stated that during September, 1962 he discussed a number of matters with respondent, such as schedules, whether to play the game in Tuscaloosa or in Birmingham, for Georgia to buy and install lights, tickets, the bank situation, what time the Georgia team wanted to work out, the investment they were both interested in, enforcement policies of certain rules, football in general, and respondent's passing game (R. 569-571).

Burnett testified he did nothing about the call which he had overheard until January 4, 1963 when, unable to restrain himself any longer, he told his close friend, Bob Edwards, about it (Burnett—R. 192; Graham—R. 899). Burnett was prevented from testifying as to what he told Edwards, on the ground it was hearsay (Court—R. 192). Edwards communicated the information to Griffith, and in January, 1963, Burnett and Edwards met Griffith at his room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference. (Burnett R. 193, 211, 252; Griffith—R. 304).

Griffith testified that during the 1962 season he had suspected that someone had been giving Georgia's plays and formations to her opponents (R. 376), and that he said to Burnett "I figured somebody had been giving information to Alabama." (R. 369).

Griffith called J. D. Bolton, Comptroller of the University of Georgia, and Treasurer of its Athletic Board, who was also at the meeting at the Biltmore, (Bolton—R. 262). Bolton went to Griffith's room and was shown Burnett's notes (Bolton—R. 263). Upon his return to Athens on Saturday, January 26, 1963, Griffith turned the notes over to University President O. C. Aderhold (Bolton—R. 263; Griffith—R. 304). That night the notes were delivered to Cook Barwick, a member of the Georgia Athletic Board at his home in Atlanta (Bolton—R. 263-64).

During the following week, Burnett and Edwards met with Dr. Aderhold, J. D. Bolton, and Barwick (Burnett—R. 19[illegible] 259). Burnett consented to a recording of the meeting (Burnett—R. 259). Ten days later, Burnett again met with the University officials at Barwick's office, where he signed an affidavit (Burnett—R. 195) and agreed to take a lie-detector test administered by an expert selected by the University (Burnett—R. 195). In compliance with this request, during the first week of February, Burnett took such a polygraph test (Burnett—R. 196). On February 21, 1963, Burnett was asked to meet with officials of the University and with Bernie Moore, Commissioner of the Southeastern Conference. At this meeting, Burnett was confronted with the fact that he had been arrested and was on probation on a bad check charge involving two checks totalling $45 (Graham—R. 909-911, 914). Frightened and angry (Graham—R. 913), Burnett sought the advice of his attorney, Pierre Howard (R. 224), and for the first time told Howard of the call which he had overheard (Burnett—R. 231, 234). Howard told Burnett that representatives of the Post were in Atlanta and recommended that he tell them his story before he was maligned (Burnett—R. 232, 233). Howard called Graham and arranged an appointment (Burnett—R. 233-234). Burnett agreed to give his story to the Post and a contract was arranged by Howard (R. 501) under which Burnett was to receive $2,000 for telling his story and $3,000 additional if the

Post story turned out to be an exclusive (R. 1387). Pierre Howard (Pl. Ex. 11, R. 1880) and Milton Flack (Pl. Ex. 8, R. 1377) were each paid $500 by the Post (Graham—R. 502).

Respondent was asked to attend a meeting at Cook Barwick's office in Atlanta on Friday, February 22 (Butts—R. 684-86). Upon his arrival, he found not only Dr. Aderhold, J. D. Bolton and Barwick, but also Harmon Caldwell, Chancellor of the University System; James Dunlap, Chairman of the Board of Regents; Bernie Moore, Commissioner of the Southeastern Conference, and a close friend and former coaching assistant, Bill Hartman (Bolton—R. 266-67). After brief prefatory remarks by Dr. Aderhold (Aderhold—R. 1100-1102), Cook Barwick explained the nature of the charges made by Burnett and the results of the investigation (Aderhold—R. 1101). Respondent was handed a copy of the Burnett notes (Bolton—R. 267, 1154; Butts—R. 684; Aderhold—R. 1101). After reading them briefly, respondent said, according to Bolton:

> "No doubt the guy heard what he said he heard. I don't blame him for placing the interpretation that he did on this conversation. If I had been in his place, I probably would have thought the same thing, but he is mistaken. It's just conversation, ordinary football talk among coaches, and that you know I would never give old Bryant anything to help him and hurt Georgia. . . . If I did give any information to hurt Georgia it was not intentional." (R. 267, 277).

Dr. Aderhold testified that respondent "indicated that the call was made, and that these items were probably discussed, but they did not mean what Mr. Burnett had indicated that they did mean." (Aderhold—R. 1101-1102). Respondent testified that, on being shown the notes, "I said such a telephone call might have been overheard. I did not evaluate the notes." (Butts—R. 684). Hartman testified that respondent stated: "it was possible that a

telephone conversation could have been overheard . . . but that it had been misconstrued." (Hartman—R. 977).

According to Dr. Aderhold and Bolton, respondent was asked to take a lie-detector test and sign an affidavit as Burnett had done (Bolton—R. 273; Aderhold—R. 1103). Respondent and Hartman testified that respondent was not asked to sign an affidavit (Butts—R. 685; Hartman—R. 980). Butts testified that he was requested to take the lie-detector test and that he refused to do so because he considered it more or less an insult (Butts—R. 789-90).

On the following day, Saturday, February 23, respondent went to the office of University President Aderhold, and resigned as Athletic Director effective February 28 (Bolton—R. 267; Butts—R. 686), stating in his resignation:

> "During the past two years, I have developed business interests. I find that I am having to devote more time to these interests. It is for this reason that I submit my resignation as athletic director of the University of Georgia effective February 28, 1963." (Butts—R. 771).

Respondent testified he resigned because Bolton advised him his resignation would be reported in the press and that would be embarrassing to Dr. Aderhold (R. 769-770) Bolton denied so advising respondent (R. 1124-1125).

As permitted by Georgia law (R. 1071-1072), six persons connected with the University of Georgia testified for petitioner with respect to respondent's credibility. Dr. Aderhold, who had been president of the University for 13 years and who was Chairman of the Athletic Board, said that the general character of respondent was bad (R. 1094-1095). J. D. Bolton, Comptroller and Treasurer of the University and Treasurer of the Georgia athletic association, said that respondent's character in the community was bad and that he would not believe respondent

under oath (R. 1153). Similar testimony was given by four members of the Athletic Board: Harold Heckman, head of accounting and professor of accounting at the University (R. 1069, 1071-1072); William Bradshaw, an alumnus and former player (R. 1076, 1087); R. H. Driftmier, head of both the department and the division of agricultural engineering (R. 1088-1089); and Dr. Hugo Mills, an associate professor in the Education School of the University (R. 1142).[2]

Three or four days before February 24, Dr. Aderhold called the President of the University of Alabama, Dr. Frank A. Rose, and arranged a meeting in Birmingham (Rose—R. 1214). On Sunday, February 24, Dr. Aderhold, accompanied by Cook Barwick, met Dr. Rose and Bernie Moore at the latter's office in Birmingham (Aderhold—R. 1125; Rose—R. 1214-15) and advised Dr. Rose of the information disclosed by their investigation (Aderhold—R. 1125-26). Dr. Rose was specifically asked to investigate to determine whether respondent had given Bryant plays and detailed information about the Georgia team and whether this information helped Alabama in the game (Rose—R. 1248-49).

Upon his return to Tuscaloosa, Dr. Rose discussed the matter with Coach Bryant for approximately three hours (Bryant—R. 581; Rose—R. 1215). Bryant was unable to remember either the September 13 or the September 16 conversation (Bryant—R. 584), but, according to Rose, told Rose that he and respondent had talked on a number of occasions about rules interpretations, ticket sales and investments (Rose—R. 1216-17).

Dr. Rose talked to Coach Bryant on two or more occasions (Rose—R. 1217), and on March 6, wrote Dr. Aderhold advising him of the results of his investigation (Def. Ex. 21, R.—1420-1422);

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2. Proferred evidence that respondent had charged personal expenses to the Athletic Association was excluded (R. 822-835).

"University of Alabama
Unversity, Alabama

Office of The
President

March 6, 1963
Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, L.S.U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes, [sic] particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week.[2] The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially yours,
Frank A. Rose,
President."

2. Dr. Rose admitted at the trial that George Gardner had visited the University of Alabama before the September 13 call, at the request of Bryant, and, therefore, Bryant did not invite Gardner to the University after the call as stated in the letter (Rose—R. 1224).

Dr. Rose testified he had dictated the letter hurriedly on the morning of March 6 before catching an 8:40 A.M. plane to attend a meeting of the American Council on Education in Washington and that it was mailed without his

having read it (Rose—R. 1219). In the letter, he used the word "plays" when he intended to have used the word "techniques" (Rose—R. 1222-23). He also testified that the information contained in the letter was obtained from Coach Bryant (Rose—R. 1247). Bryant testified that although he discussed the matter with Dr. Rose, Rose had not accurately reported Bryant's remarks (Bryant—R. 582-583). Rose did testify that Bryant informed him that he was unable to remember either the September 13, or the Sunday, September 16 call (Rose—R. 1238), a fact repeatedly asserted by Bryant at the trial (Bryant—R. 529, 548, 568, 584).[3]

2. Georgia Preparations for and Play in the Alabama Game.

On September 13, Georgia Coach John Griffith was preparing his team for its opening game against Alabama on September 22. Georgia, which had an unusual number of sophomores (Griffith—R. 321; Pearce—R. 413), held

3. Subsequent to the trial, petitioner took the depositions of Dr. Rose and his secretary, Mrs. Marian Park, with respect to this letter. At the deposition of Dr. Rose, it was disclosed that Bryant had written a letter to Dr. Rose on February 28, three days after his return to Tuscaloosa from the meeting with Dr. Aderhold, Cook Barwick and Bernie Moore in Birmingham (R. 1429-1430, 1454-1455, 1524-1525) in which Bryant stated, *inter alia*, that he remembered the call to respondent of September 16, 1962. In addition, Dr. Rose admitted that he had been incorrect in testifying at the trial that he had to catch an 8:40 A.M. plane to Washington or that he went to Washington at all on March 6 (R. 1531-1533). He further testified that the letter to Dr. Aderhold had not been written on March 6 but on the preceding day, March 5 (R. 1530-1539). He was unable to remember whether he was in Tuscaloosa on that date (R. 1539) but his expense records showed no trips on March 4, 5 or 6 (R. 1539).

Mrs. Park testified that the March 6 letter to Dr. Aderhold was dictated slowly and thoughtfully by Dr. Rose as the fifth in a series of 32 letters, which took approximately an hour and a half to dictate (R. 1583-1584). Dr. Rose's correspondence file was found to contain a carbon copy of what appeared to be an earlier draft of the letter of March 6, dated March 5, which differs slightly from the March 6 letter (R. 1429, 1451). Although Mrs. Park testified that no draft had been prepared, her stenographic notes corresponded more nearly to the March 5 draft than to the letter of March 6 (R. 1581-1583).

secret practices behind a walled practice field, from which the public was excluded (Inman—R. 405; Pearce—R. 413). Respondent, as Athletic Director, was a frequent visitor at these practices (Inman—R. 405; Pearce—R. 444; Gregory—R. 628). As an additional safeguard for the secrecy of the plays, the Georgia team was divided into three groups—the ends, the backs and the linemen. Only that portion of each play which pertained to their respective positions was distributed to each group, so that should a player's copy of the plays fall into the wrong hands, it would be useless without the other two sections. Only the quarterbacks had a complete picture (Pearce—R. 414).

Georgia's offense consisted of two basic formations, the "slot right" with the right end split 3 yards from the tackle (Griffith—R. 306-307; Inman—R. 391; Pearce—R. 432), and the "pro set," in which the slot was also to the right, but with the left end split 15 yards (Griffith—R. 306-307; Inman—R. 390; Pearce—R. 434). The Georgia staff considered the width of the slot to be of major importance to the success of the formation and practiced it diligently in order to make sure that the ends lined up exactly the right distance (Pearce—R. 432). Advance knowledge of the distance the Georgia ends would be split would be of tremendous advantage to an opponent (Inman—R. 391-396; Pearce—R. 432). End Mickey Babb denied that the split was a fixed distance, testifying that he varied his split according to field position (R. 741-742).

Georgia's passing attack was built around end Mickey Babb, the team's leading pass receiver, who was to be used as the split end in all of Georgia's offensive formations (Griffith—R. 316), and as quarterback Larry Rakestraw's primary target (Pearce—R. 434). When Georgia neared the goal line, it was usually planned that Babb run a "hook" pass pattern (Griffith—R. 356).

Defensively, Georgia planned to use a "loose-six" defense against Alabama, in which Georgia would drop its ends off and contain with its tackles (Griffith—R. 317). Attempts were being made to correct the tendency of

Georgia safety-man Brigham Woodward to commit himself too fast on pass defense (Griffith—R. 311; Pearce—R. 429).

Alabama entered the September 22 game a 14 to 17 point favorite (Pearce—R. 415; Graham—R. 513). Georgia gained probably less than 100 yards offensively, which is bad (Griffith—R. 381), probably completed 11 out of 18 or 19 passes (R. 381-382), and never got closer to the Alabama goal line than the 40-yard line (R. 382). The final score of 35-0 shocked and stunned Coach Griffith (R. 376). He denied that his players had taken "a frightful physical beating" (R. 376).

During the game, according to Griffith, Georgia players came to the sidelines and said to him:

> "They know what we are running; they are even calling out our plays!"
>
> "What are we going to do?" (R. 377)

As already noted, Coach Bryant testified that Alabama was not properly prepared for one formation Georgia used during the game (R. 542-545). This was corroborated by Alabama players Jordan (R. 711) and Sharp (R. 585-586). Bryant also stated that Alabama made no significant changes in its defensive plan between September 13 and the day of the game, September 22 (R. 547). Pell testified to the same effect (R. 595-596), and added that during the period from September 1 to September 22, Alabama did not concentrate on any particular two or three formations (R. 600). Sharp testified that during the game he heard no player on Alabama's team call out such things as "you can't run eighty-eight pop on us" (R. 589).

Charley Trippi, Georgia's assistant coach in charge of offense, who called ninety percent of the plays used by Georgia from the press box (R. 722), said he saw nothing indicating that Alabama knew anything about what Georgia was going to do in the game; the only thing he saw was that Alabama blocked, tackled and ran harder than Georgia did (R. 726).

Respondent also produced three Georgia players who played in the game, Robert Wallace Williamson (R. 733), Mickey Babb (R. 740) and Brigham Everett Woodward (R. 756). Woodward testified that Georgia players in that game did not take a frightful physical beating as stated in the article (R. 758). Williamson testified that there was nothing done or said by the Alabama players during the game which indicated that they knew what Georgia was going to do (R. 734). He also said that the statement in the article that the Georgia players took a frightful physical beating was not true (R. 735). Babb testified that the Georgia players did not take a frightful physical beating (R. 744) and that as a player in the game he did not feel that their moves were being analyzed by the Alabama team (R. 745). He specifically denied having told the Post's source, Furman Bisher, that the Alabama players had taunted them by yelling out "you can't run eighty-eight pop on us," as he was quoted in the article (R. 745).

3. Evidence by Football Coaches and Players on Value of Burnett Notes.

None of the football authorities called as witnesses were examined on the value of the information which Burnett testified he overheard respondent give Bryant. The testimony of all such witnesses was directed to the Burnett notes.

In head coach Johnny Griffith's opinion, the Burnett notes contained meaningful information for an opposing coach about the Georgia team, the most important of which was the two formations Georgia intended to use in the Alabama game (Griffith—R. 307-317). Under cross-examination, he stated that a good number of the notes were inaccurate and didn't apply to anything Georgia had, and that the only two things he saw in the notes that might have been of benefit to an opposing coach were the two formations (R. 386-387). The knowledge that only two specified formations would be used by Georgia would free practice

time which would otherwise have been devoted to preparation against other formations Georgia might possibly use (Griffith—R. 317). Georgia assistant coaches, Inman and Pearce, were of the opinion that the information contained in the notes could have been helpful to Alabama (Inman—R. 394-395; Pearce—R. 411-437). Assistant coach Gregory, testifying for respondent, maintained that the notes were either wrong or meaningless (R. 622-632). On cross-examination he admitted signing a letter to the Assistant Attorney General of Georgia, dated March 26, 1963, stating that, ". . . it is my opinion . . . that if such information was given to Coach Bryant before the opening game of the season, it contained vital and important information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team, and could have effective [sic] the outcome of the game on September 22, 1962" (R. 634). He testified he signed the letter because he was afraid his job would be jeopardized if he did not (R. 636-638).

Bryant denied that the Burnett notes reflected any information that would have been helpful to him (R. 551-563). While Bryant testified there may have been a couple of things in Burnett's notes that he would rather have known than not known (R. 572), the things he would be interested in about another team would be their game plan —what they planned to do in certain field positions and on specified downs (R. 573-575).

Charles Trippi testified that the notes produced by Burnett were baseless and that the first thing that he would do with the notes would be to tear them up (R. 723-24). He further stated that based upon his experience as a college football player, as well as a professional football player, the outcome of a college football game definitely cannot be pre-arranged, fixed or rigged without the participation of the players, or some of the players, themselves (R. 727). Trippi further testified:

> "I have studied these (Burnett) notes, and I believe I expressed my opinion of these notes when they

first were announced; and I still contend there's nothing in here to substantiate anything of value in football planning." (R. 728)

He further stated:

"We give more information to the press every week to promote the game than is being expressed in these notes right here." (R. 727)

Leroy Jordan testified that in his opinion even if an opposing coach knew what formations were going to be employed by the offensive team, such information would be of no value to the coach (R. 713). With reference to the Burnett notes, he stated that there was nothing in them which the University of Alabama specialized in defensively before its game with the University of Georgia (R. 715-16). He further testified that in his opinion as a football player, the outcome of a football game cannot be rigged or fixed without participation of the football players themselves (R. 716). He stated further that in his opinion there is no way that two coaches can rig or fix the outcome of a football game without the players' knowledge (R. 717).

Alabama player Pell testified that in his opinion for Alabama to have known in advance formations and plays which any team such as the University of Georgia was going to use would be of no advantage since they would have needed to know almost a thousand other things before they could have used any such information (R. 601-02). Witness Pell also testified that in his opinion as a football player a football game cannot be rigged or fixed without the individual players knowing about it and without the individual players participating in the rigging and fixing (R. 604).

Also testifying for the respondent was William C. Hartman, Jr., former Assistant Coach of the University of Georgia (R. 973). He testified that in his opinion the information contained in the Burnett notes would not be of any assistance at all to the University of Alabama in pre-

paring for its game with the University of Georgia, that the information concerned nothing more than basic "T" formations, and that the University of Alabama and everyone else had all that information in their own offense. He stated that the University of Alabama must have previously seen at least three or four movies of Georgia games showing the same information (R. 982-983).

4. The Investigation, Preparation and Publication of the Article.

News of the Butts-Bryant affair reached Roger Kahn, sports editor of the Post, in New York on Tuesday, February 10, 1963 (Kahn—R. 950). The information had come from an attorney in Birmingham, Alabama, Roderick Beddow, who was representing petitioner in a libel suit brought there by Bryant against petitioner and Furman Bisher (R. 497-498). Kahn selected Frank Graham, whom he knew to be an experienced sports writer, to go to Atlanta to investigate the matter (Kahn—R. 952). If, in Graham's judgment, there was a story there, he was to proceed (Kahn—R. 952). The Post was interested in getting to the truth of the entire matter (Kahn—R. 957). Graham was to move with all deliberate speed (Kahn—R. 956) to do a complete investigation, without any time limitation (Kahn—R. 957). He was to go to Atlanta and make a thorough investigation to get all available facts (Kahn—R. 952-53), an affidavit from Burnett (Kahn—R. 954), and, if possible, a copy of his notes (Kahn—R. 954). Kahn cautioned Graham to be careful, that this was a big story (Kahn—R. 957).

Graham arrived in Atlanta late on the night of Wednesday, February 20th (Graham—R. 498). On the following morning, he met Beddow and they went to the office of Pierre Howard (Graham—R. 497-499). Shortly after their arrival at Howard's office, the group was joined by Milton Flack. Howard and Flack recounted the story told by Burnett (Graham—R. 499-500). One of the things they thought Burnett had said was that respondent told Bryant that

Georgia quarterback Larry Rakestraw tipped off what he was going to do by the way he held his feet (Graham—R. 871-72).[2] They also filled Graham in on the background of the Georgia football situation as they knew it (Graham—R. 500). Howard told Graham that in 1961, respondent had resigned as head coach of the University of Georgia after prominent University alumni had soured on him (Graham—R. 879), and since that time, respondent had been outspokenly bitter about his removal (Graham—R. 879-80).[3] Graham was also told by Flack and Howard that respondent had lost approximately $80,000 in a Florida orange grove speculation (Graham—R. 880-81). He was also told that it was rumored that respondent had entered a hospital in Athens (Graham—R. 906-907). Bisher later informed Graham that the rumor was groundless (Graham—R. 907).

At 7:00 P.M. on the evening of February 21, Burnett, Howard and Flack met Frank Graham at his room in the Heart of Atlanta Motel and Burnett told his story (Burnett—R. 233). After relating what had transpired at the meeting with the officials of the University earlier that day (Graham—R. 506). Burnett told Graham of the call which he had overheard between respondent and Bryant, as it was subsequently reported by Graham in the Post article (Graham—R. 521-27), except that the item about Rakestraw was not given Graham by Burnett (Burnett—R. 241).

On the following morning, Graham again met Burnett at Howard's office (Graham—R. 508). Graham asked

2. Graham learned of the error after publication of the article, when Burnett advised a representative of the Post that he did not recall overhearing this statement (Graham—R. 872).

3. About eighteen months after respondent's resignation as coach, his close friend, Bill Hartman, began to hear reports that respondent was making speeches in which he was openly caustic of the entire Georgia coaching staff (Hartman—R. 990-91; Bradshaw—R. 1087). Respondent's antagonism toward the University increased to such extent that he made critical remarks every time the Athletic Board met (Driftmier—R. 1089-90). Reports of respondent's repeated criticisms of Coach Griffith and his staff also reached President Aderhold (Aderhold—R. 1114).

Howard for a copy of Burnett's notes (Graham—R. 510-11). Howard promised to obtain a copy for him from Cook Barwick, and rush them to Graham by air (Graham—R. 510-11); however, this was never done (Graham—R. 510-11). At Graham's request, an affidavit was prepared and signed by Burnett (Graham—R. 494-508).

Frank Graham spent Saturday morning at the Atlanta Public Library, studying the newspaper reports of events leading up to and following that Georgia-Alabama game on September 22 (Graham—R. 513). George Burnett and Milton Flack drove Graham to the airport and spent about three and a half hours with him (Burnett—R. 236; Graham—R. 515). Before leaving Atlanta, Graham read in the Atlanta Journal that respondent had resigned as Athletic Director (Graham—R. 879).

On Monday, February 25, Roger Kahn, sports editor of the Post, was contacted in New York by Furman Bisher, sports editor of the Atlanta Journal (Kahn—R. 966). Bisher told Kahn that he had a major story involving colossi of southern football (Kahn—R. 966-67). Kahn called Graham (Graham—R. 492) and arranged a meeting with Bisher at his hotel later that evening (Graham—R. 493). Bisher told Graham substantially what Graham had learned in Altanta, much of which was contained in the affidavit which George Burnett had signed for the Post (Graham—R. 494), information which Bisher had apparently learned from Cook Barwick (Graham—R. 494).

Kahn knew Bisher to be a good reporter (Kahn—R. 966). Because he had more entrees to people in Atlanta, it was decided that Bisher would complete the investigation (Graham—R. 494, 517). Bisher was to accumulate every bit of useful information, particularly in talking to University authorities (Graham—R. 912), and forward it to Graham. Kahn suggested that films of the game be reviewed, but believed Bisher said they were unavailable (Kahn—R. 970). Bisher testified he had no recollection of a discussion about viewing of the films at that meeting,

but there might have been and he would have said it would have been a very good idea (R. 1025-1026).

On the following Friday, March 1, 1963, Bisher called Graham in New York, stating that he had talked to people at the University and gave Graham quotes from Mickey Babb (Graham—R. 893-94), the trainer, Sam Richwine (Graham—R. 895), and Coach Griffith (Graham—R. 517-18, 894-95; Kahn—R. 972). Babb and Richwine denied at the trial having made the statements attributed to them by Bisher (Babb—R. 745, Richwine—R. 752). Bisher specifically quoted Griffith as having said that "Nobody ever used that name for that play but one man" (Graham—R. 902) and that he didn't move for an hour after reading Burnett's notes (Graham—R. 904). Griffith did not deny these facts. Griffith was also quoted by Bisher as having said "I never had a chance." After publication of the article, Griffith denied having made such a statement (Griffith—R. 372; Kahn—R. 972). According to Graham, Bisher supplied additional background information for the article (Graham—R. 878) and reaffirmed that respondent had been very bitter about his removal as head coach (Graham—R. 878). Bisher denied giving Graham the latter piece of information (R. 1027-1028). Bisher told Graham that records of Southern Bell confirmed the September 13 call (Graham—R. 909). The following week, an advance copy of the story was sent to Furman Bisher, who made no corrections or suggestions (Graham—R. 513).[4]

Frank Graham wrote the article and submitted it to Davis Thomas, managing editor of the Post (Thomas—R. 1021). Because of the nature of the charge made in the article, the Post made sure that great care had been exercised (Thomas—R. 1015) and that every significant source of information had been checked (Thomas—R. 1014, 1021) in advance of publication. In approving the article for publication, Thomas attached great significance to the affi-

4. Furman Bisher was paid $1,000 by the Post for his investigation (Pl. Ex. 10, R. 1379).

davit executed by Burnett, which supported his belief in the truth of the statements contained in the article (R. 1015). Thomas took into consideration the fact that Burnett had been arrested and convicted of passing bad checks (R. 1016). The Post knew that the University had made a full investigation of Burnett (Graham—R. 911) and that the Burnett notes had been convincing to Griffith and University authorities (Thomas—R. 1024).

The article was then submitted to Clay Blair, Jr., Editor-in-Chief of Curtis Publishing Company, for his approval. The article was approved for publication only after Blair was satisfied that the statements contained in the article had been thoroughly checked as to their truthfulness and accuracy (Blair—R. 945-46).

Blair was interested in changing the "image" of the Post (R. 940); he had said in an interview with Newsweek magazine, in November, 1962, that he intended to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" (R. 943). Although he said that by adding the word "sophisticated" he intended to alter the most common usage of the term "muckrake", the term "sophisticated muckraking" was not clearly defined by him (R. 940-944). On January 15, 1963, he had circulated a congratulatory memorandum to his staff which stated (facetiously, according to his testimony) (R. 939) that "the final yardstick" of this policy was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism" (P. 6, 1376, R. 946-47). The number of lawsuits stated was inaccurate (R. 947). He also described the issue containing the article here involved as "a step in the right direction", adding that with this issue "we have gone twenty-five percent toward the goal of the magazine that I envision" (R. 940). Both he and Davis Thomas knew that when the editorial accompanying the article stated, "But careers will be ruined, that is sure," it was applicable to respondent (Blair—R. 945, Thomas—R. 1014).

Prior to publication of the article, Curtis' advertising revenues had been falling drastically (R. 935-936). Blair was not asked if this was the reason for the editorial policy he adopted.

Under date of March 11, 1963, seven days before the publication date of March 18, respondent's counsel sent a telegram and a letter to petitioner stating without specification, that the proposed content of the article was false (R. 22-23, 1023). Sometime during the week prior to publication, respondent's daughter called Blair and, without claiming the article to be false, requested him not to publish it (R. 947-949).

Following the publication of the article, a demand for a retraction was made by the plaintiff and ignored by the Post (R. 22-23, 26-27).

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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No. 150

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The Petition herein was filed on May 18, 1966. Thereafter, on August 15, 1966, the Supreme Court of Colorado, in still another of Respondent's libel actions against Petitioner, held squarely that the doctrine of *New York Times* v. *Sullivan* is applicable to Respondent, General Walker, upon the very facts involved in the present case. *Walker* v. *Associated Press,* Colo. , P. 2d . In its unanimous opinion (with one Justice not sitting), the Colorado court said:

> "The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily

go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.

"We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press."

Since the decision of the Supreme Court of Colorado is not yet reported, the full text of the opinion is annexed hereto as Appendix 1. The new *Walker* decision is in direct conflict with the rulings of the courts below in the instant case, and thus constitutes an additional reason for the granting of the writ.

Respectfully submitted,

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APPENDIX 1

No. 21732

EDWIN A. WALKER,
Plaintiff in Error,

v.

THE ASSOCIATED PRESS,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

HON. SAUL PINCHICK, *Judge*

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

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CLYDE J. WATTS,
Attorneys for Plaintiff in Error.

WINNER, BERGE, MARTIN & CAMFIELD,
Attorneys for Defendant in Error.

MR. JUSTICE MCWILLIAMS DELIVERED THE OPINION OF THE COURT.

Edwin A. Walker, hereinafter referred to as the plaintiff, brought a libel action against the Associated Press, a New York corporation, and The Denver Post, Inc., a Colorado corporation. In this writ of error we are concerned only with plaintiff's three claims for relief against the one defendant, Associated Press.

After permitting the plaintiff to amend his complaint on several occasions, the trial court eventually granted a motion to dismiss filed by the Associated Press, and judgment of dismissal followed. It is this judgment of dismissal which the plaintiff now seeks to have reversed.

In order to better understand this matter it becomes necessary to analyze with some degree of particularity the several complaints, and amendments thereto, filed by the plaintiff. This action was commenced by the plaintiff on September 30, 1963 with the filing of a complaint. In his original complaint the plaintiff claimed to have been libeled in the following publications: (1) an editorial appearing in The Denver Post on October 1, 1962; (2) a news article appearing in The Denver Post on October 2, 1962; and (3) an Associated Press news release of October 3, 1962, which was forwarded by the Associated Press to the Denver Post.

Our examination of the original complaint leads us to conclude that by the words used in this complaint plaintiff intended to charge, and did charge, the Associated Press with only one allegedly libelous publication, i.e., its news release of October 3, 1962, and that it was The Denver Post which was said to have libeled plaintiff in its editorial of October 1, 1962 and in its news article of October 2, 1962. Be that as it may, in our view on November 14, 1963 plaintiff cleared up any possible doubt on this particular matter by quite definitely charging Associated Press with only one libelous publication, namely its news release of October 3, 1962.

Thereafter, on February 17, 1964, the trial court granted the motion to dismiss filed by Associated Press, and the plaintiff was granted time within which to file a second complaint. This the plaintiff did on March 11, 1964, in what he chose to denominate as an "Amended

Complaint." This amended complaint contained what plaintiff labeled as counts one, two and three. Count one related to The Denver Post editorial of October 1, 1962, but in this pleading *both* The Denver Post and the Associated Press were charged with this particular publication.

Count two of the amended complaint related to The Denver Post news article of October 2, 1962, and again in this amended complaint *both* the Associated Press and The Denver Post were charged with this publication.

Count three of the amended complaint was directed solely against the Associated Press, and it concerned the press release of October 3, 1962.

To this amended complaint Associated Press again filed a motion to dismiss alleging, as to counts one and two, that "such alleged claims . . . did not accrue within one year prior to the filing of the amended complaint."

The trial court agreed with this contention of Associated Press, and dismissed these particular counts on the ground that they were barred by the one year statute of limitation. C. R. S. 1963, 87-1-2. In our handling of this writ of error we shall first concern ourselves with the propriety of this particular ruling, laying aside for a moment a consideration of the third count in the amended complaint.

Counsel apparently agree that *if* counts one and two represent "new" claims against Associated Press, then each is barred by the applicable statute of limitation. Plaintiff argues, however, that counts one and two are not really new claims, but on the contrary relate back to the original complaint. Being, then, merely an enlargement upon the averments in the original complaint, plaintiff urges that counts one and two are therefore not barred by the one year statute of limitation. See *Platte Valley Motor Co.* v. *Wagner,* 130 Colo. 365, 278 P. 2d 870; *Smith* v. *La Forge,*

170 Kans. 677, 228 P. 2d 509; and *Doyle* v. *Okla. Press Pub. Co.*, 206 Okla. 254, 242 P. 2d 155.

Associated Press argues, to the contrary, that counts one and two represent *new* claims as to it, even though not to The Denver Post. In other words, it is pointed out that the Associated Press, as opposed to The Denver Post, was never charged with the publication of The Denver Post editorial of October 1, 1962 or The Denver Post news article of October 2, 1962 until March 11, 1964, the date when the amended complaint was filed.

In the original complaint it would appear that The Denver Post was charged with two libelous publications, i.e., its editorial of October 1, 1962 and its news article of October 2, 1962, and that the Associated Press was charged with only one libelous publication, i.e., its news release of October 3, 1962, which it is observed occurred subsequent to the dates of the allegedly libelous publications of The Denver Post.

If, however, there be doubt as to which defendant was charged with libelous publication, the matter in our mind was, as already mentioned, fully cleared up by the plaintiff himself when he filed his Amendment to Complaint on November 14, 1963. In that pleading it is quite evident that Associated Press is charged with only one libelous publication, namely its press release of October 3, 1962. Hence, when plaintiff in his Amended Complaint of March 11, 1964 avers that the Associated Press also published the allegedly libelous editorial and news article appearing in The Denver Post, he truly is setting forth "new" claims, "new" at least as to the one defendant, the Associated Press.

These three separate publications, of course, constitute separate and distinct claims. See *Hartmann* v. *Time, Inc.*, 60 N. Y. S. 2d 209. Accordingly, we conclude that counts

one and two in the amended complaint constitute "new" claims against the Associated Press, and not having been asserted against Associated Press within one year after the cause of action accrued, are now barred by the provision of C. R. S. 1963, 87-1-2. See *Evans* v. *The Republican Publishing Company,* 20 Colo. App. 281, 78 Pac. 311 and *Spears Free Clinic* v. *Maier,* 128 Colo. 263, 261 P. 2d 489.

We shall now proceed to a consideration of count three in the amended complaint. In all of his various pleadings the plaintiff alleged only general—as opposed to special—damages. And this was so even though he was given more than adequate opportunity by the trial court to amend his several complaints in this regard. However, he chose not to so do, and the trial court eventually dismissed count three of the amended complaint for this failure on the part of plaintiff to allege special damages. The reasoning of the trial court was that the allegedly libelous press release was only libelous per quod, and that in such event the plaintiff had to allege special damages, and the mere allegation of general damages was legally insufficient.

Plaintiff admits that he only alleged general damages, but contends that such is sufficient because, contrary to the determination made by the trial court, the news release—he claims—was libelous per se. So, this particular problem narrows down to a determination as to whether the press release of Associated Press under the date of October 3, 1962 is libelous per se, or per quod.

Plaintiff's overall position in this regard is that the Associated Press release of October 3, 1962 falsely charges him with the commission of a crime, namely a violation of 18 U. S. C. A. 111, which provides that he who "assaults, resists, opposes, intimidates or interferes" with, among other persons, a United States Marshal while engaging in the performance of his official duties shall be fined not more

than $5,000 or imprisoned for not more than three years, or both.

Plaintiff and Associated Press agree that *if* the latter in its press release of October 3, 1962 falsely charged the plaintiff with the commission of a crime, then the publication is libelous per se. See *Cinquanta* v. *Burdett,* 154 Colo. 37, 388 P. 2d 779, 1 A. L. R. 3rd 840 and *O'Cana* v. *Espinosa,* 141 Colo. 371, 347 P. 2d 1118. Associated Press contends, however, that its press release of October 3, 1962 does *not* charge plaintiff with having committed a crime, and that it is only by innuendo that such could ever be "read into" this particular release.

Our study of this news release of October 3, 1962 leads us to the conclusion that this particular publication is libelous per se in that it does charge the plaintiff with the commission of a crime. At the very least this news release charges plaintiff with taking the "command" of a theretofore unorganized mob which was resisting and interfering with United States Marshals who were about their official business by "charging" them, by hurling "bricks, bottles, rocks and wooden stakes toward the clustered marshals." One can, of course, be charged with the commission of a crime even though it is not done in the exact language of the statute. From our reading of the news release plaintiff was clearly charged with resisting and interfering with U. S. Marshals who were about their official business, and was also charged with aiding and abetting others who were similarly engaged in various acts constituting resistance and interference. If the language used in this press release doesn't equate to "resistance" and "interference", then it would be difficult to know what would. Hence, we hold the press release in question as libelous per se.

The Associated Press goes on to argue that even though its press release be deemed libelous per se, count three of

the amended complaint is still subject to a motion to dismiss on the basis of *New York Times Company* v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A. L. R. 2d 1412. In our view of this matter the rule laid down in the *New York Times* case does have application to the instant controversy, but, as will be developed, such does not justify an outright dismissal of count three of the amended complaint on a motion to dismiss.

In the *New York Times Company* case the Supreme Court of the United States rather severely limited the right of *public officials* to recover for libelous newspaper articles by holding that the constitutional safeguards regarding freedom of speech and press require that a public official in a libel action against a critic of his official conduct must show actual malice on the part of such critic before the public official can make any recovery, and that such is true even though the statements are libelous per se.

The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.

We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press.

We recognize that there is authority from other jurisdictions which looks away from such a holding. See, e.g., *Fignole* v. *The Curtis Publishing Company,* 247 F. Supp. 595. But in our considered view the rationale of *New York Times Company* v. *Sullivan, supra,* clearly suggests that the rule announced therein should apply to one in the position of this plaintiff. And there is authority from other jurisdictions which supports our conclusion in this regard. Accordingly, we subscribe to the reasoning found, for example, in *Walker* v. *Courrier-Journal & Louisville Times Co.,* 246 F. Supp. 231. See, also, *Pauling* v. *National Review, Inc.,* 269 N. Y. S. 2d 11; *Pauling* v. *News Syndicate Company, Inc.,* 335 F. 2d 659 and *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597.

Even though the rule of *New York Times Company* v. *Sullivan, supra,* does have applicability to the instant matter, such determination does not justify a dismissal of count three of the amended complaint on a motion to dismiss. Plaintiff in count three of his amended complaint alleges that the Associated Press published its press release of October 3, 1962 with actual malice, and his pleading in this regard is, therefore, sufficient to bring him even within the narrow rule announced in *New York Times Company* v. *Sullivan, supra.*

Associated Press finally argues that plaintiff has made a judicial admission that the Associated Press acted without actual malice by amending his pleading so as to incorporate by reference plaintiff's libel action brought in Texas against the Associated Press, which action was apparently based on the same press release of October 3, 1962. See *Associated Press* v. *Walker,* Tex. App. , 393 S. W. 2d 671. Without belaboring this point, we are of the view that the position of Associated Press in this regard is not well-taken and that this matter cannot be injected in this manner into the instant proceeding.

The judgments of dismissal as to counts one and two of the amended complaint are affirmed. The judgment of dismissal as to count three of the amended complaint is reversed and the cause is remanded with directions that further proceedings in connection therewith be consonant with the views herein expressed.

Mr. Chief Justice Sutton not participating.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

VERSUS

EDWIN A. WALKER,
Respondent.

REPLY TO SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

VERSUS

EDWIN A. WALKER,
Respondent.

REPLY TO SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

By Supplemental Brief, the Associated Press has presented to this Honorable Court a recent (15 Aug. 1966) decision by the Supreme Court of Colorado in *Walker* v. *The Associated Press,* wherein the Court squarely held that the Rule of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, applies to this epic battle between Walker and The Associated Press, "to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice,"[1] as therein defined.

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[1] From page 7: "We now hold that the Rule of New York Times Company v. Sullivan, supra, applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the New York Times Company case, on the part of Associated Press."

We appreciate this opportunity to bring into actual focus the *Sullivan* Rule, if applied to General Walker as a "public figure."

The Rule of *Sullivan* is precise and simple: The First Amendment to the Constitution protects the Press from libel, unless a defamatory statement is published with ACTUAL MALICE which is defined as:

> "1) KNOWINGLY FALSE, *or* 2) IN RECKLESS DISREGARD FOR THE TRUTH."

Under this Rule, malice is established, simply and conclusively, by the language of Associated Press in its news report:

> "*Walker assumed command of the crowd,* which I estimated at 1,000 * * *."
>
> "*Two men* took *Walker* by the arms and they *headed for* the Lyceum and the *Federal Marshals.* Throughout this time, *I was less than six feet from Walker.*"

The jury found that this report, charging plaintiff with a felony, was false; and, implicit in its verdict, is the finding that it was knowingly false and published in reckless disregard for the truth.[2]

With the Savell report having been issued and sold under an "Editor's Note," "Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and *saw what happened,*" and with the author of the report

---

[2] See Answer to Special Issues (Respondent's Brief, Apx. A, wherein jury held that the Savell report that Walker led a charge: a) was not substantially true, b) was not fair comment, c) was not made in good faith.

claiming to have seen, from a distance of six feet, a criminal act on the part of Walker, which the jury found that Walker did not commit, the report cannot be less than KNOWINGLY FALSE.

In addition, such falsity on the part of the greatest news media on earth, when measured by necessary standards of accuracy and integrity, as contrasted with the loose and heedless actions by which plaintiff was branded as a criminal and a lunatic, amount to RECKLESS DISREGARD FOR THE TRUTH, and not "reportorial negligence" which could be argued as being within the protection of *Sullivan*.

The Associated Press reported to the world that plaintiff, a former Major General in the United States Army, had "ASSUMED COMMAND" of a mob and led a charge against United States Marshals. The jury found that the report was false. It is respectfully submitted that a fair evaluation of the evidence in this case will reflect that the report was "knowingly false" and "in reckless disregard for the truth."

Proposition I

As an "eye-witness" report, the Savell story was either true or knowingly false.

Before *New York Times* v. *Sullivan*, a false charge of a crime was libelous *per se*; and the only defense was TRUTH. The "*Sullivan* Rule" has changed the law, however, and has extended to the Press the awesome privilege of defamation, limited only by the element of MALICE. Even the concept of malice has been changed from actual ill-will, which is almost impossible to prove, to a simple

standard of "knowingly false" or "reckless disregard of the truth." As stated in *Garrison* v. *State of Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125:

> "Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

In the instant case, Associated Press elected to publish an eye-witness report by its newsman that he had seen Walker committing a crime, thus breaking a highly sensational and saleable news report well in advance of Walker's actual arrest, which could have been published with absolute immunity . . . if and when Walker had been charged with a crime and arrested. The possibility remains that he may never have been charged and arrested, had not Associated Press issued its false report.

The jury has specifically found, upon ample evidence, that Savell did not see Walker commit the crime with which he was charged. Having accepted and reported to the world that their newsman was an eye-witness, the Associated Press is in no position to side-step responsibility for his false reporting, and the jury's determination of such falsity, by claiming that it was not knowingly false.

It is respectfully submitted that the jury's finding of falsity of the Associated Press report that Plaintiff had been seen by its newsman committing a crime would preclude the defendant from contending that the report was not knowingly false.

Proposition II

Under standards of accuracy and integrity reasonably applicable to Associated Press, the false report of Walker assuming command of a mob and leading a charge against U. S. Marshals, a crime against the Government of the United States, was published in reckless disregard for the truth.

Neither *Sullivan* nor subsequent decisions from either the United States Supreme Court, or other Federal Courts, have established guide lines for determination of "reckless disregard for the truth." Obviously a question of fact, it would appear that a jury in determining whether a false publication resulted from simple negligence, or reckless disregard for the truth, must consider two basic elements: 1) The nature of the duty owed by the author, to the public and to the victim of the false report, and 2) How the duty was, in fact, performed . . . *i.e.*, how and why a false report was published.

This issue has previously been litigated in the Texas Courts between the parties to this action; and, in support of our concept of the nature of the profound and vital duty owed by Associated Press to the public, as well as to an individual who may have become the subject of one of its news reports, we quote from Appellee's Brief in *Walker* v. *Associated Press* (Tex. Ct. of Civ. App., 1965), 393 S.W.2d 671, as follows:

(p. 1) " 'ONCE AGAIN, CONFLICTING IDEOLOGIES ARE LOCKED IN DESPERATE RIVALRY FOR THE *KEY TO HUMAN DESTINY.*'

"Thus, Mr. Gil Robb Wilson, Editor of FLYING Magazine challenges his fellow Americans to the stark reality of the current global stuggle. The issues at stake involve the survival of Freedom as we know it.

"Comparison of the Objectives, the Strategies and the Tactics of the two ideologies may reveal that the 'KEY' is . . . INTEGRITY . . . of which the basic element is TRUTH.

"Vital decisions under one ideology are made by ruthless rulers, who use propaganda, with its components of deceit, fabrication and falsehood for human motivation. Its concepts of Justice are shaped solely for enhancement of the power of the ruling oligarchy . . . never by the rights of the individual.

"The other ideology preserves both Freedom and Justice upon a broad base of individual knowledge and is devoted to a concept of Equal Justice Under the Law. The indispensable element of true knowledge is timely and accurate information, for which the American citizen is completely dependent upon a highly organized system of gathering and disseminating news.

"Against this background, the issues now before this Honorable Court transcend the interest, of the respective parties, and involve principles vital to the survival of our form of Government.

"In the jet-propelled and supercharged orbit of modern civilization, and particularly with electronic communication facilities which can encircle the world at fantastic speed, words have become the most lethal weapons known to man.

"They can start and stop wars, create or destroy illusions, depict or deny reality, imprison or release a citizen and launch or finish a career.

"By a fabulous network of communications, the Associated Press has acquired an ultimate capability in word usage . . . for the shaping of thoughts and knowledge of the people of America, and perhaps the whole world.

"Such power implies an equivalent duty with commensurate standards of accuracy and integrity. Upon faithful performance of this duty, Freedom depends.

"In the instant case, the unsupported and unverified report of an inexperienced 21 year old reporter has created of the Appellee, Walker, a false public image as a lunatic and insurrectionist. Upon Savell's report that Walker had assumed command of a crowd of rioters and led a charge against U. S. Marshals, Walker was arrested, and, without notice, counsel or hearing, and, upon affidavit of a psychiatrist who had never seen him, he was committed to a Government mental prison.

"The accuracy, the integrity and the motivation of the Associated Press in publishing this report has been weighed in the balance of jury trial, and, by unanimous verdict, has been found wanting. Appellant seeks to overturn this verdict by an appellate review of the evidence and a claim of privilege.

* * * * * *

"The soundness and logic of the above rule of the Texas Courts is forcefully illustrated by the facts in the instant case, and the wrong suffered by Walker in terms of false imprisonment and being branded as a lunatic and insurrectionist, as the result of the false charge that he had assumed command of a riotous group of students and others, and had led a charge against U. S. Marshals, who represented the authority of the Government.

"There is no amount of comment or criticism that would have caused his imprisonment. Even if the Associated Press had owed to its subscribers a duty of commenting upon Walker's activities, which the Associated Press has repeatedly pointed out is beyond the type of service which it provided, it would only have

criticized his statements and activities. Such criticism or comment, even though caustic and derogatory, could come within the protection of privilege. But, when the statement is one of fact, and particularly of such serious nature as to impute a crime, the author of the statements must, under the law, be prepared to prove the truth of the statement.

"Publication of false facts can produce prosecution!

"Publication of comment, whether true or false, cannot!"

When measured by the awesome responsibility concurrent with its vast power, the performance of Associated Press in publishing this false report concerning plaintiff requires the conclusion that it was more than "reportorial negligence," and was published "in reckless disregard for the truth." Facts which establish the conduct of Associated Press as reckless disregard for the truth, rather than reportorial negligence, include the following:

1) The report was FALSE, as found by the jury.

2) Appellant relied solely upon the unsupported telephone report of an inexperienced 21-year-old cub reporter, completely unsupported by any other informant or evidence.

3) Associated Press should have been on notice of the falsity of Savell's story, when he first reported to A-P newsman, B. R. Thomas at New Orleans, that Walker had made an inflammatory speech from a Confederate Monument, *and then led a charge against U. S. Marshals.* Further verification should have been required when Savell later reported that Walker first entered the campus, assumed command of the crowd,

led a charge of 1,000 people, *and then* fell back to the Monument and made his speech.

4) For many days after the incident, Associated Press continued to issue republications and repetitions of the original false report, without any effort toward further investigation or verification of Savell's story. A typical example appears from the deposition of "ace" AP newsman, Relman Morin, who admitted that Savell was "the only one I can specifically remember," who had reported seeing Walker lead a charge.

5) A most flagrant example of slanting of the news concerning Walker is reflected by the testimony of AP Newsman, Louis Milliner, who admitted that he had reported to his New Orleans news room that a Government psychiatrist, Guttmacher, had testified that he found evidence of mental deterioration on the part of Walker, and also reported to the same news room that the court-appointed psychiatrist, Stubblefield, had found that Walker was "functioning at the superior level of intelligence." Associated Press published the report of Walker's mental deterioration on its "A" Wire, with circulation around the world. The Stubblefield report of superior intelligence was put on the "B" Wire, with restricted local coverage.

The record is replete with evidence refuting the contention of defendant, as allegedly supported by its witnesses, that Walker actually led a charge.

Defendant rests its whole contention that Savell and Associated Press were guilty only of "reportorial negligence" rather than reckless disregard for the truth, upon testimony of its own witnesses. A review of the defendant's evidence will reveal shocking conflict in the testimony of

defense witnesses, for example, Rev. Duncan Gray refuted the testimony of witnesses, Gregory and Savell, that Walker led a charge *before* his speech from the monument. The conflict between testimony of various witnesses for defendants, and the implausible stories of others leaves the impact of their testimony almost as unbelievable as the fabricated Savell story published by AP. The quality of their testimony, singly and collectively, is not such as would convince a jury that Savell even thought he saw what he reported. In fact, it is probable that the lack of candor and consistency in their testimony, together with absence of Savell from the courtroom, caused the jury to lose confidence in the entire defense of Associated Press.

In furtherance of Principles of Justice, the disparity in power between Associated Press and a private citizen should be weighed and considered in determining "reckless disregard for the truth." Once an individual is falsely reported to have committed a *criminal act*, or to be of deficient mentality, he is powerless to correct the false image, regardless of his innocence or sanity. His reputation and public image are completely at the mercy of the news media, and he can look only to the law for reasonable protection and vindication of his record.

With reputation more precious than wealth, and the citizen in no postion to debate with a newspaper, and certainly not Associated Press, a realistic protection against defamation is a critical necessity under the *Sullivan* Rule. Such protection must recognize the helplessness of the victim.

Recent decisions of this Honorable Court have well protected against official "overbearing" the rights of one accused of a crime. As illustrated in *Miranda* v. *State of Arizona* (U.S. Sup. 6/13/66), 86 Sup. Ct. Rep. 1602:

From page 1611:

> "* * * basic rights that are enshrined in our Constitution—that 'No person * * * shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall * * * have the Assistance of Counsel'—*rights which were put in jeopardy in that case through official overbearing.* These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come * * * designed to approach immortality as nearly as human institutions can approach it.'"

Rights of a citizen must be protected from those holding superior power.

If the conduct of the Associated Press in the instant case is condoned as simply a negligent misstatement, rather than reckless disregard for the truth, the right of a citizen to secure vindication for defamation as a question of fact for injury will be destroyed as a matter of law.

Equal weight and consideration should be given to the *Duty* and *Responsibility* of the Press, as well as to Freedom of the Press. Without a *legal duty* and responsibility, clearly defined and recognized, Freedom of the Press can degenerate into oppression. The privilege of the Press can sink into license . . . to smear . . . to create false images . . . to slant news . . . to propagandize. Once this cycle is

started, we can expect competition between different wire services, between different newspapers and between different types of news media, for the most senational and saleable items of news. In such competition, the one least restrained by concepts of accuracy, integrity and responsibility would have a substantial competitive advantage over the other. The dividing line between fact and fiction in the news will become more obscure. The news media will become more and more inclined to make the news, rather than to report the news. Public confidence in all of them will deteriorate in a manner most unfortunate for public welfare.

It would create a most dangerous precedent for the Court to hold in this case, as a matter of law, and contrary to the verdict of the jury, that the Associated Press report was not published in reckless disregard for the truth. It seems inconceivable that an expert and highly organized news gathering agency could fail to observe a "red flag" when telephone reports from a cub reporter contain hopeless and irreconcilable conflict as to time and place while relating the occurrence of an event so sensational as leading the charge of a mob against U. S. Marshals by a former Major General in the U. S. Army. Further investigation must have disclosed the facts, as related by defendant's witness, Rev. Duncan Gray, that there was no generalized charge of any kind before Walker's speech on the monument, and that a 1,000-man charge, such as described by Savell would literally have run over the Rev. Duncan Gray, and many other witnesses offered by the appellant. Such a charge did not happen, and the slightest investigation by Associated Press after the original discrepancy appeared between the report of Savell to Thomas

and the subsequent reports by Savell would have revealed that the charge described so dramatically and so extensively by Savell in his eye-witness report was a figment of his imagination. It would not be unreasonable for a jury to consider such action upon the part of Associated Press as reckless disregard for the truth, when the falsity of this report had been proved under the circumstances involved in this case.

It is respectfully submitted that the verdict of the jury in this case is supported by evidence of reckless disregard for the truth, as well as publication of a false report with knowledge of its falsity.

CONCLUSION

The Associated Press has expanded and been organized to the point where it has almost a monopoly upon nationwide and worldwide news gathering facilities for informing the people of this country as to current developments in the news. [*Associated Press* v. *Taft-Ingalls Corp.* (6 Cir. 1965), 340 F.2d 753, 766.] Upon the accuracy and integrity of this constant flow of information depends the current knowledge of the people and their confidence in their security, their social and business affairs and their Government.

Like "Caesar's Wife" these news media must be above suspicion, or even question; and it will eventually become a disservice even to Associated Press if it were relieved of legal responsibilities for a false news report that accuses a citizen of a crime and causes his imprisonment. Unless the Associated Press is able, willing and required to lay on the line its financial responsibility as a guarantee of accuracy

and integrity of reporting such news, "news slanting" and "image making" will become even more rampant than they are today; and the reputation of all whose names may be projected into the news as "public figures" will depend solely upon the whim of newsmen, even down to "cub reporters," under a law which recognizes that they can do no wrong.

The present greatness of our country has evolved, to a large extent, from the "pendulum action" of the public opinion of its citizens. With information available to them, accurately, adequately, timely and honestly, the swinging of the pendulum, from left to right and right to left assumes a gyroscopic effect upon the thought processes of the people, and particularly upon their ability to govern themselves. It is, therefore, of vital importance that the pendulum swing freely, and that information and knowledge be gathered and disseminated with the utmost care, concern and integrity.

The slanting of news, for any purpose, or without purpose, can only warp public opinion and freeze the free-swinging of the pendulum.

For many years, the rule has universally been recognized that false accusation of a crime is libelous *per se*. Under *Sullivan*, it is libelous only where malicious (knowingly false or in reckless disregard for the truth).

As recognized by the jury in this case, the facts present a flagrant example of false reporting by Associated Press.

It is respectfully submitted that the jury's verdict is supported by the evidence, both as to knowledge of falsity and reckless disregard for the truth on the part of Associated Press, and should not be disturbed by certiorari from this Honorable Court.

Respectfully submitted,

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September, 1966

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served by depositing a copy of the same in a United States mail box with air mail postage prepaid addressed to William P. Rogers, Leo P. Larkin, Jr., and Stanley Godofsky 200 Park Avenue, New York, New York 10017, and to Arthur Moynihan, 50 Rockefeller Plaza, New York, New York 10020; and with first class postage prepaid addressed to J. A. Gooch and Sloan B. Blair, 1800 First National Building, Fort Worth, Texas 76102, Counsel of record for Petitioner on September 7, 1966.

Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

RESPONSE TO PETITIONER'S SUPPLEMENTAL STATEMENT AND ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED

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TABLE OF AUTHORITIES

All cases and authorities cited herein were referred to in the tables of the Initial Response or the Further Response, with the following exceptions:

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At the time the Court requested petitioner to file a supplemental statement discussing its contentions in light of *Rosenblatt v. Baer*, 383 U.S. 75 (1966), respondent was preparing to file a supplemental response in light of *Johnson v. New Jersey*, 384 U.S. 719, decided June 20, 1966. Respondent decided to await the filing of petitioner's supplemental statement. This has now been filed.

I.

Response To Petitioner's Supplemental Statement

In its Supplemental Statement, petitioner contends that actual malice "is both legally immaterial and wholly unsupported by the record" and attaches thereto an appendix purporting to be a "summary of evidence." First, respondent does not agree that it is legally immaterial that actual malice was conclusively proven and, second, respondent points out that peti-

tioner's so-called summary of evidence is replete with inaccuracies and argument and omits undisputed evidence showing conclusively that actual malice was proved as found by the trial judge and concurred in by the Court of Appeals. We respectfully call the Court's attention to the fourteen undisputed instances of malice as set out at pages 26 through 31 of respondent's initial Response, the statement of the trial court showing actual malice as quoted on page 31 of the Response, and the Court of Appeals' affirmance thereof as quoted at the top of page 32 of the Response. Most of these fourteen points were conspicuously omitted from petitioner's purported summary of evidence.

Respondent cannot agree that the overwhelming proof of actual malice is legally immaterial as claimed by petitioner. It is strange indeed that, having applied for the writ on the basis of the constitutional requisites of factual proof enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), petitioner now seeks to exclude from consideration the answer to the question its contention raises. Whether or not actual malice was proven is, indeed, the primary relevant question if and when the Court gets to the stage of applying the *Times* decision. Certainly the petitioner would not have this Court require the parties and the lower courts to perform again a long and expensive trial for no reason.[1]

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[1]The Georgia Court of Appeals has stated it well: "It is of the utmost importance that the weary river of litigation should 'wind somewhere to the sea', and it is with extreme reluctance that the appellate courts will retrace its course to find for it another channel than the one over which it has already flowed. We hope its perturbed spirit will now enter into unbroken rest." *Young Men's Christian Ass'n v. Bailey*, 112 Ga. App. 684, 711, 146 S.E.2d 324, 343 (1965).

Furthermore, as stated in respondent's Further Response on page 9: "The Court will recall that the sole defense made in this case was the truth of the article. When the trial court's charge was given petitioner made no objection to the charge as to actual malice, as required by the Federal Rule of Civil Procedure 51. This rule is based on sound practice and it should not be here disregarded."

II.

Johnson v. New Jersey

In the *Johnson* case, the Court decided that two landmark decisions announcing constitutional rights of persons accused of crime should not be applied retroactively to cases tried before the decision dates, even where appeals were pending on such dates and the judgments had not become final. The decisions in question are *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).[2]

---

[2]In *Escobedo*, it was held that defendant's rights to counsel under the Sixth Amendment had been denied by the police in refusing his request for counsel during interrogation by the police, thereby making inadmissible in the subsequent state criminal trial any incriminating statements elicited during the interrogation. In *Miranda*, the Court in each of four criminal cases held that the defendants' constitutional right against self-incrimination guaranteed by the Fifth Amendment had been violated in that statements had been obtained from the defendants under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. The Court held that such statements had been wrongfully received in evidence. The majority opinion goes to great lengths in spelling out the procedures which should be employed to safeguard the right of the accused against self-incrimination.

In reaching its decision against retroactive application, the Court noted that it had the right to confine rules promulgated concerning constitutional claims to subsequently tried cases " 'where the exigencies of the situation require such an application.' " 384 U.S. at 726-27. Mr. Chief Justice Warren commented, "to reiterate what was said in *Linkletter*, we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." 384 U.S. at 728. The Court noted that retroactive application would seriously disrupt the administration of the criminal laws and found no persuasive reason to do so.

In the instant case, a comparable situation is presented, for the case was tried before the Court's decision in *Times*. The Court noted in both *Escobedo* and *Miranda* that its decisions had been foreshadowed by earlier cases. This was equally true of its decision in *Times* (see Response, pp. 21-24).

There are no special considerations requiring that *Times* be made retroactive so that a retrial can be ordered for the purpose of determining if this case can be brought within the scope of *Times*. On the contrary, there are special and compelling reasons why certiorari should be denied.

In *Rosenblatt*, the Court did give retroactive application to *Times*, but the facts and circumstances of that case are substantially different from those in this case as pointed out in the Further Response. The cir-

cumstances of each case must determine what application is to be made of *Times*.[3]

Rosenblatt (and *Times*) were concerned with "debate on a public issue" of long standing. No public issue as to the "rigging and fixing" of the game by Butts and Bryant existed at the time of publication of the magazine article here found to be libelous. Thus, there is no justification for remanding this case for a retrial on the question of whether Butts was a public official within the meaning of *Times* (as was done in *Rosenblatt*). Furthermore, it is quite obvious that Butts was not a "public official" under the law as it existed at the time of the trial and, as has been shown, it would require a substantial stretching of *Times* and *Rosenblatt* to regard him as such. Indeed, the question was raised after the *Times* decision and it was decided by the trial judge that Butts was not a public official.

Even had Butts been held by the trial judge to have been a public official under *Times*, there is no need for a retrial on the question of whether actual malice existed. The evidence clearly supports a finding of actual

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[3]As stated by Justice Fortas in urging that the writ in *Rosenblatt* be vacated as improvidently granted: "The trial below occurred before this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254. As a result, the factual record in this case was not shaped in light of the principles announced in *New York Times*. Particularly in this type of case it is important to observe the practice of relating our decisions to factual records. They serve to guide our judgment and to help us measure theory against the sharp outlines of reality. Especially where our decision furnishes a necessarily Procrustean bed for state law, I think, with all respect, that we should insist upon a relevant factual record. A subsequent trial may conceivably help respondent, but it will be too late to be of assistance to us." 383 U.S. at 100-01.

malice and it was so found by the trial court whose findings were approved by the Court of Appeals.

Finally, it is submitted that if a person convicted of "felony murder" prior to *Escobedo* and *Miranda* may not obtain the benefit of the constitutional rights as interpreted in those decisions, certainly petitioner is not entitled to a new trial because of the subsequent decision in *Times*.

CONCLUSION

Some three years have elapsed since the case was tried, during which time Curtis has settled with Bryant for $300,000.00.[4] (R. 1456-57). In fairness to Butts, no further delay should be countenanced.

For the reasons herein set forth, in addition to those previously stated and upon which respondent still insists, the application for writ of certiorari should be denied.

Respectfully submitted,

William H. Schroder

Allen E. Lockerman

[4]Petitioner has cited a number of periodicals in which college football is discussed, including an old issue of *The Saturday Evening Post*. If the Court is interested in reviewing this application for certiorari on such a basis, respondent suggests it examine Bear Bryant's article giving his version of the facts out of which respondent's suit arose, appearing in the September 5, 1966 issue of *Sports Illustrated*, copies of which have been sent to the Clerk of this Court.

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Response To Petitioner's Supplemental Statement And Additional Reason Why Certiorari Should Be Denied has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of September, 1966.

Attorney for
Wallace Butts, Respondent

SUPREME COURT, U. S.

JAN 4 1967

JOHN F. DAVIS, CLERK

IN THE

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CURTIS PUBLISHING COMPANY,

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v.

WALLACE BUTTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 37

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinions of the United States Court of Appeals for the Fifth Circuit (R. 1251-1305, 1380-1393) are reported in 351 F. 2d 702. The opinion of the United States District Court for the Northern District of Georgia on petitioner's motion for new trial (R. 70-80) is reported in 225 F. Supp. 916. The opinion of the United States District Court for the Northern District of Georgia, denying petitioner's motions for new trial under Fed. R. Civ. P. 60(b) (R. 1118-1125), is reported in 242 F. Supp. 390.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1965 (R. 1306). A petition for rehearing *en banc*, filed August 4, 1965 (R. 1307), was denied on October 1, 1965 (R. 1380). The petition for a writ of certiorari was filed December 11, 1965 and was granted October 10, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The District Court had jurisdiction by virtue of diversity of citizenship under 28 U. S. C. § 1352(a)(1).

QUESTIONS PRESENTED.

1. Whether the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *The New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), may be disregarded in reviewing a verdict and judgment rendered prior to the *New York Times* decision, on the ground that the constitutional question was not raised by the defendant at the antecedent trial.

2. Whether a publication charging, in substance, that the athletic director of a State University gave to the football coach of another State University confidential information calculated to affect the outcome of a forthcoming football game between the two schools is protected by the First Amendment, as interpreted by this Court in *New York Times* and subsequent decisions.

3. Whether an award of $400,000 as punitive damages for libel, after a jury verdict of $3,000,000 in punitive damages, constituted, in the circumstances, an abridgement of the freedom of the press or a taking of property without due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 79-83.

STATEMENT.

This is a libel action instituted by respondent against the petitioner on March 25, 1963 in the United States District Court for the Northern District of Georgia, demanding $5,000,000 in general damages and $5,000,000 punitive damages for the alleged defamation of respondent by an article published in *The Saturday Evening Post* of March 23, 1963 (R. 14-19).

1. The Publication.

The article (R. 1071-1074; Appendix B, *infra*, pp. 87-90), entitled "The Story of a College Football Fix" and sub-titled "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall," reported that on September 14, 1962, eight days before the opening game of the football season between the University of Georgia and the University of Alabama, George Burnett, an insurance salesman in Atlanta, while dialing the telephone number of a local public relations firm, was accidentally connected into a long distance telephone call from respondent at that local number to Paul Bryant in Tuscaloosa, Alabama. Respondent, the former head coach of the football team of the University of Georgia, was then athletic director of the University. Bryant was the athletic director and head coach of the football team of the University of Alabama.

The article told the story of the telephone call, as follows (R. 1072-1074; Appendix B, *infra* p. 88):

> . . . the voice of a telephone operator said:
>
> "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"
>
> And then a man's voice: "I'll hold, operator."
>
> . . . .

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Byrant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself up to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Byrant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said, "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller,"

and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

. . . .

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

The article proceeded to describe the Alabama-Georgia game, which Alabama, a 14 to 17 point favorite in the "betting lines", won 35-0, stating *inter alia:*

Bryant, before the game, certainly did not talk to the press like a man who was playing with a stacked deck.

"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) snapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

. . . .

Georgia made only 37 yards rushing, completed only 7 of 19 passes for 79 yards, and made its deepest penetration (to Alabama's 41-yard line) on the next to the last play of the game. Georgia could do nothing right, and Alabama nothing wrong. The final score was . . . the most lopsided score between the two teams since 1923.

It was a bitter defeat for Georgia's promising young team. The 38-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned. Asked about the game by reporter Jim Minter, he said: "I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. " 'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32-6.)

According to the article, the "whole matter weighed heavily on George Burnett" and he "began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut." On January 4, he told his friend Bob Edwards, whom he knew to be a friend of Johnny Griffith, his story of the phone call. Edwards asked if he could report the story to Griffith and Burnett told him to go ahead but try to keep his name out of it. Griffith pressed to meet Burnett and a meeting was arranged in the middle of January in Griffith's room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference coaches.

. . . Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

The article then reported that Griffith "went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain in his job"; that Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University, where he met Dr. Aderhold, the president of the University; that his story was carefully checked and he was asked to take a lie-detector test, which he passed; that an official of the Southern Bell Telephone Company checked and found that a call had been made from the Atlanta number to the University of Alabama extension noted by Burnett at the time when Burnett claimed he overheard the conversation; that on February 21, Burnett was summoned once again to Barwick's office, because "Bernie Moore, the commissioner of the Southeastern Conference, 'wanted to ask some questions' "; that at this meeting, attended by Moore, Dr. Aderhold, two members of the University's Board of Regents, and "another man identified as Bill Hartman, a friend of Wally Butts," Burnett "sensed a mood of hostility in the air" and was confronted with an accurate report that he had been arrested two years before for writing two bad checks—one for twenty-five and the other for twenty dollars—and that he was still on probation on that charge; that Burnett, who "felt that he had been candid with the University but that he had also angered many friends of Wally Butts," began to feel that he would be hurt "when and if these people decided to make this mess public"; that he then went to his lawyer and they agreed that he should tell his story to *The Saturday Evening Post.*

The article concluded, as follows:

> Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance.*"

When a fixer works against you, that's the way he likes it.

In an editorial accompanying the article (R. 1071), the *Post*'s editors asserted:

> *Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.*
>
> *Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.*
>
> *The corrupt here were not professional ball players gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.*

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled.

The petitioner admitted publication of the article but denied that it was published "wilfully, maliciously and falsely," as averred by the respondent (R. 20, 16). It also pleaded truth as a defense (R. 20), a plea that the trial court ruled imposed on the defendant the burden of proving the "sting of the libel" by a preponderance of evidence (R. 34, 1019, 1021). The jury was instructed that the "sting of the libel" was "the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant information which was calculated to or could have affected the outcome of the game," in the sense that it "could have caused one team to win or lose, or could have increased the number of points by which the game was won" (R. 1021).

2. The Evidence.

At the trial, there was conflicting testimony as to whether Butts gave Bryant any information about Georgia's team, formations and plays and as to the value of the information that Burnett, according to his testimony, notes and prior statements, heard Butts give. Some of the incidental affirmations in the article were shown to be inaccurate. There also was dispute as to the adequacy of the *Post*'s investigation prior to its publication of the article and as to the publication policy followed by the *Post* under its recently changed command.

The evidence, in detail, was as follows:

The Butts-Bryant Conversation.

The defendant proved by records of the Southern Bell Telephone Company that a long distance call had been placed by Wallace Butts to Paul "Brince" at the Athletic Department of the University of Alabama in Tuscaloosa

at 10:29 a.m. on the morning of September 13, that the call lasted for 15 minutes, 2 seconds and that it was charged to the credit card of the University of Georgia Athletic Association (R. 119-121). It was also proved that a call billed to the credit card of Paul W. Bryant was placed from the University of Alabama to the home of Wallace Butts in Athens, Georgia at 8:51 p.m. on Sunday, September 16, 1962, and that it lasted for sixty-seven minutes (R. 122-124, 214).

Burnett's testimony substantially confirmed and elaborated his account of the Butts-Bryant phone call of September 13,[1] as it was reported in the *Post*.

Burnett said that after the parties had identified themselves (R. 129) and Bryant had asked "Do you have anything for me, Wally?" (R. 130), Butts answered "Yes" and began to give Bryant information about the offensive and defensive plays of the University of Georgia (R. 129-130, 150). Since the opening game with Alabama was to take place on September 22, Burnett inferred that the statements related to the plays that Georgia would be using in that game (R. 151). After the conversation had progressed for a minute or a minute and a half Burnett began to make notes (R. 130), writing as he could get the words (R. 131, 134), abbreviating when he could (R. 152, 164), missing things that were said (R. 132, 152, 164). The notes, spread over seven pages (R. 1077-1079), contained at the beginning the names "Bear Bryant" and "Wally Butts" (R. 1077) and at the end the words "Give Wally Ring Sunday," "641—Athletic Office," "10-40 A. M. —Sept. 13, 1962" and "Ja. 5-3536"[2] (R. 1079). Between

---

1. The article inaccurately fixed the date of the call as September 14, but Burnett's testimony (R. 128, 155) and his notes (R. 1079) both fixed the date correctly as September 13.

2. Bryant testified that 641 was one of his extensions at the University of Alabama Athletic Department (R. 420-421). Ja. [Jackson] 5-3536 was the telephone number of Communications International, the number Burnett was attempting to reach (R. 128, 138).

these entries there were some twenty-one references to the capacity or the behavior of members of the Georgia team or to football formations or plays, representing Burnett's sometimes cryptic record of what he had heard Butts say. Having no independent memory of the details of many of these statements, Burnett used the notes to refresh his recollection (R. 130) and they also were admitted in evidence (R. 178).

According to Burnett's testimony and his notes, respondent told Bryant that Georgia lineman "Reismuller" (as his name was spelled in the notes, though it was actually Rissmiller [R. 130, 220; see also R. 234]) was one of the best in the history of the school (R. 130); that Mickey Babb (referred to in the notes as "Baer") an end who, according to Coach Griffith (R. 227) and Assistant Coach Pearce (R. 319), was Georgia's leading pass receiver, "catches everything they throw" (R. 136); and that halfback Don Porterfield was the best back at Georgia since Trippi (R. 134). Butts also said that Georgia safety-man Woodward (spelled "Woodard" in the notes) committed himself fast on pass defense (R. 132) (a tendency of his which Griffith and Pearce testified they had been attempting to correct [R. 222, 315]); and that Georgia's pass defense was weak and passes could be thrown in anybody's direction, except Blackburn, who was strong on pass defense (R. 133). Griffith testified that Georgia "had counted on" halfback Blackburn "being our best defensive back" but "he was sick off and on before the Alabama game, and didn't get the work he needed actually to be ready to play against Alabama" (R. 223).

Further, Burnett testified that Butts said that the formation Georgia played until they got close to the goal line was a slot to the right with the ends normal—split out about three yards (R. 135), and he also had noted "Slot right, left end out 15 yards" but remembered nothing more about that than the words that he wrote down (R. 136). The Georgia coaches testified, however, that these were the two

basic offensive formations that Georgia planned to use and used in the Alabama game (Griffith, R. 219, 227; Inman, R. 286-287; Pearce, R. 317-318). Butts also said that when Georgia was on the goal line " 'Baer' goes on a hook," a statement that was unintelligible to Burnett (R. 135) but was correct, according to Coach Griffith, assuming "Baer" to refer to Babb (R. 258). Butts also spoke of an "optional left pass"—if they can block the man on the corner, they keep running, if not, they pass (R. 131). This optional left pass terminology had been originated and used by Butts as head coach (Butts, R. 499; Griffith, R. 221), but was no longer used by Georgia in 1962 (Griffith, R. 221, 236; Pearce, R. 343). Butts also asked Bryant "You remember my old 29-0 series?" and said that Georgia used that (R. 136). Neither Griffith nor Pearce knew any Georgia play so designated (R. 226, 261, 350), but former backfield coach Hartman recognized the reference as an abbreviation of "29 overpass", a play that Butts had used during his tenure as head coach (R. 747, 751, 757-8).

Other notations, reflecting statements Burnett heard, included "On side guard pulls on sweep" (R. 1078, 132) and "Ga. Drop End off, contain with tackle (Defense)". (R. 1079, 137). Griffith (R. 222) and Pearce (R. 312-314) testified that on sweeps (end runs) Georgia pulled its on-side guard against certain defenses and Griffith confirmed that it was part of his defensive training for the Alabama game to "drop our ends off and contain with a six loose defense" (R. 227). Burnett did not remember what his notation "long count left half in motion" was in reference to (R. 134), but both Griffith (R. 223-224, 258) and Pearce (R. 316) discerned a meaning in relation to a Georgia play. Another notation "Right halfback on fly, Left halfback, quarterback gives to left half, left guard pulling blocks on corner" had a meaning to Burnett that he was not permitted to explain (R. 135), but meant no more to Griffith than that Georgia "put the right halfback on fly", which is a common practice (R. 258-259). The entry "Slot Rt—

Rt Half on Fly Screen to Him" (R. 1079) reflected a statement by Butts (R. 136), but was unintelligible to the coaches unless "him" referred to the left halfback rather than the right (R. 226, 260, 309-310, 325, 349-350).

A few of the entries in the notes meant nothing to Burnett or to the coaches.[3] Neither Griffith nor Pearce subscribed to an appraisal of the Georgia team as a "well disciplined ball club" (R. 256, 311-312) but Burnett testified that Butts had used those words and that he had also said, "This is no thanks to Johnny Griffith because they added two coaches" (R. 179, 131), as Georgia had, namely, Pearce and Inman (R. 230, 312).

It was also Burnett's testimony that during the conversation Bryant asked Butts questions about the Georgia team (R. 138, 148). One of these questions was "How about quick kicks?", to which Butts replied "Don't be worried about quick kicks; they haven't got anybody that can" (R. 135-136, 1079). According to Griffith (R. 225-226) and Pearce (R. 318-319, 352-354) the Georgia team had no one who could quick kick from its normal offensive formation, though a substitute quarterback could kick from a special formation. See also R. 745 (Hartman).

In response to several of Bryant's questions, Butts replied, according to Burnett, "I don't know." A "couple of times" Bryant then said "Can you find out?" and Butts answered "I will try." The conversation ended with Bryant asking "Will you be home Sunday, Wally?" Butts said "Yes" and Bryant said "I will give you a call then" (R. 148, 137).

On one point Burnett testified that the article was in error in its report of the conversation that he overheard. Butts did not say that Rakestraw "tipped off what he was going to do by the way he held his feet" or make any statement on that subject (R. 157, 158). Burnett did not tell

3. They were: "Rakestraw to right", as to which see R. 131, 254, 343; "Baer slot Rt/Split Rt End out," as to which see R. 133, 223, 345; "Don't over shift", as to which see R. 132, 180, 256, 340, 470.

the author of the article that such a statement had been made (R. 175), and according to Coach Griffith it was not correct (R. 266).

When the Butts-Bryant conversation ended, Burnett testified that he did not hang up immediately, that the operator spoke and he asked "to what number——." He was not permitted to complete his sentence or report his conversation with the operator, the Court ruling that it would be hearsay and sustaining an objection (R. 137, 146). After twenty or thirty seconds, Burnett dialed Jackson 5-3536, the number he had originally tried to reach, and spoke to Milton Flack at the office of Communications International. Again, he was prevented from testifying as to what he asked Flack or what Flack said, on the ground that it was hearsay (R. 138, 146).

According to Burnett, his office associate John Carmichael, whom he had been trying to locate when he dialed the Jackson number, came into the office thirty minutes to an hour and a half after he heard the conversation (R. 166). Burnett discussed the contents of his notes with him (R. 146). Later in the afternoon Flack came by and the three of them renewed the discussion (R. 146). Both Carmichael and Flack advised Burnett to "forget about the whole thing" and he tried to do so, putting the notes away in a dresser drawer at home (R. 146-147).

Carmichael, who testified for the respondent, confirmed and contradicted Burnett's story in some part. He stated that he came into the office about 10:30 on the morning of September 13 and found Burnett at Carmichael's desk with the telephone to his ear. When Burnett put his finger to his mouth, Carmichael walked outside the door to where there was a secretary's desk and began looking through the morning mail (R. 617-618). He was six or eight feet from where Burnett was seated (R. 619). After five or six minutes during which Burnett did not speak into the phone, Burnett called him into the office and said "John—I heard a conversation between Coach Wally Butts and Coach

'Bear' Bryant. Seems funny to me that one coach or athletic director would be calling another one before game time. I made some notes about it" (R. 620). He stated that if Burnett had said anything into the phone he would have heard it (R. 620) and specifically denied that Burnett spoke to the operator or to Milton Flack (R. 620-621).

Carmichael testified further that Burnett told him that in the telephone conversation Butts had said that some football player was a great football player and that Georgia had two new coaches and that Bryant had asked Butts if he was going to be home on Sunday. Beyond that, there was nothing involved in the Butts-Bryant conversation, as Burnett reported it to him, except general conversation (R. 622). According to Carmichael, Burnett related about the same thing to Milton Flack in his presence that afternoon (R. 623) and Flack reported that Butts had in fact been at the office of Communications International that morning (R. 624). In response to Burnett's question whether, in view of the conversation, they should bet on the Alabama game, both Carmichael and Flack said there was nothing there to indicate which side to bet on and that the best thing for Burnett to do was "to forget it" (R. 622, 624). Carmichael also swore that he had seen, though he had not handled, the notes that Burnett had on September 13 and they were not the notes in evidence at the trial (R. 644, 645-646, 789-791, 805-806).

Both Butts and Bryant testified, disclaiming any recollection of the telephone calls of September 13 and 16, but neither denied that the calls were made (Butts, R. 487, 590-591; Bryant, R. 393).

Butts acknowledged that he had talked to Bryant often through the years (R. 487), as he had talked with other coaches (R. 490-492). He specifically recalled calling Bryant in the summer of 1962 to inform him that the enforcement of certain rules would be improved (R. 485). But he denied that in the call of September 13 or at any other time he gave Bryant any secret information (R. 487,

490) or that he gave Bryant before the Alabama game any of the information embodied in the entries in Burnett's notes (R. 514) or that he ever gave any coach information about Georgia's plans in a forthcoming game (R. 516). He stated that he did not know Coach Griffith's game plan for the Alabama game (R. 514) and had never known his plan for any game (R. 490, 514). The first time he learned of the September 13 call was when John Carmichael, whom he had known for a number of years (R. 489), telephoned him in Philadelphia on January 30 to tell him of Burnett's disclosure to University officials (R. 487-488; see also Carmichael, R. 638-642).[4]

Bryant flatly denied that Butts in any conversation gave him information relating to Georgia's plays, formations or defenses (R. 393-395). He testified that Alabama was not properly prepared for one formation Georgia used in the game (R. 404-405) and that there was no significant change in Alabama's defensive plan between September 13 and the day of the game (R. 407). He attacked Burnett's statement that the operator on the September 13 call said "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?" by stating that the practice field at Alabama is three blocks from the office having extension 641 and that morning practice had been discontinued by September 13 (R. 420-421). He pointed out that according to phone company records he had not only talked to Butts for sixty-seven minutes on September 16 but also to the University of Texas coach for thirty-seven minutes (R. 424). He said that during September 1962, he discussed a number of matters with Butts both personally and by telephone, such as schedules, whether to play the game in Tuscaloosa or in Birmingham, getting Georgia to buy some lights to make it

4. As permitted by Georgia law (R. 808-809), Dr. Aderhold testified as to Butts' general character, stating that it was bad (R. 825). Five other witnesses connected with the Unversity and members of the Georgia Athletic Board also so testified and said they would not believe him under oath (Bolton, R. 868; Heckman, R. 808-809; Bradshaw, R. 818-819; Driftmier, R. 821; Mills, R. 861).

possible to play at night, tickets, the band situation, the investment in which they both were interested, a new interpretation of the butting rules, football in general and particularly Butts' passing game (R. 424-427, 409).

Burnett's Disclosure and the Investigation by the University Authorities.

Burnett testified that he did nothing about the call that he had overheard until January 4, 1963, when, unable to restrain himself any longer, he told a close friend, Bob Edwards, about it (R. 139, 147). He was not permitted to testify to what he said to Edwards, on the ground that it was hearsay (R. 139).[5] He subsequently showed his notes to Edwards, who asked him to meet with Coach Griffith (R. 153), to whom Edwards had reported what Burnett had told him (R. 280, 779).[6] On January 24 (R. 190), Burnett, Edwards and Griffith met in Griffith's room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference (R. 140, 153, 183, 217). Burnett turned the notes over to Griffith (R. 140). Though Griffith was not permitted to describe his reaction to the notes (R. 220), he did testify that he perceived in them references to the two formations Georgia planned to use and used in the Alabama game (R. 219); that in the 1962 season he thought "that somebody had given the Georgia plays or formations to other teams" (R. 274); and that he made the statement to Burnett "I figured somebody had been giving information to Alabama" (R. 268). According to Burnett, Griffith "made the remark that 'we knew something had happened,' that somebody had given away their plays; 'sold them out' is the words" (R. 159), and also said if this were allowed to continue in football he was going to get out of it (R. 159, 160).

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5. Respondent's witness, Carmichael, did testify, however, to what Burnett told him he had said to Edwards on this occasion. See R. 638.

6. Griffith's recollection differed on the date when Edwards first called him about Burnett's disclosure. He thought it was "before Christmas in 1962" (R. 280).

After examining the notes, Griffith telephoned J. D. Bolton, Comptroller of the University of Georgia and Treasurer of its Athletic Board, who was also registered at the hotel for the meeting at the Biltmore (R. 190, 217). Bolton went to Griffith's room and was shown Burnett's notes (R. 190). Upon his return to Athens on Saturday, January 26, Griffith turned the notes over to O. C. Aderhold, President of the University (R. 217, 191). That night they were delivered to Cook Barwick, a member of the Georgia Athletic Board, at his home in Atlanta (R. 191). Burnett did not have them again until the trial (R. 140, 186).

During the following week, Burnett and Edwards met with Dr. Aderhold, J. D. Bolton and Barwick in Barwick's office (R. 140, 187, 191). Burnett consented that the meeting be recorded (R. 187, 161). Ten days later, at a second meeting in Barwick's office, Burnett signed an affidavit (R. 141, 187) and agreed to take a lie-detector test, which he took in the first week in February (R. 142). On February 21, Burnett attended another session at which Bernie Moore, Commissioner of the Southeastern Conference, was present (R. 370, 373, 688, 845). On this occasion he was confronted with the fact that, contrary to his earlier statement that he had no record (R. 161), he was on probation on a bad check charge involving two checks, one for $20 and one for $25 (R. 692, 689). Sensing hostility in the meeting (R. 688-689), Burnett was frightened and disturbed (R. 162, 169). That afternoon he went to the office of his lawyer, Pierre Howard, and told him what had happened (R. 168). Burnett did not know that Howard had learned about the phone call previously from Carmichael (R. 170, 188), that he and Flack had actually been approached the day before by representatives of the *Post* interested in obtaining Burnett's story and that Howard had been trying to reach him by phone while he was in Barwick's office (R. 368-373). Howard told Burnett that the *Post* people were in town and, on his advice, Burnett decided "it was time for me to get this story out before people were trying to malign me totally in a different way" (R. 170). Howard

arranged an appointment that evening, Burnett told his story (R. 170, 374) and the next day in Howard's office Burnett dictated and signed an affidavit, which was given to Frank Graham of the *Post* (R. 375-376). Howard, acting for Burnett, agreed to Graham's proposal that the *Post* would pay Burnett $2,000 for the affidavit and, if the story were published and proved to be a *Post* exclusive, $3,000 after publication (R. 370-371, 376, 1051). These payments were made to Howard for Burnett (R. 1044, 1045), and Howard and Flack were each paid $500 by the *Post* (R. 1044, 1041). Burnett paid Howard $1,000 as a legal fee to represent him "in the things" he knew "were going to come from this" (R. 163).

On February 22, the day after Burnett's last meeting with the University authorities, Butts was asked to attend a meeting at Barwick's office (R. 192, 516, 829). On his arrival, he found not only Dr. Aderhold and Bolton, with whom he drove to Atlanta (R. 193), but also Harmon Caldwell, Chancellor of the University System; James Dunlap, chairman of the Board of Regents; Bernie Moore of the Southeastern Conference; and Bill Hartman, a close friend and former coaching assistant (R. 193, 829, 739-740). After brief prefatory remarks by Dr. Aderhold (R. 829), Barwick explained the nature of the Burnett story (R. 829, 740). Butts was handed a copy of the Burnett notes (R. 830, 740). After looking at the notes, he said, according to Bolton (R. 193-194):

> ". . . No doubt the guy heard what he said he heard. I don't blame him for placing the interpretation that he did on this conversation. If I had been in his place, I probably would have thought the same thing, but he is mistaken. It's just conversation, ordinary football talk among coaches, and that (sic) you know I would never give old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia. If I did give any information to hurt Georgia it was not intentional."

Dr. Aderhold testified that Butts "indicated that the call was made, and that these items were probably discussed, but they did not mean what Mr. Burnett had indicated that they did mean" (R. 831). Butts testified that, on being shown the notes, "I said such a telephone call might have been overheard. . . . I did not evaluate the notes" (R. 517). Hartman testified that what Butts said was "it was possible that a telephone conversation could have been overheard . . . but that it had been misconstrued" (R. 741).

According to Dr. Aderhold and Bolton, Butts was asked to sign an affidavit and to take a polygraph test, as Burnett had done, and he refused (R. 831, 197-198). Both Butts and Hartman denied that he had been asked to sign an affidavit (R. 517, 744). Butts testified that he refused to take a lie-detector test because he considered it "more or less, an insult" (R. 600).

Butts had previously been the target of unfavorable criticism by alumni of the University (R. 583, 812-813, 832, 839) and, on January 28, had asked to be retired as athletic director on the following June 30 (R. 585, 833-834, 840). On February 23, the day following the meeting, he resigned effective February 28, his letter to Dr. Aderhold stating that during the past two years he had "developed business interests" to which he was "having to devote more time" (R. 585, 1083). Butts' explanation of the resignation was that he had heard the night before that a newspaper story was about to be published stating that he would resign the following week instead of in June, that Bolton had told him that this would "be embarrassing to the President" and that to avoid that embarrassment he resigned (R. 584). Aderhold testified, however, that though Butts had mentioned the prospective publication and asserted that he had not authorized it, he had not given "those reasons" when he resigned (R. 847).

On February 24, Aderhold and Barwick met with Dr. Frank Rose, President of the University of Alabama, at

Bernie Moore's office in Birmingham (R. 848-849, 918-919). They told Rose "that there had been a telephone conversation or telephone conversations between Coach Bryant and Coach Butts regarding the coming football game" (R. 919). Rose, "greatly disturbed" (R. 919), undertook his own investigation, beginning by interrogating Bryant for about three hours that evening (R. 919). He talked to Bryant twice again (R. 921) and on March 6, he wrote to Dr. Aderhold, as follows (R. 1084-1085):

> I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.
>
> Coach Butts has been serving on the football rules committee, and at a meeting held last summer [of], the Rules Committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes [sic], particularly on certain plays.
>
> Coach Butts had discussed this with Coach Bryant and the two were together at some meeting were Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.
>
> Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

At the trial, Dr. Rose conceded that Bryant's invitation to Gardner and Gardner's visit to the University of Alabama to discuss the new rules interpretations had occurred "before the telephone conversations that Coach Bryant had had" (R. 926, 938), i.e., before September 13. Though he had stated in his pre-trial deposition that the information in his letter had been "obtained from Coach Bryant" (R. 944), his testimony at the trial was that the letter contained only his "interpretation" of what Bryant said "he could have talked about" with Butts (R. 925, 931, 944); that when he used the words "plays" and "defenses" in the letter, he should have said offensive or defensive "techniques" (R. 925, 933, 938); that Bryant, when he talked to him, "did not recall specific telephone calls at first" but said that "he had had many telephone conver-

sations with all the coaches and athletic directors with whom we play", that "this was nothing unusual, that coaches talk about many things before a ball game" (R. 920); and that Bryant had told him he did not remember calling Butts back on September 16 (R. 936-937). Rose also testified that he had dictated the letter of March 6 hurriedly before taking a plane to Washington and did not have a chance to read it before it was signed and mailed by his secretary, who was supposed to clear it with Bryant but had been unable to do so (R. 922).[7]

The Significance of the Information Reflected in Burnett's Notes and the Alabama-Georgia Game.

The Alabama-Georgia game opened the 1962 football season and Georgia had an abnormal number of sophomores on its team (R. 230, 218). These facts, in the opinion of Coaches Griffith and Pearce, limited the information Alabama could have had through scouting and exchange of films about Georgia's plans (R. 232, 306-307). Practice, which began September 1, was conducted behind a walled practice field from which the public was excluded (R. 296-297, 303). Butts as athletic director had access to the practice sessions, and prior to the Alabama game had attended some, including the session on September 15 (R. 297, 326, 472). To protect the secrecy of its plays, the Georgia team was divided into three groups, the ends, the backs and the linemen, and only that portion of each play which pertained to their respective positions was distributed to each group, except for the quarterbacks who had a complete picture (R. 303-304).

In the opinion of Coach Griffith, the Burnett notes contained meaningful information for an opposing coach

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7. Evidence refuting this testimony, including a letter from Bryant to Dr. Rose, dated February 28 (R. 1111), was not discovered by petitioner until after the trial. It was one of the grounds of petitioner's motion for new trial under Fed. R. Civ. P. 60(b) (R. 1090-1106). See R. 1119-1121.

about the Georgia team which might affect the result of the game, of which the most important was the description of the two principal formations Georgia planned to use (R. 227, 281). The notes did not "disclose just general football talk" (R. 231). On cross-examination, Griffith stated that a good number of the notations were inaccurate and that the only things of value were the references to the two formations (R. 281-282). That knowledge, he thought, would free practice time which otherwise would have to be devoted to preparation against other formations Georgia possibly might use (R. 228).

Assistant Coaches Inman and Pearce were also of opinion that the information in the notes could have been helpful to Alabama. Inman thought that "any information in football from a reliable source would be valuable to any coach" (R. 288). Pearce, in addition to referring to the two formations (R. 305-306), thought that it would be helpful to know who the best opposing lineman was (R. 311), that the on side guard might pull on a sweep (R. 312-313), that the pass defense was generally weak (R. 316), that the size of the slot right was three yards (R. 317), that Georgia could not quick kick from normal formation (R. 318-319) and that Woodward committed fast (R. 330).

Assistant Coach Gregory, testifying for respondent, viewed most of the entries in Burnett's notes as an inaccurate description of Georgia's formations and plays or as inconsequential (R. 468-476). He had, however, signed a letter to the Assistant Attorney General of Georgia stating that "if such information was given to Coach Bryant before the opening game of the season, it conveyed vital information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team . . ." (R. 477). He testified that this was a statement that Griffith told him the Attorney General had sent over; that it was typed in Dr. Aderhold's office; and that he had signed it because he was afraid that his job would otherwise be jeopardized (R. 478, 480).

Charles Trippi, Georgia offensive backfield coach in 1962 (R. 545), testified that if the notes "had to do with a team" he "was preparing to play", the "first thing" he "would do is tear them up because they are baseless; there is nothing in here that indicates any tendencies" (R. 546), "nothing in here to substantiate anything of value in football planning" (R. 550). He also expressed the opinion, based upon his "experience as a college football coach and a professional football coach," that "the outcome of a college football game" cannot "be pre-arranged, fixed, or rigged without the participation of the players, or some of the players, themselves" (R. 549-550).

William C. Hartman, Jr., a former Georgia assistant coach (R. 738), testified that he did not think that the Burnett material "would be of any significance at all" to him if he were coaching Alabama "because most of the technical information in these notes are basic T-formation plays" and the University of Alabama "or anybody else, anybody in the United States, somewhere in their offense has all of these plays" (R. 746). He would rely on his "own scouting information" he had "gotten through statistical study" (R. 747). He also thought that Alabama "must have seen at least three or four movies" showing that Georgia used a slot-right in 1961 and, if they did so, would have had to use it in the opening game of 1962 (R. 746).

In Bryant's testimony, he denied that any of the information reflected in Burnett's notes would have been helpful to him, though he said that there may have been a couple of things that he would rather have known than not known (R. 427-428). He insisted that what would be of interest to him about another team would be its game plan, what they planned to do in specific circumstances, such as certain field positions or on particular downs (R. 428-430).

LeRoy Jordan, who was captain of the Alabama team in 1962 and had become a professional player (R. 534) did

not think it would mean anything to a defending coach to know the offensive formations of an opponent; what he would want to know is when he is going to run a particular play (R. 538-539). Charles Pell, who also played for Alabama in 1962 (R. 445), expressed the same opinion (R. 446-454). Both Jordan and Pell thought that a football game could not be rigged without the knowledge and participation of the players (R. 541, 454).

Though Alabama entered the Georgia game a 14 to 17 point favorite (R. 304), the score was 35-0 and Georgia never got closer than the 40-yard line to the Alabama goal (R. 278), gaining less than a hundred yards in its offensive plays (R. 277). There was no evidence, however, that related Alabama's strategy or performance in the game to specific information in the Burnett notes and there was some to the effect that Alabama did not take advantage in its play of points that the notes revealed (Pearce, R. 330-333, 345; Butts, 509). Bryant testified, as previously noted (p. 17, *supra*), that Alabama was unprepared for one formation Georgia used. Jordan (R. 537) and another Alabama player, Jimmy Sharp (R. 438-439), gave the same testimony. Bryant, Jordan and Sharp also testified that Alabama made no significant change in its defensive plans between September 13 and the day of the game (R. 407, 541, 441). Trippi, Georgia's assistant coach in charge of offense, who called eighty (R. 264) to ninety per cent of the plays used by Georgia (R. 545), said he saw nothing to indicate that Alabama knew anything about what Georgia was going to do in the game; the only thing he saw was that Alabama blocked, tackled and ran harder than Georgia (R. 549).

Coach Griffith, who was "stunned . . . to a certain extent" by the score (R. 274), testified that during the game one or two players came off the field "with a statement along these lines, that 'they know what we are running; they are even calling out our plays. What are we going to do?' or something along those lines" (R. 274, 270).

Griffith denied that his players had taken "a frightful physical beating," as stated in the article (R. 273) and Georgia players Robert Wallace Williamson, Mickey Babb and Brigham Everett Woodward also testified that this was not the case (R. 557, 563, 575). Williamson also testified that there was nothing said or done by the Alabama players which indicated that they knew what Georgia was going to do (R. 556). Babb said that as a player in the game he did not feel that their moves were being analyzed by the Alabama team (R. 564) and he specifically asserted that he was inaccurately quoted in the article as having told Furman Bisher that the Alabama players "knew just what we were going to run and just what we called it" and taunted them by yelling out "you can't run eighty-eight pop on us," (R. 564); any statements that he made to Bisher had referred to the 1961 game (R. 568). Sharp also testified that he had not heard any Alabama player calling out "you can't run eighty-eight pop on us" (R. 442); and there was proof that Georgia had no play designated by those words (R. 279).

The Circumstances of the Publication.

News of the Butts-Bryant affair reached Roger Kahn, sports editor of the *Post,* in New York on Tuesday, February 19, 1963 (R. 719-720). The information came from an attorney in Birmingham, Alabama, Roderick Beddow, who was representing petitioner in a libel suit brought there by Bryant against petitioner and Furman Bisher, based on an article by Bisher in the *Post* (R. 367). Kahn selected Frank Graham, an experienced sports writer (R. 361-362), to go to Atlanta to investigate the matter (R. 721, 366). If, in Graham's judgment, there was a story there, he was to proceed (R. 721). The *Post* was interested in getting to the truth of the entire matter (R. 726). Graham was to move with all deliberate speed (R. 725) to do a complete investigation, without any time limitation (R. 725). He was to go to Atlanta to get all the available facts (R.

722), an affidavit from Burnett (R. 723) and, if possible, a copy of his notes (R. 723). Kahn cautioned Graham to be careful, that this was a big story (R. 725).

Graham arrived in Atlanta late on the night of Wednesday, February 20 (R. 368). On the following morning, he met Beddow and they went to the office of Pierre Howard (R. 368-369). Shortly after their arrival there, the group was joined by Milton Flack. Howard and Flack recounted the story told by Burnett (R. 369). They also filled Graham in on the background of the Georgia football situation as they knew it (R. 369). Howard told Graham that Butts had resigned as head coach of the University of Georgia in 1961, after prominent alumni had soured on him (R. 662), and that, since that time, Butts had been outspokenly bitter about his replacement (R. 663). Graham was also told by Flack and Howard that Butts had lost approximately $80,000 in a Florida orange grove speculation (R. 663-664). He was also told that it was rumored that Butts had entered a hospital in Athens (R. 686) but Bisher later informed him that the rumor was unfounded (R. 686).

At 7:00 p.m. on the evening of February 21, Burnett, Howard and Flack met Graham at his room in The Heart of Atlanta Motel and Burnett told his story (R. 170, 374). After relating what had transpired at the meeting with the University officials earlier that day (R. 374), Burnett told Graham of the call he had overheard, as it was subsequently reported by Graham in the article (R. 386-391), except for the statement that Rakestraw tipped off what he was going to do by the way he held his feet, which Graham had heard from Howard and Flack, who thought that they had heard it from Burnett (R. 657-658, 175).[8]

On the following morning, Graham again met Burnett at Howard's office and asked Howard for a copy of Burnett's notes (R. 378-379). Howard promised to obtain a

8. Graham did not learn of his error on this point until after publication of the article, when Burnett advised a representative of the *Post* that he did not recall overhearing such a statement (R. 657-658).

copy for him from Cook Barwick and rush it to Graham by air, but this was never done (R. 378). Burnett did, however, repeat his story in an affidavit that was delivered to Graham, in accordance with the agreement with Howard (see p. 20, *supra*).

Graham spent that morning at the Atlanta Public Library, studying the newspaper reports of events leading up to and following the Georgia-Alabama game (R. 379-381). Burnett and Flack drove him to the airport, spending about three and a half hours with him there (R. 381, 172). Before leaving Atlanta, Graham read in *The Atlanta Journal* that Butts was to resign at once as athletic director (R. 662).

On Monday, February 25, Furman Bisher called Roger Kahn in New York, telling him that he had a major story involving colossi of southern football (R. 732-733). Kahn called Graham and arranged a meeting with Bisher at his hotel later that evening (R. 363, 733). Bisher told Graham substantially what Graham had already learned in Atlanta, much of which was contained in Burnett's affidavit for the *Post* (R. 364-366)—information that Bisher had apparently obtained from Cook Barwick (R. 364).

Kahn knew Bisher to be a good reporter (R. 732). Since he had more entrees to people in Atlanta, it was decided that Bisher would complete the investigation there (R. 365). He was to accumulate every bit of useful information, particularly through talking to the University authorities (R. 691), and forward it to Graham. Kahn suggested that films of the game should be reviewed but believed that Bisher said they were unavailable (R. 736). Bisher testified that he had no recollection of a discussion at that meeting about viewing the films but that there might have been and he would have said it would have been a very good idea (R. 779).

On March 1, the Friday after his meeting in New York, Bisher telephoned Graham from Atlanta, stating that he had talked to people at the University. He gave Graham

the quotations of Mickey Babb (R. 674-675) and the trainer, Sam Richwine (R. 676), that Graham used in the article—statements that Babb and Richwine denied at the trial that they had made (R. 564, 570). Bisher was also the source of some of the quotations of Coach Griffith in the article (R. 682-684), including the statement "I never had a chance" (R. 737) that Griffith testified at the trial he never said (R. 270-271). Bisher also confirmed to Graham Burnett's statement that the Southern Bell Telephone Company had checked and that its records showed that a call had been made by Butts to Bryant on September 13 (R. 687-688).

Graham wrote the article, relying for his sources on Burnett's affidavit and oral statements in Atlanta (R. 386-391, 661, 678-681, 685, 688-689, 692), what he was told by Flack and Howard (R. 657, 661, 662, 664, 673, 685), his study of the newspaper stories relating to the Alabama-Georgia game (R. 380, 668, 671, 672, 676) and the information furnished him by Furman Bisher (R. 383, 661, 662, 674-676, 682-684, 688, 698). On Monday, March 4, he sent a copy of his draft to Bisher in Atlanta and Bisher offered no suggestions or corrections (R. 384). The *Post* paid Bisher $1,000 for his work (R. 1043).

The decision to publish the Graham article was made by Davis Thomas, managing editor of the *Post*, and approved, after a reading of the copy, by Clay Blair, Jr., then editor-in-chief of Curtis Publishing Company (R. 706). Portions of their testimony, taken by deposition by respondent, were introduced in evidence (R. 703-718; 769-778). Both of them knew that Butts' career might be ruined by the story (R. 715, 770). Thomas stated that he made certain that "every significant source" was "thoroughly investigated" and that "the most particularityness of care" was exercised (R. 770-771). Blair was concerned that the matter "be checked out thoroughly" as "to the truth of the article" (R. 716). Thomas expected his writer to "get the real facts" (R. 772) and said that it was not the

practice of the *Post* to submit an article to persons mentioned in it, but rather to "rely" on its "reporters" (R. 774-775). He believed that Burnett was telling the truth, attaching "a great deal of significance to the affidavit" and taking "into consideration" the fact that he had been arrested and convicted of passing the bad checks (R. 771-772). Though the *Post* "would have liked to see" the Burnett notes, it published without seeing them, since they "knew the notes existed" (R. 773). The quotations of Griffith in the article were believed to be accurate at the time when they were published (R. 775). If Griffith had wanted to write a letter to the *Post* correcting the quotations, "We would have been happy to publish it in the 'Letters' column of the magazine" (R. 775). Graham had not thought it necessary to interview Carmichael because he had been told he would not talk to him (R. 666-667). Thomas was aware of this (R. 699-700, 771) and apparently supported Graham's decision (R. 774).

Blair wanted to change the "image" of the *Post* (R. 711) and in an interview with *Newsweek* in November 1962, he had said that he intended to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" (R. 714). He testified, however, that he did not use the term "muckraking" in the sense in which the dictionary describes its use by President Theodore Roosevelt—to refer to unjust and sweeping charges—but rather in the sense of expose; and that by "sophisticated" he did not mean sophistical (R. 712-714). Blair also had circulated a congratulatory memorandum to his staff on January 15, 1963 (R. 1040), in which he stated, facetiously according to his testimony (R. 710), that the "final yardstick" of the improvement in the magazine was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." By "them" he meant "the whole United States" (R. 709). He was inaccurate, however, about the number of lawsuits; there were less (R. 710). Blair also

testified that in his opinion the issue containing the Butts' article was "a step in the right direction", saying that "with this issue . . . we have gone 25 per cent toward the goal of the magazine that I envision" (R. 711).

Blair also acknowledged that the Curtis Publishing Company showed a loss of about $1.1 million for the first quarter of 1963, compared to $4.7 million for the same quarter of 1962; that from 1960 to 1961 advertising revenue had declined $20 million and about the same amount from 1961 to 1962; that advertising revenue is affected by the size and nature of circulation; and that he "would be hopeful we could have more advertising revenue in the Post" (R. 707-708).

Under date of March 11, 1963, seven days before the publication date of the article, respondent's counsel sent a telegram and registered letter to the *Post*, stating without specification that the charges contained in the proposed article were false (R. 777). Sometime during the week prior to publication, respondent's daughter telephoned Blair and tearfully asked him not to publish (R. 717-718). Following the publication of the article, a demand for a retraction was made by the respondent and ignored by the *Post* (R. 17, 20).

3. The Rulings and Judgment of the District Court.

The District Court held that petitioner's evidence in support of its plea of truth sufficed to present a question for the jury, declining to direct a verdict for the plaintiff on that issue (R. 354-359). It charged the jury, as stated above (*supra*, p. 10), that the defendant had the burden of proving the truth of the "sting of the libel" by a preponderance of evidence (R. 1019, 1021); that unless the defendants proved the statements to be true, they were libelous per se (R. 1020, 1022, 1023); that malice was "to be inferred" (R. 1023); and that "the law will presume that anyone so libeled must have suffered damage" (R. 1023). The jury also was instructed that where "it is established

that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages" (R. 1026); that "the burden of proof to establish the facts of actual malice is upon the plaintiff . . . by a fair preponderance of the evidence" (R. 1026); and that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1026). The "purpose of punitive damages," the jury was told, "is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense." Such an award "is intended to protect the community and has an expression of ethical indignation . . ." (R. 1026) and the sum awarded as punitive damages "need have no relationship to any amount" that the jury might "award for general damages" (R. 1025).

On August 20, 1963, the jury returned a verdict in favor of respondent, awarding him $60,000 general damages and $3,000,00 punitive damages (R. 1036). Petitioner filed a timely motion for new trial (R. 36-66), contending *inter alia* that the verdict for punitive damages was invalid under the First, Fifth and Fourteenth Amendments to the Constitution (R. 36-38). On January 14, 1964, the District Court denied petitioner's constitutional claims, viewing them as an attack on the Georgia statute allowing punitive damages and holding that such a contention "is an affirmative defense and must be so pleaded in defendant's answer" (R. 76; 225 F. Supp. at 920). However, the court found the amount of the punitive damages awarded by the jury to be "grossly excessive," expressed the "considered opinion" that the "maximum . . . that should have been awarded" is $400,000 (R. 76) and granted petitioner's motion for new trial unless respondent within 20 days should remit the punitive damages in excess of $400,000 (R. 81; 225 F. Supp. at 922). Respondent filed the remittitur (R. 82) and on

January 22, 1964, the District Court entered judgment against petitioner for $460,000 (R. 83). Petitioner filed a notice of appeal to the Court of Appeals for the Fifth Circuit on January 24, 1964 (R. 84).

On February 28, 1964, petitioner moved again for a new trial under Rule 60(b)(2) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence (R. 1090-1112). While this motion was pending, this Court, on March 9, 1964, decided *New York Times Co. v. Sullivan*, 376 U. S. 254. Thereafter, on March 23, 1964, petitioner filed an additional motion for new trial under Rule 60(b) (R. 1115-1118), contending that the respondent as director of athletics of the University of Georgia was a public official within the meaning of the *New York Times* decision and thus precluded from recovering for a statement relating to his official conduct without proof that the statement was published with knowledge that it was false or with reckless disregard of whether it was false or not; that the definition of "actual malice" given the jury by the District Court did not conform to this requirement; and that the evidence at the trial did not suffice to prove malice in this sense with the "convincing clarity" required by the *Times* decision.

Though the issue had not been litigated as such at the trial, the record showed or it was subject to judicial notice that the University of Georgia is a state institution operated by the Board of Regents of the University System (GA. CODE ANN. § 32-101 *et seq.*); that Butts was employed as the director of athletics of the University by the separately incorporated Athletic Association, a fifteen member Board of which the president of the University was chairman *ex officio* (R. 807, 823, 832, 189, 874-875), composed of a majority of faculty members appointed by the president and a minority selected from alumni (R. 874-875, 769, 189); that the Association is an agent of and employed by the Board of Regents to supervise the University athletic program (R. 189; see *Allen v. Regents*, 304 U. S. 439, 443,

452 [1938]); that Butts received a salary of $12,000 from the Association (R. 875, 877), with some addition paid by the University subject to teacher retirement [9] (R. 846); and that his duties were to supervise the entire athletic program of the University, including the scheduling and location of intercollegiate games in all sports, planning and budgeting, the adding of new athletic facilities and ticket sales (R. 492-493, 425). According to the opinion of the District Court, by virtue of his position the respondent also was a member of the faculty (R. 1124).

The District Court denied the motions for new trial on April 7, 1964 (R. 1118-1125), ruling both that the respondent was not a public official within the principle of the *New York Times* decision and that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not" (R. 1124-1125; 242 F. Supp. at 395). Petitioner filed a notice of appeal from this decision on April 10, 1964 (R. 1125).

4. The Decision of the Court of Appeals.

On appeal from the judgment and the order denying the motion for new trial under Rule 60(b), petitioner urged the constitutional contentions rejected by the District Court on the motions for new trial and argued, in addition, that the judgment entered on the remittitur was repugnant to the Constitution.

The Court of Appeals affirmed the judgment by divided vote (R. 1251-1306). The majority (Judge Spears, with

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9. The additional amount involved is not established by the record. A question by respondent's counsel sought, however, to bring out that he received $6500 a year from the Georgia Student Educational Fund (R. 877). The State Department of Audits Report of Examination of the University of Georgia for the year ended June 30, 1963, a document that Georgia law requires to be filed for public information (GA. CODE § 40-1805(c)), shows (p. 211) payments by the University to respondent as athletic director of $1,666.64 for the eight months before his resignation.

the concurrence of Judge Brown) declined to rule upon petitioner's contentions based upon the *New York Times* decision on the ground that petitioner's failure to raise at the trial the constitutional questions that some of its attorneys knew were being litigated in the *Times* case "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*" (R. 1265-1266; 351 F. 2d at 713). Ignoring the constitutional attack on the verdict, the Court also held that there was "ample basis for the trial court's judgment" in selecting "the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts" (R. 1278; 351 F. 2d at 719); and that the requirement of the remittitur of the punitive damages held to be excessive was "a permissible course" that "does not infringe upon the Seventh Amendment's guaranty of a jury trial" (R. 1277-1278; 351 F. 2d at 718-719).

Judge Rives dissented on all points. In his view the respondent was a public official and the publication related to his official conduct, within the principle of *New York Times* (R. 1281-1286; 351 F. 2d at 720-723); the trial court's instruction did not comply with the *New York Times* standard since it permitted "recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood" (R. 1286-1287; 351 F. 2d at 723); it was the duty of the District Court to give effect to the supervening decision of this Court by granting the motion for new trial (R. 1291; 351 F. 2d at 725) and the defendant may not be "said to have waived by 'silence' a constitutional right not enunciated at the time" (R. 1287; 351 F. 2d at 724).

Apart from the constitutional deficiency of the criterion of malice embodied in the District Court's instruction to the jury, Judge Rives also concluded that the $400,000 punitive award was a deprivation of property without due process and a prior restraint forbidden by the First Amendment;

and that the jury verdict of $3,000,000 so reflected passion and prejudice that it could not be cured by the remittitur consistently with the Seventh Amendment. These grounds, Judge Rives thought, were all properly presented in petitioner's attack upon the verdict and upon the District Court's denial of the motions for new trial (R. 1291-1298; 351 F. 2d at 726-729).

A petition for rehearing before the Court of Appeals *en banc*, filed under Fifth Circuit Rule 25(a), was denied by the same panel of the Court by the same divided vote, the majority and the minority reiterating their positions in further opinions (R. 1380-1393; 351 F. 2d at 733-739).

SUMMARY OF ARGUMENT.

I.

The Court of Appeals was plainly wrong in holding that by failing to invoke the First Amendment at the trial petitioner had waived the right to challenge the standard of liability, applied by the District Court, under the supervening ruling of this Court in *New York Times Co. v. Sullivan.*

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. That the rule governs when the change of law derives from a revised interpretation of the Constitution by this Court, except in the rare case where the revision is expressly given a more limited prospective operation, is not an open question, so long as the case is on direct review.

The judicial duty defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. It is, moreover, immaterial in this connection that the decision of the court below was cast in terms of finding "waiver" by petitioner. If there was no duty to anticipate the ruling of this Court in *New York Times* there was no basis for finding a waiver in the failure to advance before the *Times* decision the constitutional grounds that were asserted in that pending case. A right is not "known" to exist if it is merely known to be asserted in another litigation.

Even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgments of this Court, such discretion was abused by the decision to ignore the constitutional sub-

mission. For here the issue was presented in the District Court at the first reasonable opportunity following this Court's decision; the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the result; and only the unfounded ground of waiver was adduced to justify withholding an adjudication.

II.

The publication was protected by the First Amendment and entitled to the privilege established by the rule of *New York Times*.

A. Under the criteria laid down by this Court in *Rosenblatt v. Baer*, the plaintiff was a "public official" and the publication was concerned with his misconduct in performance of his duties.

Rosenblatt did not definitely hold that if the publication implying dishonesty in the financial management of the Belknap County Recreation Area could be found to make a reference to Baer, the constitutional privilege must necessarily apply. The disposition is, however, instinct with the affirmation that if Baer was, indeed, responsible for the financial management of the Area, the privilege would attach to statements that impugned his honesty or his efficiency in the performance of that task. No other conclusion is consistent with the general criteria embodied in the Court's opinion. It was not doubted that the operation of the publicly-owned Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for its management, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees."

If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that func-

tion, there can be no basis for a contrary result when the responsibility to which the charge relates entails the management of the program of athletics of a University established, maintained, and supported by the State. In the one case no less than in the other, the privilege is necessarily to protect the freedom of the press to criticize the way in which an important public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

It is immaterial in this connection that the respondent was not employed as Athletic Director by the Board of Regents of the University System but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni, which a statute declares "not to be" an agency of the State and the accounts of which are exempted from State audit. These statutory provisions have no greater import than the State definitions of the term "public official" that were held to be irrelevant in *Rosenblatt*. What is decisive is that the Athletic Association is an organ of the management and government of the University. Its status as a separate corporation is wholly unrelated to the purpose of the First Amendment and the privilege defined by *New York Times*.

B. The public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to accord the privilege of *New York Times* to statements critical of his discharge of his official duties. The integrity of college football is a matter about which the public has important and legitimate concern, whoever the participants, because it is a phase of higher education. This public interest in the subject matter of the publication suffices, we contend, to gain it the protection of the First Amendment and the privilege prescribed by *New York Times*.

The qualified privilege of *New York Times* embodies an accommodation of the conflicting interests in protecting reputation and protecting freedom of expression. Its principle is similar to that which elsewhere has been deemed to be essential to sustain a curb on speech or publication, assimilating the criteria of libel law in this respect to those demanded by the Constitution in related fields. We see no reason why this same accommodation should not govern liability for statements that reflect on non-official persons, if the same conflicting interests are involved.

In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the magnitude of private power and the extent of public subsidy, the freedom that the Constitution deems most vital for correction of abuses ought not to be circumscribed by artificial lines.

III.

The respondent's argument that "actual malice within *New York Times* was conclusively proven" is both legally immaterial and wholly unsupported by the record.

The argument is legally immaterial because the District Court's instructions to the jury did not call on it to make a finding that comports with the requirements of *Times*. The charge, precisely like those held erroneous in *Times* and later decisions, allowed "recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood" or, even short of this, a merely "negligent misstatement". The grounds for reversal in the previous decisions are accordingly presented here.

Nor is there support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial. Such an assertion is entirely inconsistent with the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant and its statement in the charge that there "has been a sharp conflict in the testimony in this case." The defendant's evidence of truth was, apart

from small detail, included in the evidence that led the publisher to think the story true when it was published.

If this Court should undertake to make its own appraisal of the record, we contend that far from the conclusive proof to which respondent has referred, it lacks entirely "the convincing clarity which the constitutional standard demands." We think the evidence makes clear that this was an entirely honest publication, reflecting the conviction of the agents of the *Post* that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

IV.

Whether or not the rule of liability applied in the District Court is consistent with the First Amendment, the verdict and the judgment are repugnant to the Constitution.

The jury verdict of $3,000,000 punitive damages for a publication causing "actual damages", including mental anguish and humiliation, assessed at $60,000, was not only "grossly excessive", as the District Court found; it contravened the First Amendment and entailed a deprivation of due process.

Even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960). Apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co. v. McCray*, 291 U. S. 566, 571 (1934). It takes no argument to show that the $3,000,000 verdict "unduly" infringed the "protected freedom" and inflicted "sheer oppression". The verdict supplies what Mr. Justice Black concurring in *New York Times* called

"dramatic proof" . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs . . ." (376 U. S. at 294). The only way that threat can be removed is to hold that a punitive award must be shaped by such objective factors as the fine imposable upon conviction of criminal libel, the reasonable costs of litigation or, at most, a modest multiple of the actual damages sustained. This verdict did not comport with these or any other rational criteria and thus was tainted by a violation of the Constitution.

If the verdict was unconstitutional it was not saved by the remittitur required by the District Court. It is well established that a verdict based upon the jury's prejudice cannot be cured. A verdict violative of the Constitution is no less incurably defective. The vice of such a verdict is shown plainly in this case, since its magnitude exerted a substantial influence upon the Court's determination that the maximum sum that "should have been awarded . . . should be $400,000."

Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, the punishment imposed is repugnant to the Constitution. The District Court employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. It neither sought nor used any objective standard in the measurement of the amount. Deeming the publication unprotected by the First Amendment, the Court took no account of the effect of the award, and of the threat of like awards in other cases, on the freedom the Amendment guarantees. The assessment was, therefore, entirely arbitrary and unprincipled and offensive to the Constitution on that ground. The offense was compounded by the size of the award which, as this Court said of the jury verdict in *New York Times*, creates "an atmosphere in which the First Amendment freedoms cannot survive" (376 U. S. at 278).

ARGUMENT.

I.

The Constitutional Limitations Enunciated by This Court in New York Times Co. v. Sullivan and Subsequent Decisions Govern the Review of a Verdict and Judgment Rendered Prior to the New York Times Decision, Although the First Amendment Was Not Invoked at the Trial.

The Court of Appeals held that by failing to invoke the First Amendment at the trial petitioner had waived the right to challenge the standard of liability applied by the District Court under the supervening ruling of this Court in *New York Times*. Its decision on this point was plainly wrong.

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. *United States v. Schooner Peggy*, 1 Cranch 103 (1801). The doctrine applies to "*nisi prius* and appellate tribunals alike" (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543 [1941]) and has been reaffirmed repeatedly upon a supervening change in the law governing the cause, whether the change was worked by treaty, as in *Schooner Peggy*, by constitutional amendment, as in *United States v. Chambers*, 291 U. S. 217 (1934); *Massey v. United States*, 291 U. S. 608 (1934), by the repeal or the enactment of a statute, as in *United States v. Tynen*, 11 Wall. 88 (1870); *United States v. Alabama*, 362 U. S. 602 (1960); *Hamm v. Rock Hill*, 379 U. S. 306 (1964), by a novel interpretation of a statute, as in *Hormel v. Helvering*, 312 U. S. 552 (1941); *Helvering v. Richter*, 312 U. S. 561 (1941); *Uebersee Finanz-Korp. v. McGrath*, 343 U. S. 205, 212-213 (1952) or by a judicial alteration of a rule of

common law (*Vandenbark v. Owens-Illinois Glass Co., supra*). That the rule governs when the change in law derives from a revised interpretation of the Constitution by this Court, except in the rare case where the revision is expressly given a more limited prospective operation (*Johnson v. New Jersey*, 384 U. S. 719 [1966]), assuredly is not an open question. *O'Connor v. Ohio*, — U. S. —, 87 Sup. Ct. 252 (1966); *Rosenblatt v. Baer*, 383 U. S. 75 (1966); *Tehan v. Shott*, 382 U. S. 406, 409, n. 3 (1966); *Linkletter v. Walker*, 381 U. S. 618, 622-629 (1965); see also, *e.g., Griffin v. California*, 380 U. S. 609 (1965); *White v. Maryland*, 373 U. S. 59 (1963); *Jackson v. Denno*, 378 U. S. 368 (1964). Whether or not the change will be accorded retrospective operation on collateral attack upon a final judgment, it will, as this Court said in *Linkletter* "be given effect while a case is on direct review" (381 U. S. at 627).

The judicial duty thus defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. Such a condition would be patently unthinkable in cases where the change is wrought by legislative action, since no ruling could be premised upon unenacted legislation. *Cf. 149 Madison Avenue Corp. v. Asselta*, 331 U. S. 795 (1947), *modifying* 331 U. S. 199 (1947); *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U. S. 793 (1947); *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446, 477 (1948). The situation is no different when the change is brought about by a decision modifying the hitherto prevailing rule. Here, too, a lower court must make its rulings prior to the change under the law that is established at that time. A litigant wishing himself to challenge the previously authoritative rule may, to be sure, be asked to lay the groundwork of that challenge in the lower court, futile though his effort there may be. *Cf. Yakus v. United States*, 321 U. S. 414, 444-445 (1944). The higher court will thus obtain the

benefit of ventilation of the issue in the court below before it must confront the novel question raised.[10] But neither this nor any other purpose of the legal system is subserved by insisting that a litigant anticipate a change he does not seek to bring about, under penalty of forfeiting its benefit if it should subsequently be ordained, while his case is still pending in the courts.

Even a State rule of procedure must be shown to serve a valid interest of the State judicial system if it is relied on to foreclose consideration of a federal contention. *Henry v. Mississippi*, 379 U. S. 443 (1965). A federal court can surely have no greater freedom to decree a forfeiture of constitutional protection on a ground that serves no useful purpose in administration of the law. Since the District Court, in ruling on petitioner's motion for new trial under Rule 60(b), held that the First Amendment as construed in *New York Times* did not protect the instant publication, it is clear that the anticipation of that issue at the trial by an objection to the charge would not in fact have served the slightest purpose.

That there was no anticipatory objection in *O'Connor, Rosenblatt, Griffin, White, Helvering* or *Uebersee* (*supra*, pp. 45-46) is, we submit, decisive of the proposition that it may not be required as a pre-condition to invoking supervening judgments of this Court.[11] It is, moreover, im-

10. Petitioner's motion for new trial, filed under Rule 60(b) promptly following the *New York Times* decision and before this judgment became final (*cf. Polites v. United States*, 364 U. S. 426, 433 [1960]), afforded the District Court an opportunity to rule on the effect of that decision prior to the Court of Appeals' review.

11. *Accord, e.g.*, as to *Mapp v. Ohio*, 367 U. S. 643 (1961): *United States ex rel. Carafas v. LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *cert. denied*, 381 U. S. 951 (1965); *United States ex rel. West v. LaVallee*, 335 F. 2d 230 (2d Cir. 1964); *Dillon v. Peters*, 341 F. 2d 337 (10th Cir. 1965); *United States ex rel. Dalton v. Myers*, 342 F. 2d 202 (3d Cir. 1965); *People v. Loria*, 10 N. Y. 2d 368 (1961); *State v. Smith*, 37 N. J. 481 (1962); *Commonwealth ex rel. Ensor v. Cummings*, 416 Pa. 510 (1965); *cf. Commonwealth v. Jacobs*, 345 Mass. 300 (1963); *People v. Kitchens*, 46 Cal. 2d 260, 262-263 (1956); as to *Malloy v. Hogan*, 378 U. S. 1 (1964) and

material in this connection that the decision of the court below was cast in terms of finding "waiver" by petitioner. For the sole ground of "waiver" was the failure to advance in the trial court *before* this Court's decision in *New York Times* "the constitutional grounds asserted in Times" to the knowledge of one of petitioner's co-counsel (R. 1259-1264, 1380-1386; 351 F. 2d at 709-711, 713, 733-735). If, as we submit, there was no duty to anticipate the ruling of this Court in *Times*, there was no basis for the finding made. See, *e.g.*, *United States ex rel. Angelet v. Fay*, 333 F. 2d 12, 16 (2d Cir. 1964), *aff'd*, 381 U. S. 654 (1965); *United States ex rel. Durocher v. LaVallee*, 330 F. 2d 303, 309-310 (2d Cir. 1964); *Cf. England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964); *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 393 (1937). The reference to a "known right or privilege" in *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938) and *Fay v. Noia*, 372 U. S. 391, 439 (1963) envisages, of course, a right known to exist, not one merely asserted in another litigation. Indeed, the Circuit Court's concern with "waiver" added to the forfeiture that it decreed the spectacle of an inquiry into the extent to which the various attorneys for petitioner were aware of the issues tendered in the pending suit against *The New York Times*. Far from supporting the determination of the Court, that "unseemly trial of Curtis' lawyers" (Rives, J., dissenting, R. 1392; 351 F. 2d at 739) adds further reason for its disapproval here.

That the *New York Times* decision broke new ground in holding that the First and Fourteenth Amendments impose limits on State libel law, as well as in its formulation

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Griffin v. California, 380 U. S. 609 (1965); *People v. Roberts*, 63 Cal. 2d 84 (1965); *State v. Lanzo*, 44 N. J. 560 (1965); *People v. McLucas*, 15 N. Y. 2d 167 (1965); as to *Escobedo v. Illinois*, 378 U. S. 478 (1964): *People v. Hillery*, 62 Cal. 2d 692 (1965); *King v. State*, — Del. —, 212 A. 2d 722 (1965); *State v. Clifton*, 240 Ore. 378 (1965). For other Court of Appeals decisions giving effect to supervening rulings not anticipated by an earlier submission, see, *e.g.*, *Sulzbacher v. Continental Casualty Co.*, 88 F. 2d 122 (8th Cir. 1937); *Ruppert v. Ruppert*, 134 F. 2d 497 (D. C. Cir. 1942); *United States v. O'Connor*, 237 F. 2d 466, 471 (2d Cir. 1965). See also *Kuchinic v. McCrory*, 422 Pa. 620 (1966).

of the nature of the limits they impose, is not a point we feel obliged to labor in this Court. See *New York Times Co. v. Sullivan*, 376 U. S. 254, 268, 279, 283, 297, 299 (1964). The doubt on this score entertained by the majority of the court below (R. 1259-1260; 351 F. 2d at 709) hardly comports with that court's previous position. See, *e.g.*, *Abernathy v. Patterson*, 295 F. 2d 452, 456 (5th Cir. 1961).

We also are content with a short answer to the argument of the respondent (*Response to Petitioner's Supplemental Statement*, pp. 3-6) that *Johnson v. New Jersey*, 384 U. S. 719 (1966), calls for limiting the application of the rule of *New York Times* to trials begun after the date of that decision. This Court has held the contrary in cases subsequent to *Times*, most recently in *Rosenblatt v. Baer*, 383 U. S. 75 (1966). It is, moreover, clear that *Johnson* was the product of the most exceptional considerations, namely, the justifiable reliance of law enforcement authorities on the earlier decisions of this Court and the "unjustifiable burden on the administration of justice" (384 U. S. at 733) involved in the reversal of all convictions obtained prior to *Escobedo v. Illinois*, 378 U. S. 478 (1964), or *Miranda v. Arizona*, 384 U. S. 436 (1966), and still pending on appeal. No similar considerations are presented here.

For the foregoing reasons, we submit that the Court of Appeals was legally obliged to test this judgment in the light of this Court's rulings in the *New York Times* and subsequent decisions; and that its compatibility with those decisions is, accordingly, a question open for consideration here. But even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgments of this Court "as may be just under the circumstances" (28 U. S. C. § 2106; see *Hormel v. Helvering*, 312 U. S. 552, 556-557 [1941]), we think it clear that such discretion was abused by the decision to ignore the constitutional submission. For here the issue was presented in the District Court at the first reasonable opportunity following this Court's decision in *New York Times* (*cf. Herndon v. Georgia*, 295 U. S. 441, 444 [1935]; *Polites*

v. United States, 364 U. S. 426 [1960]); the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the result;[12] and only the unfounded ground of waiver was ad-

12. The Court of Appeals regarded as "persuasive" the respondent's suggestion that petitioner pleaded truth as a defense "rather than" raise a constitutional defense or invoke the privilege provisions of the Georgia Code (§ 105-709) "in order to get the right to open and close the arguments" (R. 1385-1386; 351 F. 2d at 735).

The right to open and close was, however, a concomitant of the burden of proof which Georgia law placed on the defendant if the plea of truth was made (R. 34; GA. CODE ANN. § 105-1801). There is no support whatever for the view that if that plea had been coupled with additional affirmative defenses, the burden would have shifted to the plaintiff under Georgia law. Moreover, if the defendant had advanced a constitutional defense, either separately or in conjunction with the plea, it presumably would have been stricken upon motion under Rule 12(f).

If the respondent meant by his suggestion that a plea of truth could not be coupled with affirmative defenses, so that defendant was required to elect between them, it is clear from Rules 8(e) and 12(b) that he is wrong. Indeed, if he were right, and the defendant had to choose between a plea that it thought valid and an as yet unestablished federal defense, its choice to rely upon the plea would not establish waiver of the federal protection. *Cf. Fay v. Noia*, 372 U. S. 391, 439 (1963); *Green v. United States*, 355 U. S. 184, 192-194 (1957); *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964); *Whitus v. Balkcom*, 333 F. 2d 496 (5th Cir. 1964).

It is true that GA. CODE ANN. § 105-709 provides that "Comments upon the acts of public men in their public capacity and with reference thereto" are "deemed privileged communications," unless "the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted" (GA. CODE ANN. § 105-710). As in most states, however, the privilege does not protect a publication "if untrue and libelous"; the statements made must be "supported by the facts." *Barwick v. Wind*, 203 Ga. 827, 831 (1948); *Kirkland v. Constitution Publishing Co.*, 38 Ga. App. 632 (1928), *aff'd by equally divided court*, 169 Ga. 264 (1929); *Lowe v. News Publishing Co.*, 9 Ga. App. 103 (1911); see Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896, n. 102 (1949). Here, as in *New York Times Co. v. Sullivan*, claiming the statutory privilege would have added nothing to the plea of truth. *Cf.* 376 U. S. at 267, 278-280. The test of "malice" under § 105-710 is, moreover, different from the *New York Times* standard.

duced to justify withholding an adjudication. Even after a plea of *nolo contendere,* this Court has been astute to grant an opportunity to a defendant to present a possible defense established by a subsequent decision. *United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 411-412 (1947); *cf. United States v. Ohio Power Co.,* 353 U. S. 98 (1957); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964); *Gondeck v. Pan American World Airways, Inc.,* 382 U. S. 25 (1965). No less solicitude is due to a defendant who has not confessed to judgment, when enormous punishment has been imposed and the supervening ruling goes to First Amendment rights.

II.

The Publication Was Protected by the First Amendment and Entitled to the Privilege Established by the Rule of New York Times.

The District Court in ruling on the motion for new trial under Rule 60(b) held that the publication here in suit was not protected by the ruling of this Court in *New York Times Co. v. Sullivan* because the respondent was not a "public official" within the meaning of the rule this Court laid down. The only other judge who passed upon the issue, Judges Rives dissenting in the court below, squarely rejected this conclusion. We submit that the principle of *New York Times* applies and that the publication was entitled to the privilege defined by that decision.

A. The Plaintiff Was a "Public Official" Under the Criteria Established by This Court in Rosenblatt v. Baer, 383 U. S. 75 (1966).

In *Rosenblatt,* the plaintiff, who had been employed by County Commissioners as Supervisor of the Belknap County Recreation Area, a public recreation facility operated by the County principally as a ski resort, obtained a judgment of $31,500, based upon a publication held to

libel him by impugning the honesty of those in charge of the financial operation of the Area during the period of his incumbency. The judgment was reversed by this Court on two grounds: first, that the instructions of the New Hampshire trial court contravened the First Amendment in permitting the jury "to find liability merely on the basis of" the plaintiff's "relationship to the government agency, the operations of which were the subject of discussion" and "without regard to evidence that the asserted implication of the column was made specifically of and concerning him" (383 U. S. at 82); and, second, that the plaintiff as Supervisor of the Area "may have held" a position as a "public official" (383 U. S. at 87) within the meaning of the *New York Times* rule, and thus be barred from a recovery for defamation by a publication critical of his performance of his duties, without proof of malice as defined by *Times*. Though the first ground of reversal is irrelevant, the second is decisive of this cause.

First: We recognize that *Rosenblatt* did not definitively hold that if the publication implying dishonesty in the financial management of the Area could be found to make a reference to Baer, the privilege of *New York Times* must necessarily apply. What the opinion states explicitly is that Baer's theory "that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations"—the theory advanced at the trial to establish that the article referred to him—"at the least, raises a substantial argument that he was a 'public official' " within the limitations of the rule of *New York Times* (383 U. S. at 87). How substantial that argument was thought to be is indicated, in our view, by the Court's statement that one of the reasons for not foreclosing Baer from "attempting retrial of his action" was that the record, made before the *New York Times* decision, left "open the possibility that respondent *could have* [emphasis supplied] adduced proofs to bring

his claim outside the *New York Times* rule" (383 U. S. at 87-88). The "proofs" referred to must, we think, envisage evidence showing that the scope of Baer's responsibility was less extensive than he sought to show at the first trial. The disposition is, therefore, instinct with affirmation that if Baer was, indeed, responsible for the management of the Ski Area criticized by the publication, the privilege would attach to statements that impugned his honesty or his efficiency in the performance of that task.

No other conclusion appears to us to be consistent with the general criteria embodied in the Court's opinion, namely, that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" (383 U. S. at 85); and that where "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees" (383 U. S. at 86), malice in the *New York Times* sense must be proved. It was not doubted that the operation of the publicly-owned Ski Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for the management of the Area, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees." Such reservation as there was in the Court's ruling must, therefore, we submit, be understood as a reflection of uncertainty as to whether and how far Baer was in fact involved in those aspects of the management of the Area that were attacked by the challenged publication, not as a legal doubt that if he was responsibly involved, he must prove malice to recover.

On this analysis, the *Rosenblatt* decision plainly governs disposition of this cause. Here, as in *Rosenblatt,* the official status of the plaintiff was not litigated as such at the trial. But there was no dispute, and could have been none, that as Athletic Director respondent had, in his own words, "responsibility for . . . general supervision of the entire athletic program at the University of Georgia" (R. 492), including the "big business" (R. 492) of college football. See p. 36, *supra.* If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that function, there can be no basis for a contrary result when the responsibility to which the charge relates entails the management of the program of athletics of a University established, maintained and supported by the State. There surely is no smaller or no less legitimate a public interest in the conduct of athletics as an aspect of a State-conducted public education program than in the use of public land and facilities for purposes of recreation. The "scope of the privilege is to be determined," as the Court said in *Rosenblatt,* "by reference to the functions it serves" (383 U. S. at 85, n.). In the one case no less than in the other, the privilege is necessary to protect the freedom of the press to criticize the way in which an important public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

Second: Respondent's answer to the patent parallel between this case and *Rosenblatt* is that he was not employed as Athletic Director by the Board of Regents of the University System, the governing body of the University (Ga. Const. Sec. IV, par. I; Ga. Code Ann. §§ 32-101, -104, -112, -113), but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni (see p. 35, *supra*), which a statute of 1949 declares "not to be" an agency of the State and the accounts of which the statute exempts from the State audit required "in connection with the

financial operations of State agencies" (GA. CODE ANN. §§ 32-153, -154). The Athletic Association, it is urged, "was thus not an arm of government" and the respondent as its employee could not "be engaged in government while performing its functions" (*Further Response,* p. 4).

We submit that the distinction is without significance for purposes of measuring the ambit of the privilege established by the principle of *New York Times.* The statutory declaration that the Athletic Associations of the State Universities are "not to be agencies of the State" can obviously have no greater import in determining how far freedom to criticize their operations or the operations of their managerial employees is protected by the First Amendment than the State definitions of the term "public official" that were held to be irrelevant in *Rosenblatt v. Baer.* The one denomination no less than the other was developed "for local administrative purposes, not the purposes of a national constitutional protection," with the result that it is "at best accidental" if the State-law standard should "reflect the purposes of *New York Times*" (383 U. S. at 84).

That this State terminology is wholly unrelated to the purpose of the privilege is very clear. The fact that the Athletic Association or, as it is often called, Athletic Board (*e.g.,* R. 189, 807, 823), is exempted from State-imposed procedures governing expenditures, contracting and accounting (*e.g.,* GA. CODE ANN. §§ 40-1805, -1808, -1902, -1906.1, -2001; see R. 875-876) does not detract from the fact that its sole function is to play a part in the management and government of the State University, subject to the ultimate responsibility and control of the President, the Chancellor and the Board of Regents (R. 189, 823, 832). The athletic program, the administration of which was governed by the Board, was the program of the University. The position of Director of Athletics, though the incumbent was chosen and paid in major part (see p. 36, *supra*) by

the Association, was that of Director of Athletics of the University of Georgia.

The role of the Association as an organ of administration of the University has not, indeed, significantly changed since the Board of Regents and the State contended in this Court that "public education is a governmental function" and that "the holding of athletic contests is an integral part of the program of public education conducted by Georgia." *Allen v. Regents of the University System*, 304 U. S. 439, 449 (1938). The President of the University is Chairman of the Association and of its Executive Committee (R. 823, 832). The Comptroller and Treasurer of the University is Treasurer of the Association (R. 189, 868). A majority of the members of the Board are members of the faculty, as required by the Southeastern Athletic Conference,[13] to which Georgia belongs, and they are chosen by the President (R. 189, 595, 769, 808, 874-875). In short, nothing distinguishes the Athletic Association from any other entity responsible for the administration of the programs of the University except that it has a larger measure of financial autonomy and that there is a minority participation of alumni. To accord these differentia constitutional significance would trivialize the principle of *New York Times*. The considerations that preclude a State from avoiding the limitations of the Fourteenth Amendment by the delegation of its public functions are, we believe, even more plainly applicable here. *Cf. Burton v. Wilmington*

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13. This requirement tends to comply with the first recommendation of the Report of the Special Committee on Athletic Policy of the American Council on Education, approved by the Executive Committee of the Council in 1952, that as "in all other educational activities, the control of athletics should be held absolutely and completely by those responsible for the administration and operation of the institution." See *Council Action on Athletic Policy*, THE EDUCATIONAL RECORD, vol. xxxiii, pp. 246, 249 (1952). A study by the Carnegie Foundation, published in 1929, listed Georgia as an institution in which "genuine faculty control" of the regulation of college athletics had been found. SAVAGE, AMERICAN COLLEGE ATHLETICS, p. 101 (Carnegie Bulletin No. 23).

Parking Authority, 365 U. S. 715 (1961); *Evans v. Newton*, 382 U. S. 296 (1966).

Third: In his original response to the petition for a writ of *certiorari*, respondent sought to draw strength from this Court's decision in the *Allen* case that State immunity to federal taxation did not extend to gate receipts for public admission to athletic contests of the University, since the exhibition of such contests is "a business having the incidents of similar enterprises usually prosecuted for private gain" (304 U. S. at 452). *Response*, p. 24. The District Court accorded weight to this submission in denying the petitioner's motion for new trial (R. 1124).

It is enough to point to *Rosenblatt* to answer this contention. The conduct of a public recreation area, charging admission fees, also involves a "business comparable in all essentials to those usually conducted by private owners" (304 U. S. at 451), yet no importance was attributed to that fact in considering if *New York Times* applied. The reason is entirely obvious. The fact that government undertakes enterprise similar to that in which non-governmental entities engage does not diminish, and at times may well enhance, the need for freedom of discussion of the way in which the public enterprise is run and of the honesty or the efficiency of those who have it in their charge. The policies that govern the extent of governmental tax immunity have no relationship at all to those that measure the extent of the protection conferred by the First Amendment.

Fourth: There is no greater merit in other distinctions the respondent seeks to draw between this case and *Rosenblatt*.

The suggestion (*Further Response*, p. 5) that there was no issue as to Butts' performance of his duties as Athletic Director prior to the instant publication is not true [14] and,

14. Burnett reported his story to the University authorities before he disclosed it to petitioner and it was being investigated by, *inter alia*, the President of the University, a member of the Georgia

even if it were, would be irrelevant. What is decisive is the scope of his responsibility for supervising the entire athletic program of the University. If his position was "one which would invite public scrutiny and discussion of the person holding it" (383 U. S. at 87, n.), as we submit it plainly was, the privilege must necessarily apply to the first published criticism of his official conduct, no less than to the later publication of a criticism previously made.

Nor is there force in the submission that the criticism here involved "did not relate to his conduct of his duties as Athletic Director" (*Further Response*, pp. 6-7) because the Football Coach, not the Director, was responsible for formulating the team's plan and strategy. It was because he was Director that respondent had access to the team's secret practice sessions (see R. 297; p. 24, *supra*). It was as Director that he was responsible for scheduling the game with Alabama (p. 36, *supra*) and, perforce, for safeguarding its full integrity as a scholastic competition. It might as well have been contended in *Garrison v. Louisiana*, 379 U. S. 64 (1964), that the defendant's insinuations that the judges were subject to "racketeer influences" (379 U. S. at 66) did not relate to their official conduct since they were not authorized by their commissions to pervert the course of justice.

Fifth: It may be asked if our contention, that respondent as Director of Athletics was a public official for the purpose of the rule of *New York Times*, implies that every member of the faculty of a State University is in the same position. We do not blink the possibility that this may be the right conclusion, since, as we contend below, we think the privilege ought to apply to any statement challenged as a defamation if the First Amendment protects freedom

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Athletic Association, the Chancellor of the University System, the Chairman of the Board of Regents of the University System, the Commissioner of the Southeastern Athletic Conference and the President of the University of Alabama. See pp. 19-24, *supra*.

of expression on the subject matter of the statement. See pp. 63-65, *infra*. On the other hand, we think it sound to point to possible distinctions that would justify reserving resolution of that issue in this case. For one thing, a member of the faculty is not as such charged with a supervisory or managerial responsibility to which the criteria laid down in *Rosenblatt* would easily apply. But more than this, freedom of teaching, research and scholarship is itself protected by the First Amendment. See *Sweezy v. New Hampshire*, 354 U. S. 234, 250-251, 261-263 (1957). To the extent that a defamatory statement jeopardizes academic freedom in conducting such activity, it may be thought that liability unqualified by privilege *pro tanto* safeguards "values nurtured by the First and Fourteenth Amendments" and may thus avoid the "thrust of *New York Times*" (383 U. S. at 86). That proposition must be weighed against the argument *per contra* that the accommodation that resolves the "tension" (383 U. S. at 86) between First Amendment values and the social interest in protecting reputation is no less appropriate in dealing, in addition, with conflicting interests in the freedom of expression.

We submit that a less subtle problem is presented by this case. The respondent was responsible for supervision of the University's athletic program. Neither that program nor its supervision involves modes of self-expression comprehended in the freedom that the First Amendment guarantees. But since the management of a State University is plainly a governmental enterprise, criticism of the operation of the program of athletics or of the quality or the integrity of its direction "is at the very center of the constitutionally protected area of free discussion" (383 U. S. at 85). The social "interest in preventing and redressing attacks upon reputation" must, accordingly, yield place to the "values nurtured by the First and Fourteenth Amendments" (383 U. S. at 86) to the extent required by the privilege of *New York Times*.

B. The Public Interest in the Subject Matter of the Publication Requires That the Privilege Apply.

The public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to accord the privilege of *New York Times* to statements critical of his discharge of his official duties. The integrity of college football is a matter about which the public has important and legitimate concern, whoever the participants, because it is a phase of higher education. This public interest in the subject matter of the publication suffices, we contend, to gain it the protection of the First Amendment and the privilege prescribed by *New York Times*.

First: "Criticism of government is at the very center of the constitutionally protected area of free discussion" (383 U. S. at 85) but it assuredly is clear that this is not the only subject on which freedom of expression is protected by the First Amendment. *Cf., e.g., Thornhill v. Alabama,* 310 U. S. 88 (1940); *Thomas v. Collins,* 323 U. S. 516 (1945); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U. S. 1 (1964); *Kingsley International Pictures Corp. v. Regents,* 360 U. S. 684 (1959); *Jacobellis v. Ohio,* 378 U. S. 184 (1964). It was, indeed, said by the Court in *New York Times,* and repeated in the subsequent decisions, that our "profound national commitment" is to "the principle that debate on *public issues* [emphasis supplied] should be uninhibited, robust and wide-open . . ." (376 U. S. at 270). We think that "public issues" must include, at the least, any subject of discussion as to which the public has important and legitimate concern.[15]

15. This has been the almost universal view of commentators on the *New York Times* decision. See, *e.g.,* Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L. Q. 581, 591-595 (1964); Bertelsman, *Libel and Public Men,* 52

Second: That this publication was addressed to a public issue, in the sense defined above, is wholly clear.

James Bryant Conant is not alone in the belief that the "strength of this republic is . . . intimately connected with the success or failure of our system of public education." EDUCATION IN A DIVIDED WORLD (1948) p. 1. As President Kennedy stated in his Special Message to the Congress proposing the measure that became the Higher Education Facilities Act of 1963 (77 Stat. 363), "from every point of view, education is of paramount concern to the national interest as well as to each individual." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 1963, p. 106. Because of the magnitude of that concern, Congress, as President Kennedy put it in an earlier message (*id.*, 1962, p. 111), "has repeatedly recognized its responsibility to strengthen our educational system without weakening local responsibility," citing enactments reaching back to the Northwest Ordinance of 1787 and the Morrill Act of 1862.

To affirm public concern in education is, of course, to affirm such concern in all the problems it confronts, which never were of greater moment than they are in our time.

A. B. A. J. 657, 661 (1966); Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L. J. 642, 645 (1966); Comment, *Defamation of Public Officials—Free Speech and the New Constitutional Standard*, 12 U. C. L. A. L. REV. 1420, 1446-1447 (1965). *But cf.* Note, *New York Times Co. v. Sullivan—The Scope of a Privilege*, 51 VA. L. REV. 106, 114 (1965).

Viewed in these terms, the First Amendment would be taken to incorporate the common law privilege of fair comment, as applied in those States which do not accept the limitation that statements of fact must be proved true. *Cf. Coleman v. MacLennan*, 78 Kan. 711, 723 (1908) (quoted in *New York Times*, 376 U. S. at 281-282): "This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office." See also, *e.g.*, PROSSER, TORTS § 110 (3d ed. 1964); RESTATEMENT OF TORTS § 606 *et seq.* (1938); *Hoeppner v. Dunkirk Printing Co.*, 254 N. Y. 95 (1930) (criticism of high school football coach). The scope and limits of the common law privilege are ably discussed by Judge Leventhal in *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649 (D. C. Cir. 1966).

The maintenance of the integrity of the athletic programs of the colleges and universities that engage in intercollegiate competition does not pose the largest issue in the field of higher education but it has presented an important problem through the years. Its importance is attested by the Report of the Special Committee on Athletic Policy of the American Council on Education, composed of eleven Presidents or Chancellors under the chairmanship of John A. Hannah of Michigan State, which was unanimously approved by the Executive Committee of the Council in 1952. The Report (*Council Action on Athletic Policy,* THE EDUCATIONAL RECORD, vol. xxxiii, pp. 246-255) states, *inter alia:*

> American colleges and universities engage in intercollegiate athletics because of a deep conviction that when properly administered they make an important contribution to the total educational services of the institution. There is an increasingly widespread awareness, however, that athletics may become so severely infected with proselyting, subterfuge, and distorted purpose as to more than neutralize the benefits. Certainly the abuses and suspicion of abuse now associated with the conduct of intercollegiate athletics foster moral apathy and cynicism in our students—those young men and women who increasingly share responsibility for this country's strength and freedom.
>
> The urgency of the problem is even more apparent in the context of current external and internal threats to our society. In the last analysis, the strength of our free society depends not only upon armaments but also upon the integrity of our institutions and our people.
>
> This committee, after consulting competent authorities, has reluctantly reached the conclusion that in intercollegiate athletics as now conducted, despite the adherence by many institutions to the highest standards, serious violations not only of sound educational

policies but also of good moral conduct are not in fact uncommon. Wherever these exist, they can only be injurious to athletics, to our schools and colleges, and especially to our youth.

The present situation has been brought about by external pressures and internal weaknesses evident during a considerable period. The rewards in money and publicity held out to winning teams, particularly in football and basketball, and the desire of alumni, civic bodies, and other groups to see the institutions in which they are interested reap such rewards, have had a powerful influence on many colleges and universities. The influence has been magnified when control of athletic policy has been permitted to slip from the hands of the faculty and central administration.[16]

Third: If, as we contend, the First Amendment protects freedom of discussion of the subject of the publication, we submit that the privilege of *New York Times* should be determined to apply.

In *New York Times* this Court held that a "defense for erroneous statements honestly made" is constitutionally required because allowance of the defense of truth alone "with the burden of proving it on the defendant, does not mean that only false speech will be deterred." "Under such a rule," as the Court said, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so" (376 U. S. at 278-279). The critic of non-governmental action obvi-

16. *Cf.* SAVAGE, *op. cit. supra* note 13, p. 32: "Whatever the reason, it is certain that the seriousness with which college athletics are nowadays taken has driven certain well-recognized abuses under cover, but at the same time has propagated and intensified them." See also, *e.g.*, MILLER, THE TRUTH ABOUT BIG TIME FOOTBALL (1953) *passim;* Guthrie, *No More Football for Us!*, SAT. EV. POST, Oct. 13, 1951, p. 24.

ously faces the same problem, leading to "self-censorship" no less severe if he must "guarantee the truth of all his factual assertions" and "do so on pain of libel judgments virtually unlimited in amount" (376 U. S. at 279). In the latter case, no less than in the former, if the criticism is protected by the First Amendment, the burden upon speech or publication must be taken to abridge the freedom the Amendment guarantees.

A contrary result would involve holding, in effect, that freedom to criticize non-governmental action is protected by the Constitution only if the statements made can be proved to the satisfaction of a jury to be true. We submit that the Framers of the First Amendment were too well aware of the vicissitudes of jury action to attribute to them any such attenuated safeguard of the freedom they sought to secure.

This submission does not deny that, as the Court observed in *Rosenblatt* (383 U. S. at 86), society "has a pervasive and strong interest in preventing and redressing attacks upon reputation." It recognizes, rather, that the qualified privilege of *New York Times* itself embodies an accommodation of the conflicting interests in protecting reputation and protecting freedom of expression. The principle of the accommodation, limiting liability to utterances proved to be knowingly or recklessly false, is similar to that which elsewhere has been deemed essential to sustain a curb on speech or publication (*e.g.*, *Dennis v. United States*, 341 U. S. 494, 516 [1951]; *Smith v. California*, 361 U. S. 147 [1959]; *cf. Wieman v. Updegraff*, 344 U. S. 183 [1952]; *Speiser v. Randall*, 357 U. S. 513 [1958]), assimilating the criteria of libel law in this respect to those demanded by the Constitution in related fields. See *New York Times Co. v. Sullivan*, 376 U. S. at 278-279. We see no reason why this same accommodation should not govern liability for statements that reflect on non-official persons, if the same conflicting interests are involved. It would be strange, indeed, if limitations that this Court has found appropriate

to protect the congressional policy "to encourage free debate on issues dividing labor and management" (*Linn v. United Plant Guard Workers*, 383 U. S. 53, 62 [1966]) were not applied with equal vigor to protect the First Amendment policy of freedom of expression.

In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the magnitude of private power and the extent of public subsidy, the freedom that the Constitution deems most vital for correction of abuses ought not to be circumscribed by artificial lines.

III.

Respondent's Argument That "Actual Malice Within New York Times Was Conclusively Proven" Is Both Legally Immaterial and Wholly Unsupported by the Record.

In the effort to avoid review and reversal of this enormous judgment, respondent argues that malice in the sense of *New York Times* was "conclusively proven". *Further Response*, p. 7; *Response*, p. 26. The argument is legally immaterial and wholly unsupported by the record.

First: The argument is legally immaterial because, respondent notwithstanding (*Response*, p. 33; *Further Response*, p. 9), the instructions to the jury did not call on it to make a finding that comports with the requirements of *New York Times*.

As we have said above (p. 34), the District Court charged that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1026). It is too plain for argument that this instruction does not condition the punitive award on finding that a false statement was made "with knowledge that it was false or with reck-

less disregard of whether it was false or not" (*New York Times Co. v. Sullivan,* 376 U. S. 254, 280) or make clear that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times*" (*Garrison v. Louisiana,* 379 U. S. 64, 74 [1964]) may be the basis of recovery. The charge, precisely like those held erroneous in *Times, Garrison, Henry v. Collins,* 380 U. S. 356 (1965) and *Rosenblatt* (383 U. S. at 83-84), allowed "recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood"[17] (380 U. S. at 357) or even short of this, a merely "negligent misstatement" (383 U. S. at 84). The grounds for reversal in the previous decisions are, accordingly, presented here.

By the same token, it is wholly immaterial that the District Court gave as a ground for the denial of the motion for new trial that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (R. 1124-1125). The simple and decisive fact is that the question was, at most, for the decision of the jury under an appropriate instruction. It was not decided by the jury since no issue was submitted in these terms.

Second: There is no support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial.

We note *in limine* that this is an entirely paradoxical submission since the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant (R. 354-359) and its statement in the charge that there "has been a sharp conflict in the testimony in this case" (R. 1029) apply *a fortiori* if the plaintiff must establish falsity and

17. That petitioner was well aware that the publication threatened harm to the respondent was, of course, readily admitted (R. 715, 770).

reckless disregard. Indeed, the syllogism is not only valid with respect to the issue of truth, as to which *Times* would shift the burden to the plaintiff. It is also valid on this record with respect to reckless disregard, since the defendant's evidence of truth was, apart from small detail, included in the evidence that led the publisher to think the story true when it was published. How the same evidence that would have justified a jury verdict that the statement was essentially the truth could fail to justify the publisher's conviction of its truth, the respondent as yet has not explained.

It is, in short, entirely plain that on the record as evaluated by the District Court at the trial a jury correctly instructed as to the burden of proving falsity and the required proof of malice could have reasonably found for the defendant. Indeed, the record in this case yields a graphic demonstration of the difference in defending libel actions between the criterion of liability enunciated at the trial and that prescribed by *New York Times*. Extra-judicial statements of reliable informants are inadmissible to prove the truth of their assertions and the jury cannot find for the defendant on the plea of truth without convicting the plaintiff of the misconduct the publication charged. Moreover, on the issue of punitive damages, the decision as to whether "actual malice" has been proved is made on the assumption that the publication was false, since the defendant did not persuade the jury of its truth.

For the reasons stated we believe reversal is required whether or not the evidence would have sustained a jury finding that the publication was malicious; and that the Court is not, therefore, obliged to make its own appraisal of the record. But were the evidence to be considered, we should strongly urge that far from the conclusive proof to which respondent has referred, it lacks entirely "the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, 376 U. S. at 285-286).

As we show in detail in the Statement (pp. 28-32, *supra*), petitioner in publishing the article relied essentially on Burnett's sworn statement as to what he had overheard and a number of circumstances tending to corroborate his story. Those circumstances were ascertained in the course of the *Post*'s investigation prior to the publication, an investigation conducted by Frank Graham, an experienced sports writer, who subsequently wrote the article, and Furman Bisher, a sports editor of *The Atlanta Journal*, who had independently called the attention of the *Post* to Burnett's charges.

Among the corroborating circumstances were the facts that Burnett before talking to the *Post*, and at a time when he had no motive to falisfy, had reluctantly reported his charges to Coach Griffith and consented to Griffith's laying them before the University authorities, who had promptly initiated an investigation; that Milton Flack, whom Burnett claimed to have told about the conversation on the day that it occurred, confirmed that he had done so; that Burnett had voluntarily submitted to a lie detector test requested by the University authorities and passed; that the records of the Southern Bell Telephone Company confirmed the fact that a call had been made by Butts to Bryant on September 13, 1962; that Burnett claimed to have taken notes while he listened to the conversation; that the notes had been seen by Flack and Griffith; that the notes, together with Burnett's charges, were believed by Coach Griffith to be sufficiently important to report them to the University authorities; that on the occasion when Burnett saw Griffith, Griffith indicated that he found the notes revealing and that he had a suspicion that someone had been giving information to Alabama; that when Butts was called before the University authorities he refused to take a lie detector test and the next day submitted his resignation as Director of Athletics; that the Georgia-Alabama game was a fiasco for Georgia; that Furman Bisher, purporting to have talked to people at the University, called Graham on March 1

and reported statements that he claimed were made by Georgia player Babb, Georgia trainer Richwine, and Coach Griffith, all of which tended to support the proposition that the Alabama team was familiar with Georgia's plays and formations; that two weeks before the *Post* issue went on sale, the completed story was sent to Bisher by Graham and Bisher made no comments or suggestions.

On the basis of this information Clay Blair, Jr., the *Post*'s then editor-in-chief, and Davis Thomas, its managing editor, whose testimony the respondent took by deposition, swore that they were satisfied of the truth of the assertions in the publication.

Against the foregoing circumstances of corroboration, the respondent points to the fact that no representative of the *Post* saw Burnett's notes before the article was published, efforts to obtain them from the University authorities proving unavailing; that the *Post* knew that at a meeting with the University authorities on February 21, 1963, Burnett was confronted with the fact that he had been convicted and placed on probation on a charge of cashing two checks totalling $45 against insufficient funds (a dereliction the respondent's counsel charitably asserts established that he was known "as a bad-check artist" [*Response*, p. 27]); that the *Post* did not interview John Carmichael, Burnett's office associate, to whom Burnett claimed he had reported the Butts-Bryant conversation immediately after overhearing it on September 13 (a report very substantially confirmed by Carmichael in his testimony at the trial), because it was known that Carmichael had opposed Burnett's disclosure and would not be cooperative; that the *Post* did not review the film of the Alabama-Georgia game, though its sports editor wished to do so; that neither Butts nor Bryant was interviewed in the *Post*'s investigation; that some of the quotations of statements of Georgia players and football staff, given Graham by Furman Bisher, were used without interviewing the quoted parties, who denied at the trial that they had made them; that the *Post* did not

interview any coach or member of the Alabama team; that seven days before the publication date of the story, the respondent's counsel sent a telegram and letter to the *Post* stating without specification that the proposed content of the article was false; that during the week before the publication the respondent's daughter telephoned Clay Blair and tearfully requested him to forego publication; and, finally, that a demand for a retraction was presented and ignored.

We submit that this evidence affords no sufficient basis for concluding that petitioner's agents published the Graham article knowing that its essential statements were false or with a "high degree of awareness of their probable falsity." The important statements were derived in every instance from informants on whose truthfulness and accuracy the *Post* editors had reason to and did rely.

As another panel of the court below has recently observed in reversing a libel judgment, a "reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co. v. Connor*, 365 F. 2d 567, 576 (5th Cir. 1966). See also *Washington Post Co. v. Keogh*, 365 F. 2d 965 (D. C. Cir. 1966). It may be argued that the petitioner's investigation was in some respects inadequate. But even if the argument should be sustained, we think it clear that the inedequacy claimed may point to negligence but nothing more.

Respondent's statement that "Curtis was informed of the falsity of the story" by his counsel's telegram and letter and his daughter's phone call (*Response*, p. 26) is, we think, entirely disingenuous. If a denial unaccompanied by information or a mere appeal for sympathy suffices to defeat the privilege of *New York Times*, the great principle of that decision would be nullified at once in application. The opinion happily makes clear that it was not envisaged that such nullification should prevail (376 U. S. at 286-288).

It remains to add that the respondent drew great strength before the jury, and seeks to draw strength here, from statements by Clay Blair, Jr., the *Post*'s editor-in-chief, that he wished to change the image of the *Post*, to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" and that "the final yardstick" of this policy was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." He also described the issue containing the publication here involved, as "a step in the right direction," adding that with this issue "we have gone twenty-five per cent toward the goal of the magazine I envision" (pp. 32-33, *supra*).

This is admittedly language that invites inflammatory misconstruction. Read in connection with the evidence we have detailed, we do not think that it permits a finding that petitioner embarked on a policy of grave indifference to the truth and that the instant publication was a product of such reckless disregard. The "high degree of awareness" of the "probable falsity" of challenged statements demanded by the rule of *New York Times* calls, in our submission, for a judgment based upon the sources of the publication and their actual impact on the minds of those responsible for the derogatory statements made. Judged in these terms, we think the evidence makes clear this was an entirely honest publication, reflecting the conviction of the agents of the *Post* that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

IV.

The Award of Punitive Damages Violates the First and Fifth Amendments.

Whether or not the rule of liability applied in the District Court is consistent with the First Amendment, the verdict and the judgment in this cause are repugnant to the Constitution.

First: The jury verdict of $3,000,000 punitive damages for a publication causing "actual damages," including mental anguish and humiliation (R. 1024), assessed at $60,000, was not only "grossly excessive", as the District Court has found; it contravened the First Amendment and entailed a deprivation of due process. These points were made against the verdict by the motion for new trial (R. 36-37) and were, therefore, plainly open on appeal from the judgment.

We concede *arguendo* that an award of damages imposed as a deterrent to the defendant and to others and "to protect the community" (R. 1026) is not *per se* invalid in a civil case, as this Court said long ago in *Day v. Woodworth,* 13 How. 363, 370-371 (1851).[18] When such an award is used, however, as a means of regulating publication, it is clear that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940). For that reason, even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall,* 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U. S. 479, 488 (1960). See also, *e.g., Grosjean v. American Press Co.,* 297 U. S. 233 (1936); *N. A. A. C. P. v. Alabama,*

18. The classic statement of the contrary position is by Justice Foster in *Fay v. Parker,* 53 N. H. 342 (1872). The nineteenth century debate upon the issue is fully indicated by GREENLEAF, EVIDENCE (Lewis ed. 1896) § 253, n. 2, p. 294 *et seq.*; THEODORE SEDGWICK, MEASURE OF DAMAGES (8th ed. 1891) § 348 *et seq.*; FIELD, DAMAGES (1876) § 72 *et seq.* It is ironical that such awards appear to go back to the actions based on the general warrants issued by the Earl of Halifax, where the defendants were officials who could not have been expected to "protect the community" against themselves. The cases are summarized in SAYER, THE LAW OF DAMAGES (1792) p. 218 *et seq.*

For a modern analysis, see Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173 (1931).

357 U. S. 449 (1958); *Smith v. California,* 361 U. S. 147, 150-151 (1959); *Bates v. Little Rock,* 361 U. S. 516 (1960); *Freedman v. Maryland,* 380 U. S. 51 (1965). As Mr. Justice Brandeis said long ago: "A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." *Whitney v. California,* 274 U. S. 357, 377 (1927) (concurring opinion). Indeed, quite apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co. v. McCray,* 291 U. S. 566, 571 (1934).

Since the First and Fifth Amendments apply to all the agencies of government (*N. A. A. C. P. v. Alabama,* 357 U. S. 449, 463 [1958]; *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 68 [1963]), a jury verdict must be tested by these standards, no less than a judicial or administrative action or an act of legislation.

So tested, we believe it clear that the $3,000,000 verdict, representing 65 per cent of the defendant's retained earnings (Pl. Ex. No. 22, R. 1053, 1054), was in violation of the Constitution. The verdict plainly was designed to put defendant out of business and was thus, as Judge Rives said below (R. 1296; 351 F. 2d at 728), equivalent to a prior restraint. Prior restraint or not, it takes no argument to show that such a penalty, imposed in addition to full compensation for all injury believed to be inflicted on the plaintiff and the mitigation of such injury involved in the mere fact of verdict, "unduly" infringed the "protected freedom" and inflicted "sheer oppression". The maximum penalty against a corporation for criminal libel is fixed by Georgia law at a fine of $1,000. Ga. Code Ann. §§ 26-2101, 27-2506. That legislative judgment as to the penalty necessary to protect the community provides, in our submission, the perspective for appraising the constitutional validity of this award.

This jury verdict, therefore, even more than that in *New York Times*, supplies what Mr. Justice Black, concurring in that judgment, called "dramatic proof . . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs . . ." (376 U. S. at 294). The only way that threat can be removed, short of according the absolute privilege this Court declined in *Times* to find embodied in the First Amendment, is to hold that a jury's compensatory verdict must bear a reasonable relationship to the amount of damage shown and that a permissible punitive additional award must be shaped by such objective factors as the fine imposable upon conviction of criminal libel, the reasonable costs of conducting the litigation (*Day v. Woodward*, 13 How. at 371; see also *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649, 661-663 [D. C. Cir. 1966]) or, at most, a modest multiple of the actual damages sustained. The punitive verdict here did not comport with these or any other rational criteria and thus was tainted by a violation of the Constitution.

Second: If the verdict was, as we submit, unconstitutional, it was not saved by the remittitur required by the District Court. For even though the use of a remittitur may be too well established to be "reconsidered or disturbed at this late day," as this Court reluctantly declared in *Dimick v. Schiedt*, 293 U. S. 474, 485 (1935), it is no less established that a verdict based upon a jury's prejudice cannot be cured. *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 521 (1931); *National Surety Co. v. Jean*, 61 F. 2d 197, 198 (6th Cir. 1932); *Brabham v. Mississippi*, 96 F. 2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone*, 205 F. 2d 267 (4th Cir. 1953). A verdict violative of the Constitution surely is no less incurably defective, if, indeed, the jury's prejudice is not in such a case to be presumed.

The vice of such a verdict is shown plainly in this case. For when the trial court found the jury's verdict to be "grossly excessive", it did not ask itself what size verdict

might comport with constitutional requirements and show a due regard for the importance of preserving freedom of the press. It asked, instead, what was the largest verdict "ever sustained for punitive damages by the Appellate Courts" and, finding that figure to be $175,000 (of which $100,000 was the largest sum awarded against any one defendant) in *Reynolds v. Pegler*, 223 F. 2d 429 (2d Cir. 1955), it expressed its "considered opinion that the maximum sum" that "should have been awarded . . . should be $400,000" (R. 74-76; 225 F. Supp. at 919-920). That the magnitude of the invalid jury verdict exerted a substantial influence upon the Court's determination is, therefore, undeniable. The Court's award was inescapably a "fruit" of the illegal action of the jury. *Cf., e.g., Wong Sun v. United States*, 371 U. S. 471, 484 (1963).

Third: Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, we contend that the punishment imposed is repugnant to the Constitution.

In assessing the sum of $400,000 as "the maximum" that "should have been awarded," the Court, as we have said, employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. It neither sought nor used any objective standard of the kind we think essential when a punishment of this kind is imposed. Deeming the publication unprotected by the First Amendment, it, of course, took no account of the effect of the award, and of the threat of like awards in other cases, on the freedom the Amendment guarantees. The assessment was, therefore, entirely arbitrary and unprincipled. We submit that it offends the Constitution on this ground.

The offense is compounded by the size of the award. What this Court said of the $500,000 judgment rendered against *The New York Times* is no less applicable here:

"Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive" (376 U. S. at 278).

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV.

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

GEORGIA VERSUS ALABAMA

THE STORY OF A COLLEGE FOOTBALL FIX

A SHOCKING REPORT OF HOW WALLY BUTTS AND "BEAR" BRYANT RIGGED A GAME LAST FALL

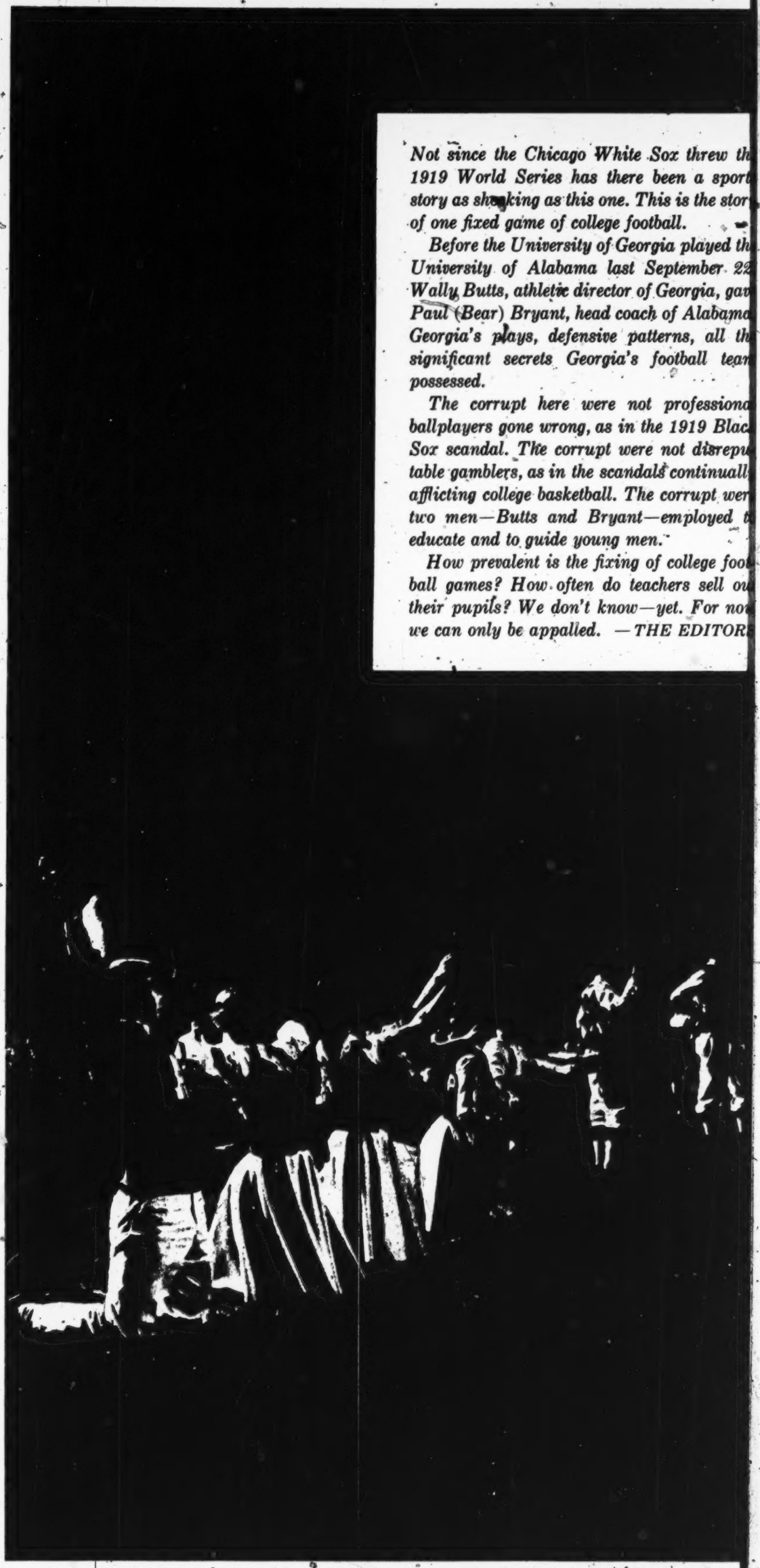
By FRANK GRAHAM JR.

Not since the Chicago White Sox threw th 1919 World Series has there been a sport story as shocking as this one. This is the stor of one fixed game of college football.

Before the University of Georgia played th University of Alabama last September 22 Wally Butts, athletic director of Georgia, gav Paul (Bear) Bryant, head coach of Alabama Georgia's plays, defensive patterns, all th significant secrets Georgia's football tea possessed.

The corrupt here were not professiona ballplayers gone wrong, as in the 1919 Blac Sox scandal. The corrupt were not disrepu table gamblers, as in the scandals continuall afflicting college basketball. The corrupt wer two men—Butts and Bryant—employed t educate and to guide young men.

How prevalent is the fixing of college foot ball games? How often do teachers sell ou their pupils? We don't know—yet. For no we can only be appalled. —THE EDITOR



On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up his telephone and dialed the number of a local public-relations firm. The number was Jackson 5-3536. The line was busy, but Burnett kept trying. On the fourth or fifth attempt he had just dialed the final number when he heard what he later described as "a series of harsh electronic sounds," then the voice of a telephone operator said:

"Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"

And then a man's voice: "I'll hold, operator."

Like most males over the age of four in Atlanta, George Burnett is a football fan. He realized that he had been hooked by accident into a long-distance circuit and that he was about to overhear a conversation between two of the colossi of Southern football. Paul (Bear) Bryant is the head coach and athletic director of the University of Alabama, and Wallace "Wally" Butts was for 22 years the head coach of the University of Georgia and, at the time of this conversation, the university's athletic director. Burnett ("I was curious, naturally") kept the phone to his ear. Through this almost incredible coincidence he was to make the most important interception in modern football history.

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later. Georgia's opponent was to be Alabama.

Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?'. And Butts said, 'Don't worry about quick kicks. They don't have anyone who can do it.'

"Butts also said that Rakestraw [Georgia quarterback Larry Rakestraw] tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. And another thing he told Bryant was that Woodward [Brigham Woodward, a defensive back] committed himself fast on pass defense."

As the conversation ended, Bryant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said. "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad he kept on his desk. Some of the names were strange to him—tackle Ray Rissmiller's name he jotted down as "Ricemiller," and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

Through some curious electronic confusion, George Burnett, calling his friend Milt Flack, had hooked into the call Wally Butts was making from a rear office in Flack's suite. He was the third man, the odd man. But he was not out.

Putting the pieces together

In the next few hours Burnett tried to piece together what he knew of Georgia football. Butts, a native of Milledgeville, Georgia, had joined the university coaching staff as an assistant in 1938. A year later he was named head coach. For 20 years he was one of the most popular and successful coaches in the South. Then prominent University of Georgia alumni abruptly soured on him, and on January 6, 1961, he was replaced by a young assistant coach named Johnny Griffith. Butts, filed away in the position of Georgia's athletic director (which he had held along with his coaching job for some years), was outspokenly bitter about his removal from the field.

Burnett knew, too, that Butts recently had been involved in a disastrous speculation in Florida orange groves. Butts had lost over $70,000 because, as someone put it, "you couldn't grow *cactus* on that land." One of his partners in the deal was also an associate of Milt Flack at a public-relations firm called Communications International, the office Burnett had been trying to call when he hooked into the Butts-Bryant conversation.

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes away in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

Eight days later, on September 22, the Georgia team traveled to Birmingham to play Alabama before a crowd of 54,000 people at Legion Field. Alabama hardly needed any "inside" information to handle the outmanned Bulldogs. Bryant, one of the country's most efficient and most ruthless coaches—he likes his players to be mean, and once wrote that football games are won by "outmeaning" the other team—had built a powerhouse that was in the middle of a 26-game winning streak. Alabama was the defending national champion, combining a fast-charging and savage-tackling defense with an effective attack built around a sensational sophomore quarterback named Joe Namath. The Georgia team was composed chiefly of unsensational sophomores.

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"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) shapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

"The Georgia backfield never got out of its backfield," one spectator said afterward. And reporter Jesse Outlar wrote in Atlanta's Sunday *Journal* the following day: "Every time Rakestraw got the ball he was surrounded by Alabama's All-American center Lee Roy Jordan and his eager playmates."

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Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta *Journal*. "The Alabama players taunted us," end Mickey Babb told him. "'You can't run *Eighty-eight Pop* [a key Georgia play] on us,' they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32–6.)

Only one man in the Georgia camp did not despair that day. Asked by reporter

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UNITED STATES CODE TITLE 28.

§ 2106 *Determination* "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 60(b).

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or pro-

ceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949."

GEORGIA CODE ANNOTATED.

§ 105-701.

LIBEL DEFINED; NECESSITY OF PUBLICATION.—A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery.

§ 105-1801 (4488)

PLEA OF AUTHORITY UNDER LAW; EFFECT AS TO RIGHT TO OPEN AND CONCLUDE.—In every case of tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issue; but such plea shall not give to the defendant the right to open and conclude the argument before the jury, unless it shall be filed before the plaintiff submits any evidence to the jury trying the case (Acts 1888, p. 35).

§ 26-2101 (340 P. C.)

LIBEL DEFINED; PUNISHMENT.—A libel is a malicious defamation, expressed either by printing or writing, or signs, pictures or the like, tending to blacken the memory

of one who is dead, or the honesty, virtue, integrity, or reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule. Every person convicted of this offense shall be punished as for a misdemeanor. (Cobb. 812.)

§ 27-2506 (1065 P. C.)

MISDEMEANORS, HOW PUNISHED.—Except where otherwise provided, every crime declared to be a misdemeanor shall be punished by a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months, to work on the public works in such public works camp or other appropriate institution under the jurisdiction of the State Board of Corrections not to exceed 12 months, any one or more of these punishments in the discretion of the trial judge. (Acts 1865-6, p. 233; 1878-9, p. 54; 1895, p. 64; 1908, p. 1119; 1956, pp. 161, 168; 1957, pp. 477, 482.)

§ 32-101.

CREATION OF BOARD OF REGENTS. CORPORATE NAME OF TRUSTEES OF UNIVERSITY OF GEORGIA CHANGED.—There is hereby constituted a department of the State Government of Georgia, to be known as the "Board of Regents of the University System of Georgia." The name of the corporation heretofore established and existing under the name and style, "Trustees of the University of Georgia," is hereby changed to "Regents of the University System of Georgia" (Acts 1931, pp. 7, 20).

§ 32-113.

GOVERNMENT OF UNIVERSITY OF GEORGIA.—The management and government of the University of Georgia, and all of its branches named in section 32-103 are vested in the Board of Regents (Acts 1931, pp. 7, 21).

32-152. Athletic Associations of University of Georgia and Georgia School of Technology Declared to Be Corporations.—The Athletic Associations of the University of Georgia and the Georgia School of Technology are hereby declared to be corporations, incorporated under charter issued by the superior court of the county in which said associations are located. (Acts 1949, p. 29.)

32-153. Associations as Not State Agencies; Financial Operation Rules and Regulations.—The Associations named are hereby declared, not to be agencies of the State and not subject to the limitations, restrictions and laws of general application imposed on State agencies by the Constitution of Georgia and the laws enacted by the General Assembly of Georgia in compliance with the Constitution of Georgia, and the Associations are authorized under their corporate charter issued by the superior court to make such rules and regulations for the financial operations of the Associations as they deem necessary: Provided, however, that this resolution shall not apply to any tax money appropriated by the State of Georgia. (Acts 1949, p. 29.)

32-154. Audit of Accounts of Associations Not Required of State Auditor.—The State Auditor of Georgia is not required to make an audit of the accounts of the Associations as is required of him in connection with the financial operations of State agencies. (Acts 1949, p. 29.)

remain in his job. On January 28 a report reached the newspapers that Butts had resigned. At first it was denied by Butts and the university. A few days later it was confirmed with the additional news—that Butts would remain as athletic director until June 1 so that he could qualify for certain pension benefits. Rumors flooded Atlanta. One of the wildest was that Butts was mysteriously and suddenly ill and had entered the state hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game.

But if Butts was seen publicly, events involving him remained closely guarded secrets. Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University of Georgia. There he met Dr. O. C. Aderhold, the university president. Burnett's story was carefully checked. He then agreed to take a lie-detector test, which was administered by polygraph expert Sidney McMain, in the Atlanta Federal building. Burnett passed the test to everybody's satisfaction.

Phone-company check

Next an official of the Southern Bell Telephone Company checked and found that a call had been made from the office of Communications International to the University of Alabama extension noted by Burnett on his scratch pad. This information corroborated Burnett's statement that the call had been made at about 10:25 in the morning and had lasted 15 or 16 minutes.

"I jotted down the time when the call was completed," Burnett said. "It was 10:40. This is an old navigator's habit, I guess. For instance, I know that I was shot down over Saint-Vith at exactly 10:21, because when the bombardier called 'Bombs away!' I looked at my watch and wrote down the time. A few seconds later we got hit."

University officials still nursed reservations about Burnett's story because of the fantastic coincidence that had enabled him to overhear Butts's call. Then, during one of the many conferences he attended in attorney Barwick's office in the Rhodes-Haverty Building, a second coincidence, equally odd, cleared the air. Barwick placed a call to Doctor Aderhold at the university. Suddenly, Barwick and Aderhold found themselves somehow braided into a four-way conversation with two unknown female voices. The two men burst into nervous laughter. Burnett's story gained a little more credence.

February 21 was a painful day for George Burnett. He was summoned once more to Barwick's office, because Bernie Moore, the commissioner of the Southeastern Conference, "wanted to ask some questions." On Burnett's arrival he found not only Moore but Doctor Aderhold, two members of the university's board of regents, and another man identified as Bill Hartman, a friend of Wally Butts.

From the start, Burnett sensed a mood of hostility in the air. The ball was carried by one of the members of the Georgia board of regents, who confronted Burnett with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END

Butts and Bryant meet as friends, exchange warm greetings before Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1

ORGIA VERSUS ALABAMA

THE ORY OF OLLEGE OTBALL FIX

A SHOCKING REPORT HOW WALLY BUTTS AND "BEAR" BRYANT RIGGED A GAME LAST FALL

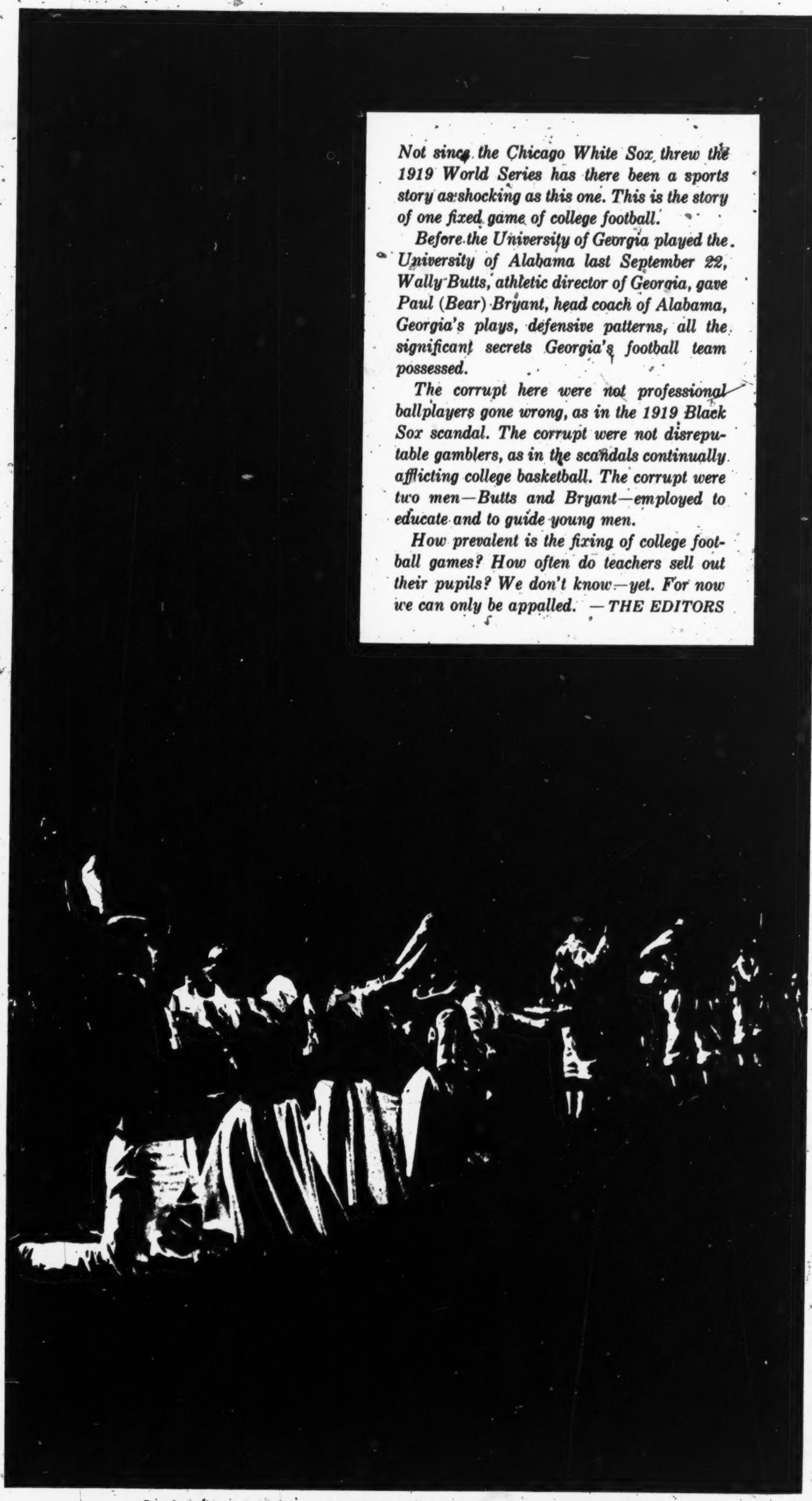
By FRANK GRAHAM JR.

Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled. —THE EDITORS



On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

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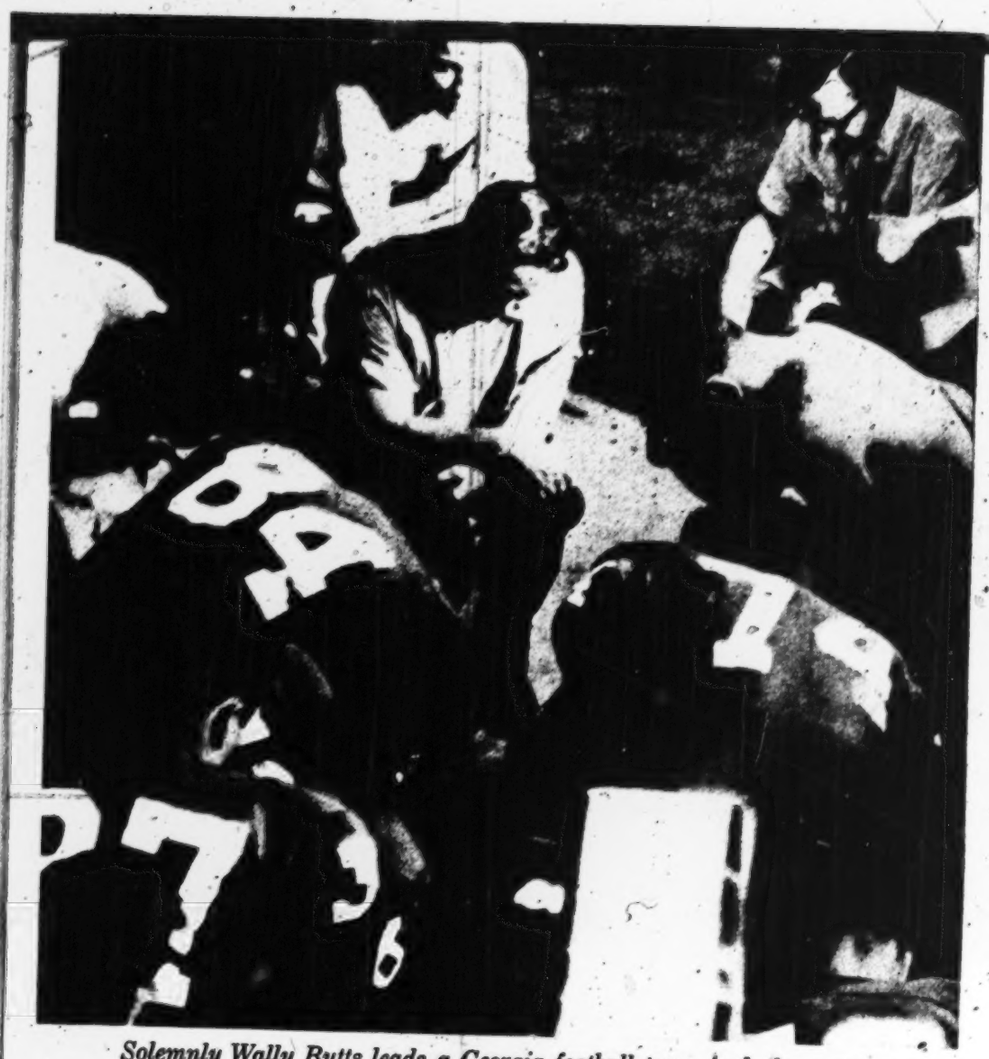

Solemnly Wally Butts leads a Georgia football team in locker-room prayer.

Downcast coach Griffith slouches near bench as Georgia team is slaughtered.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential*."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furore, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

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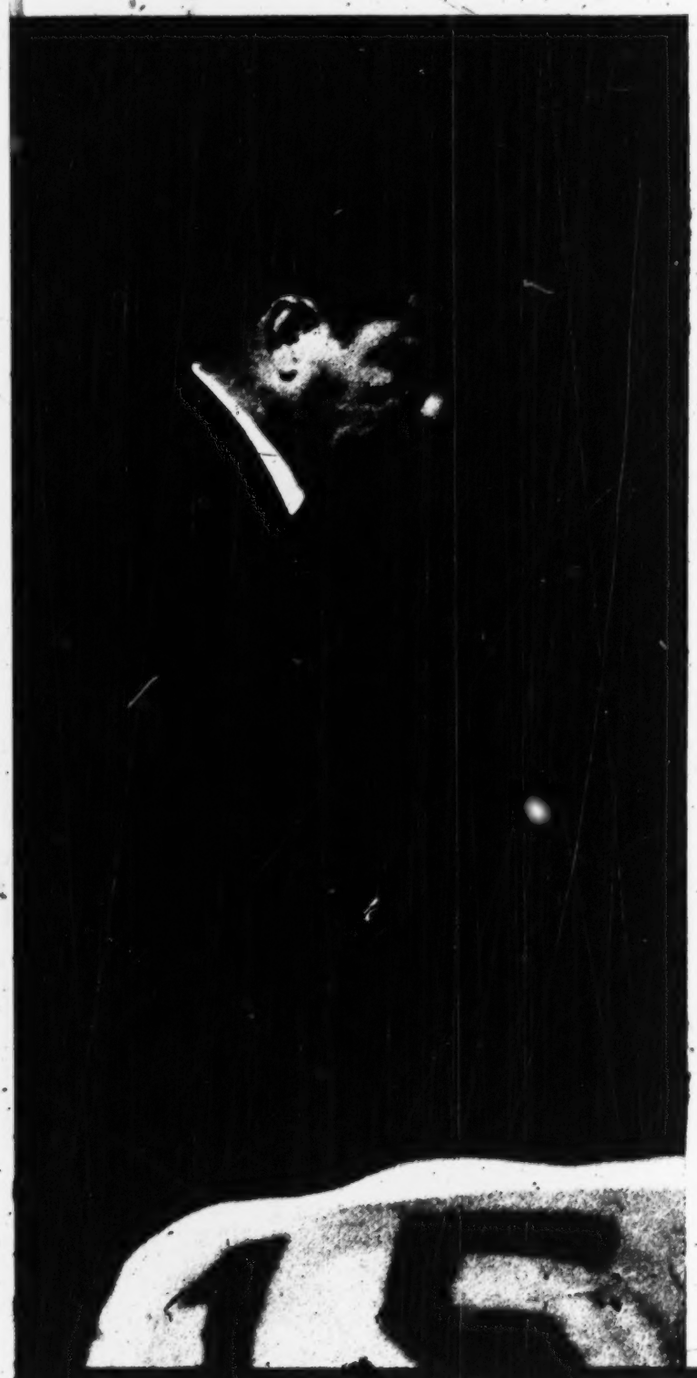
Butts leads a Georgia football team in locker-room prayer.



Downcast coach Griffith slouches near bench as Georgia team is slaughtered.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "*Potential* is the word for what I saw," he said. "Unlimited *potential*."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

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After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go ahead but to try to keep his name out of it. Powerful men in Georgia might be offended if Wally Butts was hurt, and Burnett did not want to jeopardize his own career just when things were beginning to break nicely for him.

But like so many others, Burnett found that there is no such thing as a little involvement. Griffith pressed to meet him, and nervously Burnett agreed. In the middle of January he met with Edwards and Griffith in the Georgia coach's room at Atlanta's Biltmore Hotel. Simultaneously a general meeting of the Southeastern Conference coaches was taking place at the Biltmore.

The Georgia-Alabama game had been forgotten by most of the coaches and athletic officials present. A popular topic of conversation was a late-season game between Alabama and Georgia Tech, in which Bryant's long winning streak had been broken.

Alabama, a five-point favorite, had trailed 7–6 with only a little more than a minute to play. Then Alabama made a first down on the Georgia Tech 14-yard line. Since Bryant had a competent field-goal kicker, the classic strategy would have been to pound away at the middle of Tech's line, keeping the ball between the goalposts and, on third or fourth down, order a field-goal try. (Alabama had defeated Georgia Tech on a last-minute field goal in 1961.) Instead, Bryant's quarterback passed on first down. The pass was intercepted, and Georgia Tech held the ball during the game's waning seconds, thus scoring last season's greatest upset.

During the January conference at the Biltmore, Bryant was frequently kidded about that first-down pass.

Away from the bars and the crowds, in Griffith's room the talk was only of Georgia-Alabama. Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here's something in your notes that you couldn't possibly have dreamed up . . . this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Suspicions confirmed

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their linebackers are hollering out our plays while we're still calling the signals.'"

Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left. "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to

...y Griffith of Georgia's beaten Bulldogs: "I never had a chance."

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...publicly, events ...closely guarded ...to come to the ...ok Barwick, an ...e University of ...r. O. C. Ader... ...dent. Burnett's ...cked. He then ...ctor test, which ...olygraph expert ...Atlanta Federal ...he test to every...

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...painful day for ...summoned once ... because Bernie ...r of the South... ...ted to ask some ...arrival he found ...ctor Aderhold, ...ersity's board of ...an identified as ... Wally Butts. ...sensed a mood ... ball was carried ... of the Georgia ...fronted Burnett with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that *I* was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I *was* arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

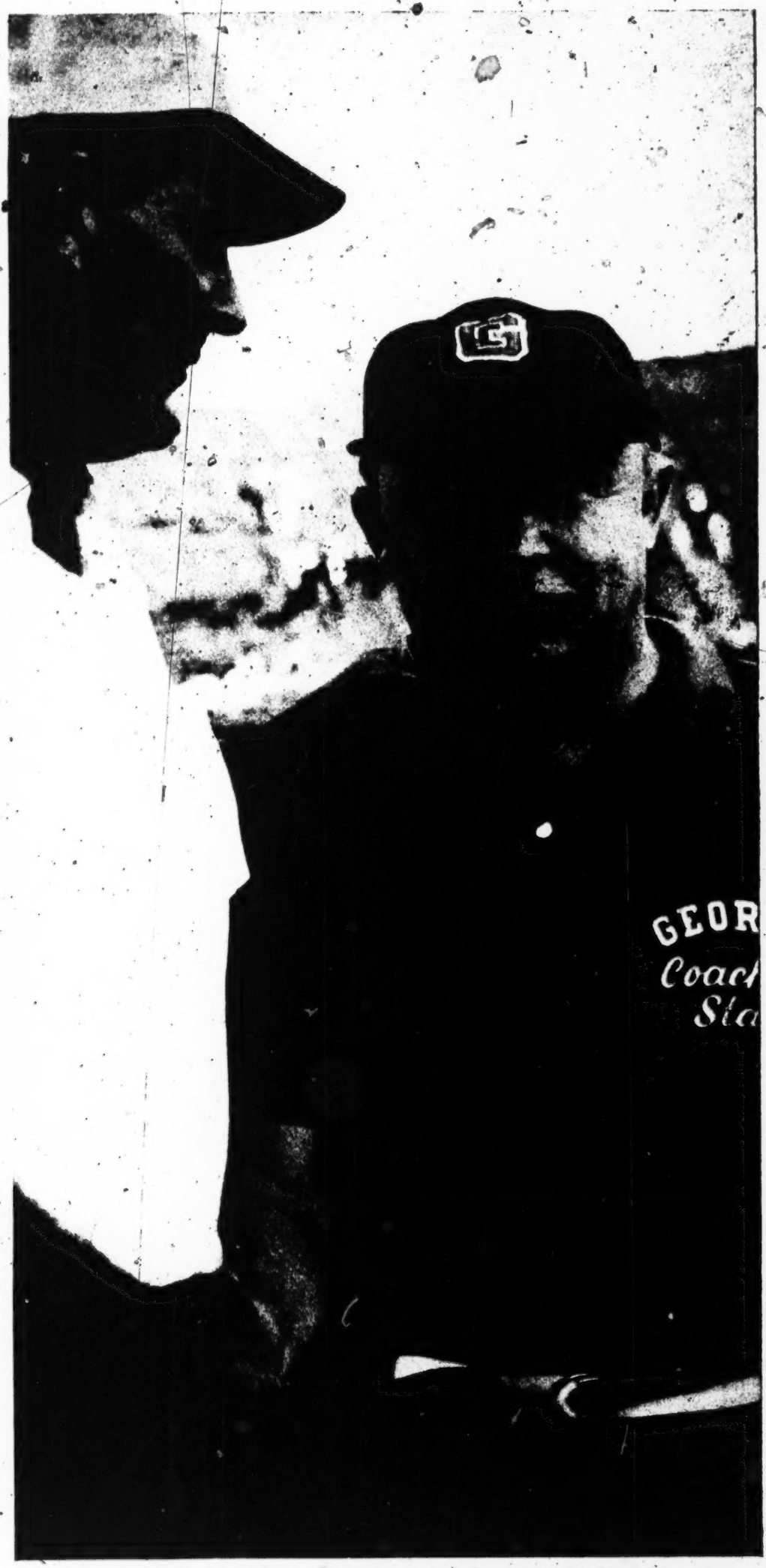
Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a *chance*."

When a fixer works against you, that's the way he likes it. THE END



Butts and Bryant meet as friends, exchange warm greetings before the Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1960.

JAN 4 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE PETITIONER

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IN THE

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OCTOBER TERM, 1966

No. 150

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ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

CITATIONS TO OPINIONS BELOW

The unreported opinion of the Trial Court, contained in a letter to counsel dated July 29, 1964, is printed in the Record, pp. 69-72.

The opinion of the Texas Court of Civil Appeals, dated July 30, 1965, reported at 393 S. W. 2d 671, is printed in the Record, pp. 1527-1551.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on July 30, 1965 (R. 1551).* An application for rehearing was denied on September 17, 1965 (R. 1552).

*All citations to "(R.)" are to the printed Transcript of the Record.

Petitioner's application to the Supreme Court of Texas for a writ of error was denied on February 9, 1966 (R. 1553). Petitioner's motion for a rehearing on its application for a writ of error was denied by the Supreme Court of Texas on March 23, 1966 (R. 1554).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). This Court granted certiorari on October 10, 1966 (U. S. , 87 S. Ct. 40).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Civil Statutes, Article 5431

In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and

also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action.

Vernon's Texas Civil Statutes, Article 5432, Subsections 4 and 5

The publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel.

* * *

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

5. The privilege provided under Sections 1, 2, 3, and 4, of this article shall extend to any first publication of such privileged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any re-publication of such privileged matter, after the same has ceased to be a matter of such public concern, shall not be deemed privileged, and may be made the basis of an action for libel upon proof that such matter had ceased to be of such public concern and that same was published with actual malice.

QUESTIONS PRESENTED

1. Whether the doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, is limited

to public officials or applies to other persons or circumstances:

A. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports, made without actual malice, respecting events of profound political and social importance and national public interest, such as the enforcement by the United States Government of judgments of United States courts, and suppression of the riots resulting from the confrontation between Federal and State power in connection therewith which occurred at Oxford, Mississippi, on September 30, 1962, particularly at the behest of one who, like General Edwin A. Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

B. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports made without actual malice concerning the public activities of persons like General Walker in connection with controversies of profound political and social importance and national public interest, such as those presented by the Oxford confrontation, where such persons are actively attempting to influence the outcome of such controversies and where such persons are, or are generally regarded as being, by virtue of their stature and activities, in a position significantly to influence the resolution of the issues thus presented.

2. Whether an award of general damages of $500,000 for the publication, without actual malice or any proof of pecuniary or other loss, of reports of newsworthy events is so oppressive that it inhibits freedom of expression to an extent which violates the First and Fourteenth Amendments to the Federal Constitution.

3. Whether the defense of "fair comment," as construed and applied by the Texas courts in this case, is so limited as to violate the First and Fourteenth Amendments to the Federal Constitution.

4. Whether the record in this case on the issues of "substantial truth" and "fair comment" is so lacking in evidentiary support for the judgment below that that judgment constitutes a denial of due process in violation of the Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

On the night of September 30, 1962, there occurred in Oxford, Mississippi, a fateful confrontation between Federal and State power which arrested the attention of the entire nation, and which has become a milestone in the century-long battle for racial equality.

This confrontation was the culmination of events arising out of an attempt by a single Negro—James Meredith—to gain admission to the then all-white student body of the University of Mississippi and the attempt by the State of Mississippi and its highest elected officials to prevent such admission through invocation of the historically and judicially discredited doctrine of interposition (R. 564-565).*

The events surrounding this confrontation, now an important chapter in the nation's history, directly involved, at one time or another, the President of the United States (R. 598), the Justices of this Court (R. 537-538), the Judges

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**Meredith* v. *Fair*, 199 F. Supp. 754 (S. D. Miss. 1961), *aff'd.* 298 F. 2d 696 (5th Cir. 1962); 202 F. Supp. 224 (S. D. Miss. 1962), *motion denied* 305 F. 2d 341 (1962), *rev'd* 305 F. 2d 343 (5th Cir. 1962), *stay vacated* 306 F. 2d 374 (5th Cir. 1962), *cert. denied* 371 U. S. 828, *stay vacated* 83 Sup. Ct. 10; 313 F. 2d 532 (5th Cir. 1962), 313 F. 2d 534 (5th Cir. 1962), *cert. denied* 372 U. S. 916.

of the Court of Appeals for the Fifth Circuit and the Southern District of Mississippi (R. 541), the Attorney General of the United States (R. 543), the Governor and Lieutenant Governor of Mississippi (R. 542), the Trustees of the University of Mississippi (R. 539-540), the United States Army (R. 546-547), the Mississippi National Guard (R. 600), a massive force of United States Marshals (R. 282), the Mississippi State Highway Patrol (R. 223), and local law enforcement officials (R. 219-220).

A central figure in the confrontation was General Edwin A. Walker, Respondent here. General Walker—a former General Officer of the United States Army (R. 439-440), the commander of the troops at a similar confrontation in Little Rock in 1957 (R. 439), a man who had resigned his commission in order to be free to engage in political controversy (R. 519, 520) and who thereafter lectured widely on public issues (R. 521-523), a man who had but recently been a candidate for nomination for Governor of Texas (R. 527), a man who had achieved national status and was a self-admitted person of political prominence with an organized political following all his own named the "Friends of Walker" (R. 526)—deliberately and with as much fanfare as he could trumpet thrust himself into the very vortex of the confrontation at Oxford. Yet General Walker now seeks to collect an award of $500,000 in general damages (although he proved no actual damages at trial) because—according to the Texas state courts—the Petitioner, Associated Press, acting in good faith, reported in two respects inaccurately* General Walker's public activities on the occasion of that confrontation (R. 59-61; 69-72; 74-76; 1530-1532).

---

*The finding that the article was inaccurate is not supported by the evidence. To the contrary, the evidence affirmatively and conclusively establishes that the statements complained of were substantially true.

The news reports upon which this action is based were prepared by Petitioner* on the basis of information supplied to Petitioner by Van Savell, a local employee of Petitioner (R. 720-721).

The dispatches read in full text (Pl. Exh. 1-A, 1-B, R. 119-123):

> "October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'
>
> "October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the weekend battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)
>
> "By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.
>
> " 'This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker,

*Petitioner is a nonprofit, membership corporation engaged in the gathering and dissemination of news to its membership, which consists of newspapers and broadcasting stations.

who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals.

Throughout this time, I was less than six feet from Walker.

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes—toward the clustered marshals.

" 'We fled the tear gas and the charging marshals —the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "you may lose this battle, but you will have been heard."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" 'There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p.m. and— I raced to the telephone again. Upon my return,

Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

" 'One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" ' "This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French

> newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.'"

The only statements in the foregoing dispatches which were ultimately asserted to have been libelous of Walker were:

1. "Walker, who Sunday night led a charge of students against federal marshals on the Ole Miss Campus, . . ." (October 2, 1962 report); and
2. "Walker assumed command of the crowd . . ." (October 3, 1962 report).

As could reasonably be anticipated, the record presents considerable conflict as to what transpired on the campus at Ole Miss during the dark, bloody, riot-filled night of September 30, 1962. But even the testimony of General Walker and his witnesses, for whose credibility he has vouched, establishes beyond question and without reference to the testimony of the witnesses called by Petitioner that the conclusory statements of which Walker complains are substantially true and constitute fair comment upon his activities.

Underlying all of the events which transpired is the naggingly persistent question: Why was General Walker of Dallas, Texas at the campus of the University of Mississippi on the night of September 30, 1962?

The answer, we submit, may be found in General Walker's own words and actions at the time:

On September 26, 1962, over radio station KWKH at Shreveport, Louisiana, General Walker issued the following call to arms:

> "It is time to move. We have talked, listened and been pushed around far too much by the anti-

> Christ Supreme Court. Rise to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every state in the Union. Rally to the cause of freedom. The battle cry of the Republic. Barnett, Yes, Castro, No. Bring your flags, your tents, and your skillets. It is time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi. The last time in such a situation I was on the wrong side. That was in Little Rock, Arkansas, in 1957, and 1958. This time I am out of uniform and I am on the right side and I will be there." (R. 545; Def. Ex. 7).

Walker reiterated his call the next morning in a television broadcast from Dallas, during which the following colloquy took place:

Unidentified Voice:

> "General, if forces go, will you lead this force?"

General Walker:

> "This is a cause for freedom. This is Americans, patriotic Americans from all over the nation. It is a movement for Freedom. And I will be there. Rise to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Thousands strong from every state in the Union. Rally to the cause of freedom." (R. 550).

The next evening, on September 28, 1962, General Walker took to the air from New Orleans (R. 559-560):

> "INTERVIEWER: Do you have plans, sir, for rallies, if and when the Federal troops are entered

into Mississippi, of a certain point in the state where all your followers will then meet with you to protest the integration if it does come about?

"GENERAL WALKER: I intend to join the movement. There are thousands of people, I am sure, already in Mississippi—probably hundreds of thousands there—that are already standing beside their Governor Barnett. The best place to do this would, of course, be at the capitol or at Oxford, at the University, since that is where the issue is involved, and I am sure that that is where most of the movement will move to, to show the grass roots of movement in this issue."

On September 29, 1962, the day before the riots, and with full knowledge that Governor Barnett had then been held in contempt by the Court of Appeals for the Fifth Circuit (R. 533-534) but was continuing his course of opposition to the admission of James Meredith (R. 583), Walker proceeded to Jackson, Mississippi, where he held yet another press and television conference and said:

"I am in Mississippi—beside Governor Ross Barnett.

"I call for a national protest against the conspiracy from within.

"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.

"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies. This is the conspiracy of the

> crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a nation." (R. 551; Def. Ex. 8).

The next day—September 30, 1962—General Walker arrived at Oxford, and, consistent with his stated purpose to "stand beside Governor Barnett," volunteered his services to the County Sheriff (R. 582). At the time he made this offer, he knew that the Sheriff was under the jurisdiction of the Governor; that the Governor had previously used the police forces of the state, including the Sheriff, to prevent the admission of Meredith to the University; and that the Governor had not since changed his position (R. 582-583).

Late on the afternoon of September 30, 1962, at the Ole Miss Motel in Oxford, General Walker held still another press conference, during which he once again urged defiance of the orders of the Courts and of the Federal Government:

> "As the forces of the New Frontier assemble to the north, let history be witness to the courage and determination that calls us to Oxford to support a courageous Governor. His lawful stand for state sovereignty is supported by thousands of people beyond the state borders now on their way to join you at Oxford." (R. 554-555).*

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*The General has also admitted that, during the week preceding his expedition to Oxford, he "probably" made the following statement when asked if he recommended that his volunteers go armed:

> "The Administration has indicated that it will do whatever is necessary to enforce this unconstitutional action. I have stated that whatever is necessary to oppose that enforcement and stand behind Govenor Barnett should be done." (R. 575).

The General also admits that he "may" have said:

> "The decision for force will be made in Washington. Evidently it has not been made yet. When and if it is, it's their decision to make. We will move with the punches." (R. 575).

While eating dinner that evening in a restaurant in downtown Oxford, General Walker listened to President Kennedy's speech announcing that James Meredith was in residence on the campus of the University and calling upon the people of Mississippi to preserve law and order (R. 599-602). General Walker's reaction: "Nauseating, nauseating" (R. 603).

Promptly on learning that there was "trouble" on the campus, Walker hurried there (R. 470-471).

"Trouble" was, to say the least, an understatement. By the time the General arrived at the campus, violent, widespread rioting was in progress (R. 150, 155, 170, 179-180, 234-237, 314, 351). The riot, which was to rage throughout the night, resulted in the deaths of two persons and injuries to at least 50 others, the destruction of 16 automobiles, and the arrest of 160 rioters (R. 236, 645, 894, 895).

The crowd, which at times had the earmarks of a lynch mob (R. 213), engaged in an almost continuous series of furious physical attacks on the Federal marshals who were guarding the Lyceum, the school's administration building (R. 235-237). The marshals were attacked with sticks, bricks, bottles, stones, rocks, pieces of concrete benches and even "Molotov cocktails" (R. 147, 176, 285, 358, 401, 636, 858, 859) and were forced to defend themselves with tear gas. Gunfire eventually broke out (R. 353, 386, 402, 896, 897) and the campus, in the words of one of Walker's witnesses, became "a battlefield" (R. 215).

Later that evening, as the rioting and wild confusion intensified, the mob attempted to charge the marshals with a firetruck and then a bulldozer (R. 495-496).

It was into this melee that General Walker voluntarily thrust himself, as he had promised he would (R. 558). So anxious was General Walker to be present in an official capacity, if possible, that, even after he had seen for him-

self the catastrophic results of the defiance of the Federal Government, he requested a Deputy Sheriff, whom he met on the campus by chance, to deputize him on the spot (R. 238, 611).

Is it any wonder, in the light of his widely publicized and highly intemperate and inflammatory statements, that the rioting students believed Walker had come to assist them and hailed him as their leader: "We have a leader" . . . "General, will you lead us up to the steps?" . . . "Will you get us organized, will you lead us?" (R. 608, 609).*

And is it any wonder, when General Walker delivered a speech from the Confederate Monument to the assembled mob (R. 484) and offered expert advice on how to combat the tear gas with which the Federal marshals were then defending themselves (R. 632), that Van Savell concluded that Walker had indeed "assumed command of the crowd" which had so assiduously sought his leadership?

At the trial, General Walker purported to justify his speech as an attempt to calm the crowd (R. 485). Yet the General himself admits that when an Episcopalian minister, the Reverend Duncan Gray, pleaded with him to help stop the riot, he declined, telling Reverend Gray to his face that the minister's attitude made him ashamed to be an Episcopalian (R. 481).

General Walker also admits that, in his speech, he congratulated the students on their "protest" (R. 632), telling them they had a right to "protest" (R. 628), could continue to "protest" (R. 621), and should "stand by your Governor" (R. 631)—all this at a time when Walker well knew that the "protest" consisted of a series of violent physical attacks on the Federal marshals (R. 631). He also admits telling the rioters that Colonel Birdsong, head

*It is conceded that General Walker was an object of attention (R. 313, 422, 477-478), and that, wherever he went, the crowds followed him and sought his advice (R. 285).

of the Mississippi Highway Patrol, had betrayed them—a sentiment clearly calculated to incite and inflame his audience. Walker even went so far as to absolve the mob from responsibility for the havoc they were then creating. He told them that Governor Barnett had not abandoned them (R. 623), thus creating an aura of legality for their actions under the so-called interposition doctrine; that the responsibility for the violence was "on the hands of the Federal Government" (R. 621); and that the forces carrying out the mandate of the Federal Court should have been sent to Cuba, not Oxford (R. 315, 336, 352, 485).

Respondent's own witnesses further testified that General Walker also said "Protest, protest, all you want to, you have a right to protest and they may run out of gas" (R. 284); that he urged the crowd to continue their protest at a time when they were throwing Molotov cocktails and setting cars on fire (R. 285-286); and that he said "You may not win but you will be heard" (R. 692) and "Help is on the way, thousands are coming" (R. 284).*

We need not speculate as to whether other portions of the speech deprecating violence were merely *pro forma* statements for the record or "aesopian" restatements of Walker's claim that responsibility for the violence rested with the Federal Government. Overall, at least, Walker's statements—even his version of them—could reasonably have been interpreted as a call to renewed and increased violence, and many of those present obviously considered them such.

By virtue of his status as a former United States Major General who had commanded the Federal troops at Little Rock and because of the inflammatory nature of his widely publicized statements in support of Governor Barnett, General Walker, simply by his presence on the campus,

*Presumably the "thousands" to whom Walker referred were those whom Walker himself had previously summoned to Oxford with their "flags, tents and skillets" to stand beside Governor Barnett.

became a central figure to whom the rioters looked for leadership. For this reason, the delivery of a speech such as that which even General Walker concedes he made, whether treated separately or taken in conjunction with his admitted conduct before and afterwards, establishes, we believe, the substantial truth and fairness of the conclusion that Walker "assumed command" of the crowd.

The second statement on which the $500,000 jury verdict was predicated was the statement that "Walker . . . led a charge" against the marshals. The trial court defined the term "charge" to mean "A movement toward the marshals, or a group or body of people moving toward an objective", and the term "led" to mean "Activities by a person who directs, moves to action, or encourages in some action or movement" (R. 58).

Measured by these definitions and giving to General Walker the benefit of every reasonable inference, the evidence in this case plainly establishes that on more than one occasion General Walker led a charge.*

General Walker himself concedes that on at least two occasions during the evening he moved in a westerly direction from the area of the Confederate Monument toward the area of the flagpole (R. 478-479, 489-490). Since the Lyceum (where the Federal marshals were gathered) is west of the flagpole, it is obvious that on at least two occasions General Walker advanced toward the Federal marshals.

General Walker denied at trial (R. 490-491) that he was on either occasion "leading a charge", but here is what his own witnesses had to say on that subject:

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*There are almost as many versions of the "charge" as there are witnesses. But this is to be expected in a situation where, as here, numerous witnesses attempt to recollect events which occurred in murky darkness, and in the midst of violence, bloodshed, tear gas and general confusion.

Talmage Witt, a Deputy Sheriff who was called by the Plaintiff and who was with Walker substantially all of the time Walker was on the campus (R. 284, 285), testified that Walker advanced toward the flagpole on two occasions. On the first occasion, prior to the speech, a small crowd followed him until they were dispersed by tear gas (R. 265-266).

The second occasion is succinctly described in Witt's written statement, which reads in relevant part (Def. Ex. 1, R. 282, 285):

> "After some in the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: 'Keep protesting and see if we can get closer.' He then started towards the marshals and the crowd of at least a thousand by that time, followed him. This crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them. At all times during this, I was near or in sight of General Walker and stayed in sight of him until about 5 a.m. the next morning."

And further (*ibid.*):

> "On a number of occasions Walker would walk towards the marshals, or in that general direction, and whenever he did, a large crowd would fall in behind and follow him. In fact, wherever Walker

went, the crowd followed. During the time after the first march towards the marshals with Walker in or near the lead, I heard different statements, many of which I cannot remember, but at one time, in talking with a group about the protest they were making, he said, 'good, good, keep it up.' I heard people asking how to snuff out or counteract the tear gas, and Walker told them to use water, and right after that they got a fire truck and hose and began to try to use that to stop the gas."

Charles May, another of Plaintiff's witnesses, testified that he saw Walker walking toward the flagpole with a crowd surrounding him (R. 819-820).

Danny Lee Hunter, who was called on behalf of the Plaintiff, testified that when Walker finished the speech at the Confederate Monument he exhorted his listeners: "Come on, let's go," or "Let's go up and see," and started walking toward the flagpole with practically the entire crowd—estimated at approximately 200 people—following him (R. 708-709).

Plaintiff's witness Edwin Leon Jackson testified that the General walked to the vicinity of the flagpole; that ten or fifteen people followed him; that twenty-five were with him; and that those in front of him were throwing rocks (R. 688-690).

Plaintiff's witness Henry Edwards testified that Walker approached the flagpole, accompanied by some fifty or sixty people (R. 429).

Plaintiff's witness Cecil Cox testified that Walker was in the middle of a group of about twenty-five or thirty people who walked up towards the marshals, some waving a flag of truce and demanding "we want that nigger" (R. 206, 208, 213). Following the speech at the Confederate Monument, Cox saw the General and fifteen or twenty others start toward the Lyceum building (R. 212).

Richard Harvey Sweat, another witness for the Plaintiff, testified that Walker walked toward the Lyceum building before his speech with students around him (R. 154-156) and that he walked toward the flagpole a second time after his speech with about fifteen people, including some who had missiles in their hands (R. 189-196).

Finally, there is the testimony of Alfred Kuettner, a reporter for United Press International. Kuettner's testimony is particularly significant because Respondent, at the trial, sought to contrast the alleged unfair treatment accorded to him by Petitioner with the supposed fair treatment accorded him by UPI (R. 1221-1223). Yet the UPI reporter, testifying for Plaintiff, said that Walker was "more than an interested observer" when he came onto the campus (R. 858); that he gave advice to the rioters and was the focal point of student activity (R. 859); and that he, Kuettner, personally saw Walker advance on the Lyceum with two men, one on each side of him (R. 846-847).

The inescapable conclusion which emerges from the welter of testimony is this: Whether Walker advanced toward the marshals with a small group or a large one, whether the mob was hurling missiles at the marshals or demanding "that nigger" under a flag of truce, whether the advance proceeded at slow march or double-time, it is beyond dispute, even on the testimony offered by the Plaintiff, that Walker, during the four to five hours he was on the campus (R. 225), did, in fact, lead at least two charges on the Federal marshals.

We have so far adverted only to the testimony of Respondent's witnesses, since even this evidence establishes conclusively that General Walker did indeed "assume command of the crowd" and "lead a charge." These conclusions are, however, not only corroborated but amplified by the testimony of Petitioner's witnesses.

That testimony discloses, for example, that General Walker not only agreed to lead the rioters in protesting (R. 1082), but also called upon them to "riot, riot" (R. 932). The evidence also discloses that, at a time when a violent, bloody riot was already in progress, General Walker told the students that "You can continue to protest until Meredith is not admitted" (R. 937). There was further testimony that General Walker exhorted the rioting students to "Give them protest, give them casualties" (R. 1136).

Petitioner's evidence further showed that the General repeatedly sought to incite and encourage the rioters by promising that they would receive reinforcements. For example, there was testimony that General Walker told the students to "keep it up all night," and, using pronouns which identified him with the rioters, said that "We have got more people coming" (R. 1059). There was testimony too, that the General told the rioters that the volunteers he had promised were "around town" and would be "available when they are needed" (R. 1134), and that "We can bring them in if we need them" (*Id.*). Defendant's witnesses also testified that General Walker told the students, "Stand fast, firm. There are thousands behind you. You will win in the end" (R. 1022).

Other testimony offered by Petitioner strongly confirms that General Walker in fact "assumed command" and "led a charge". Tom Gregory, a staff writer for the *Meridian Star* and a native of Mississippi, testified, for example, that a large group formed around the General with cries of "He's going up to the Marshals", "General Walker won't let the Marshals stop him" and "Gas won't stop General Walker", after which the General advanced toward the Lyceum Building "at a rather fast clip" with a crowd of about 200 following him (R. 1134-1135).

Doy Gorton, an Ole Miss student, testified that "General Walker went straight toward the Lyceum Building" while "the students and everybody around them started moving in behind General Walker", "yelling rebel yells and cursing and screaming", and that the crowd thereupon advanced, throwing rocks and bricks, until turned back by a volley of tear gas (R. 1097-1098).

Travis Buckley, an attorney from Louin, Mississippi, testified that, in response to cries of "Lead us on, General Walker" and "Be our leader", the General nodded and said "All right, all right, I will", and that the students then gathered around Walker and advanced about 250 yards towards the Lyceum, many of them throwing rocks (R. 1112-1113).

John Charles Hill, a student at Ole Miss, testified that, after the mob shouted "Tell us what to do" and "You are our leader", the General walked toward the Lyceum Building "at a steady pace", and the crowd "sort of fell in behind him" (R. 1059-1061).

The reporter Kingsby Kingsley, a native of Mississippi and an Ole Miss graduate not connected with the Associated Press, saw General Walker walk toward the Lyceum Building, wave his arms and motion to a large group of students to come with him (R. 1122, 1124).

General Walker's attitude toward the violence is reflected in the testimony of Tom Gregory, the *Meridian Star* staff reporter, who testified that the General called the riot "A splendid protest" and exhorted the crowd to "Give them protest, give them casualties." (R. 1136).

Finally, there is Gregory's contemporaneous report for the *Meridian Star,* which was written wholly independently of the Associated Press dispatches and at a time when Gregory had not discussed with Savell the events in ques-

tion. This report, which was published in the *Meridian Star* on October 1, 1962, reads, in full text (Def. Ex. 29; R. 1138, 1490-92):

"WALKER CHARGES, THEN FALLS BACK

Outsiders Take Part In Campus Rioting

By TOM GREGORY

Star Staff Writer

OXFORD, Miss.—Into the mob walked Edwin C. Walker, former major general of the United States Army.

Around him swirled a whirlpool of humanity and human emotion. Two hundred yards away, a line of gas-masked, club and tear gas-armed federal marshals had turned the ancient Lyceum building into a federal fort.

'Now we have a leader,' screamed somebody. 'Rally to General Walker!'

Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him.

'Tear gas won't stop him,' another person yelled. 'Follow General Walker.'

About 50 yards from the federal line, tear gas bombs began falling around the group.

General Edwin Walker (retired), who wouldn't retreat, did.

One of Many

The former Army officer was just one of the number of outsiders—how many will probably never be known—who egged and aided a hard core of Ole Miss students into a rock flinging, destructive riot that left two dead, 75 to 100 injured, at least

31 arrested and seriously damaged the reputation of a university.

I walked through that howling, passionately unthinking mob for more than four hours during the violence here last night. I saw the rock throwers and the agitators.

I stood under a Confederate flag hoisted on the flag pole before the stately Lyceum and watched students and outsiders rush the marshals' line, retreat before tear gas, regroup and charge again—all without any attempt at control.

Most of the rioters were students—although the number of Ole Miss men steadily decreased through the night. The number of outsiders—non-students—steadily increased.

Denim-trousered adults, and teenagers from nearby towns furnished the impetus that kept the college boys at their job of injury and destruction.

One Reference to Meredith

"Do you think they'll leave that nigger here now?" a young student asked nobody in particular shortly after the riot began. In each hand he held a brick.

That was the only direct reference to Negro James Meredith I heard after the rioting began.

Earlier the crowd had attacked at least two newsmen and destroyed a number of cameras and tape recorders, but during the height of the riot, they practically ignored writers taking notes. No cameramen dared take a picture once the situation got out of control.

I wore no identification and was dressed in a short-sleeved white shirt and tie. I was never questioned. Late in the evening, there were so many

non-students that nobody questioned anybody who did not have a camera or recorder.

Only a few of the students—I would estimate 200—actually participated in the violence and destruction.

There were incidents of violence almost as soon as the newsmen started arriving on the campus about 7 p.m. But then, almost without warning, the marshals began firing tear gas into the crowd. After that it was a mob scene.

Walker Enters Scene

About an hour after the rioting started General Walker entered the scene.

After his abortive attempt to reach the marshals' line, he confined his activity to speech-making and watching. A crowd gathered around him at the edge of the grove and he finally said, 'All right, I'll speak to them.'

Just prior to that, an Episcopal priest, Rev. Duncan Gray, Jr., had tried to talk him into leaving and taking the crowd with him.

'They'll follow you,' Gray said.

But Walker stood at the foot of the old Confederate monument and began speaking.

He told the crowd there had been a 'sellout.' He said a representative of the governor's office had told him that Gov. Ross Barnett's orders were not to let the marshals on the campus.

After an impromptu whispered conference with a blue-coated follower, Walker said, that a member of the Highway Patrol had been responsible for the sellout.

Again there was a conference and Walker said:

'The name is Birdsong.'

Col. T. B. Birdsong is the head of the Highway Patrol and was in the car that led the first group of marshals to the campus during the afternoon.

Then, referring to the Episcopal priest who had asked him to leave:

'I am ashamed that I am an Episcopalian.'

At this point Rev. Gray appeared in front of the crowd and was forceably taken from the area by men who feared that he would be injured.

Later a group of students attempted to arrange a truce, but were unable to make the deal (it was: no rocks, no tear gas) because of shouts from the crowd that had inched toward the building. Among the truce-triers were members of the Ole Miss football squad.

One of the shouters was a fat, middle aged man who quite obviously was not a student.

'No truce! No truce!' he shouted.

There was no truce. After a while the troops arrived."

Notwithstanding the foregoing, the jury returned a verdict for Respondent for $500,000 in general damages and $300,000 in punitive damages (R. 62-63).

The definition of "malice" contained in the trial court's charge to the jury (R. 60, 61) was more favorable to General Walker than the definition of "actual malice" required by *New York Times Co.* v. *Sullivan.* Even so, the trial court found that there was no evidence of malice, set aside the jury's verdict so far as related to punitive damages and entered judgment in favor of Respondent for $500,000 (R. 78).*

*Upon the facts, the Texas courts were clearly correct in holding that there was no evidence to support a finding of malice. Moreover no reason was adduced at trial why Van Savell, a native of Mississippi (R. 719) formerly employed by the segregationist *Jackson*

An appeal to the Texas Court of Civil Appeals followed, where the judgment was affirmed *per curiam* (R. 1551, 393 S. W. 2d 671) (1965), and an application for rehearing was denied (R. 1552, 393 S. W. 2d 671) (1965).

An application for a writ of error was thereafter filed with, and duly denied by, the Supreme Court of Texas, the court finding no reversible error (R. 1553). An application for rehearing in the Supreme Court of Texas was also denied (R. 1554).

Petitioner's constitutional claims were uniformly rejected below. Since the Supreme Court of Texas rendered no opinion, we briefly advert, so far as relevant to the constitutional questions here presented, to the opinions of the trial court and the Texas Court of Civil Appeals.

The opinion of the trial court is set forth in a letter to counsel dated July 29, 1964, and poses the constitutional questions as follows (R. 72):

> "Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant."

Clarion-Ledger (R. 720), should have had any malice toward General Walker.

In an effort to create an issue of malice without supporting evidence, Respondent has engaged in captious attacks on peripheral details of the Van Savell story, such as the allegedly false statement that two men took General Walker by the arms during one of the charges. Even as to that detail, the evidence is conflicting (R. 269-271). But, even if the contrary testimony on such an inconsequential detail is accepted, no malice is established; similar conflicts occur among General Walker's own witnesses (Compare, e.g., R. 242 with R. 708), and such conflicts were obviously inevitable in the darkness and confusion of the Oxford riots.

In holding the *Sullivan* doctrine inapplicable, the trial court said (*ibid.*):

> "The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.
>
> "Freedom of the press is perhaps the most important protection against tyranny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.
>
> "However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case."

The Texas Court of Civil Appeals affirmed, relying, as to the constitutional issues, solely on the authority of a thirty-seven year old law review article and some cases cited to support the proposition that the right of a citizen to defend his reputation "is zealously guarded". The Court said (R. 1542-1543):

> "We find no merit in appellant's contention that the reports, made without malice, are protected from

the claim of libel by the First and Fourteenth Amendments to the United States Constitution.

* * *

"We find no application of the authorities cited by the appellant to the facts of this case."

Moreover, the Court held inapplicable the defenses of "substantial truth" and "fair comment", characterizing the latter defense as a "weak defense . . . subject to so many limitations that it is seldom completely applicable." (R. 1540).

The Supreme Court of Texas declined even to hear the case, finding no reversible error in any of the rulings below (R. 1553).

SUMMARY OF ARGUMENT

The doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, should be extended to public men of political prominence, such as Respondent, who deliberately thrust themselves into the vortex of important public events. The essential policy behind *Sullivan*, that of protecting and promoting free and unfettered discussion of public issues and those who are in a position to influence the resolution of such issues, cannot be implemented by a privilege which extends only to "public officials". Many prominent public figures who hold no public office have the power, to a much greater extent than many "public officials", to influence public thinking on important political and social issues. The application of *Sullivan* is especially appropriate here, since General Walker deliberately and voluntarily participated centrally in the events at Oxford, Mississippi to such an extent that it would have been impossible to report the facts regarding that fateful

confrontation between Federal and State power without describing the General's activities.

The award of $500,000 in general damages, with no proof of actual damages, is, in the circumstances of this case, itself so excessive as to be violative of the First and Fourteenth Amendments. If such awards are under such circumstances permitted to stand, free discussion of major public events will necessarily be substantially and unconstitutionally inhibited. The inhibiting effect is magnified where, as here, the complainant institutes suits in a large number of jurisdictions based on the same dispatches.

The Texas courts, in holding that the statements here complained of were not "fair comment", have so truncated the defense of fair comment as to render it meaningless, thus violating the First and Fourteenth Amendments. To exclude from the scope of the defense of fair comment the conclusory statements that Walker "assumed command" and "led a charge", on the ground that they were "statements of fact", is to impose an unconstitutional restriction upon discussion of public events.

Finally, the record in this case conclusively establishes that the statements here complained of were true or substantially true. The findings of falsity by the jury and the holdings to the same effect by the Texas courts are so totally unsupported by the evidence as to constitute a denial of due process.

ARGUMENT

POINT I

THE SULLIVAN DOCTRINE IS APPLICABLE TO THIS CASE AND PRECLUDES RECOVERY BY RESPONDENT

It plainly appears from the Record that the statements complained of by General Walker are either true or constitute fair comment upon facts which are essentially undisputed. Accordingly, it is possible for this Court to dispose of

this case without reaching the broader Constitutional questions here presented (See Points III and IV, *infra* pp. 48-51).

Those Constitutional questions are, however, of such vital importance to protection of the freedoms of speech and press which are guaranteed by the First Amendment that we believe it appropriate to discuss them at the very outset.

In this connection, the fundamental question here presented is whether the doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, is applicable to Respondent, who, though not a "public official," is a self-proclaimed person of political prominence and influence who chose voluntarily, aggressively and defiantly to thrust himself into the very center of what was perhaps the most fateful confrontation between Federal and State power since the Civil War. We submit that the doctrine is applicable in the circumstances disclosed by this record.

The Texas courts held squarely that there was no evidence of "malice," actual or otherwise, present here. They nevertheless refused to apply the *Sullivan* doctrine on the sole ground that General Walker was not, at the time of the Oxford riots, a "public official". We submit, however, that the *Sullivan* doctrine cannot, consistent with the First Amendment, be so limited.

In *Sullivan* itself, this Court said that its holding was based upon a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open" (376 U. S. at 270) and that "freedom of expression upon *public questions* is secured by the First Amendment" (376 U. S. at 269).*

The controlling significance of this emphasis upon "public issues" and "public questions" has been confirmed by subsequent decisions of this Court.

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*Except as otherwise indicated, the emphasis supplied to quotations from the language of this Court's opinions is our own.

Thus, in *Garrison* v. *Louisiana*, 379 U. S. 64, this Court said (pp. 74-75):

> "Truth may not be the subject of either civil or criminal sanctions *where discussion of public affairs is concerned.* And since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .,' 376 U. S. at 271-272, only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning *public affairs* is more than self-expression; it is the essence of self-government."

More recently, in *Rosenblatt* v. *Baer*, 383 U. S. 75, this Court said (p. 85):

> "There is, first, a strong interest in debate on *public issues*, and, second, a strong interest in debate *about those persons who are in a position significantly to influence the resolution of those issues.*"

And further (p. 86):

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in *public discussion* are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

Finally, as recently as December 5, 1966, in *Bond* v. *Floyd*, U. S. , 87 S. Ct. 339, 349 (not yet officially reported), this Court again emphasized:

> "The central commitment of the First Amendment, as summarized in the opinion of the Court in New York Times v. Sullivan, 376 U. S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964), is that 'debate on *public issues* should be uninhibited, robust, and wide-open.'"

The basic issue here presented, therefore, is whether the profound national commitment to free and open discussion of public issues can or should be limited to discussions of the activities of "public officials" or whether such commitment must extend to matters of grave public interest and importance and to participants therein. Petitioner believes there can be no true freedom of discussion concerning such matters unless the Constitutional doctrines enunciated in *Sullivan* apply, at the very least, to voluntary participants in public controversies, particularly where, as here, such persons have assumed positions of leadership.

In a pluralistic society such as the United States, decisions of far-reaching political and social importance are continuously and significantly influenced by the views and activities of persons who, though public men, are not "public officials." Many persons—including General Walker—with myriad points of view on public issues have the ability far beyond the power of many "public officials" to influence public thinking on such issues. If the participation of such public men in affairs of pressing public importance and concern cannot be the subject of unfettered discussion and comment, then the process of decision, and dissemination of the facts and views necessary to formulate

decision, must necessarily be inhibited to a degree utterly incompatible with that open discussion which rests at the heart of our system of government.

Specifically with respect to the case at bar, we ask: How can the story of Oxford be told without free and full discussion of the activities of General Walker? Any attempt to describe the events at Oxford without discussing the activities of this central figure would be not only frustrating, but futile.

It is of obvious national interest and significance when General Walker, a person of self-proclaimed national political prominence, a former General officer of the United States Army still addressed as "General" by Court and counsel, calls upon ten thousand of his fellow citizens from every state in the Union to "bring your flags, your tents and your skillets" to defy the executive and judicial power of the Federal Government and thereafter, when generally acknowledged by the mob to be its leader, plays an active role in a violent and bloody assault upon duly constituted officers of the Federal Government then performing their official duties. Such conduct is particularly ironic, and therefore particularly newsworthy, when that same person, while a public official, had been in his own words "on the wrong side" in a similar confrontation in Little Rock.

Indeed, one could scarcely imagine a factual situation which would fit more precisely the very question which this Court expressly left open in *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 (n. 12), namely:

> ". . . whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

Not only did General Walker "thrust himself into the vortex" of the Oxford confrontation through widely publicized, intemperate statements and actions immediately preceding the bloody riots; he became, in effect, a catalyst for the tragic events which occurred there.

If the actions of every public official from the President of the United States and the Governor of Mississippi to the most junior United States Marshal or Mississippi Deputy Sheriff can freely be discussed and commented upon within the ambit of *Sullivan,* it would indeed be paradoxical to exclude from that discussion the actions and statements of General Walker who, voluntarily, and with as much publicity as he could muster, traveled from Texas to Mississippi to "stand beside Governor Ross Barnett" in the cause of diehard segregation.

It is no answer to the foregoing to assert, as does General Walker in this case, that the defense of "truth" is sufficient protection for one who seeks to report and comment upon the activities of such persons as Respondent. The basic fallacy of this contention has often been recognized by this Court, most recently in *Bond* v. *Floyd,* where the Court once again reiterated that "erroneous statements must be protected to give freedom of expression the breathing space it needs to survive . . . ." 87 S. Ct. at 349. *Accord, Garrison* v. *Louisiana,* 379 U. S. 64 at 74. *See, also, Cantwell* v. *Connecticut,* 310 U. S. 296 at 310.

As this Court said in *Sullivan,* 376 U. S. 254, at 279:

> "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. * * * Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and

> even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U. S., at 526. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

Events, activities and decisions which become the subject of political controversy are often so complex that the whole truth concerning them can never fully be known or proved. And when, as here, the statements complained of are essentially conclusory in nature, the difficulty of establishing their "truth" is infinitely magnified. Particularly is this true in matters of public controversy involving highly emotional issues, where the dividing line between fact and comment is often difficult to draw.

The press will not be free, unfettered, or, in the case of smaller enterprises, even capable of survival* if the *Sullivan* doctrine is not extended to persons of political prominence such as General Walker and the "truth" of an article concerning such persons is to be determined by those strongly opposed to its thrust.

Overwhelmingly, the developing law in both state and lower Federal courts supports the extension of *Sullivan* to persons who, though not public officials, are prominent in the public arena and have taken part in the resolution of issues of public importance. *See, e.g., Walker* v. *Associated Press,* Colo. , P. 2d (1966); *Walker*

*For example, Hodding Carter, publisher of *The Delta-Democrat Times,* has personally been sued for slander by General Walker on the basis of remarks made about Walker and his cause in a speech made at the University of New Hampshire on October 11, 1962, as a part of that University's "Distinguished Lecture Series". Damages of $2,000,000.00 are sought. *Edwin A. Walker* v. *Hodding Carter,* Cause No. 6182, Circuit Court of Washington County, Mississippi.

v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231 (W. D. Ky. 1965), *rev'd on other grounds,* F. 2d (6th Cir. 1966)*; *Pauling* v. *Globe-Democrat Publishing Company,* 362 F. 2d 188 (8th Cir. 1966), *app. pend'g; Pauling* v. *News Syndicate Company,* 335 F. 2d 659, 671 (2d Cir. 1964), *cert. denied,* 379 U. S. 968; *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dep't 1964), *aff'd,* 15 N. Y. 2d 1023, 207 N. E. 2d 620, 260 N. Y. S. 2d 29 (1965); *State* v. *Browne,* 86 N. J. Super. 217, 206 A. 2d 591, 598-599 (App. Div. 1965); *Pauling* v. *National Review,* 49 Misc. 2d 975, 269 N. Y. S. 2d 11 (Sup. Ct. N. Y. Co. 1966), *app. pend'g.***

Of particular interest here are those cases in which the courts have applied the *Sullivan* doctrine to General Walker himself with respect to the very news reports complained of in this case.*** Thus, in *Walker* v. *Courier-Journal and Louisville Times Co.,* 246 F. Supp. 231 (W. D. Ky. 1965), *rev'd on other grounds,* F. 2d (6th Cir. 1966), the District Court reached the "inescapable conclusion" that *Sullivan* applied, saying (246 F. Supp. at 233-234):

> "The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political

*For the convenience of the Court, the as yet unreported opinions of the Supreme Court of Colorado and of the Court of Appeals for the Sixth Circuit are annexed hereto as an appendix.

***See; also,* Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment",* 1964 Sup. Ct. Rev. 191; Berney, *Libel and the First Amendment—A New Constitutional Privilege,* 51 Va. L. Rev. 1 (1965); Comment, *The Scope of First Amendment Protection for Good Faith Defamatory Error,* 75 Yale L. J. 642 (1966); 19 Sw. L. J. 399 (1965); 9 Vill. L. Rev. 534 (1964); 16 Syracuse L. Rev. 132 (1964).

***Omitted from this discussion is *Walker* v. *Associated Press,* La. App. , So. 2d , (1966) *app. pend'g,* discussed below at pages 43-45.

prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

"Had not Plaintiff thereby become a 'public man'? Could he not have reasonably foreseen that his being a person of 'political prominence' his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported? This Court so believes.

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in New York Times v. Sullivan is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.'"

And further (246 F. Supp. at 234):

". . . I am perhaps 'plowing new ground' in legal effect, but also with the accompanying con-

viction that not to do so would negate the spirit of the Times Opinion which I believe to be a '* * * profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open * * *.' Public debate cannot be 'uninhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in reporting the words and actions of persons of national prominence and influence (not 'public officials') who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.

"This is particularly so here where open riot and turmoil with accompanying destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night."

The District Court's holding that *Sullivan* applied was sustained by the Sixth Circuit, which said (Appendix, p. 12a):

"It is apparent, and Appellant alleges in his petition, that he is a person of political prominence, and is a person in a position significantly to influence the resolution of issues of national importance. It is also apparent that Appellant involved himself dramatically into the racial crises in Oxford,

> Mississippi; that he 'thrust himself into the vortex of the discussion of a question of pressing public concern.' The motivating force of the Times decision compels its applicability here."

Walker v. *Associated Press*, Colo. , P. 2d (1966) was another of Respondent's many libel actions against Petitioner. The Supreme Court of Colorado held squarely and unanimously that *Sullivan* was applicable to General Walker upon the very facts involved in this case. The Colorado Court said (Appendix, p. 7a):

> "The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.
>
> "We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press."

The case before this Court represents one of the most serious—and to date successful—attacks ever made on freedom of the press. What is here at stake is nothing less than the fundamental right of news media to publish and

disseminate, without fear or favor, good faith reports and comment concerning events of national significance and persons of political prominence who are involved or involve themselves in such events.

This is but one of at least fifteen cases brought by General Walker against the Associated Press, its members, or both, arising out of news reports identical to or substantially the same as those now before this Court. In those fifteen cases, Respondent seeks damages aggregating some $33,250,000.*

These cases were for the most part filed in forums in Southern or border states where it could reasonably be anticipated that juries would share the belief, widely held in the South, that the South's position in the segregation controversy had been grossly falsified and maliciously reported by national news media, and might therefore be influenced, in determining the issues of liability and damages, by the widespread regional feeling that "irresponsible outsiders" should be taught a lesson.

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* I CASES NAMING ASSOCIATED PRESS AS A DEFENDANT

Name of case	Court in which filed and docket number	Damages demanded in complaint
Walker v. The Associated Press	District Court, Tarrant County, Texas, No. 16624	$2,000,000
Walker v. The Associated Press	Circuit Court of Duval County, Florida, Civil Action No. 64-246-L; removed to U. S. District Court, Middle District of Florida, No. 64-267-Civil-J	$2,000,000
Walker v. The Associated Press	Circuit Court of Pulaski County, Arkansas, No. 58859; removed to U. S. District Court, Eastern District of Arkansas, No. LR-65-C-178	$1,000,000
Walker v. Associated Press and Times-Picayune Publishing Corporation	District Court, Caddo Parish, Louisiana, Number 160,536	$2,250,000
Walker v. The Denver Post, Inc. and The Associated Press	District Court, City and County of Denver, Colorado, Civ. No. B66072	$1,000,000
Walker v. The Kansas City Star Company and The Associated Press	Circuit Court, Jackson County, Missouri, No. 133,768	$1,000,000

That this is what in fact occurred is demonstrated by this very case, in which the jury awarded some $300,000 in punitive damages on a record which the Texas courts thereafter held, as a matter of law, was wholly devoid of any evidence of malice and by the further award of some $500,000 in general damages, although not one penny of actual damages was established or even claimed.

In the only other case heretofore tried—that in the Louisiana state courts—the jury returned a verdict of $3,000,000, although Respondent himself had only sought damages of $2,250,000 and punitive damages are not allow-

Name of case	Court in which filed and docket number	Damages demanded in compliant
Walker v. Savell and The Associated Press	Circuit Court, Lafayette County, Mississippi, No. 7137; removed to U. S. District Court, Northern District of Mississippi, No. W-C-34-62; Subsequently dismissed as to Associated Press for lack of jurisdiction.	$2,000,000
II Cases Not Naming Associated Press as a Defendant		
Walker v. Courier-Journal and Louisville Times Company, Inc. and WHAS, Inc.	U. S. District Court, Western District of Kentucky, Civil Action 4639	$2,000,000
Walker v. Times Publishing Company	Circuit Court, Pinellas County, Florida, No. 17,694-L	$2,000,000
Walker v. The Pulitzer Publishing Company	U. S. District Court, Eastern District of Missouri, Eastern Division, No. 63 C 361(1)	$2,000,000
Walker v. Atlanta Newspapers, Inc. and Ralph McGill	U. S. District Court, Northern District of Georgia, Civ. No. 8590	$10,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-270	$2,000,000
Walker v. The Journal Company	U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-276	$2,000,000
Walker v. The Gazette Publishing Company, Inc.	Circuit Court, Pulaski County, Arkansas, Civ. No. 58857	$1,000,000
Walker v. Arkansas Democrat Company	Circuit Court, Pulaski County, Arkansas, Civil No. 58858	$1,000,000
	Total	$33,250,000

able in a civil action in Louisiana.* On appeal, although the judgment was reduced to $75,000, the Louisiana Court of Appeals held as a fact that actual malice had been established and thus avoided a determination as to the applicability of *Sullivan*.**

These cases are striking examples of the effectiveness of the technique of converting the libel laws into weapons to punish those disseminating information about public controversies which arouse deep emotions—in this case the attempts by hard-core segregationists, in public office and out, to perpetuate a system of racial segregation which is patently unconstitutional.***

The resultant threat to fundamental freedoms of speech and press is self-evident. As this Court said in *Sullivan*, 376 U. S. 254, 278, in speaking of a libel award against the New York Times in Alabama, also for half a million dollars:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

If ever there was a case which, in the interest of free speech and the public good, requires the extension of the *Sullivan* doctrine, this is that case.

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*See, e.g., *Gugert* v. *New Orleans Independent Laundries*, 181 So. 653 (La. Ct. App., 1938) (not officially reported); *Heeb* v. *Codifer & Bonnabel*, 162 La. 139, 110 So. 178 (1926); *Brian* v. *Harper*, 144 La. 585, 588, 80 So. 885, 886 (1919); *Universal C. I. T. Credit Corp.* v. *Jones*, 47 So. 2d 359 (La. Ct. App. 1950) (not officially reported).

**Petitioner has applied to the Supreme Court of Louisiana for a writ of error.

***This technique is not novel. It is patterned, apparently, on that adopted by Alabama and its officials in attempting to punish the New York Times for criticizing Alabama's conduct in the desegregation controversy (*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 278, 292).

In this, the first to be tried of the fifteen lawsuits brought by Respondent against Petitioner, its members or both, the Texas courts have all expressly held that Respondent failed to prove malice, actual or otherwise, and the record demonstrates beyond doubt that there could have been none. Yet, in the second of the suits to be tried, a Louisiana trial court and the Louisiana Court of Appeals, on precisely the same operative facts, have sustained a finding by a jury that Petitioner's publication was motivated by "actual malice". It may reasonably be anticipated that, in the remaining suits, Respondent will attempt again and again to circumvent any holding that *Sullivan* applies to him by urging in each of those cases that dissemination of the dispatches here involved was motivated by "actual malice".

We believe, therefore, that a holding which extends *Sullivan* to Respondent may neither fully resolve the constitutional issues presented by this and Walker's other suits, nor, as a practical matter, relieve Petitioner of the great expense and effort of defending, with whatever ultimate success, the many other actions now pending. This Court has already recognized, in *Sullivan* (376 U. S. 254, 279), that the "fear of the expense" of proving truth might deter publication and restrict discussion of questions of public importance. How much greater is the deterrent when it is magnified, as here, by a multiplicity of suits arising out of the same dispatches. The threat inherent in the pendency of these suits, and the burden of defense thus placed upon Petitioner is, we submit, as unconstitutionally inhibiting a restraint on free discussion as a single extravagant award. *See, e.g.*, Painter, *Republication Problems in the Law of Defamation,* 47 Va. L. Rev. 1131, 1138 (1961); Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959, 968-970 (1953); *Hartmann* v. *Time,* 166 F. 2d 127, 134 (3rd Cir.

1948), *cert. denied,* 334 U. S. 838; *Nagoya Associates, Inc.* v. *Esquire, Inc.,* 191 F. Supp. 379, 382 (S. D. N. Y. 1961).*

General Walker's multi-state, multi-million dollar attack on Petitioner and its members is a striking illustration of the dangers which led a minority of this Court to question the efficacy of the actual malice qualification. As Mr. Justice Douglas said, in his concurring opinion in *Garrison* (379 U. S. 64 at 81):

> "If malice is all that is needed, inferences from facts as found by the jury will easily oblige."

Or in the words of Mr. Justice Black, in his concurring opinion in *Rosenblatt* (383 U. S. 75 at 95):

> "Half-million-dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that 'malice' be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried. And this Court cannot and should not limit its protection against such press-destroying judgments by reviewing the evidence, findings, and court ruling only on a case-by-case basis."

For all these reasons, we ask this Court not only to hold that the *Sullivan* doctrine is applicable to Respondent, but, in fulfillment of its governing role in the administration of justice in cases involving constitutional issues, to rule, also, that Respondent, in failing to prove actual malice in this case, is hereafter precluded from unconstitutionally restricting free speech and press by raising the issue of actual malice in any of his other actions against Petitioner which are based on the same or substantially the same facts.

*Indeed, the expenses incurred by Petitioner and its members in defending Respondent's pending actions has already greatly exceeded the judgment in this case.

POINT II

THE AWARD OF $500,000 GENERAL DAMAGES IN THIS CASE ITSELF CONSTITUTES AN ABRIDGMENT OF CONSTITUTIONAL PROTECTION.

One of the most shocking features of this case is the inordinate and unconscionable size of the award—half a million dollars in "general" damages where no actual pecuniary or other damage was or could be shown.

The enormous award was plainly intended, not to compensate, but to punish and deter; to wreak vengeance on Petitioner for disseminating over its news service good faith reports of the Oxford riots and the related activities of General Walker, and to deter Associated Press, its member newspapers and other news media from gathering and disseminating news on the integration issue deemed unfavorable to the segregationist cause or critical of prevalent Southern views.

Permitted to stand, the award will indeed deter and perhaps entirely preclude news gathering and disseminating institutions from performing a function vital to any free society—the disclosure and discussion of controversial public issues and personalties. What newspaper, what magazine, what wire service would, as a practical matter, disseminate a report unfavorable to General Walker or any other controversial public or political figure if there were substantial risk of a judgment for half a million dollars? Or if that news medium could be forced to defend—perhaps successfully, but nevertheless at great cost and effort—libel suits, however specious, brought wherever the plaintiff believes he has found a forum friendly to himself or antagonistic to the news medium involved?

We respectfully submit that, in and of itself, the inexplicably high award for compensatory damages alleged to

have been suffered in Texas alone presents a substantial constitutional question under the First and Fourteenth Amendments.* The repressive effect of such an award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument and discussion so plain, the punishment for such a presentation so burdensome and oppressive that this Court should not, consistent with the First Amendment, permit its imposition. Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717; *Shelton* v. *Tucker,* 364 U. S. 479; *Speiser* v. *Randall,* 357 U. S. 513.

POINT III

THE DEFENSE OF "FAIR COMMENT" AS CONSTRUED AND APPLIED BY THE COURTS BELOW IS SO LIMITED AS TO BE UNCONSTITUTIONAL.

Petitioner contended throughout the proceedings below that the conclusory statements which were held libelous constituted "fair comment" on the activities of General Walker at Oxford. The Texas courts, however, held otherwise. In so holding, those courts so truncated the doctrine of fair comment as to leave it meaningless, and thus violated the First Amendment to the Federal Constitution.

The Texas Court of Civil Appeals rejected the fair comment defense on the ground that the statements that Walker "assumed command" and "led a charge" were not

*Although the judgment is civil in form, we believe an award which is two hundred and fifty times the maximum statutory fine for criminal libel (see Vernon's Texas Penal Code, § 1270) is, in the circumstances of this case, a classic case of "cruel and unusual punishment." The "cruel and unusual punishment" provisions of the Eighth Amendment, applicable to the states by virtue of the due process provisions of the Fourteenth Amendment (*Robinson* v. *California,* 370 U. S. 660) relate, by analogy at least, to civil actions and proceedings. *Toepleman* v. *United States,* 263 F. 2d 697, 700 (4th Cir. 1959), *cert. denied sub nom. Cato Bros., Inc.* v. *United States,* 359 U. S. 989; Cf. *Trop* v. *Dulles,* 356 U. S. 86.

"fair comment," but "statements of fact" (R. 1537). The danger of a holding based on so illusory a distinction has long been recognized. In *Coleman* v. *MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), the Court, after emphasizing the "insensible gradations" which often exist between comment and fact, said (98 Pac. at p. 291):

> "In keeping plain the distinction between comment and statements of fact, the courts of some of the states leave the law very much in the attitude of saying to the newspaper: 'You have full liberty of free discussion, provided, however, you say nothing that counts.'"

The dangers envisaged by the Kansas court could scarcely be better illustrated than by this case. The relevant facts as set forth above, despite some conflict as to the details, are essentially undisputed. If on the basis of those facts a news medium cannot make the comment in good faith that General Walker "assumed command of the crowd" and "led a charge" of students on the Federal marshals without risking a libel judgment of $500,000 then the freedoms of press and speech guaranteed by the Federal Constitution become illusory.

It is no answer to assert, as have the courts below, that a news medium need have no fears if it but accurately reports the "facts." In this case, there was no finding that any of the underlying facts set forth in the articles were false, but rather that Petitioner's conclusion or opinion of Walker's role, based on the facts contained in the articles and developed at trial, was not "fair comment." Obviously, any comment critical of Walker would not have been considered "fair" by a jury under all the circumstances of the trial.

Where, as here, the defense of "fair comment" is rejected by the Texas Court of Civil Appeals as a "weak defense . . . subject to so many limitations that it is seldom completely applicable" (R. 1540), and where, as

here, such limitations are invoked to impose a liability of half a million dollars, it is obvious that the libel laws have been used to achieve a result which the Federal Constitution prohibits.

If this decision is permitted to stand, the only prudent course open to the press will be to refrain from commenting on events—however significant and newsworthy—where such comments may reflect unfavorably upon a participant in a public controversy arousing deep emotional responses which differ in the various regions of our country. For all practical purposes, the doctrine of fair comment would be of no avail and useless as a protection to news media involved in such controversies.

This Court has already indicated that there are Federal Constitutional boundaries limiting the extent to which the states can circumscribe the availability and applicability of the defense of "fair comment." See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 292, n. 30. Petitioner submits that those boundaries have here been violated.

POINT IV

THE STATEMENTS COMPLAINED OF ARE TRUE, AND THE JURY'S CONTRARY FINDING AND CONSEQUENT AWARD CONSTITUTE A DENIAL OF DUE PROCESS.

When all is said and done, and apart from the other constitutional questions which permeate this case, the fact remains, as we observed at the very outset of this discussion, that there is no more support for the jury's finding of falsity than there was for its finding of malice.* To award half a million dollars where there is no evidence establish-

*It is, of course, firmly settled that this Court may examine independently the factual record to insure that principles of Federal constitutional law are correctly applied. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285; *Edwards* v. *South Carolina*, 372 U. S. 229, 235; *Blackburn* v. *Alabama*, 361 U. S. 199, 205, n. 5; *Spano* v. *New York*, 360 U. S. 315, 316. "Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines." *Pennekamp* v. *Florida*, 328 U. S. 331, 335.

ing the underlying cause of action is, of course, a denial of due process—indeed, one of the most obvious denials of due process that can be imagined. *Shuttleworth* v. *Birmingham*, 382 U. S. 87; *Garner* v. *Louisiana*, 368 U. S. 157; *Thompson* v. *Louisville*, 362 U. S. 199. We respectfully submit that this Court, as the ultimate guardian of the rights guaranteed by the Constitution, should correct this grave injustice by holding that the record establishes the truth or substantial truth of the publications complained of and that the jury's contrary finding and consequent award constitute a denial of due process in violation of the Fourteenth Amendment.

CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to reverse the judgments of the Texas courts upon the verdict with respect to special issues Nos. 1, 2, 3, 5, 6, 7 and 9; to vacate the $500,000 award; to direct that the complaint herein be dismissed with prejudice; and to award costs to Petitioner.

Petitioner further requests that this Court expressly hold that Respondent is precluded from raising the issue of "actual malice" in any of his other actions against Petitioner which are based on the same or substantially the same facts.

Respectfully submitted,

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APPENDIX

Texts of Unreported Opinions

1. *Walker* v. *Associated Press*, Colo. , P. 2d (1966)

No. 21732

EDWIN A. WALKER,
Plaintiff in Error,

v.

THE ASSOCIATED PRESS,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

HON. SAUL PINCHICK, *Judge*

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

EARL J. HOWER,
CLYDE J. WATTS,
Attorneys for Plaintiff in Error.

WINNER, BERGE, MARTIN & CAMFIELD,
Attorneys for Defendant in Error.

MR. JUSTICE MCWILLIAMS DELIVERED THE OPINION OF THE COURT.

Edwin A. Walker, hereinafter referred to as the plaintiff, brought a libel action against the Associated Press, a

New York corporation, and the The Denver Post, Inc., a Colorado corporation. In this writ of error we are concerned only with plaintiff's three claims for relief against the one defendant, Associated Press.

After permitting the plaintiff to amend his complaint on several occasions, the trial court eventually granted a motion to dismiss filed by the Associated Press, and judgment of dismissal followed. It is this judgment of dismissal which the plaintiff now seeks to have reversed.

In order to better understand this matter it becomes necessary to analyze with some degree of particularity the several complaints, and amendments thereto, filed by the plaintiff. This action was commenced by the plaintiff on September 30, 1963 with the filing of a complaint. In his original complaint the plaintiff claimed to have been libeled in the following publications: (1) an editorial appearing in The Denver Post on October 1, 1962; (2) a news article appearing in The Denver Post on October 2, 1962; and (3) an Associated Press news release of October 3, 1962, which was forwarded by the Associated Press to the Denver Post.

Our examination of the original complaint leads us to conclude that by the words used in this complaint plaintiff intended to charge, and did charge, the Associated Press with only one allegedly libelous publication, i.e., its news release of October 3, 1962, and that it was The Denver Post which was said to have libeled plaintiff in its editorial of October 1, 1962 and in its news article of October 2, 1962. Be that as it may, in our view on November 14, 1963 plaintiff cleared up any possible doubt on this particular matter by quite definitely charging Associated Press with only one libelous publication, namely its news release of October 3, 1962.

Thereafter, on February 17, 1964, the trial court granted the motion to dismiss filed by Associated Press,

and the plaintiff was granted time within which to file a second complaint. This the plaintiff did on March 11, 1964, in what he chose to denominate as an "Amended Complaint." This amended complaint contained what plaintiff labeled as counts one, two and three. Count one related to The Denver Post editorial of October 1, 1962, but in this pleading *both* The Denver Post and the Associated Press were charged with this particular publication.

Count two of the amended complaint related to The Denver Post news article of October 2, 1962, and again in this amended complaint *both* the Associated Press and The Denver Post were charged with this publication.

Count three of the amended complaint was directed solely against the Associated Press, and it concerned the press release of October 3, 1962.

To this amended complaint Associated Press again filed a motion to dismiss alleging, as to counts one and two, that "such alleged claims . . . did not accrue within one year prior to the filing of the amended complaint."

The trial court agreed with this contention of Associated Press, and dismissed these particular counts on the ground that they were barred by the one year statute of limitation. C. R. S. 1963, 87-1-2. In our handling of this writ of error we shall first concern ourselves with the propriety of this particular ruling, laying aside for a moment a consideration of the third count in the amended complaint.

Counsel apparently agree that *if* counts one and two represent "new" claims against Associated Press, then each is barred by the applicable statute of limitation. Plaintiff argues, however, that counts one and two are not really new claims, but on the contrary relate back to the original complaint. Being, then, merely an enlargement upon the averments in the original complaint, plaintiff urges that counts

one and two are therefore not barred by the one year statute of limitation. See *Platte Valley Motor Co.* v. *Wagner,* 130 Colo. 365, 278 P. 2d 870; *Smith* v. *La Forge,* 170 Kans. 677, 228 P. 2d 509, and *Doyle* v. *Okla. Press Pub. Co.,* 206 Okla. 254, 242 P. 2d 155.

Associated Press argues, to the contrary, that counts one and two represent *new* claims as to it, even though not to The Denver Post. In other words, it is pointed out that the Associated Press, as opposed to The Denver Post, was never charged with the publication of The Denver Post editorial of October 1, 1962 or The Denver Post news article of October 2, 1962 until March 11, 1964, the date when the amended complaint was filed.

In the original complaint it would appear that The Denver Post was charged with two libelous publications, i.e., its editorial of October 1, 1962 and its news article of October 2, 1962, and that the Associated Press was charged with only one libelous publication, i.e., its news release of October 3, 1962, which it is observed occurred subsequent to the dates of the allegedly libelous publications of The Denver Post.

If, however, there be doubt as to which defendant was charged with libelous publication, the matter in our mind was, as already mentioned, fully cleared up by the plaintiff himself when he filed his Amendment to Complaint on November 14, 1963. In that pleading it is quite evident that Associated Press is charged with only one libelous publication, namely its press release of October 3, 1962. Hence, when plaintiff in his Amended Complaint of March 11, 1964 avers that the Associated Press also published the allegedly libelous editorial and news article appearing in The Denver Post, he truly is setting forth "new" claims, "new" at least as to the one defendant, the Associated Press.

These three separate publications, of course, constitute separate and distinct claims. See *Hartmann* v. *Time, Inc.*, 60 N. Y. S. 2d 209. Accordingly, we conclude that counts one and two in the amended complaint constitute "new" claims against the Associated Press, and not having been asserted against Associated Press within one year after the cause of action accrued, are now barred by the provision of C. R. S. 1963, 87-1-2. See *Evans* v. *The Republican Publishing Company*, 20 Colo. App. 281, 78 Pac. 311 and *Spears Free Clinic* v. *Maier*, 128 Colo. 263, 261 P. 2d 489.

We shall now proceed to a consideration of count three in the amended complaint. In all of his various pleadings the plaintiff alleged only general—as opposed to special—damages. And this was so even though he was given more than adequate opportunity by the trial court to amend his several complaints in this regard. However, he chose not to so do, and the trial court eventually dismissed count three of the amended complaint for this failure on the part of plaintiff to allege special damages. The reasoning of the trial court was that the allegedly libelous press release was only libelous per quod, and that in such event the plaintiff had to allege special damages, and the mere allegation of general damages was legally insufficient.

Plaintiff admits that he only alleged general damages, but contends that such is sufficient because, contrary to the determination made by the trial court, the news release—he claims—was libelous per se. So, this particular problem narrows down to a determination as to whether the press release of Associated Press under the date of October 3, 1962 is libelous per se, or per quod.

Plaintiff's overall position in this regard is that the Associated Press release of October 3, 1962 falsely charges him with the commission of a crime, namely a violation of 18 U. S. C. A. 111, which provides that he who "assaults,

resists, opposes, intimidates or interferes" with, among other persons, a United States Marshal while engaging in the performance of his official duties shall be fined not more than $5,000 or imprisoned for not more than three years, or both.

Plaintiff and Associated Press agree that *if* the latter in its press release of October 3, 1962 falsely charged the plaintiff with the commission of a crime, then the publication is libelous per se. See *Cinquanta* v. *Burdett,* 154 Colo. 37, 388 P. 2d 779, 1 A. L. R. 3rd 840 and *O'Cana* v. *Espinosa,* 141 Colo. 371, 347 P. 2d 1118. Associated Press contends, however, that its press release of October 3, 1962 does *not* charge plaintiff with having committed a crime, and that it is only by innuendo that such could ever be "read into" this particular release.

Our study of this news release of October 3, 1962 leads us to the conclusion that this particular publication is libelous per se in that it does charge the plaintiff with the commission of a crime. At the very least this news release charges plaintiff with taking the "command" of a theretofore unorganized mob which was resisting and interfering with United States Marshals who were about their official business by "charging" them, by hurling "bricks, bottles, rocks and wooden stakes toward the clustered marshals." One can, of course, be charged with the commission of a crime even though it is not done in the exact language of the statute. From our reading of the news release plaintiff was clearly charged with resisting and interfering with U. S. Marshals who were about their official business, and was also charged with aiding and abetting others who were similarly engaged in various acts constituting resistance and interference. If the language used in this press release doesn't equate to "resistance" and "interference", then it would be difficult to know what would. Hence, we hold the press release in quesiton as libelous per se.

The Associated Press goes on to argue that even though its press release be deemed libelous per se, count three of the amended complaint is still subject to a motion to dismiss on the basis of *New York Times Company* v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A. L. R. 2d 1412. In our view of this matter the rule laid down in the *New York Times* case does have application to the instant controversy, but, as will be developed, such does not justify an outright dismissal of count three of the amended complaint on a motion to dismiss.

In the *New York Times Company* case the Supreme Court of the United States rather severely limited the right of *public officials* to recover for libelous newspaper articles by holding that the constitutional safeguards regarding freedom of speech and press require that a public official in a libel action against a critic of his official conduct must show actual malice on the part of such critic before the public official can make any recovery, and that such is true even though the statements are libelous per se.

The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.

We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se,

plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press.

We recognize that there is authority from other jurisdictions which looks away from such a holding. See, e.g., *Fignole* v. *The Curtis Publishing Company*, 247 F. Supp. 595. But in our considered view the rationale of *New York Times Company* v. *Sullivan, supra,* clearly suggests that the rule announced therein should apply to one in the position of this plaintiff. And there is authority from other jurisdictions which supports our conclusion in this regard. Accordingly, we subscribe to the reasoning found, for example, in *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231. See, also, *Pauling* v. *National Review, Inc.*, 269 N. Y. S. 2d 11; *Pauling* v. *News Syndicate Company, Inc.*, 335 F. 2d 659 and *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597.

Even though the rule of *New York Times Company* v. *Sullivan, supra,* does have applicability to the instant matter, such determination does not justify a dismissal of count three of the amended complaint on a motion to dismiss. Plaintiff in count three of his amended complaint alleges that the Associated Press published its press release of October 3, 1962 with actual malice, and his pleading in this regard is, therefore, sufficient to bring him even within the narrow rule announced in *New York Times Company* v. *Sullivan, supra.*

Associated Press finally argues that plaintiff has made a judicial admission that the Associated Press acted without actual malice by amending his pleading so as to incorporate by reference plaintiff's libel action brought in Texas against the Associated Press, which action was apparently based on the same press release of October 3, 1962. See *Associated Press* v. *Walker*, Tex. App. , 393 S. W. 2d 671.

Without belaboring this point, we are of the view that the position of Associated Press in this regard is not well-taken and that this matter cannot be injected in this manner into the instant proceeding.

The judgments of dismissal as to counts one and two of the amended complaint are affirmed. The judgment of dismissal as to count three of the amended complaint is reversed and the cause is remanded with directions that further proceedings in connection therewith be consonant with the views herein expressed.

Mr. Chief Justice Sutton not participating.

2. *Walker* v. *Courier-Journal and Louisville Times Co.*, F. 2d (6th Cir. 1966) *rev'g.* 246 F. Supp. 231 (W. D. Ky. 1965)

No. 16999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWIN A. WALKER,
Plaintiff-Appellant,

v.

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, INC. AND WHAS, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky at Louisville.

Decided October 28, 1966.

Before: WEICK, Chief Judge, PHILLIPS and CELEBREZZE, Circuit Judges.

PER CURIAM: This is an appeal from an order sustaining a motion to dismiss a libel action instituted by Appellant, retired Major General Edwin Walker. In his complaint, Appellant alleged that the defendants Courier-Journal, Louisville Times Company and WHAS, Inc., falsely and maliciously reported that Appellant participated in riots in Oxford, Mississippi by leading a charge of brick throwing students against United States Marshals. The riots occurred as a result of the integration of white and

negro students at the University of Mississippi. Appellant alleges in his complaint that he:

> ". . . was . . . a person of political prominence who had in public announcements vigorously asserted his adherence to accepted and constitutionally defined limitations upon the powers of the central government and to principles of separation of powers as between the central government and the several States."

On the basis of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 83 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the District Court dismissed Appellant's complaint. We agree with the District Court as to the applicability of New York Times. Applying the doctrine of New York Times, however, we disagree with the District Court in not giving an opportunity to Appellant to offer evidence to show malice.

The Supreme Court said in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966):

> "The motivating force for the decision in New York Times was twofold. We expressed a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (Citation omitted). There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. * * *

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

In footnote 12, the Court said:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the New York Times standards—for example that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

It is apparent, and Appellant alleges in his petition, that he is a person of political prominence, and is a person in a position significantly to influence the resolution of issues of national importance. It is also apparent that Appellant involved himself dramatically into the racial crises in Oxford, Mississippi; that he "thrust himself into the vortex of the discussion of a question of pressing public concern." The motivating force of the Times decision compels its applicability here. In a thorough analysis of the Times decision, and subsequent decisions, the Court, in *Pauling* v. *Globe-Democrat Publishing Company,* 362 F. 2d 188 (C.A. 8, 1966), applied the Times doctrine to Dr. Linus Pauling. There the alleged libel grew out of a controversy over Dr. Pauling's efforts to promote a nuclear test ban treaty.

However, there is no constitutional protection for a false statement "made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan,* 376 U. S. 279-280.

Unlike *New York Times* v. *Sullivan, supra,* and *Pauling* v. *Globe-Democrat Publishing Company, supra,* Appellant was prevented from adducing proofs which could present a jury question on the issue of malice. Whether there was malice was a fact question placed in issue by the complaint, and no affidavits or depositions were filed which may have removed this issue from the case.

The judgment of the District Court is reversed and the case remanded for further consideration consistent with this opinion.

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No. 150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

THE ASSOCIATED PRESS,

Petitioner,

vs.

EDWIN A. WALKER,

Respondent.

BRIEF FOR THE TRIBUNE COMPANY AS AMICUS CURIAE.

HOWARD ELLIS,
KEITH MASTERS,
DON H. REUBEN,
LAWRENCE GUNNELS,
of KIRKLAND, ELLIS, HODSON,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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"The newspaper is the mood of a nation, a day-to-day record of life's pattern. The historian writes of events in relation to their sequel; the newspaper keeps pace with the pitch and roll of this planet as it spins through eternity. There is little time to look back, less to look forward. Yesterday is our history, tomorrow our horizon. We catch the fleeting moment, cast it into the impatient press and, before the ink is dry, it smells of mortality."—Cross, *The People's Right to Know*, p. 3 (Columbia Univ. Press, 1953) quoting from *The Press, 1898-1948* (London, The Newspaper World, 1948).

IN THE

Supreme Court of the United States

OCTOBER TERM 1966.

No. 150

THE ASSOCIATED PRESS,

Petitioner,

vs.

EDWIN A. WALKER,

Respondent.

BRIEF FOR THE TRIBUNE COMPANY AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The Tribune Company publishes the *Chicago Tribune,* one of the nation's largest metropolitan daily and Sunday newspapers; the Tribune Company has been a member of the Associated Press since the formation of the Association. W. D. Maxwell, the Editor of the *Tribune* and the first vice president of the Tribune Company, served as one of the Association's directors for a three-year term. The Tribune Company has a long established policy and tradition of appearing, when appropriate, in litigations that threaten freedom of expression and communication. The Tribune Company last appeared in such a cause in this

Court when it filed a brief as *amicus curiae* in *New York Times Co.* v. *Sullivan,* 376 U. S. 254.[1]

The several *Walker* litigations arise out of the respondent Walker's presence and activities at the riots that occurred at the University of Mississippi in Oxford in September, 1962; the violence occurred because of the matriculation of the University's first Negro student. The crisis in Mississippi lasted several days and was an event of national concern that received front page coverage for over a week. The respondent Walker traveled from Texas to Oxford for the pre-announced purpose of attending the disturbances and violence at the campus. The Associated Press extensively reported the Mississippi riots, sending at times almost hourly dispatches to its member newspapers. The Association also transmitted dispatches concerning the respondent's involvement in the disturbances and fighting; many newspaper members of the A.P. then published such accounts as a part of their overall news coverage.[2] The respondent Walker filed fifteen libel suits in ten states, naming the Associated Press in seven suits, and its newspaper members in eleven; the aggregate damages claimed in the suits were $33,250,000.

The instant case was the first of the respondent's libel actions to be tried before a jury. The Texas courts, al-

1. The Tribune Company's interest as *amicus* in this cause is more fully detailed in the affidavit of W. D. Maxwell, Editor of the *Tribune;* the affidavit is lodged in the Clerk's Office and is reproduced in the Appendix hereto.

2. The respondent is a highly publicized ex-Major General of the Army and was an unsuccessful candidate for Governor of Texas in 1962. The dispatches of which Walker complains were written and transmitted by an A. P. reporter at the scene of the riots, while the respondent Walker was still in Oxford; Walker claims that the dispatches falsely reported that he "led a charge of students" and "assumed command of the crowd."

though expressly finding that the Associated Press was not guilty of actual malice, sustained a verdict and judgment against the Associated Press of $500,000. The Tribune Company filed its appearance in this cause as *amicus curiae* after certiorari was granted to review the judgment of the Texas Court of Civil Appeals. The Tribune Company obtained the written consent of both the petitioner and respondent to appear here.[3]

3. True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

ARGUMENT.

We believe that in light of respondent's past activities and public status, it is indisputable that he is subject to the First Amendment standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254. The decisive applicability of the *New York Times* doctrine to the peculiar facts of the instant case is plain, we submit, from the nature of respondent's army career, his previous involvement in politics and controversial events, and his presence and conduct at the University of Mississippi race riots. The petitioner's brief has fully argued this proposition and to avoid repetition, we fully endorse and adopt petitioner's *New York Times* argument.

However, as *amicus curiae*, we respectfully commend and urge that this Court ground a decision of reversal on a broader base than the doctrine of "public official" or "public figure". (See *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659 (2d Cir.), *cert. denied* 379 U. S. 968.) We urge the Court to recognize and hold that the First Amendment permits the reporting of current public events with impunity unless the report is both false and the product of actual malice. We think that such a holding is a necessary and logical augmentation of the First Amendment free speech and press authorities generally, and especially of the doctrine declared in *New York Times Co.* v. *Sullivan*, *supra*.

The First Amendment clearly contemplates encouragement of reporting public events, *as they happen*, even if those reports are later shown to be less than completely accurate. A nation such as ours, founded upon the concept of enlightened popular thought and opinion within the

framework of ordered liberty, must always be currently informed about the social upheavals of the day, their causes, their effects and the evils they perpetrate or seek to cure. As the Court declared in *Bridges* v. *California*, 314 U. S. 252, 268:

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."

And, in *Associated Press* v. *United States*, 326 U. S. 1, 20, the Court strongly emphasized the necessity of securing "the widest possible dissemination of information from diverse and antagonistic sources." See also *Stromberg* v. *California*, 283 U. S. 359, 369; *Whitney* v. *California*, 274 U. S. 357, 375-76 (concurring opinion); *Roth* v. *United States*, 354 U. S. 476, 484.

Moreover, in the *New York Times* case this Court specifically recognized that the First Amendment embodies "a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide open. . . ." (376 U. S. at 270) (emphasis added). The Court further recognized that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . ." (376 U. S. at 271-72). The *New York Times* decision also quoted and endorsed the early holding of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 78 Kan. 711, 723, 98 P. 281:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. *This privilege extends to a great variety of subjects, and includes matters of public concern*, public men, and candidates for office." (376 U. S. at 281-82) (emphasis added).

Subsequent to the *New York Times* decision, the Court declared in *Garrison* v. *Louisiana*, 379 U. S. 64, 74, that "[S]peech concerning *public affairs* is more than self-expression; it is the essence of self-government." (Emphasis added). And, in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86, the Court explained and strengthened the holding of the *New York Times* case as follows:

> "There is, first, a *strong interest in debate on public issues*, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues."
>
> • • • • •
>
> "The thrust of *New York Times* is that when interests in *public discussions* are particularly strong, as they were in that case, the constitution limits the protection afforded by the law of defamation." (Emphasis added.)

Other courts, both before and after the *New York Times* case, have also clearly recognized and held that news reporting of public events and other matters of public concern are protected by the First Amendment. In *Sweeny* v. *Patterson*, 128 F. 2d 457, 458 (D. C. Cir.) Judge Edgerton so declared:

> "The protection of the public requires not merely discussion, but information . . . Errors of fact, particularly in regard to man's mental states and processes are inevitable . . . Whatever is added to the field of libel is taken from the field of free debate."[4]

So also, in *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 2d 586, the Pennsylvania Supreme Court rejected a libel suit based on a claimed false news report of the infamous Appalachian meeting of crime syndicate overlords:

> "[T]o impose liability upon the defendant under the circumstances presented would render 'Freedom of the

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4. The *Sweeny* case was cited with approval in *New York Times*, 376 U. S. at 272.

> Press' a lie, seriously impinge upon priceless constitutional guarantees and be a substantial deprivation of the public's right to know."

Similar declarations and analogous holdings are found in *Krebiozen Research Foundation* v. *Beacon Press, Inc.*, 334 Mass. 86, 134 N. E. 2d 1, 7; *Kulesza* v. *Chicago Daily News, Inc.*, 311 Ill. App. 117, 35 N. E. 2d 517; *Tanzer* v. *Crowley Publ. Corp.*, 240 App. Div. 203, 268 N. Y. S. 620; *Hoan* v. *Journal Co.*, 238 Wis. 311, 298 N. W. 228; *Parmelee* v. *Hearst Publ. Co.*, 341 Ill. App. 339, 93 N. E. 2d 512; *Dilling* v. *Illinois Publ. Co.*, 340 Ill. App. 303, 91 N. E. 2d 635; *Broking* v. *Phoenix Newspapers, Inc.*, 76 Ariz. 334, 264 P. 2d 413; *Lulay* v. *Peoria Journal-Star, Inc.*, 34 Ill. 2d 112, 214 N. E. 2d 746.[5]

We submit that if on-the-spot news reporting of current public events is to be fostered and encouraged, as contemplated by the First Amendment, publishers and news wire services must be protected from libel actions such as those instituted by the respondent. As history has shown, the civil libel action, with its lack of criminal law safeguards and unlimited general and punitive damages, is one of the most effective weapons to suppress and silence the press and other modes of communication and expression. (See *City of Chicago* v. *Tribune Co.*, 307 Ill. 596, 607, 139 N. E. 86, 90, and the discussion thereof in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 at 277-78.)

The appended affidavit of the *Tribune's* Editor, W. D. Maxwell, attests (and common experience tells) that the riot, the demonstration, the protest and other like manifestations of social disturbance are becoming an all too common

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5. See, also, Comment, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 Yale L. J. 642 (1966); Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Supreme Court Rev. 191; Bertelsman, *Libel and Public Men*, 52 A. B. A. Journal 657 (1966).

part of the news of the day. Mr. Maxwell's affidavit also delineates that on-the-scene reports of such sudden and violent happenings, although the best news of the event available at the time, are not always completely accurate because of the very nature of the incident covered. Strife, violence and civil disruption typically involve split-second happenings accompanied by great chaos and confusion, so that even those directly on the scene are not completely informed of the true state of events and issue reports later determined to lack complete accuracy. Indeed, it is probable that the exact truth as to many such occurrences is never completely ascertained because of the fever-pitch excitement and the invariable tendency of eye-witnesses to see and hear things differently.

Historians have recorded numerous examples of inaccurate and conflicting reports emanating from the scenes of violent or turbulent events:

The Assassination of President Lincoln. In the tumultuous aftermath of Lincoln's shooting at Ford's Theatre on the evening of April 14, 1865, wire dispatches from Washington, the situs of the tragedy, were extremely confused, contradictory and erroneous; one dispatch reported that Lincoln "with several members of his cabinet" had been assassinated. Eisenschiml, *Why Was Lincoln Murdered?*, Chap. 8, pages 65-90 (Little, Brown & Co., 1937).[6] Other news reports

6. Otto Eisenschiml concludes his exhaustive study of the assassination with the following observation (page 438):

"A great deal of new evidence must be brought to light before students can write a definite answer to many questions that confront them in their research on Lincoln's death. Facts, facts and more facts are needed and should be unearthed. In the meantime, hasty inferences are dangerous and may turn out to be unjust. Seemingly perfect nets of circumstantial evidence have at times been torn apart by a single contradictory but incontrovertible fact. Well estab-

stated that Secretary of State Sewar[illegible] Vice President Johnson had been killed along wi[illegible]oln. Still another dispatch reported that Lincol[illegible]een fired upon from the crowd as he was depar[illegible] Ford's Theatre, rather than in his loge during t[illegible] performance (*Ibid.*) (See also Lewis, *Myths After Lincoln,* pages 48-49 (Grosset & Dunlap, 1929).)

The Sinking of the Titanic. Immediately after the luxury liner *Titanic* sank, all of the New York newspapers (save for the *Times*) reported that on-the-scene observers said that all passengers on the doomed ship had survived, when in fact the vast majority perished. *American Heritage,* Vol. III, No. 1 (Dec., 1955).

The Attack on Pearl Harbor. During the week following the Japanese bombing of Pearl Harbor and Hickam Field on December 7, 1941, a plethora of false on-the-scene reports concerning the war's outbreak were widely disseminated: (1) that a task force at sea led by the Carrier *Enterprise* had been sunk by the Japanese; (2) that the Battleship *Pennsylvania* had captured two Japanese carriers and was towing them to Pearl Harbor; (3) that a large Japanese invasion fleet was rapidly approaching the northern coast of California; (4) that some Japanese advance troops had actually landed on California soil. Lord, *Day of Infamy,* pages 202-03 (Henry Holt & Co., 1957).

The Pursuit of John Dillinger, "Public Enemy No.

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lished theories have been shattered because they could not be brought into harmony with a single important new revelation, just as the discovery of radium has destroyed the belief of science in the indestructibility of the atom and changed its ideas on the transmutation of elements.

"Pending future developments, the story of Lincoln's assassination remains, in many of its phases, an unsolved mystery."

1". When F. B. I. Agents pursued the notorious John Dillinger gang to a hunting lodge near Little Bohemia, Wisconsin in April, 1934, a fierce gun battle took place; the reports to the outside world were a welter of confusion and error. The reports are well summarized in Cromie, *Dillinger—A Short and Violent Life*, page 221 (McGraw-Hill, 1962):

> "The word out of Little Bohemia was confusing, to put it politely, in the hours between the opening volley and daylight, when the Federal agents moved in and captured six machine guns, twelve shotguns, five bulletproof vests and three young women.
>
> "J. Edgar Hoover announced at 2 a.m. in Washington that Dillinger was surrounded. At 3:30 came a flash from Mercer that posses would join battle with Dillinger and his gang within a matter of hours. Shortly thereafter a third report said that Dillinger had been seen at Antigo, heading toward Chicago. Not until 6 a.m. was it admitted officially that four of the gang 'may' have broken through the cordon."

The Selma, Alabama Civil Rights Demonstrations—March, 1965. At the time of the killing of the Reverend James Reeb (who went to Selma from Boston to support Dr. Martin Luther King, Jr.'s voting crusade), the streets of Selma, according to some reports, were filled with violence and terror. Yet, one on-the-scene observer stated that, "In few cities anywhere are you as safe on the streets as you are in Selma today." (Lloyd Wendt, "Two Views of Selma—From Both Sides of 'Wall'," *Chicago's American*, Mar. 15, 1965, page 7, Col. 1.) The author of the cited article travelled to Selma to report the demonstrations first hand, and in the course of his reporting, discussed in graphic detail the difficulties of obtaining reliable information concerning the true state of events.

The above examples demonstrate that there is an unavoidable and inherent possibility of error in dispatches issued from the scenes of sudden, violent or tragic happenings. Thus, the publishing of such material exposes a newspaper or wire service to an inordinately greater risk of suit than is inherent in ordinary news reporting. And, only a moment's reflection confirms that there are few lawsuits more costly to defend than libel cases requiring the reconstruction of the true facts concerning a riot, a demonstration, a strike, an uprising or like social conflagration. Very few publishers can or will risk the reporting of such on-the-spot dispatches if plaintiffs such as Walker can later sue on the ground that events viewed in retrospect sustain a claim of libel. The expenses of litigating such claims are far too onerous for the average publisher to bear even once, let alone as a repeated expenditure.[7]

We plainly recognize that reversal of the judgment below on the ground that respondent is a public figure within *New York Times Co.* v. *Sullivan* would adequately relieve the petitioner of an unconstitutional judgment. But we submit that such a truncated holding will not encourage or protect future on-the-spot news reporting of events such as the Mississippi riots. The fortuitous circumstance that the respondent Walker is a well-known public figure will clearly not be present in many, if not most, future libel actions based upon current news reporting of riots, protests and other events of intense public concern.

Beyond cavil, if freedom from oppressive libel suits is to be contingent upon the nature and status of the plaintiff, rather that the event, the mandate of the First Amendment

7. The publisher's expenses of litigation may be multiplied many fold if the plaintiff sees fit (as the respondent Walker did here) to file not *one* but numerous libel suits in different jurisdictions predicated on the same claim of factual error. See Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953).

has not been fulfilled. Accordingly, we believe that a more definitive holding is necessary to ensure that current reporting of such events as the Mississippi riots is protected and encouraged—not thwarted by the fear of suffering enormous expense and perhaps even ruin by libel suits. Reporting of such events is, we submit, best fostered within the framework of the First Amendment, consonant with the rights of all concerned, by holding that on-the-spot news reports of such events are non-actionable—although later proved false—unless they are the product of actual malice. In sum, the doctrine of public officials should encompass not only the public *figure* but also the public *event*. And, we cannot envisage a more appropriate cause for the Court to acknowledge such a doctrine than the Mississippi riots, for if the First Amendment is to have its intended vitality it certainly must protect on-the-scene news reporting of an event of such national magnitude.

CONCLUSION.

We respectfully urge that the judgment below should be reversed on the ground that the petitioner was reporting without malice a current news event of immediate and significant public interest and concern.

Respectfully submitted,

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KEITH MASTERS,
DON H. REUBEN,
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January 6, 1967.

APPENDIX.

AFFIDAVIT.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

W. D. MAXWELL, having been duly sworn on oath, deposes and says:

1. He is the First Vice-President of the Tribune Company, an Illinois corporation, and is the Editor of the *Chicago Tribune*. He has also served as a member of the Board of Directors of the Petitioner, the Associated Press, from 1958 to 1966; he is thus familiar with the services and functions of the Associated Press both as an editor and as one who has participated in its management.

2. The Tribune Company publishes one of the world's largest daily metropolitan newspapers, the *Chicago Tribune;* its presses, personnel and executive offices are all located in Chicago, Illinois, where the *Tribune* is published. Although the bulk of the *Tribune's* circulation is within the State of Illinois, the *Tribune* also has readership and subscribers in virtually every state of the union and in many foreign lands. The *Chicago Tribune* is a member of the Petitioner, the Associated Press, and has been a member since the inception of the Association in 1900.

3. The Tribune Company has a signal interest in this case not only because of its membership in the Associated Press, but also because of the Tribune Company's long-established practice and policy of at all times following, and at appropriate times participating in, litigation that

concerns and jeopardizes freedom of the press [see, *e.g.*, *Near* v. *Minnesota*, 283 U. S. 697; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *New York Times Co.* v. *Connor*, 291 F. 2d 492 (5th Cir.)]. The instant litigation is one of fifteen separate libel actions brought by the Respondent Edwin A. Walker because of news coverage of Respondent's deliberate presence and role in the University of Mississippi riots in September, 1962; the suits are pending in 10 different states, name the Associated Press in 8 suits, and newspapers of general circulation in 11 suits. The total damages that have been sought by Respondent for news stories, dispatches and editorials concerning his activities at the University of Mississippi is $33,250,000.

4. The Tribune Company regards pendency of the suits instituted by the Respondent and the result below in this case as a substantial threat to free speech and press. Acts of violence, incidents of strife and riots have in recent years become a prominent and recurring part of the news of the day. These happenings must be reported by the press if the news is to be covered and the public is to be adequately informed about such events; the public cannot possibly make an intelligent or enlightened appraisal of such occurences or their underlying causes unless such news is currently and widely disseminated.

5. A riot, a lawless demonstration or almost any violent incident is invariably fraught with general confusion, events of split-second duration, and conflicting charges and countercharges; because of the dynamic nature of the events the facts are sometimes never precisely learned or, in the alternative, are determined much later. Accordingly, at times eyewitness news emanating from the scene of such happenings may be only partially correct although it is the best available report at the moment. If on-the-scene spot news reports cannot be published as received but must await ultimate confirmation hours or days later because

of the fear of a subsequent libel claim, then the news will oftentimes not be printed. The cost of defending libel actions in such cases is much too heavy a burden for many of the country's newspapers as well as for the nation's wire services.

6. Affiant believes that true freedom of the press cannot endure unless the press can report, in depth and detail and without fear of economic reprisal, *all* the news of the day as received; and specifically such news as on-the-scene reports of a riot, a demonstration, or a violent social upheaval. Affiant believes on the basis of his experience as a newspaperman and editor that the press requires the freedom to publish such news in accordance with the same constitutional limits marked by this Court for the reporting of the activities and conduct of public officials. The "public official" standard, if applied to such events and participants, would permit publishing about such occurrences as they happen without fear of economic ruin from defending libel suits and yet would at the same time discourage publication of truly malicious falsehoods concerning such events.

Further affiant sayeth not.

/s/ W. D. MAXWELL,
W. D. MAXWELL,

SUBSCRIBED AND SWORN TO before me this fourth day of January, A.D., 1967.

/s/ DOLORES FIGIEL,
Notary Public.

[SEAL]

FEB 2 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

VERSUS

EDWIN A. WALKER,
Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF THE TRIBUNE COMPANY

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January, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0080

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In the

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OCTOBER TERM, 1966

THE ASSOCIATED PRESS,
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VERSUS

EDWIN A. WALKER,
Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF THE TRIBUNE COMPANY

By Amicus Curiae Brief herein, on behalf of the news media generally, the Chicago Tribune seeks, as an extension of its present First Amendment Freedom, the awesome power to DEFAME (even to accuse falsely) without LIABILITY—to MAKE (rather than report) the news without RESPONSIBILITY.

With issues that involve the life and death of our Constitutional System, the *Walker* case presents to this Honorable Court the responsibility for shaping the course of the Freedom, not only of the Press, but of the American Citizen for decades to come.

By Affidavit, W. D. Maxwell, Editor of the Chicago Tribune, represents to the Court an example of the difficulty which confronts AP in obtaining accuracy of "on the scene

spot news" reports during the confusion of riots and disorder. In fairness, we must recognize their problem, and the vital interest of the public, which actually includes the Press, as well.

The *Walker* case is an example of oppressive impact of false news reporting that deserves most careful consideration by the highest Tribunal in our land, in developing constitutional guide lines that will protect *both* the Press and the citizen.

For simplicity of illustration, and as a tragic example of hasty and irresponsible news reporting, we respectfully present, by counter Affidavit, the reports and actions by which Walker was falsely accused of a felony, charged, arrested and committed for an indefinite term to a Federal Prison Hospital for criminal insane, as a direct and proximate result of a news report, which Affidavit contains orders and proceedings of the court responsible for his trial, and custody pending trial, as follows:

1) Associated Press falsely reported upon worldwide news wires that Walker had assumed command of the mob and led a charge against United States Marshals (R. 1224-1294).

2) A Federal Complaint was filed against Walker charging Insurrection, Assaulting U. S. Officers, Sedition and Seditious Conspiracy, which stated that it was filed "on the basis of information obtained from Van H. Savell," the cub reporter of Associated Press, who was solely responsible for the above false news report.

3) Walker was committed to custody of United States Marshal in Mississippi, for confinement in Mississippi.

4) Upon telegraph Order from United States Bureau of Prisons, and without Court Order, Walker was flown to the United States Prison Hospital at Springfield, Missouri, without being given an opportunity to make bail, fixed at $100,000.00.

5) The next day, without Notice, counsel or hearing, an Order was entered by the Mississippi Federal Court that Walker be transferred and committed to the Springfield Prison Hospital, where he had actually been taken on the previous day, which Order was entered upon Affidavit of Chief Psychiatrist of United States Bureau of Prisons, who had never seen him, but had "carefully examined news reports."

6) Walker was unable to get a hearing for Habeas Corpus before the Federal Court in Springfield in less than 11 days.

7) Associated Press consistently slanted the news to emphasize that Walker had commanded the mob and was probably crazy, thus fabricating of him a false public image as a lunatic and criminal.

It is the end of Justice that no one shall suffer wrong—a concept which guides the judgment of every Court in our land.

There can be no reasonable question that Respondent has suffered wrong, as a direct and proximate result of news report that he commanded a mob and led charges against United States Marshals. The facts above set forth, and with more detail in the attached Affidavit, provide a living specimen for the necessary judicial research and development to fix the final perimeter of the First Amendment Freedom of the Press along a fair and workable boundary between the public's Right to Know and the

citizen's Right to Live in Freedom from possible tyranny of an overly powerful Press.

It has also been stated by an unknown legal scholar that, "From the crucible of adversary conflict before Courts of Justice and Law, will come the final Freedom contemplated by our Constitution."

Thus, in the instant case, the proper objective is to construe "Freedom of the Press" to permit reasonably accurate and timely reports of news vital to public knowledge, without subjecting citizens who may have become "public figures" to undue defamation and accusation.

The established rule under *Sullivan*, which would be both sound and just, if it excluded false accusation of crime, is that the Press is free from liability for defamation of a Public Official, without malice, which is defined as "knowingly false" or "in reckless disregard" for the truth.

The question arises in the *Walker* case as to whether this rule should be extended to "public figures"; and, so long as the "figure" is not directly accused of a crime, it would appear that the rule could be extended with logic and justice, provided that the Court should decide to abandon the reasoning that the superior position of the official compensates for the immunity of the Press.

Where a citizen is falsely accused of crime, however, which did not exist in *Sullivan*, it should not be an imposition upon the Press (and certainly not a restriction of its freedom) to bear a responsibility of more than "reckless disregard for the Truth."

In this very dangerous and sensitive area, any news merchant who gambles, even negligently, in the sale of news, with the liberty of a citizen should properly be required to prove, in Court, the Truth of the charge. If such a rule should slightly delay to the public immediate "on the spot" accusation of crime, as it is actually committed; the loss would be more in theory than in fact, since the Press could report, with immunity as soon as a criminal charge was filed against the suspect. In fact, if the newsman should report what he sees to proper authority a Complaint could be filed in a matter of hours, or less; but this short interval is critical to the party charged, to avoid the news report being the source of the charge, as in the *Walker* case.

If the attention of prosecuting authorities may be directed by false report to alleged facts constituting a crime, by a newsman, who seeks Constitutional immunity from responsibility, then the proponents of unpopular causes would be at the mercy of a hostile Press; and the "public debate," robust, uninhibited and "wide open" would be stifled before it was born.

During discovery proceedings in the *Walker* case, it was developed that Associated Press holds a daily conference of top management at its Headquarters in New York (R. 824). Simply as an illustration of the potential hazard of extending to the Press the power to defame and accuse with immunity, the capability would then exist to assign newsmen to a scheduled public demonstration, with orders to trail an individual, and tie him in with any violence that may erupt. Thereafter, his mere presence in the area would

make him vulnerable to a news report that he was organizing and participating in the violence, and a report by the Press immune from liability could quickly trigger his arrest upon charge of inciting a riot.

Once the Constitutional Rule may be established, the capability of false accusation would exist at all echelons of the Press.

If, either upon a local or a national level, the newsman and the prosecutor should jointly select a victim, he would be helpless to avoid arrest and prosecution. He would be helpless to avoid disgrace if he were falsely accused of being a Communist.[1]

On the other hand, so long as the Press is financially responsible for damages sustained by one arrested as the result of a false news report, the danger of such invasion of individual freedom will be remote.

The requirement to prove knowing falsity or reckless disregard for the truth can be an overwhelming burden, where a powerful element of the news media is the adversary.

In effect, amicus curiae requests that this Honorable Court write "ground rules," under which its reporters may cover tumultous events, to provide reasonable and timely information to the public, with minimum liability upon the Press. By presenting both sides of the question, it is the sincere hope of counsel for Respondent to assist in formu-

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[1] *Faulk* v. *Aware, Inc.* (N.Y. 1964), 200 N.E.2d 778, 202 N.E.2d 372 (*cert. den.* 380 U.S. 916).

lation of a final rule that will be workable and fair to both the Press and public. We respectfully suggest the following:

1) Should not the final rule extend wider latitude in reporting collateral facts, but require even more care to avoid reporting of alleged facts that accuse even a public official of the commission of a crime . . . especially facts which would give the civil authority, state or federal, the duty of making criminal charges and arrest?

2) Should not newsmen, on the scene and in rewrite rooms, be ordered to withhold reports of commission of a crime until the facts have been evaluated by a prosecuting authority, or, in any event, until the facts have been verified by more than one newsman (preferably experienced)?

3) Should not newsmen be advised that their employer faces civil liability for reporting facts that result in criminal charges, unless the report is supported by evidence that would establish a defense of "TRUTH" in a civil proceeding?

4) Should not working newsmen be subject to more, rather than less, discipline in their investigation and reporting, especially where the liberty of individual citizens may be at stake?

5) With news representing a highly salable commodity, could the Courts accept a lesser warranty of quality than for other merchandise, such as drugs?[2]

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[2] *Associated Press* v. *United States*, 326 U.S. 1: "No language in the Sherman Act or the summary judgment statute lends support to the suggestion. There is no single element in our traditional insistence upon an equally fair trial for every person from which any such discriminatory trial practice could stem. For equal—not unequal—justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which

(With words being the most lethal weapons known to modern man, when launched by a fantastic network of electronic communications, is not false news reporting more dangerous than adulterated *food or drugs*?)

6) Does the individual citizen have any real capability to "debate" with the news media, especially the Associated Press, or other national wire service?

7) Would not the news media, itself, suffer in terms of lost public confidence, if its financial responsibility is withdrawn as a guarantee for accuracy where its reports result in defamation or accusation of a private citizen?[3]

8) In comparison with its vast income from the sale of news, and advertising, has the news media really been restricted in reporting actual news to the extent that justice would require a revision of the law of defamation, which has reasonably protected the individual citizen from time of the invention of the printing

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[2] (Continued)
equally intelligent and responsible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want." Citing *International News Service* v. *Associated Press, supra.* "All are alike covered by the Sherman Act. *The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.*"

[3] *Time, Inc.* v. *Hill* (Jan. 10, 1967), 35 L.W. 4108 at 4119 (concurring opinion, MR. JUSTICE BLACK):

"A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the *New York Times* case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press."

press down through the present era of huge newspapers, wire services, magazines, radio and TV?

Against the above background of conflicting interests and aspirations between the Press and the individual citizen, we present the case of the Respondent, fervently hoping that collateral issues may not unduly influence or prejudice the final outcome.

ISSUES

I

SHOULD THE SULLIVAN RULE OF FREEDOM OF THE PRESS FROM LIABILITY FOR DEFAMATION BY ERRONEOUS REPORTS OF FACTS, MADE WITHOUT MALICE, BE RESTRICTED TO CASES WHERE SUCH REPORTS DO NOT FALSELY ACCUSE AN INDIVIDUAL CITIZEN OF THE COMMISSION OF A CRIME?

II

SHOULD THE SULLIVAN RULE BE EXTENDED TO ENCOMPASS NOT ONLY THE "PUBLIC FIGURE," BUT ALSO THE "PUBLIC EVENT"?

ARGUMENT

PROPOSITION ONE

FREEDOM OF THE PRESS UNDER THE FIRST AMENDMENT SHOULD NOT BE EXTENDED TO PROVIDE IMMUNITY FROM LIABILITY FOR FALSE ACCUSATION OF A CRIME.

Relying upon *New York Times Co. v. Sullivan,* 376 U.S. 254, and subsequent decisions of this Honorable Court, Amicus Curiae outlines a purported emergency in the reporting of riots, strife, violence and lawless demonstration, supported by Affidavit of its editor, and argues that the First Amendment should be construed, consonant with the *rights of all concerned,* to hold that "on-the-spot news reports of such events are non-actionable . . . although later proved false . . . unless they are the product of actual malice."

The Association Press Publication involved herein is quoted in full at pages 7-11 of Petitioner's Brief. The language specifically involved in the Constitutional question here presented includes the following:

> "October 2, 1962. 'Walker, who Sunday night led a charge of students against Federal Marshals . . . was arrested on four accounts including Insurection against the United States.' "
>
> "October 3, 1962. (Editor's Note: '* * * Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)' "
>
> "It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting Insurrection and Seditious Conspiracy . . ."

". . . man queried Walker as he approached the group. 'General, will you lead us to the steps?' "

"I observed Walker as he loosened his tie and shirt and nodded 'Yes' without speaking."

"Walker assumed command of the crowd . . ."

"Two men took Walker by the arms and they headed for the . . . Federal Marshals. Throughout this time, I was less than six feet from Walker."

"This march toward tear gas and some 200 Marshals was more effective than the previous attempts" (R. 11-14).

The above is in conflict and contrast with the United Press report as follows:

"Students were waving the Confederate Flag during a lull in the rioting. Edwin A. Walker, former Maj. General who commanded troops at Little Rock, mounted a Confederate Statue and advised the students to cease their violence."

" 'This is not the proper route to Cuba,' Walker . . . said."

It is obvious that the above Associated Press news report accuses Walker of specific acts, for which he was subsequently charged by the United States Government with commission of crimes (18 U.S.C. 111, 2383, 2384).

In answer to questions presented by the Court under special issues, the trial jury held, by unanimous verdict, that:

1) The Associated Press statements that, "Walker . . . led a charge . . . against U. S. Marshals" and

"Walker assumed command of the crowd" were false.

2) The statements were not "fair comment."

3) The statements were *not made in good faith.*

Amicus Curiae seeks a judgment in this case that would wipe out the jury's verdict, and deprive Respondent of legal recourse for the wrong he has suffered, which argument is summarized by a statement at page 7 of its Brief, as follows:

> "We submit that if on-the-spot news reporting of current public events is to be fostered and encouraged, as contemplated by the First Amendment, publishers and news wire services must be protected from libel actions such as those instituted by the respondent."

The first question before the Court is whether *Sullivan* and subsequent decisions involving the First Amendment Freedom of the Press should change the law of Libel where the report is both false and an accusation of crime. Respondent contends that neither the facts, the rule, nor the reasoning of *Sullivan* and other cases should be construed as imposing upon the injured party the burden of proving bad faith of the publisher, when the defamation is so serious as to cause the arrest and imprisonment of the victim. The "First Amendment theory"[4] requires careful evaluation of

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[4] "Of course, only time and more decisions, many more, can reveal the significance of New York Times and Garrison in the evolution of the First Amendment Theory."

—Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harvard L. Rev. 1, 19 (1965).

the impact upon the individual citizen, as well as the advantage to the Press, before so dangerous a power should be conferred with so little responsibility following its use.

Before *Sullivan,* there can be no doubt that a false accusation of a crime was malicious *per se.*[5]

In the instant case, the facts are conclusive that the statements found by the jury to be false were also "knowingly false," since, upon the face of the publication, it was represented that the Associated Press newsman was an eyewitness ("He was there." "Throughout this time, I was less than six feet from Walker.") From a range of six feet, Savell either saw these alleged criminal acts committed, or he did not. His report was either true or "knowingly false."

Under the undisputed evidence, there seems no reasonable question that the handling of the report by Associated Press was also in reckless disregard of the truth.[6]

These facts are far different from those in *Sullivan,*[7] where New York Times had published a paid advertisement, which contained general criticism, aimed at no particular individual, and charging, at most, mal administration in office by unidentified persons. There was no statement by which any employee of New York Times, the publisher,

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[5] *Davila* v. *The Caller Times Publishing Co.* (Ct. of App., Tex. 1958), 311 S.W.2d 945; *Houston Chronicle Publ. Co.* v. *Bowen* (Ct. of App., Tex. 1915), 182 S.W. 61; *Shepherd* v. *Brewer* (Mo. 1913), 154 S.W. 116.

[6] See summary of testimony of AP newsman, Ben Thomas, Respondent's Answer Brief.

[7] *New York Times* v. *Sullivan,* 376 U.S. 254 (293).

reported that he had seen the plaintiff commit any criminal act. Liability in the state court was merely inferred from defendant's "irresponsibility" in printing the advertisement, when its own files had articles already published that would have demonstrated the falsity of the allegations in the advertisement. A review of the facts in *Sullivan* will reveal that the Court was not confronted with a case where an employee of the defendant, as a purported eye-witness, had falsely accused the plaintiff of committing a crime, as in the *Walker* case. Perhaps the most widely quoted language of the Opinion is the following:

> "Thus we consider this case against the bankground of a profound national commitment to the principle that *debate on public issues* should be uninhibited, robust, and wide-open, and * * *
>
> * * * * * * *
>
> "That *erroneous statement is inevitable in free debate*, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"

If the power of the Press is expanded to include false charges of *crime* against an individual citizen, the free "debate" encouraged by *Sullivan* would be so heavily weighted in favor of the Press that a private citizen, who does not own a newspaper, would be at such a disadvantage that he would abandon the unequal contest before it started. His "breathing space" would be surrounded with bars; and he would have no recourse, unless he could prove

those persons[8] in the Associated Press organization having responsibility for publication of the report actually "knew" that it was false, or were acting in reckless disregard for the truth. If, as a result of false report of criminal acts, the individual should be in a Prison during the critical time, as was Walker, considerable difficulty might arise in securing evidence that the original publication was "known" by those responsible for its publication to have been false.

Amicus Curiae has cited no authority, nor have we discovered a decision holding that the First Amendment extends to the Press a Freedom to make direct and false accusation of crime; and, without direct precedent, it appears that this Court, deep within its own conscience, will balance the public's need to know through a Free Press against the right of the individual citizen to be free from the fear of false accusation, and will fix the boundary of the First Amendment Freedom of the Press so as to accomplish, as nearly as humanly possible, a result compatible with *equal justice under the law.*

It is respectfully submitted that the doctrine of the *Sullivan* case, which involved only comment, should not be extended to provide for the Press a Freedom to make false accusation of crime against individual citizens, which eventually could be expanded into a license to destroy.

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[8] From *Sullivan*:

"The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be *brought home to the persons in the Times organization having responsibility* for the publication of the advertisement."

PROPOSITION TWO

THE SULLIVAN RULE DOES NOT APPLY TO A PRIVATE CITIZEN.

Amicus Curiae "commend and urge" this Court to "ground a decision of reversal on a broader base than the doctrine of 'public official' or 'public figure,' and to extend the First Amendment Freedom to permit the reporting of 'current public events with impunity unless the report is both false and the product of actual malice.'" Based upon the affidavit of its managing editor delineating the expediency of unrestricted reporting, Amicus Curiae argues:

> "Beyond cavil, if freedom from oppressive libel suits is to be contingent upon the nature and status of the plaintiff, rather than the event, the mandate of the First Amendment has not been fulfilled * * *. In sum, the doctrine of public officials should encompass not only the public *figure* but also the public *event*. And, we cannot envisage a more appropriate cause for the Court to acknowledge such a doctrine than the Mississippi riots, for if the First Amendment is to have its intended vitality it certainly must protect on-the-scene news reporting of an event of such national magnitude."

If the rights of the individual are to be ignored, such a rule would have one advantage—simplicity. The Press would be well-protected against liability for false reporting, unless the victim were able to establish that the report was "knowingly false" or "in reckless disregard for the truth," a most formidable obstacle, unless the Press has convicted itself, as in the instant case, where the false report of their young reporter was preceded by a "sales

pitch," "Here is the story of Van Savell, 21, *Associated Press Newsman,* who was on the scene and *saw what happened.*" —thus, leaving open only the question as to whether the purported eye-witness story was true or false.

It would appear that the news media, itself, would seek to establish higher, rather than lower standards of integrity and accuracy in its reporting. If accuracy is difficult to obtain under present conditions, it would be infinitely worse if those who gather and disseminate the news for profit are relieved of financial responsibility for damages caused by their product. Private industry spends millions for quality control. The Press might improve its product at far less cost.

In other fields of the law, the Courts have consistently imposed higher standards of product liability,[9] under concepts of both warranty and negligence, even to the extent of assuming negligence, under principles of *Res Ipsa Loquitur,* from the occurrence of an accident, and shifting the burden to the manufacturer and distributor to prove *reasonable* care. In this area, there have been judgments for shattered bodies, even higher than Libel judgments for shattered reputations; but no Court has yet established a protective rule of privilege to require an injured plaintiff to prove that the manufacturer either had knowledge of the defect or acted in reckless disregard of reasonable care.

It would seem that the potential harm to the public from false news may be even greater than from defective merchandise.

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[9] See *Associated Press* v. *U. S.,* 326 U.S. 1; *Moran* v. *Pittsburgh Des Moines Steel Co.,* 1948 (C.A. 3, Pa.), 116 F.2d 908, *cert. den.* 334 U.S. 846, 92 L.Ed. 1770, 68 S.Ct. 1516; 81 A.L.R.2d 332.

Especially is this so with the monopolistic capability of the wire services,[10] and the fact that most metropolitan areas are under the sole control of a single newspaper, which is under management of a single ownership..

Over the years, basic concepts have developed, that have, so far, kept our "Ship of State" upon a fairly even course. These include:

1) *Know the Truth, and the Truth shall keep you free.*

2) *Power corrupts. Absolute power corrupts absolutely.*

Appalled by the impact of world turmoil and aggression, one of the great modern writers, the late Gill Robb Wilson, who became one of the spokesmen of the early Air Age, challenged his fellow Americans:

> *"Once again, conflicting ideologies are locked in desperate rivalry for the key to human destiny."*

Comparison of the Objectives, the Strategies and the Tactics of the two ideologies may reveal that the "KEY" is . . . INTEGRITY . . . of which the basic element is TRUTH.

Vital decisions under the one ideology are made by ruthless rulers, who use propaganda, with its components of deceit, fabrication and falsehood for human motivation. Its concepts of Justice are shaped solely for enhancement of the power of the ruling oligarchy . . . never by the rights of the individual.

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[10] *Associated Press* v. *Taft-Ingles Corp.* (6 Cir. 1965), 340 F.2d 753, 766.

The other ideology preserves both Freedom and Justice upon a broad base of individual knowledge and is devoted to a concept of Equal Justice Under the Law. The indispensable element of true knowledge is timely and accurate information, for which the American citizen is completely dependent upon a highly organized system of gathering and disseminating news.

In its final plea (p. 12, Tribune Brief) Amicus Curiae submits this case, growing out of the Mississippi riots, as the most appropriate cause for the Courts to expand the First Amendment Freedom of the Press to protect "on-the-scene" news reports of such events. To do so would place judicial approval upon a performance by Associated Press that resulted in false imprisonment (as found by a Grand Jury and two Trial Juries) of one who must bear to his grave a false public image as a lunatic and Insurrectionist, as the result of a false charge by an inexperienced 21-year-old reporter, whose report was published by Associated Press, after notice to more experienced newsmen in the New Orleans re-write room that the cub reporter's telephone reports were hopelessly mixed up as to time and detail. Later, the principal actor in the Mississippi Drama, Meredith, was falsely reported by Associated Press as having been killed from ambush.[11]

In order to expand the "First Amendment Theory" into a blank check for the Press to defame and accuse with immunity, it would first be necessary to overhaul completely the *Sullivan* rule. In that case, the break from long

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[11] See Time Mazagine, June 17, 1966, p. 62, "The 'Death' Blunder."

established precedent was accomplished as a corollary of "Equal Justice Under Law," by extending to a private citizen the reciprocal right and privilege to criticize, with immunity, the conduct of public officials who, in turn, were protected against liability for defamation in the course of official statements, unless actual malice can be proved.[12]

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[12] *New York Times Co.* v. *Sullivan*, 376 U.S. 254:

"We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to avoid damages in a libel action brought by a *public official against critics of his official conduct.*

"We hold that the rule of law applied by the Alabama Courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a *public official against critics of his official conduct.*

"The question before us is whether this rule of law liability, as applied to an action brought by a *public official against critics of his official conduct,* abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

"The right of free public discussion of the *stewardship of public officials* was thus, in Madison's view, a fundamental principle of the American form of government.

"A rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions . . . Under such a rule, would-be *critics of official conduct* may be deterred from voicing their criticism . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

"Such a privilege for criticism of *official conduct* is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen.

"It would give public servants an unjustified preference over the public they serve, if *critics of official conduct* did not have a fair

A continuation of the concept of protecting the individual citizen against official "overbearing" is well illustrated in *Miranda* v. *State of Arizona*[13] (U.S. Sup. June 13, 1966), 86 Sup. Ct. Rep. 1602.

It is obvious that the "overbearing," as condemned in *Miranda* was a product of official power. The Associated Press has even greater power, on a national level, and newspapers, including newspaper chains, have similar power on both national and local levels. Where public officials are ultimately subject to public opinion, the news media actually creates and controls public opinion, and will have no restraint if financial responsibility is removed.

If the conduct of Associated Press in the instant case is condoned and approved as a precedent for future Freedom of the Press, the right of the individual citizen to secure vindication and compensation for injury for defamation and accusation, as a question of fact for jury trial, will be

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12 (Continued)
equivalent of the immunity granted to the officials themselves . . . We hold today that the Constitution limits a State's power to award damages for libel in actions brought by public officials against critics of their *official conduct*. Since this is such an action, the rule requiring proof of actual malice is applicable.

13 *Miranda* v. *State of Arizona*, 86 Sup. Ct. Rpr. 1602 (1966), — U.S. —:

"• • • basic rights that are enshrined in our Constitution—that 'No person • • • shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall • • • have the Assistance of Counsel'—*rights which were put in jeopardy in that case through official overbearing*. These precious rights were fixed in our Constitution only after centures of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come • • • designed to approach immortality as nearly as human institutions can approach it.'"

destroyed as a matter of law. Equal weight and consideration should be given to the *duty and responsibility* of the Press, as well as the Freedom of the Press. Without a legal duty and responsibility, clearly defined and recognized, Freedom of the Press can degenerate into oppression . . . can sink into license . . . to smear . . . to create false images . . . to slant news . . . to propagandize. Once the bars are down, and the cycle started, we can expect competition between different wire services, between different newspapers and between different types of news media for the most sensational and salable items of news. In such competition, the one least restrained by concepts of accuracy, integrity and responsibility *would have a substantial competitive advantage over the other. The dividing* line between fact and fiction will become more obscure, and the news media will be more inclined to *make the news, rather than to report the news.* Public confidence in all of them will deteriorate in direct proportion.

Amicus Curiae, upon the sole basis of expediency and freedom from financial responsibility in reporting on-the-scene news, seeks extension of the *Sullivan* rule beyond the public official to include the public "figure" and also the public "event." The "Equal Justice" concept for a private citizen to criticize the public official is not applicable in the instant case; and the requested constitutional Freedom of the Press to defame and accuse a private citizen with immunity must be based upon some other ground. We recognize that some lower courts have extended the rule to a "public figure who has voluntarily thrust himself into

the vortex of public discussion of an issue which is of pressing public interest and concern.'[14]

The Colorado Supreme Court states:

> "We recognize that there is authority from other jurisdictions which looks away from such a holding. See, e.g., Fignole v. The Curtiss Publishing Co., 247 F. Supp 595. But in our considered view the *rationale of New York Times* Company v. Sullivan, supra, clearly suggests that the rule announced therein should apply to one in the position of this plaintiff."

And, now, with the parties in final confrontation before the ultimate judicial authority, the question arises, "What rationale?" Aside from the Equal Justice concept, *Sullivan* notes that the libel judgment was 1,000 times greater than the maximum fine in Alabama for criminal libel, and concludes:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment Freedoms cannot survive."

In this area the first question arises as to whether there is a First Amendment Freedom to publish false reports that

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[14] *Walker* v. *Associated Press* (Colo. 1966), — P.2d —; *Walker* v. *Courier-Journal, et al.* (6 Cir. 1966), — F.2d — (reviewing 246 F. Supp. 231, W.D. Ky. 1965); *Pauling* v. *National Review, Inc.*, 269 N.Y.S.2d 11; *Pauling* v. *News Syndicate Co., Inc.*, 335 F.2d 659; *Rosenblatt* v. *Baer*, 383 U.S. 75.

Other cases involving Walker in the lower courts are: *Associated Press and Times-Picayune Publ. Corp.* v. *Walker* (Ct. of App. La., 1966), — S.W.2d —; *Associated Press* v. *Walker* (Civ. App. Tex., 1965), 393 S.W.2d 671.

accuse a private citizen of a felony, and, next, whether such freedom in this very limited area would be necessary for survival of the Press. As to the instant case, there is no threat to the survival of Associated Press, whose annual operating budget exceeds $40,000,000.00. Its resources are further illustrated by comment at page 46 of Petitioner's Brief that Associated Press and its members had already incurred expenses in defending Respondent's actions far in excess of the judgment in this case. If Respondent could go equally outside the record, the comparison of his relatively poverty stricken budget in seeking vindication of the false charges against him would further emphasize the great disparity in power between the Press and individual members of the public, and the difficulty of proving "knowingly false" or "reckless disregard for the truth" by so powerful a defendant.

In a recent decision, *Faulk* v. *Aware, Inc.* (N.Y. 1964), 200 N.E.2d 778, 202 N.E.2d 372, an original verdict of $1,000,000 compensation and $1,250,000 punitive damages against a small publication and an individual was reduced to $400,000 compensatory and $150,000 punitive and certiorari was denied by this Honorable Court (380 U.S. 916, 1965). There the ruinous judgment issue was far more critical than in the instant case.

In *Fignole* v. *Curtiss Pub. Co.* (D.C. N.Y. 1965), 247 F.Supp. 595, the Court, after considering *Sullivan* and various other cases[15] and recognizing that "the law in this area

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[15] *Pauling* v. *News Syndicate Co.* (2 Cir. 1964), 335 F.2d 659, *cert. den.* 85 Sup. Ct. 662, 379 U.S. 968, 13 L.Ed. 561; *Walker* v. *Courier-Journal* (D.C. Ky. 1965), 246 F. Supp. 231.

is in a state of flux," held that a candidate for public office, although a "public figure" was entitled to *maintain an action for libel, without proving actual malice, with* language as follows:

> "At the moment, New York Times, which is the only decision binding upon me, does not foreclose this action. In order to grant this motion, *it would be necessary to go farther than the Supreme Court has gone to date in holding that, in the absence of actual malice as defined in New York Times, the United States Constitution forbids a state to grant redress under its libel laws* to a man who allegedly has been injured by a false defamatory statement.
>
> "I am less willing than was the court in Walker v. Courier-Journal, supra, to take this additional step. On the contrary, New York Times, to my mind, indicates that it should not be taken. The rationale of that decision appears to be that since a public official enjoys a privilege, either absolute or qualified, against liability for libelous statements which he makes in the course of his official duties, so a critic of a public official's conduct should possess an equal privilege.
>
> > 'It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.' (376 U.S. at 282-283, 84 S.Ct. 727).
>
> "If this is the basis of the New York Times rule, then there is *no reason to grant immunity to critics of mere candidates for office or of public figures in general, for the candidates and the miscellaneous public figures possess no corresponding immunity for their own defamatory utterances.* On the facts of the present case,

therefore, and on the present state of the law, I hold that defendant is not entitled to a dismissal of the libel count."

A most scholarly analysis of the issue has been presented by District Judge Holtzoff in *Clark* v. *Drew Pearson* (U.S.D.C. Dist. of Col. 1965), 248 F.Supp. 188. The case involved a defamatory publication by columnist, Drew Pearson, wherein Pearson had written that the plaintiff, Clark, a Washington lawyer, had become friendly with a Congressman, after which the Congressman had reversed his position concerning opposition to the "Natural Gas Lobby," also represented by Clark. Plaintiff alleged that the Pearson article in effect charged him with the crime of endeavoring to bribe a Congressman. Among other defenses, defendant urged that plaintiff was a public figure, and that the libellous article related to matters of public interest. The Court held that the right to redress libel is a *civil right* and rejected defendant's argument, saying:

> "The arguments * * * included a plea for drastic changes in the law of libel, in a manner that would radically devitalize and impair the protection that it affords against defamatory publications. In view of this circumstance, it seems appropriate to make a few observations on the basic status of the law of libel in Anglo-American jurisprudence.
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> "The common law sedulously guarantees to every indivdual various civil rights, such as the right of personal freedom, the right of personal safety, and the right of property. Another civil right safeguarded by the common law is the right to one's reputation. * * * (248 F.Supp. 190-191)

"The current trend in the law is to enhance and augment the protection of individual civil rights. No reason appears for making an exception as to the right to reputation. * * * Most civil actions relate only to money, while actions for libel or slander involve honor and reputation, which are to be considered on a higher level. . . ." (248 F. Supp. 191).

The latest expression by this Honorable Court in the area of First Amendment Freedom is *Time, Inc.* v. *Hill* (Jan. 10, 1967), 35 L.W. 4108, wherein it was recognized that a guarantee of freedom to the Press, "for the benefit of all of us" should preclude the saddling of the Press with the "impossible burden of verifying to a certainty the facts associated in a news article with the person's name, picture or portrait, *particularly as related to non-defamatory matter.*"[16]

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[16] *Time, Inc.* v. *Hill* (Jan. 10, 1967), 35 Law Week 4108:

"Erroneous statement is no less inevitable in such case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . ." *New York Times Co.* v. *Sullivan, supra,* at 271-272. As James Madison said, "Some degree of abuse is inseparable from the proper use of everything and in no instance is this more true than of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. "We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to non-defamatory matter.* Even negligence would be a most elusive standard, especially *when the content of the speech* itself affords no warning of prospective harm to another through falsity." (p. 4112)

(The question then arises as to the responsibility of the press *where the content of the news report accuses a citizen of a felony.* Would it be an unreasonable restriction of freedom to require *reasonable* care before risking the freedom of another by a report of questionable accuracy?)

Confronted with the legal problem as to whether the rule of *Sullivan* requiring malice would apply in a "privacy" case that did not involve a public official, the opinion of this Court reveals an almost classic laboratory experiment where legal scholars have accomplished a delicate balance of the scales of justice, and have obviously weighted each side with extensions and denials of rights and responsibilities, remedies and defenses. In arriving at the Conclusion that this invasion of privacy case should require Proof of Malice ("knowingly false" or "reckless disregard for the truth"), the Court recognized that it involved "non-defamatory matter," and further stated:

> "We find applicable here the standard of knowing or reckless falsehood not through blind application of New York Times Co. v. Sullivan, *relating solely to libel actions by public officials*, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. *This is neither a libel action by a private individual nor a statutory action by a public official.* Therefore, although the First Amendment principles pronounced in New York Times *guide our conclusion*, we reach that conclusion only by *applying these principles in this discrete context.* It therefore serves no purpose to distinguish the facts here from those in New York Times. Were *this a libel action, the distinction which has been suggested between the relative opportunities of the public official and private individual to rebut defamatory charges might be germane.* And the additional *state interest in* the *protection of* the *individual against damage to his reputation* would be involved."

From the above, it appears that this Court has such an awareness of the boundary between the "breathing space" of the Press and the "security area" of the people that it would be presumptuous for counsel to make further suggestion, particularly in view of the concurring and dissenting opinions in *Time, Inc.* v. *Hill.*

It is respectfully submitted that the *Sullivan* rule should not be extended to apply to a private citizen, even though he may be a "public figure" involved in a "public event."

CONCLUSION

Objective evaluation may reveal that the proposition presented to the Court by Amicus Curiae is not a "friendly" suggestion—that abandonment of the rule which keeps financial responsibility behind the product liability of the news merchant[17] may create a "Frankenstein" that will return to haunt not only the public, but also the news media itself.

There is a functional basis for balancing the power of public officials against the Freedom of the public to make good faith errors in public criticism of such officials, especially since the power of the public official is ultimately subject to public opinion. With the power of the news media and especially the wire services, devoted primarily to the making of public opinion, however, the same safeguard does not exist when the power of defamation and accusation is extended to the news media. In the rationale of *Time, Inc.*,

---

[17] *Associated Press* v. *U. S.*, 326 U.S. 1.

and particularly the concurring and dissenting opinions, it appears that the attention of this Honorable Court has been drawn to the necessity of increasing the responsibility of the Press from minimal requirements, where minor defamation is involved, to a progressively higher degree where the Press is gambling seriously with the reputation, and especially the Liberty, of citizens in the news.

Respectfully submitted,

CLYDE J. WATTS
Counsel for Respondent

Of Counsel:

WILLIAM ANDRESS, JR.
Fidelity Union Life Building
Dallas, Texas

WATTS, LOONEY, NICHOLS & JOHNSON
219 Couch Drive
Oklahoma City, Oklahoma 73102

January, 1967

APPENDIX

AFFIDAVIT

STATE OF OKLAHOMA

SS

OKLAHOMA COUNTY

CLYDE J. WATTS, having been duly sworn, on oath states:

1) He is a practicing attorney in Oklahoma City, a member of the Bar of the Supreme Courts of the United States of America and the State of Oklahoma. He is counsel for Respondent, Edwin A. Walker, in the instant case, and also represented Edwin A. Walker in Case WC-29-62, U. S. District Court for the Northern District of Mississippi, "United States of America v. Edwin A. Walker," wherein Walker was charged with crimes as hereafter set forth.

2) On the night of September 30, 1962, Associated Press published on its World-wide news wires that "former Maj. Gen. Edwin Walker led a charge of about 1,000 students against the Marshals" (R. 1225, 1229, 1240).

3) On October 1, 1962, the U. S. Attorney at Oxford, Mississippi, filed a Complaint against Walker, "on the basis of information obtained from Van H. Savell" (Associated Press newsman), charging him with: 1) Insurrection, 2) Assaulting U. S. Officers, 3) Sedition, 4) Seditious conspiracy. (See Apx. vi-vii.)

4) On the same date, Walker was committed to the custody of the U. S. Marshal for the Northern District of Mississippi, who was ordered to commit him in a place of confinement within the Northern District of Mississippi. (See Apx. viii-ix.)

5) Within a few hours after this commitment for confinement in the Northern District of Mississippi, the U. S. Marshall received a telegram from the U. S. Director of Prisons, directing that Walker be committed to the U. S. Medical Center at Springfield, Missouri. (See Apx. ix.) *Without a Court Order*, and without a reasonable opportunity to make the $100,000.00 bail fixed by the U. S. Commissioner, Walker was placed upon a border patrol plane, without being told where he was being taken, and transported to Springfield, Missouri, where he was committed to the custody of the Warden of the U. S. Medical Center.

6) On October 2, 1962, the U. S. Attorney at Oxford, Miss., filed with the Federal Court a Motion for Judicial Determination of Mental Capacity (see Apx. x-xiii) with attached Affidavit by Dr. Charles E. Smith, Chief Psychiatrist of the Federal Bureau of Prisons, who had never seen Walker, stating that he had "examined carefully various news reports concerning General Walker's actions and behavior, including . . . news reports of his appearances on the University Campus during the past several days." "Some of his *described behavior* reflects . . . bizarre outbursts of the types often observed in indiivduals suffering with paranoid mental disorders . . . I believe his recent behavior may be indicative of an underlying mental disturbance."

7) On the same date, and pursuant to such motion, the U. S. District Judge at Oxford ordered Walker to be "transferred and committed" to the Medical Center for Federal Prisoners at Springfield, Mo., which Order was entered without notice to Walker, representation by counsel or a hearing, and at a time when Walker had already been transferred to Springfield. (Apx. xiv-xv.)

8) Walker's Petition for *Writ of Habeas Corpus* in the U. S. District Court, filed October 3, 1962, could not receive a prompt hearing, under Order of the Court that Answer and Briefs should be filed by October 9, 1962 and the

Respondent (Warden) was granted until October 14, 1962, to file answer and return certifying the true cause for detention of Walker (Apx. xvi-xviii). Time was allowed for filing of briefs. Meanwhile Walker was in Prison in Missouri, until released on bond by the Mississippi Court on October 6, 1962.

9) In addition to the original false report that Walker had assumed command of the mob and led a charge against U. S. Marshals, Associated Press proceeded to slant the news coverage concerning Walker as follows:

a) Extensive World-wide coverage was given to Walker's arrest and commitment to the mental hospital, including one feature story that Al Capone had once been an inmate and that many of the inmates were lunatics and sexual deviates (Apx. xix).

b) No coverage was given to the fact that Walker's rights had been violated, in transporting him to Springfield, without a Court Order, and without reasonable time to make bail, and subsequently committing him, without notice, counsel or hearing, upon the Affidavit of a psychiatrist who had never examined him or even seen him.

c) At a hearing before the Federal Court in Oxford on Oct. 21, 1962, extensive coverage was given on the national "A" wire of Associated Press, that government psychiatrists had questioned Walker's mentality (R. 1384). Report of the Court appointed Psychiatrist, including his statement that "Walker was functioning under the superior level of intelligence" was placed upon the "B" wire, with limited local circulation (R. 1373, 1419). The trial judge was misquoted by the AP as having indicated that the latter report expressed no opinion as to Walker's sanity (R. 1395).

d) After the Department of Justice dismissed its charges against Walker, the story was de-emphasized by an insertion that the charges could be re-filed at any time within five years (R. 1425-6).

10) Based upon extensive investigation of the actions of Associated Press newsmen in the handling of the Walker case, and the depositions and testimony of several high level executives of Associated Press, affiant takes issue with the conclusions in the Affidavit of Mr. W. D. Maxwell that more latitude for reporters of the News Service is required by the Constitution for "on the scene spot news reports," and that "true freedom of the Press cannot endure unless the Press can report, in depth and detail and without fear of economic reprisal, all the news of the day *as received.*" Affiant would respectfully suggest to Mr. Maxwell, and to the news media, generally, that their newsmen should be trained and disciplined to avoid false charges of criminal acts against even "public figures." Associated Press Newsrooms should be instructed that Associated Press would be responsible for false reports of acts constituting the commission of a crime, at least until the alleged criminal is taken into custody. This should not delay the reporting of actual news more than a few hours at the most and would avoid the spectre of having a "public figure" arrested upon the public statement of a newsman, who may have "made the news," rather than reported the news.

11) It is also respectfully suggested that, if the news media is relieved from financial responsibility for defamation so serious as to cause arrest of the victim, news, as a very salable commodity, will become competitive upon the basis of relative sensationalism of the report, with the less spectacular true and accurate news becoming consistently less marketable. Removal of financial responsibility, as a

guarantee for accuracy and integrity, would ultimately do do more harm than good to the news media, in terms of loss of public confidence.

12) It is finally respectfully suggested that, since riots and civil disorders present problems increasingly similar to war-time combat, the Wire Services could profitably copy the basic requirement that combat reconaissance patrols travel in pairs. Such a directive by Associated Press to its newsmen would have avoided the Walker debacle, and would have prevented confinement of an innocent man for six gruesome days and nights in a Prison Hospital for criminal insane, under maximum security and in solitary confinement. There must be a better way to provide "on the spot" news coverage than to eliminate, by Constitutional construction, what little restraint and discipline may exist among certain merchants of news.

_____

CLYDE J. WATTS

Subscribed and sworn to before me on January ____, 1967.

_____

Notary Public

My Commission Expires:

_____

[APPENDIX]

FILED IN EVIDENCE
IN SUIT NO. 160536
OCT 18 1965
(Name illegible)
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION

Commissioner's Docket No. 1
Case No. 61

UNITED STATES OF AMERICA	)	COMPLAINT for
	)	VIOLATION OF
v.	)	U. S. C. Title 18
EDWIN WALKER	)	Sections 111, 372, 2383,
	)	and 2384

BEFORE Omar D. Craig, Oxford, Mississippi.

The undersigned complainant being duly sworn states:

That on or about September 30, 1962, at Lafayette County, in the Northern District of Mississippi, Edwin Walker did forcibly assault, resist, oppose, impede, imtimidate, and interfere with United States marshals and persons employed to assist such marshals, the marshals being a class of persons designated in Section 1114, Title 18, United States Code, while engaged in the performance of their official duties, in violation of Section 111, Title 18, United States Code;

That said defendant and other persons unknown in the state of Mississippi, did conspire to prevent by force, intimidation, and threats United States Marshals from discharging their duties and to injure them in their person while engaged in the lawful discharge of the duties of their office, in violation of Section 372, Title 18, United States Code;

That said defendant did incite, assist, and engage in an insurrection against the authority of the United States and the laws thereof, in violation of Section 2383, Title 18, United States Code;

That said defendant and other persons unknown in the state of Mississippi, did conspire to and oppose by force the authority of the United States and by force to prevent, hinder, and delay the execution of the laws of the United States, in violation of Section 2384, Title 18, United States Code.

And the complaint states that this complaint is based on information and belief *on the basis of information obtained from Van H. Savell.*

/s/ H. M. RAY
United States Attorney

Sworn to before me, and subscribed in my presence, October 1, 1962.

/s/ Omar D. Craig
United States Commissioner

[APPENDIX]

FILED
This 8 day of Oct. 1962
— T. Robertson, Clerk
By Shirley S. Lumpkin
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Commissioner's Docket No. 1
Case No. 61

UNITED STATES OF AMERICA	)	FINAL COMMITMENT
v.	)	of
EDWIN WALKER	)	EDWIN WALKER

To: The United States Marshal of the Northern District Mississippi;

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within the Northern District of Mississippi approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant was arrested upon the complaint of H. M. Ray, United States Attorney, charging that on or about 30 Sept., 1962, in the Northern District of Mississippi, the defendant did Assault, resist, and impede officers and employees of the United States, and conspire to impede and injure officers of the United States, insurrection, and seditious conspiracy, in violation of U.S.C. Title 18, Sections 111, 372, 2383, and 2384, and he, (*having duly waived preliminary examination before me on* Oct. 1, 1962), has been directed to furnish bond in the sum of One Hundred Thousand dollars ($100,000.00) for his appearance in the United States District Court for the Northern District of Mississippi at Oxford, Mississippi,

in accordance with all orders and directions of the court relative to his appearance before the court, and he failed to do so.

/s/ Omar D. Craig
United States Commissioner

Dated: October 1, 1962

Omar D. Craig

TO WARDEN RUSSELL SETTLE FROM DIRECTOR

OCT. 2

HERE IS A COPY OF THE TELEGRAM FORWARDED LAST NIGHT TO JOHN H. PHILLIPS UNITED STATES MARSHAL POST OFFICE AND FEDERAL BUILDING OXFORD MISSISSIPPI QUOTE IN VIEW OF FACT THAT THERE IS NO AVAILABLE SUITABLE FACILITY FOR THE TEMPORARY DETENTION OF EDWIN A. WALKER ELSEWHERE THAN IN THE MEDICAL CENTER FOR FEDERAL PRISONERS AT SPRINGFIELD MISSOURI YOU ARE AUTHORIZED AND DIRECTED TO PROMPTLY COMMIT WALKER THERE PENDING FURTHER ACTION ACTION BY APPROO APPROPRIATE COURT JAMES V. BENNETT DIRECTOR UNQUOTE END ACA

WILLDEL MSG TU END ENDM

[APPENDIX]

—x—

FILED
2 October 1962
Claude F. Clayton
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
v.	)	No. W-C-29-62
EDWIN A. WALKER	)	

MOTION FOR JUDICIAL DETERMINATION OF MENTAL COMPETENCY

Comes now the United States of America by H. M. Ray, United States Attorney for the Northern District of Mississippi, and moves this Court for a judicial determination as to the mental competency of the defendant Edwin A. Walker under the provisions of Section 4244, Title 18, U. S. Code, and for grounds for this motion would respectfully show the following:

1) That on October 1, 1962, a complaint was filed with the United States Commissioner, Oxford, Mississippi, against this defendant charging him with—

forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with United States Marshals and persons employed to assist such marshals, the marshals being a class of persons designated in Section 1114, Title 18, United States Code, while engaged in the performance of their official duties, in violation of Section 111, Title 18, United States Code;

conspiring, with other persons unknown in the State of Mississippi, to prevent by force, intimidation, and threats United States Marshals from discharging their duties and to injure them in their

person while engaged in the lawful discharge of the duties of their office, in violation of Section 372, Title 18, United States Code;

inciting, assisting, and engaging in an insurrection against the authority of the United States and the laws thereof, in violation of Section 2383, Title 18, United States Code;

conspiring to and opposing by force, with other persons unknown in the State of Mississippi, the authority of the United States and by force to prevent, hinder, and delay the execution of the laws of the United States, in violation of Section 2384, Title 18, United States Code;

and that bond was fixed in the sum of $100,000.00;

2) That Dr. Charles E. Smith, Medical Director and Chief Psychiatrist of the Federal Prison Bureau, has informed James V. Bennett, Director of the Federal Bureau of Prisons, who in turn has informed the United States Attorney, by telegram, a copy of which is attached hereto as Exhibit "A", that there is probable cause to believe that the defendant is suffering from a mental disturbance;

3) That on the basis of the aforesaid information furnished concerning this defendant, the United States Attorney has reasonable cause and does believe that it is very likely that the defendant Edwin A. Walker may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense; that the Court should cause the defendant to be examined as to his mental condition; and that for the purpose of this examination the defendant should be com-

mitted to a suitable hospital or other facility to be designated by the Court.

Respectfully submitted,

/s/ H. M. Ray
H. M. Ray
United States Attorney

AFFIDAVIT

United States of America
Northern District of Mississippi

This day personally appeared before me, the undersigned authority, H. M. Ray, U. S. Attorney for the Northern District of Mississippi, who being by me first duly sworn according to law, upon his oath states that to the best of his knowledge, information, and belief, the matters and things set forth in the foregoing motion are true and correct as therein stated.

/s/ H. M. Ray
H. M. Ray
United States Attorney

Sworn to and subscribed before me this the 2nd day of October, 1962.

William T. Robertson, Clerk
By /s/ Katherine H. Butts
Deputy Clerk

(SEAL)

I hereby certify that the foregoing is a true copy of the original thereof now in my office.
Attest 10-16-65
William T. Robertson, Clerk
By Gena S. Lamb, D.C.

October 2, 1962

Telegram to Mr. Hosea M. Ray, United States Attorney, Oxford, Mississippi

The following is a memorandum to me concerning Edwin A. Walker submitted by Dr. Charles E. Smith, Medical Director and Chief Psychiatrist of the Federal Prison Bureau: "I have carefully examined various news reports concerning General Walker's actions and behavior including his appearance before the Committee of the United States Senate on Armed Forces in April of this year and news reports of his appearances on the University Campus during the past several days STOP Some of his described behavior reflects sensitivity and essentially unpredictable and seemingly bizarre outbursts of the types often observed in individuals suffering with paranoid mental disorders. There are also indications in his medical history of functional and psychosomatic disorders which could be precursers of the more serious disorders which his present behavior suggests. From this and other information available to me I believe his recent behavior has been out of keeping with that of a person of his station, background, and training, and that as suggested it may be indicative of an underlying mental disturbance. Signed Charles E. Smith." The foregoing being forwarded to you in affidavit form by air mail.

James V. Bennett
Director of Prisons

Exhibit "A"

[APPENDIX]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
v.	)	No. W-C-29-62
EDWIN A. WALKER	)	

ORDER COMMITTING DEFENDANT
FOR PSYCHIATRIC EXAMINATION

On a motion filed by the United States Attorney for a judicial determination of the mental compentency of the above-named defendant under the provisions of Section 4244, Title 18, United States Code, the Court advises that the motion is sufficient and should be sustained.

It is, therefore,

ORDERED:

That the defendant be transferred and committed to the Medical Center for Federal Prisoners, Springfield, Missouri, for psychiatric examination and there remain for such reasonable time for such examination as may be determined by the Center to be necessary or desirable for the completion of such examination;

That upon completion of said examination a report of the results thereof be transmitted to this Court;

That the Attorney General of the United States of America, upon receipt of a certified copy of this order, deliver defendant to said Center; and upon completion of said examination said Center notify the Attorney General of the United States or his duly authorized representatives and the United States Marshal for the Northern District of Mississippi; and upon receipt of the notice the Attorney General or his duly authorized representatives shall then return the defendant to the custody of the United States Marshal for the Northern District of Mississippi;

That for delivery of said defendant to the Medical Center for Federal Prisoners and subsequently returning said defendant to the jurisdiction of this Court, a certified copy of the order shall be full warrant and authority to the Attorney General of the United States or his duly authorized representatives and to the said United States Marshal.

This the 2nd day of October, 1962.

/s/ Claude F. Clayton
Claude F. Clayton
District Judge

(SEAL)

I hereby certify that the foregoing is a true copy of the original thereof now in my office.
Attest 10-16-65
William T. Roberston, Clerk
By Gena S. Lamb, D.C.

FILED
OCT 4 1962
J. C. Truman, Clerk
By Axie Powell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

EDWIN A. WALKER	)	
Petitioner,	)	
-vs-	)	
DR. R. O. SETTLE, Warden of the United States Medical Center, Springfield, Missouri.	)	No. 14068-K.C.
Respondent.	)	

ORDER TO SHOW CAUSE

Petitioner has this day filed his petition for Writ of Habeas Corpus praying that this Court "take cognizance of the manner in which Petitioner is being restrained and denied his liberty by the Respondent; and that a writ be issued directing the Respondent to show cause why Petitioner should not be immediately released from custody and restored to his full liberty; that Petitioner be given an opportunity to make bail in a reasonable amount under the protection and supervision of this Honorable Court; that Petitioner have such further relief as may appear just and proper."

Petitioner alleges that he is being held "by virtue of an order issued by Omar D. Craig, United States Commissioner for the Northern District of Mississippi, Western Division, dated the 1st day of October 1962"; that he "was illegally transported from the Northern District of Mississippi to the Western District of Missouri by virtue of a telegram to John H. Phillips, U. S. Marshal, of Oxford, Mississippi, from James V. Bennett, Director of Prisons";

and that he is "further held by virtue of an order made by Claude F. Clayton, District Judge of the United States District Court for the Northern District of Mississippi," dated October 2, 1962. Petitioner's allegations concerning alleged violations of his Constitutional rights raise numerous questions that may not necessarily need to be determined simultaneously.

Specifically, Petitioner in Paragraph 4A(1) of his petition, alleges that his Constitutional rights have been violated in that he "has been and is being denied his right of bail."

On the other hand, Petitioner's allegations concerning the validity of the order of the U. S. Commissioner, the telegraphic direction from the Director of Federal Prisons to the Marshal in the Northern District of Mississippi, and the order of the United States District Court for the Northern District of Mississippi raise different and separable questions of law.

For that reason the Court orders that:

1. On or before Tuesday, October 9, 1962, Respondent shall make answer and file a return as to why Petitioner should not be given an opportunity to make bail.

2. Counsel for Respondent and counsel for Petitioner shall file simultaneous suggestions in support of their respective legal positions on or before Tuesday, October 9, 1962. The Court requests counsel for both parties to submit authorities on the question of:

(a) Whether any defendant is entitled to bail under circumstances which would assume the validity of the orders under which Petitioner is presently confined.

(b) Whether, assuming petitioner is entitled to bail, this Court or some other United States Court has

jurisdiction to admit Petitioner to bail consistent with Rule 46 of the Rules of Criminal Procedure and Article VIII of the Constitution of the United States.

3. Respondent, within ten (10) days of this order, shall further file an answer and return certifying the true cause of the detention of Petitioner in accordance with Chapter 153 of the United States Code.

4. Counsel for Petitioner may file with the Court such suggestions in support of Petitioner's petition for writ of habeaus corpus at the earliest convenient time.

5. Counsel for Respondent shall file an answer brief within ten *(10) days of the filing of* the Petitioner's suggestions.

6. Thereafter, if counsel for Petitioner so desire, they may have an additional five (5) days in which to reply to Respondent's answer brief.

7. Counsel are directed to file the originals of all papers in the Western Division of this Court at Kansas City, Missouri, but that, in order that a copy of all papers filed be available in the Southern Division at Springfield, Missouri, copies of all papers be filed in the Southern Division at Springfield, Missouri.

8. The Court will set a date for hearing after all documents above required to be filed are in fact filed.

IT IS SO ORDERED.

/s/ (Name illegible)
Judge

Springfield, Missouri
October 4, 1962

A 21 NU

"Deputy Atty. Gen. Nicholas Katzenbach ordered Walker's arrest after the 53 year old Texan led one student charge against federal marshals on the U. of Miss. Campus and later appeared in the midst of rioting in downtown Oxford."

A 21 Page 2

* * * * * * *

"The Springfield Center known to some as the 'Country Club of Federal Prisons' is no stranger to celebrities. Al Capone was there once and Robert Stroud, the famed 'Birdman of Alcatraz' is one of the present inmates."

"Most of the prisoners in the center which takes in some 12-15 buildings at the South Side of the Southwest Missouri city nestled in the Ozark Mountains, are mental patients. A good many are sexual deviates also."

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 150.

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas or, in the Alternative, to the Supreme Court of Texas.

BRIEF FOR THE RESPONDENT.

WILLIAM ANDRESS, JR.,
Fidelity Union Life Building,
Dallas, Texas 75201,
CLYDE J. WATTS,
[illegible],
Oklahoma City, Oklahoma 73102,
Attorneys for Respondent.

A. F. [illegible]

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Authorities.

Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 597-600 (1964) 33
18 Vanderbilt Law Rev. 1429 (1965) 40

Constitutional Provisions and Statutes Cited.

U. S. Constitution, Seventh Amendment 1
Vernon's Texas Civil Statutes, Title 88, Article 5430..1, 38
Vernon's Texas Rules of Civil Procedure, Rule 274 .....2, 37, 44
Vernon's Texas Rules of Civil Procedure, Rule 279 .....2, 37, 38, 44

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 150.

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas or, in the Alternative, to the Supreme Court of Texas.

BRIEF FOR THE RESPONDENT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Vernon's Texas Civil Statutes, Article 5430.

"A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings, tending to

blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury."

Vernon's Texas Rules of Civil Procedure,
Rule 274. Objections and Requests.

"A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. . . ."

Vernon's Texas Rules of Civil Procedure,
Rule 279. Submission of Issues.

". . .

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the

court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party."

QUESTIONS PRESENTED.

The questions framed by Petitioner are to some extent misleading because of the tendency of the authors of the Brief to engage in personalities not warranted by the particular issue presented. It does not contribute to the clarity of the argument in this case to deprecate the Respondent by using terminology such as "persons like General Walker", "one like General Walker" and "at the behest of one like General Walker".

1. Where there is evidence that a purported eye-witness account is not substantially true, and when the purported eye-witness account charges the plaintiff with having committed Federal felonies, can it be ruled that evidence of knowledge of falsity or reckless disregard of truth, as required by **Times v. Sullivan**, is lacking?

2. Does **New York Times v. Sullivan**, in definition of "actual malice", require more than knowledge of falsity or reckless disregard of truth?

3. Does the Texas definition of malice, as required to sustain a verdict for punitive damages, differ from the **New York Times v. Sullivan** definition of malice, as required to sustain any recovery for libel; and, if so, is the Texas definition the more stringent in the sense of requiring more?

4. Did Petitioner under Texas law waive its now asserted defense of no known falsity or no reckness disregard of the truth by failing to submit a special issue to the jury for its decision on these factual questions?

STATEMENT OF THE CASE.

As part of its reporting of events involved in the riot upon the campus of Mississippi University on the night of September 30, 1962, Petitioner published, over its world wide wire service, reports that Respondent had committed criminal acts . . . assuming command of a riotous mob and leading a charge against U. S. Marshals. These reports by a self-styled eye-witness, employee of Petitioner, were found by the jury to be false.

The defamatory reports, quoted in full in the Associated Press Brief (pp. 7-11), included the following sensational and dramatic statements:

> "October 2, 1962. 'Walker, who Sunday night **led a charge of students against federal marshals** on the Ole Miss Campus, was arrested on four counts including insurrection against the United States.'
>
> "October 3, 1962. (Editors Note: Former Maj. Gen. Edwin A. Walker, . . . was eating dinner Sunday night . . . was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, **who was on the scene and saw what happened)** (Emphasis added).
>
> "By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.
>
> "This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

"Walker first appeared in the riot area at 8:45 p. m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss Administration Building.

• • • • • • • •

"The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" '**Walker assumed command of the crowd,** which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. **Throughout this time, I was less than six feet from Walker.**

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

"'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes toward the clustered marshals.

"'We fled the tear gas and the charging marshals —the **crowd racing back to a Confederate soldier's statute** near the grove entrance below the Lyceum.

"'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed half-way up the Confederate monument and addressed the crowd.

"'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

• • • • • • •

"There were cheers. It was apparent that Walker had complete command over the group.

"'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics" (R. 11-25).

[The timing of the above reported charge . . . **before** the speech from the Monument . . . is in direct conflict with the first telephone report by Savell to the AP news room in New Orleans, which stated that the charge was **after** the speech on the monument.]

The above Associated Press report is in direct conflict with the United Press report (R. 1495-6), which included the following:

"UPI—A 66 Students were waving the Confederate flag during a lull in the rioting. Edwin A. Walker, former Maj. Gen. who commanded troops at

Little Rock mounted a Confederate statue and advised the students to cease their violence."

" 'This is not the proper route to Cuba', Walker, who was wearing a big Texas hat said." "The crowd jeered."

"Later, Walker mounted the statue again and said: 'I want to compliment you all on the protest you make here tonight. You have a right to protest under the Constitution'."

The jury, in answer to questions under "Special Issues" held that the reports that "Walker assumed command of the crowd" and "led a charge of students against federal marshals" were not "substantially true", not "fair comment", and not "made in good faith?" (R. 59-62).

At pages 11 through 13 of its Brief, Petitioner asks the "naggingly persistent" question: "Why was General Walker, of Dallas, Texas, at the campus of the University of Mississippi?", and thereupon proceeds to answer its question with public statements of Respondent, which were offered to the jury in an obvious attempt to prejudice the jury's consideration of the evidence as to what General Walker actually did, after arriving on the campus.

The answer to Petitioner's nagging question had been given by Walker on cross-examination:

"Q. (by Mr. Gooch) Now, General, just what was your purpose in going to Mississippi?

"A. I thought it was absolutely wrong to use military forces, troops, American troops in a strictly civilian problem.

"Q. All right.

"Mr. Watts: Let him finish.

"A. And I wanted to see for myself exactly what happened. I wanted to know from first hand infor-

mation. And I did not trust the press reporting of it in any form, since I had been at Little Rock and seen that exaggerated out of all proportions, and I intended to see for myself" (R. 561).

The answer was also given by the Texas Court of Civil Appeals:

> ". . . His [Walker's] presence there was not illegal or unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and report." **Associated Press v. Walker**, 393 S. W. 2d 671, 675 (1965).

With the sole Constitutional question involving whether the Associated Press is to be immune from liability for falsely reporting that its newsman saw Walker commit several very serious crimes, it is hoped that principle of Equal Justice Under Law will keep the examination of the factual record upon an objective basis.

Petitioner claims that "beyond question" and "giving to General Walker the benefit of every reasonable inference, the evidence in this case plainly establishes" that General Walker led a charge and assumed command of the crowd. The summary of the evidence in support of the findings of the jury and the judgment of the trial court by the Texas Court of Civil Appeals, is just the opposite:

> "He (Walker) was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherwise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was

disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk, described as strolling, ambling, or 'moseying' along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: 'You don't'." **Associated Press v. Walker**, 393 S. W. 2d 671, 675 (1965).

In order to conclude that Walker "assumed command" and "led a charge", completely overturning the jury's verdict, this Honorable Court must disregard evidence as follows:

(a) Walker (R. 434-670): Testified in great detail as to his every action on the campus; and, in answer to repeated questions as to whether he "led anybody" his answers were, "No, I certainly did not". His answers to extensive questions on direct, and piercing cross-examination, were consistently that he was on the campus only to observe and not to participate in the activities of the crowd. He refused requests of the students to "be our leader". He never got out of a walk during the entire night. In his language, "I never have had anything to do with the activities of the students toward the Marshals". When the Highway Patrol started to leave, the students became excited, with cries, "Barnett has sold us out". At this point, he agreed, for the first time, to speak, and advise the crowd that Barnett had not sold them out, that the Highway Patrol Chief, Birdsong, had let Meredith on the campus. He further advised them that "Nobody came to Mississippi for violence, no violence was intended." (At which time, the students began to "boo".) He further told them, "You can protest, you have a

right to protest, but this is not the place for violence". (All of which was in accord with the United Press report.) After the speech, the crowd dispersed, and he moved slowly up near the flagpole in the center of the University Circle (R. 489). He specifically described the "sporadic" activity of the crowd at the times when Petitioner contends that "it is beyond dispute that Walker, did in fact, lead two charges"; and, when asked "Did you participate in any activities of the crowd", his answer was, "I certainly did not" (R. 493). In order to accept Petitioner's assertion that Walker, beyond dispute led two charges, this Honorable Court must assume that he deliberately lied, under oath, in the presence of the jury, and that the testimony of defendant's witnesses, which included neither Savell nor any other employee of Petitioner, "corroborated and amplified the conclusion that Walker did, in fact, lead a charge and assume command of the crowd, as argued at page 21 of its Brief, and this without hearing such witnesses, observing their demeanor, and feeling the impact of conflicts in their evidence.

(b) Gwinn Cole: Assistant Director, Miss. Highway Patrol, testified that there was no violence until the U. S. Marshals fired tear gas into the backs of the Highway Patrol, who were separating students from the Marshals, and into the face of the students; and that, thereafter, there was no "organized charge". but only sporadic activity, with small groups, not more than 7 or 8, coming out of the crowd and throwing missiles toward the Marshals, until the time he left at 9:50, which was coincident with the timing of Walker's speech from the Monument (R. 871-884).

(c) Louis Leman: A responsible young businessman of Houston, Texas, who was with Walker the entire evening, and testified, positively, that Walker,

at no time, participated in the activity of the crowd, assumed command, or led a charge. He covered the speech on the Monument, and described Walker's actions, both before and after, including his refusal to "lead the students", and his demeanor, which included at no time any movement faster than a slow walk (R. 871-885).

(d) Cecil Holland: A reporter for the Washington Star, with 30 years experience. Testified that he was in the vicinity of the Campus Circle, and near the Marshals. He described sporadic activity of the crowd. He saw Walker at one time southwest of the Monument. He saw him lead no charge, or participate in any other activity of the crowd. In fairness, however, the witness did not testify that his visibility was such that he must necessarily have seen him (R. 360-397).

(e) Al Kuettner: Testified that he was United Press newsman, at a point east of the Monument on University Avenue as Walker was entering the Campus about 9:00 p. m. He saw him again on the Monument, and heard his speech. After hearing the speech, he reported, over the United Press Wire Service that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate Statue on the Campus and begged the students to avoid their violence." He also stated that Walker's speech was met with jeers (R. 831). He described the events involved in the riot, but saw Walker take no part therein. (Again, he was not keeping a constant watch; but it is significant that, if anything so sensational as a charge having been led by a former Major General in the United States Army had occurred, no such report appeared upon the wire service of United Press.) (R. 827-867). When he saw Walker come on the Campus, with two men abreast,

it was when he first arrived, and the witness did not say that the other persons, ahead of him and behind him, appeared to be in his party (R. 827-829).

(f) Talmage Witt: A Deputy Sheriff of Pontotoc County, Mississippi, was with Walker practically all of the time involved. He testified positively that Walker took no part in any of the violence (R. 292). He also described Walker's activities, as walking slowly about the Campus, without leading the charges on the Marshals or participating in the activities of the crowd. He refuted a portion of a written statement that had been given to one of the AP counsel, at a time when that counsel was representing him in a legal matter, and testified, positively, under oath, that Walker never did lead a charge, or participate in any act of violence (R. 219-292).

(g) Other witnesses: Plaintiff offered the testimony of witnesses, Sweatt (R. 136), Cox (R. 204), May (R. 397), Hunter (R. 694), Carrington (R. 397), MacFarland (R. 401), Watkins (R. 407), McRae (R. 415), Snyder (R. 419), Edwards (R. 420), whose testimony completely accounted for all of the time that Walker was on the Campus, and effectively refuted defendant's contention that Savell was "substantially" telling the truth when he reported that he had seen Walker assume command of the crowd and lead a charge. Although the Savell report, and his testimony by deposition, fixed the time of the charge as before Walker's speech from the Monument, the witnesses all testified positively that Walker led no charge and had no command over the crowd, either before or after the speech.

Associated Press did not bring to Court its "eye-witness", Van Savell, so that the jury could compare, from

the witness stand, his sincerity, demeanor, and candor with that of the respondent, Walker, as part of its necessary evaluation as to who was telling the truth. It is generally held that when a party fails to produce a witness who is under its control, that failure may be considered as evidence against it, and the jury may properly infer that he was not produced because his testimony would have been harmful, and that general rule prevails in Texas. **Davis v. Etter & Curtis** (Tex. Civ. App., no writ history), 243 S. W. 603.

Van Savell's news report is in irreconcilable conflict with the telephone report which the operator of the Associated Press news room in New Orleans, Ben Thomas, testified that Van Savell gave him. Thomas testified that he "was working the 'night re-write shift'" at New Orleans communicating with Associated Press newsmen at Oxford, Van Savell, Edmund Lebercon and Gavin Scott, also two Mississippi U. students, John Perkins and John Hall, who were AP correspondents, and James Boudier, AP photographer. The only newsman who reported that Walker was leading a charge was Savell, who was quoted by A. P. witness Thomas as follows (R. 123-128):

> "He said that Walker had climbed on the Confederate Monument and talked to the students, and said something to them about if they retreated and went home, they would be cowards, that they should stand up and fight.
>
> "**And then he got down from the Monument and started walking toward the Marshals**, and the students followed behind him, and he led the group of yelling, screaming, brick-throwing group with him as close to the Marshals as they could get, until they were turned back by tear gas" (R. 132).

He further testified that Savell said that the students seemed in agreement with Walker and ready to follow him,

after the speech on the Monument, and that **before the speech, there was only sporadic activity.** When Walker entered the group, "it seemed more organized" (R. 132-133). The record further contained specific answers fixing the time of the first charge reported by Savell as **after the speech, rather than before the speech**, as follows:

> "Q. Now, he then reported to you on this occasion when he first reported that Walker had led the charge, that Walker had made a speech from the monument, and that that speech seemed to give the boys more organization. Then, after the speech, he led the charge?
>
> A. Yes, to the best of my knowledge.
>
> Q. He made this report to you about the speech and the charge in the same telephone conversation and not in two?
>
> A. In the same conversation" (R. 135).

Savell's report also conflicts with that of another of Petitioner's witnesses, the Reverend Duncan Gray (R. 719-795). The above conflict between the report of Savell and the testimony of Thomas and Gray probably explains the failure of Petitioner to produce Savell at the Texas trial. When he appeared at the Shreveport trial, the verdict in favor of Walker was much larger than at Fort Worth.*

Throughout its Brief, Petitioner makes frequent use of the terms "uncontradicted", "beyond dispute", etc., concerning the evidence. Respondent challenges every such use. The evidence was disputed but the preponderance of the evidence supports the jury verdict.

Petitioner insinuates (Brief, p. 21) that Walker led a mob "demanding that 'nigger' under a flag of truce."

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* See Petitioner's Brief, p. 43.

There is absolutely no evidence to connect Walker with such a statement and this, again, is obviously offered for a prejudicial effect.

Notwithstanding Petitioner still tries to retry the evidence. On pages 18-21 of its Brief Petitioner relies on statements that "Walker advanced toward the flagpole on two occasions."

Keeping in mind that the University of Mississippi Plot Plan, attached to Vol. 3 of the Record and reproduced in the Appendix to Respondent's Brief, reflects that the flag pole near the center of the Circle is approximately 250 feet from the Lyceum Building, where the Marshals were standing, and that the Confederate Monument at the east end of the circle is about 550 feet from where the Marshals were standing, and that many witnesses* have further fixed that distance by sworn testimony, the numerous quotations by Petitioner of Respondent's witnesses as alleged proof that Walker led a charge when they saw Walker "walking toward the flag pole" is not significant. We invite the attention of the Court to check every reference to the Record in Pages 18-21 of Petitioner's Brief. Not one of them establishes that Walker either assumed command of a crowd or led a charge. (As a simple test of the veracity of the Associated Press report, it is respectfully suggested that had the report honestly stated that Walker was seen "walking toward the flag pole in the center of the Circle, some 250 feet east of the U. S. Marshals," there would certainly have been no resulting false arrest and imprisonment.)

Petitioner's slanted version of Walker's own testimony at Pages 15-17 of its Brief is more ingenious than ingenuous. They have built up as a violent prelude to

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* Savell's Report fixes the distance from Lyceum to entrance of Campus as 300 yards. Petitioner's Brief, p. 8.

Walker's appearance on the campus isolated acts of violence (with which Walker admittedly had no connection), largely out of sequence and out of connotation, which occurred over a period of several hours, and compressed into a dramatized "conflagration", with the inference that Walker was a part of it all (R. 147, 176, 285, 385, 401, 636, 858, 859).

A far more reliable approach would be a careful review of the entire testimony of Cecil Holland, the highly responsible newspaper reporter for the Washington Star (R. 360-400), whose testimony is used out of context at Page 15 of Petitioner's Brief after "gun fire eventually broke out" (R. 353, 386, 402, 896). The entire testimony of this witness shows that the activity was sporadic ("I couldn't see any movements of people except small groups") (R. 365). He described a meeting with Walker (R. 372-374), which indicated no contact between Walker and the mob. It is obvious that, had so sensational an occurrence as Walker leading a 1,000 man charge taken place, this experienced newsman would certainly have known something about it, and reported it to his paper. In this connection, it is singular that the Associated Press did not bring even one U. S. Marshal to Court. (They were as conspicuous by their absence as were employees of Associated Press.) Had Walker, with his big white Texas hat, led a 1,000 man charge, an awesome thing to contemplate, one or more U. S. Marshals would certainly have appeared at the trial, or, perhaps before the Grand Jury.

Another typical example of the slanting of the testimony in Petitioner's Brief appears at Page 21, where the witness, Kuettner, is quoted as, "personally saw Walker advance on the Lyceum with two men on each side of him (R. 846-847). A review of the actual testimony of this witness will reveal that the witness was describing an

incident when Walker first entered the campus,* separated in distance and time from the alleged charge.

> "Q. Now, when you first saw Gen. Walker, I believe you said it was about 9 o'clock, was he walking toward the Lyceum when you saw him?
> A. Yes, sir."

Respectfully directing the attention of the Court back to Record pages 828-830, this alleged movement dramatized in Petitioner's Brief as an "advance on the Lyceum with two men", occurred completely out of the riot area and 200 feet east of the Monument (R. 828).

Petitioner weaves selected quotations from its own witnesses (Brief, 22-28) into a fabric that would picture Walker leading "at least two charges". The most flagrant example of conflicting and incredible testimony in the entire record is the witness, Gregory, who is relied upon as placing Walker within twenty yards of the driveway that circles the Lyceum Building (R. 1135). The performance of this witness alone, could have convinced the jury that Petitioner's entire defense was fabricated. He related that he saw Walker about 9:00 when Van Savell came up and said "Gen. Walker's on the campus" (R. 1133).

He then relates continuous conversations with students and finally Rev. Duncan Gray (one of Petitioner's witnesses), and, "very shortly thereafter" (R. 1134) he saw a large group forming around Walker with cries, "he's going up to the Monument". (550 feet from the Lyceum) —"he's going up to the Marshals"—"Gen. Walker won't let the Marshals stop him, –gas– won't stop Gen. Walker"; after which he described Walker, striding at a fast clip in the direction of the Lyceum, with 200 men behind him,

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* Approximately, 1200 feet east of Lyceum. See Mississippi U. Plot Plan in Appendix to this Brief.

and, after they arrived within 20 yards of the driveway that circles the Lyceum Building, tear gas was fired and they all ran. This conflicts directly with the testimony of both Rev. Gray (who testified that he was in the area near the monument for a considerable time before Walker's speech, and that no generalized charge across the north side of the Circle took place during that period of time, and further testified that he had a conversation with Walker just southwest of the monument shortly before Walker's speech (R. 1033-1044). At the recess, Gregory was seen talking with counsel for Petitioner, contrary to the caution that he had received in open court (R. 1038-1040). He thereafter endeavored to change the timing of his testimony, in a most clumsy manner (R. 1138-1152). At the end of his cross-examination, it would have been impossible for the jury to believe the testimony of Gregory unless it completely rejected the testimony of both Rev. Gray and Savell.

Apparently, the jury elected to believe the testimony of Rev. Gray, that he was in the immediate area to the NW of the monument, which included the NE quadrant of the circle, from about 7:50 until Walker's speech on the monument (except for about 5 minutes when he went in the YMCA). He first talked with Walker a short distance SW of the monument and a few minutes before Walker's speech,* and again after the speech. From the time of his arrival, until after the speech, there was no charge formed up near the monument and **which moved westward across the Circle.** If there had been such a charge, he would have seen it (R. 1025-1054). He did not see Walker lead a charge (R. 1053).

We respectfully commend to the Court a careful comparison between the testimony of Rev. Gray with the tes-

* This is the time of the charge described by Gregory (R. 1135).

timony of Gregory and particularly with the news report of Savell. This will result in the inevitable conclusion that Savell's alleged 1,000 man charge **before** Walker's speech on the monument could not have occurred without physically running over Rev. Gray, who was in the same area at the same time and saw no charge.

Of the four witnesses quoted on Page 23 of Petitioner's Brief as testifying that Walker led a charge, their testimony is in complete conflict as follows:

Doy Gorton (R. 1094-1108): Testified that Walker had stepped down from the Monument, after making a speech, and that a charge was started off with a "rebel yell" (R. 1104-5). (This is in conflict with the testimony of Savell that the charge was before the speech on the monument, and in conflict with the witness, Buckley, that the students were yelling, "lead us on, Gen. Walker, be our Leader", and Walker nodded his head and said, "Alright, alright, I will."

The witness Gorton testified that he did not hear the sensational statements attributed by Savell to Walker, namely: "don't let up now, you may lose this battle but you will have been heard", "you must be prepared for possible death. If you are not, go home now" (R. 1102).

Travis Buckley (R. 1109-1130): Testified that he heard Walker, in response to cries of "lead us on Gen. Walker, be our leader," say, "Alright, alright, I will", and started off toward the flag pole, all of which occurred **after the speech on the monument.** The last Buckley saw Walker was at a point 50 feet east of the flag pole (which would still be approximately 300 feet from the Marshals).

John Charles Hill (R. 1054-1077): A cub reporter for CBS, testified to substantially the same charge that Savell had related, also stated that he had a tape

recording (not produced in evidence), and had made the same report to his superiors with CBS (which was not reported to the world by that news media).

Kingsby Kingsley (R. 1122-1125): The reference by Petitioner to the testimony of this witness (Brief p. 23) as supporting its report that Walker "led a charge" is very deceptive. The incident described by this witness was completely out of the area where the riot occurred. The witness testified that he "saw Gen. Walker walk toward the Lyceum Building, wave his arms and motion to a large group of students to come with him (R. 1122-24). The testimony of this witness, a reporter for the Memphis Commercial Appeal (who incidentally did not report to his paper that Walker had "led a charge") was in reference to the time when Walker first entered the Campus, some 600 feet (2 city blocks) from the Lyceum and before the riot occurred. This is typical of the type of evidence relied upon by Petitioner to establish that Walker "led a charge", and quoted, apparently for its sound rather than substance (Walker's actions at a point in front of the Journalism Building shown on the University Plot Plan at the end of this Brief as South of University Avenue, on Fraternity Row), could have no conceivable relationship with the leading of a charge. This mature reporter was in the area during the critical time that Savell claims to have seen Walker assume command of the mob, and although Kingsley was produced as a witness by the Associated Press, it is significant that he did not testify that he saw or reported to his paper, that Walker had conducted himself as described in the AP article.

FINDINGS IN THE COURTS BELOW.

This case, under Texas law, was presented to the jury under "Special Issues", preceded by Court "Definitions". These Definitions and Issues are as follows:

Definitions.

In answer to Special Issue No. 1 you are instructed that by the term "led" is meant activities by a person who directs, moves to action, or encourages in some action or movement, and that by the term "charge" is meant a movement toward the marshals, or a group or body of people moving toward an objective.

In answering the issues in this charge in which the term "substantially true" is used, you are instructed that in order for a statement to be "substantially true" it is not necessary that the exact facts or the most minute details of the plaintiff's activities be completely accurate. Mere inaccuracies not affecting the substance of the report of plaintiff's activities are immaterial. You are further instructed that in answering special issues in which the term "substantially true" is used that the publication must be considered as a whole, giving to all the words contained therein (except those hereinabove defined for you) their ordinary meaning as read and understood by the average reader.

In answering the issues in these instructions in which the term "fair comment" is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable comments thereon. You are further instructed that by said term is meant a statement which represents the

honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon (Emphasis added).

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, Who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss Campus", complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 3:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 8:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements, if any, inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinabove set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00.

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law at your discretion, and any amount which you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00.

/s/ Charles J. Murray,
Judge Presiding.

Verdict of the Jury.

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return same into court as our verdict.

Waverly S. Johnson,
Foreman.

SUMMARY OF ARGUMENT.

There was ample evidence of known falsity or reckless disregard of whether the statement sued upon was false, as required by the **New York Times** case; hence even if the scope of the **New York Times** case should be extended to include not only public officers, but private persons participating in public affairs, the judgment below should be affirmed. Where a purported eye-witness account was shown to be fabricated (and is found by the jury to have been fabricated), then the report must be held to have been knowingly false.

The Texas definition of malice necessary to sustain a verdict for punitive damages is not the same as the definition of malice in the **New York Times** case necessary to sustain any verdict for libel; it is in fact more stringent, and the Texas courts, with all required deference to this Court's rule in the **New York Times** case, could find insufficient proof of malice to warrant punitive damages but sufficient proof of malice to warrant general damages; and it is the duty of this Court so to interpret the record.

The **New York Times** rule should not be extended to exclude private persons from redress for libel to the same extent as public officers. To so extend the rule will be substantially to discourage, rather than encourage, public participation in government, for the difficulties and expense of redress will become such that litigation, except for the very wealthy, will be almost impossible. The **New York Times** rule was designed to encourage free comment about public officials; the extension of the rule now sought by Petitioner will be to enfilade the private person who would utilize the freedom that the original Times doctrine extended.

ARGUMENT.

Point I.

The Judgment Against the Associated Press Satisfies All Constitutional Requirements.

A. *The findings of the trial jury and the rulings of the Texas courts are in accord with New York Times v. Sullivan, even if it is extended to public figures.*

The jury found in its answers to Special Issues 1, 2, 3, 5, 6, 7 and 9 that the statements by the Associated Press that Walker "led a charge of students against Federal marshals" and "assumed command of the crowd" were not "substantially true", were not "fair comment", and were not "made in good faith." The jury's verdict of $500,000 for general damages was approved by the Texas trial and appellate courts **after** consideration of the decision of this Court in **New York Times v. Sullivan,** 376 U. S. 254.

Petitioner argues that since the trial judge held there was insufficient proof of "actual malice" to sustain the verdict of $300,000 for exemplary damages that the judgment for general damages is also defective. Petitioner makes the error of equating the malice required by the **New York Times** case with the malice necessary to justify exemplary or punitive damages under Texas law. They are not the same.

In **New York Times** this Court defined "actual malice" as a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." See 376 U. S. 254 at 279-280.

Texas law imposes a more severe definition of malice where punitive damages are sought. The Texas require-

ment for punitive damages of a "conscious indifference to the welfare of the person to be affected" obviously goes far beyond the simple "reckless disregard of whether it was true or false" of **New York Times.** The trial court instructed the jury in this case:

> ". . . by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a **conscious indifference to the right or welfare of the person to be affected by it"** (Emphasis added) (R. 61).

The jury so found but the trial court and the Texas Court of Civil Appeals held that Walker "failed to prove **malice as defined** and that the trial court was correct in setting aside said findings." (Emphasis added.) See **Associated Press v. Walker,** 393 S. W. 2d 671 at 682-683, where this part of the opinion is under the heading "Exemplary Damages".

The Texas courts did not question the sufficiency of the evidence to support the verdict for general damages. Therefore, this Court should not be misled into thinking there was no proof of "'known falsity" or "reckless disregard of whether it was false or not" required by **New York Times.**

Known Falsity. The proof of "known falsity" includes:

The AP libelous story began with:

> "(Editor's Note . . . Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)
>
> ". . .
>
> "Throughout this time he was less than six feet from Walker."

The jury found that Van Savell's statements, "Walker assumed command of the crowd" and "led a charge of students against Federal marshals" were: 1) False, 2) Not fair comment (defined as a "statement which represents the honest opinion of the writer", and 3) Not "made in good faith".

Clearly a report of what was seen less than six feet from the eye-witness when found by the jury to be false could not be other than knowingly false.

Reckless Disregard. The proof of "reckless disregard of whether it was false or not" includes:

1. Disregarding the United Press dispatch that "General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to cease their violence" (R. 831, 1174).

2. Disregarding the fact that none of the hundreds of pictures taken and other wire service reports filed that night showed or referred to Walker as charging, running, throwing, assuming command of the crowd, or doing anything other than observing.

3. Sending out to the 8460 Associated Press subscribing newspapers, radio and television stations throughout the world the criminal charge that a retired Major General committed insurrection against his country, based solely on the contradictory reports filed by a newly-hired 21-year-old cub reporter.

4. Failing to check the Van Savell story with any of the other parties on the university campus such as the Federal marshals, the state highway patrol, with Leberon, Scott, Perkins, and Hall, the other AP correspondents on the scene, with Boudier, the AP photographer on the scene, or with Edwin Walker himself, to see if the criminal charges were accurate. (No Federal marshal or state highway patrolman or

AP reporter or photographer on the campus that night testified for the AP.)

5. Disregarding the clear conflict, in Van Savell's two reports, the first by telephone to the New Orleans AP office saying that Walker led the charge after giving a speech on the Monument (R. 125-128, 132), the second in Van Savell's AP article saying that Walker led the charge before climbing the Monument and addressing the crowd (R. 11-14, 776-784).

It is sufficient that the trial court and the Texas appellate courts approved the findings supporting general damages, including that the Van Savell AP story that Walker "led a charge" and "assumed command of the crowd" were false, not fair comment and not published in good faith. **United Press International v. Mohs**, 381 S. W. 2d 104 (Texas Court of Civil Appeals, July 24, 1964), holds that "fabrication" of a "libelous story" will support verdicts for both general and exemplary damages.

B. *Under the Seventh Amendment this Court cannot substitute its opinion of the evidence for that of the jury.*

This Court has often said that the "Seventh Amendment is applicable to state cases coming here".*

> "Even if we were of opinion in view of the evidence, that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guid-

* See **New York Times v. Sullivan**, 376 U. S. 254, 285, footnote 26.

ance of the jury that was in absolute disregard of the company's right to just compensation." **Chicago, B. & Q. R. Co., v. Chicago,** 166 U. S. 226, 246, 41 L. Ed. 979, 988 (1897), cited with approval in **New York Times v. Sullivan,** 376 U. S. at 285.

This Court has recognized that it should not redetermine facts found by the jury and that "it is the Seventh Amendment that fashions 'the Federal policy favoring jury decisions of disputed fact questions.'" **Atlantic & Gulf Stevedores v. Ellerman Lines,** 369 U. S. 355, 360, 7 L. Ed. 2d 798, 804 (1962). "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." **Lavender v. Kurn,** 327 U. S. 645, 653, 90 L. Ed. 916, 923 (1946).

Petitioner argues that the statements by the trial court that "there is no actual malice in this case" should compel this Court to vacate the general verdict "with respect to special issues Nos. 1, 2, 3, 5, 6, 7, and 9." This argument ignores the Seventh Amendment.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. **Arnold v. Panhandle & S. F. R. Co.,** 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840. **Cf. Dick v. New York Life Ins. Co.,** 359 U. S. 437, 446, 3 L. Ed. 2d 935, 942, 79 S. Ct. 921." **Atlantic & Gulf Stevedores v. Ellerman Lines,** 369 U. S. 355 at 364, 7. L. Ed. 798 at 807 (1962).
>
> "But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' **Atlantic**

& Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355, 364, 7 L. Ed. 2d 798, 807, 82 S. Ct. 1134." **Gallick v. Baltimore & Ohio R. Co.**, 372 U. S. 100, 119, 9 L. Ed. 2d 618, 627 (1963).

The jury verdict for general damages is entirely consistent with the Federal rule in **New York Times** when the evidence of "known falsity" and "reckless disregard" is considered. The Seventh Amendment forbids taking a "**possible** view of the case" which would make the jury finding inconsistent with **New York Times.**

There is an important distinction between the standard of care required of a newspaper when it is serving as an important outlet for those who do not have publishing facilities and the care required of one who both originates and disseminates false criminal charges. Thus in **New York Times**, the Court was concerned with what "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." **New York Times Co. v. Sullivan**, 376 U. S. at 266. Where the newspaper is merely serving as an outlet for an editorial advertisement or letters column, there is implied a less strict standard of liability. **Cf. Farmers Educ. and Co-op. Union v. WDAY, Inc.**, 360 U. S. 525; 3 L. ed. 1407 (1959). See Pedrick, **Freedom of the Press and the Law of Libel: The Modern Revised Translation**, 49 Cornell L. Q. 581, 597-600 (1964). "The first amendment is concerned with protecting the free flow of information—not slipshod reportorial work." *Id.* at 600. In this **Walker** case, the AP is both originator and disseminator.

In **Pape v. Time, Inc.**, 354 F. 2d 558, 561 (1965), cert. denied, 384 U. S. 909, the court held:

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false."

In **Hogan v. New York Times**, 313 F. 2d 354, 355-356 (1963), the court held that sufficient evidence existed to sustain the jury's verdict on "reckless disregard for the truth or falsity of the story, amounting to bad faith." There the **Times** relied "on a single telephone call to a reporter other than the author of the story." The court further held that "it is within the providence of the jury to determine if the precaution taken . . . was adequate." In the **Walker** case, the AP was far more reckless and did not rely on **any** telephone calls to other reporters or even to one of its five other employees who were on the university campus covering the riots. Any one of the five foregoing acts of "reckless disregard" would clearly justify the jury's verdict for general damages under the **New York Times** rule.

Point II.

Where AP's Purported Eye-Witness Report Is Found by the Jury to Be a Fabricated Falsehood, Not Made in Good Faith and Not the Honest Opinion of the Writer, Then the Report Is Knowingly False.

Either Walker came upon the University campus, conferred with riot leaders, assumed command of a 1,000-man mob and led them in a charge against U. S. Marshals around the Lyceum building as charged in Savell's report, or he came and acted only as an observer, as described by Walker's witnesses and by his own testimony.

Either Walker committed the acts as charged, or he did not. The jury found that he did not, and that Re-

spondent's report to the contrary was not made in good faith and not fair comment (R. 59-61).

The trial court's instructions to the jury were generous to AP. The court instructed that in order for a statement to be "substantially true" it is not necessary that it "be completely accurate" (R. 59).

The court instructed that by fair comment "is meant a statement which represents the honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances" (R. 59). Since the jury found that the AP statements about Walker were not "fair comment" (R. 59-61), the jury really found that in addition to being false that the statements were not the "honest opinion" of Van Savell. The jury also found that the statements were not "made in good faith" (R. 60-61). Such specific issue jury findings are equivalent to, if not stronger than, a finding that the Savell statements were "knowingly false."

Where, as here, the AP report, prepared by one who said "Throughout this time I was less than six feet from Walker" (R. 121), was found to be false, not "made in good faith" (R. 60-61), and not the honest opinion of the writer (R. 59-61), it can not be other than "knowingly false."

Point III.

The Definition of "Actual Malice" Under Texas Law Respecting Punitive Damages Is More Stringent Than the Definition of "Actual Malice" Under the Sullivan Decision of This Court, and a Ruling That There Was Insufficient Proof of "Actual Malice" Under Texas Law to Warrant Punitive Damages Cannot Be Taken as Compelling the Conclusion That There Was Insufficient Evidence Under the Sullivan Decision to Warrant Any Recovery at All.

The jury returned a verdict in favor of Respondent and against Petitioner for $500,000 in general damages and $300,000 in punitive damages (R. 62, 63). The trial court found that the evidence did not meet the Texas requirements of actual malice to sustain punitive damages (R. 60, 61), and set aside the punitive award, permitting the $500,000 verdict to stand (R. 78). The Texas Court of Civil Appeals sustained the trial court (393 S. W. 2d 671), and further review by the Texas Supreme Court was refused (R. 1553).

This, however, furnishes no basis for the application to this case of the doctrine of **New York Times v. Sullivan.** Petitioner itself concedes that the Texas definition of "actual malice" necessary to sustain punitive damages differs from the **New York Times v. Sullivan** definition of "actual malice" necessary to sustain any recovery at all (Brief, p. 27). Petitioner takes the position that the Texas definition is "more favorable" to Walker, the Respondent here, but a comparison of the two shows that the reverse is true:

> **New York Times v. Sullivan** (376 U. S. 279, 280)—
> " 'actual malice,'—that is, with knowledge that it [is] false or reckless disregard of whether it [is]

false or not." (This Court itself affirmed this definition in **Garrison v. Louisiana**, 379 U. S. 64, 74, 1964, and in **Rosenblatt v. Baer**, 383 U. S. 75, 84, 1966.)

Texas (charge to jury in the case at bar; R. 60, 61)—"by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

Hence it is quite possible, and consistent with logic, that the Texas courts determined that Walker showed that the statement libelling him was made "with knowledge that it was false or reckless disregard of whether it was false or not" (the Sullivan decision on general damages) but failed to show that the statement was made as the result of ill will, or from bad or evil motive, or as a result of that entire want of care which would raise the belief that the statement was the result of a conscious indifference to the right or welfare of Walker, the person to be affected by it. The legal result would be, and is, a judgment impervious to attack under the **New York Times v. Sullivan.**

Point IV.

Under Texas Law Petitioner Has Waived Its Contentions That It Still Has a Defense of Fair Comment.

Petitioner did not request or submit a special issue to the jury incorporating Petitioner's theory of the "fair comment" defense now urged by Petitioner. Petitioner did not even specifically object to the two fair comment issues submitted by the trial court (No. 2, No. 6; R. 59-61). Under Texas Rules of Civil Procedure 274 and 279, Petitioner has waived its new contention that the jury was improperly instructed on fair comment. Under Rule

279 Petitioner has also waived its alleged defense of no proof of the "reckless disregard" required by **New York Times** because this is a "defense not conclusively established under the evidence and upon which no issue is [was] given or requested." Rule 279 says that under such circumstances, the defense "shall be deemed as waived." See: **Grant v. Marshall**, 280 S. W. 2d 559, 563, 154 T. 531 (Texas Supreme Ct. 1955); **McCarver v. Corpus Christie**, 284 S. W. 2d 142, 143, 155 T. 153 (Texas Supreme Ct. 1956).

Under Rule 279 the omitted issues which Petitioner failed to submit "shall be deemed as found by the Court in such manner as to support the judgment."

Point V.

The New York Times Privilege Does Not Extend to Defamatory Statements About Persons Outside of Government.

A civil libel is a defamation which exposes the victim to public hatred, contempt, ridicule, or financial injury. **Vernon's Texas Civil Statutes**, Article 5430. The jury found that the AP statements were false and the Texas courts found that they were defamatory per se. That these statements injured Walker and exposed him to hatred, contempt, and ridicule is beyond doubt.*

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* A criminal complaint charging insurrection, assault of U. S. Marshals, etc., was filed against Walker in the United States District Court for the Northern District of Mississippi on Oct. 1, 1962, admittedly based upon "information obtained from Van H. Savell," the reporter who wrote the story which formed the basis of the libel suit at bar. On the strength of it, Walker was arrested, given no opportunity for bail, hearing or consultation with counsel, and without court order flown as a prisoner to a distant prison, and there stripped of his clothes, thrust into a criminal lunatic's cell and fed through a hole in

In **New York Times v. Sullivan,** 376 U. S. 254, the Court repeatedly expressed the issue before it as one involving the constitutional protection, under the First Amendment, of attacks by the press on "public officials" in the performance of their "official" duties. See *Id.* at 256, 268, 279. The holding was likewise expressed. "We hold today that the Constitution delimits a State's power to award damages for libel in **actions brought by public officials against critics of their official conduct.**" (Emphasis added.) *Id.* at 283.

In **Rosenblatt v. Baer,** 383 U. S. 75, 15 L. ed. 2d 597, Mr. Justice Stewart, in his concurring opinion, said:

"That Rule **[New York Times]** should not be applied except where a State's law of defamation has

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the door. Six days later he was released. **United States of America v. Edwin Walker,** United States District Court, Northern District of Mississippi, Western Division, Commissioner's Docket No. 1, Case No. 61, Complaint and Affidavit of H. M. Ray, United States Attorney; Commitment of Omar D. Craig, Oct. 1, 1962. Further exemplification of the damage that can be done by dishonest reporting of the news may be found in the distorted reporting by the Associated Press of the speech of Sen. Robert M. LaFollette, Sr., at St. Paul on September 21, 1917. The stenographic transcript showed that LaFollette actually said: "Now . . . we are in the midst of a war. For my own part I was not in favor of beginning the war. I don't mean to say we hadn't suffered grievances; we had—at the hands of Germany. . . ." The Associated Press reported that he had asserted: "We had no grievance against Germany." The falsity was wired by the AP to all its member newspapers. They printed it, and on the basis of it, LaFollette was called a traitor, and a motion was made to expel him from the Senate. But the AP refused to correct its story for eight months, even though confronted with proof of the wrong. See "The Wisconsin Story" (1958 Ed.), published by the **Milwaukee Journal,** p. 276. In 1966 the AP reported a murder after misunderstanding the words of an oral report and failing to verify its conclusion. The supposed victim had not been killed. See "The Death Blunder," **Time,** June 17, 1966, p. 62. The story concerned Meredith, whose efforts to enroll in "Ole Miss" resulted in the tumult mentioned in the instant record, in a later demonstration in Mississippi.

been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped **private citizens** of all means of redress for injuries inflicted upon them by careless liars." (Emphasis added.) *Id.* at 93.

An intimation that the **New York Times** rule is not to extend to defamatory falsehood against private persons engaged in public controversies is seen in **Linn v. United Plant Guard Workers Local**, 383 U. S. 53, 15 L. ed. 2d 582 (1966), decided on the same day as **Rosenblatt. Linn** concerned libelous statements about an official of a corporation, made during a union organizing campaign. The issue was whether the National Labor Relations Act preempted recovery under state libel law. That labor organizing campaigns are of public interest is manifest. The Court applied the **New York Times** malice rule, but "by analogy, rather than under constitutional compulsion," *Id.* at 65, as would be required were the **New York Times** rule extended to persons who thrust themselves into the vortex of controversy.

Other intimations that the **New York Times** rule does not extend to defamatory falsehoods about public figures are found in the cases involving public figures who recovered large judgments for libel, after which petitions for certiorari to reverse these judgments were denied by this Court. **Cf. Faulk v. Aware, Inc.**, 19 App. Div. 2d 464, 244 N. Y. S. 2d 259 (1963), **aff'd mem.** 14 N. Y. 2d 899, 202 N. E. 2d 352, 252 N. Y. S. 2d 95 (1964), **cert. denied** 380 U. S. 916 (1965) (the issue whether the successful plaintiff, a prominent radio and television personality and union official, was a "public figure" under **New York Times**, was extensively discussed in the briefs on petition for certiorari). Thus the rule in **New York Times** does not extend "to public figures outside the sphere of government." Note, 18 Vanderbilt Law Rev. 1429, 1444 (1965).

On page 38 of its brief, Petitioner cites cases involving Linus Pauling and Edwin Walker which said obiter dicta that the doctrine of **New York Times** should be extended to non-officials who participate in issues of public importance. It is submitted that the more logical reasoning is found in the cases which have declined to extend the **New York Times** doctrine to prominent non-officials, such as **Clark v. Drew Pearson**, 248 F. Supp. 188 (D. D. C. 1965); **Fignole v. Curtis Publishing Co.**, 247 F. Supp. 595, S. D. N. Y. 1965); **Harper v. National Review, Inc.**, 33 U. S. L. Week 2341 (N. Y. Sup. Ct., December 22, 1964), aff'd 263 N. Y. S. 2d 292; **Warren Spahn v. Julian Messner, Inc.**, 250 N. Y. S. 2d 529, aff'd 260 N. Y. S. 2d 451 (1965); **Jack Dempsey v. Time, Inc.**, 43 Misc. 2d 754, 252 N. Y. S. 2d 186, aff'd mem. 254 N. Y. S. 2d 80 (1964); **Orlando Cepeda v. Cowles Magazines**, 328 F. 2d 869 (C. A. 9, 1964).

In **Clark v. Drew Pearson**, 248 F. Supp. 188, Judge Holtzoff wrote a scholarly analysis of the law of libel as of the date of his opinion on December 20, 1965. His pertinent language is as follows:

> "The arguments . . . included a plea for drastic changes in the law of libel, in a manner that would radically devitalize and impair the protection that it affords against defamatory publications. In view of this circumstance, it seems appropriate to make a few observations on the basic status of the law of libel in Anglo-American jurisprudence.
>
> "The common law sedulously guarantees to every individual various civil rights, such as the right of personal freedom, the right of personal safety, and the right of property. Another civil right safeguarded by the common law is the right to one's reputation. Although it is more intangible and more imponderable than the others, it is equally fundamental and

vital, and its protection is equally efficacious and vigorous . . .

"The current trend in the law is to enhance and augment the protection of individual civil rights. No reason appears for making an exception as to the right to reputation . . . most civil actions relate only to money, while actions for libel or slander involve honor and reputation, which are to be considered on a higher level. (248 F. Supp. at 190-191.)

* * * * * * * *

"Counsel for the defendants in this case urge the Court, however, to apply the principle of the Sullivan case to all public figures or public persons, including those in private life, and to abrogate the limitation to public officials. In effect, they seek to transform two specific exceptions carved out by a process of erosion into an extensive demolition and destruction of the law by an act of avulsion. This Court perceives no reason in principle or in justice for radically undermining the law of libel, in this manner, nor dies it find any precedents for doing so. The law of libel, as has been shown, is a vital and important aspect of the law of torts. It is one of the branches of law that safeguard individual civil rights. It should not be whittled away." (248 F. Supp. at 195).

We have quoted at length from Judge Holtzoff's opinion because it answers most of Petitioner's arguments. In addition it and the opinion of Judge McLean in the **Fignole v. Curtis Publishing Co.** case give the logic of why the just privilege conferred by **New York Times** should not be extended.

"The basic philosophy underlying the . . . [New York Times] case is that the privilege of every citizen, no matter how well informed he may or may

not be, to cri[illegible] his government freely, should be safeguarded [illegible] Such a right is regarded as indispensable in [illegible]ular form of government . . . **Manifestly this [illegible] has no logical application to criticisms or atta[illegible] on private individuals.** The fact that some persons are better known than some others should not lead to any far-reaching distinction in their civil rights [to be secure in their reputations]. Consequently, there is no reasonable connection between a right to criticize one's Government and the right to disparage one's neighbors." (Emphasis added.) **Clark v. Pearson**, 248 F. Supp. 188, 195 (D. D. C. 1965).

"I am less willing than was the court in **Walker v. Courier-Journal**, supra, to take this additional step. On the contrary, New York Times, to my mind, indicates that it should not be taken. The rationale of that decision appears to be that since a public official enjoys a privilege, either absolute or qualified, against liability for libelous statements which he makes in the course of his official duties, so a critic of a public official's conduct should possess an equal privilege.

> 'It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.' (376 U. S. at 282-283, 84 S. Ct. at 727.)

"If this is the basis of the New York Times rule, then there is no reason to grant immunity to critics of mere candidates for office or of public figures in general, for the candidates and the miscellaneous public figures possess no corresponding immunity for their own defamatory utterances. On the facts of the present case, therefore, and on the present state of

the law, I hold that defendant is not entitled to a dismissal of the libel count." **Fignole v. Curtis Publishing Company**, 247 F. Supp. 595 at 597 (S. D. N. Y. 1965).

Point VI.

The Trial Court Granted Petitioner Every Possible Benefit of Its Defense of "Fair Comment".

The trial court extended every consideration to Petitioner's defense of fair comment except to force the jury to believe it. The instructions given by the trial court on fair comment were so favorable to Associated Press that it did not specifically object to the fair comment issues submitted by the trial court, namely special issues Nos. 2 and 6 (R. 64-55, 59, 61), and waived its right to submit instructions embodying the definition of fair comment that it now wants this court to adopt (R. 54-57). Having gambled that the jury would find in accordance with the generally-favorable-to-defendant fair comment instructions given by the trial court, the Petitioner cannot now be heard to complain of alleged error. See Rules 274 and 279 of Vernon's Texas Rules of Civil Procedure. A party who fails to request or submit a definition of fair comment cannot allege error in the definition as submitted by the trial court.

It is submitted that the following fair comment instruction given by the court was if anything more than fair to the Associated Press:

> "In answering the issues in these instructions in which the term 'fair comment' is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable com-

ments thereon. You are further instructed that by said term is meant a statement which represents the honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon" (R. 59).

When a jury answers special issues to the effect that the AP statements that Walker "led a charge of students against Federal marshals" and "assumed command of the crowd" were not the honest opinion of the writer and did not constitute a reasonable inference to be drawn from the attendant facts and circumstances, what Constitutional right of Free Speech of the Associated Press could conceivably be violated? Just as there is no Constitutional right of Free Speech to yell "Fire" in a crowded theatre, so there is no Constitutional right of Free Speech to falsely say that you saw a person committing a crime. Otherwise fair comment would become a loophole which would destroy the incentive for accurate, responsible reporting, especially when cherished reputations are involved.

Point VII.

The Amount of the Verdict Does Not Violate Petitioner's Freedom of the Press.

Petitioner's "shock" at the amount of the verdict in this case would suffer by comparison with the shock suffered by Respondent, who had gone in good faith to Mississippi to protest by his presence, as the former Military Commander of Federal troops in Little Rock, what he considered to be a misuse of military power. He was sincerely convinced (and the Cuban missile crisis three

weeks later confirmed this) that Soviet power in Cuba was a greater threat to the security of the United States than Governor Ross Barnett. He found himself falsely accused around the world of crimes that he knew he had not committed; and in rapid sequence, found himself 1) arrested, 2) transported to another state without a Court Order, 3) committed to Federal Prison hospital for criminal insane, 4) all without notice, counsel, hearing, or opportunity to post bail, 5) upon an affidavit of a Government psychiatrist who had never seen him and who based his diagnosis on what he had read in the newspapers.*

Petitioner is a news merchant who sold for profit to its 4160 newspaper, radio and television subscribers in the United States and to its 4300 similar subscribers in 87 foreign countries a sensational story that a former Major General of the United States Army had assumed command of a mob and led a charge against the representatives of the Government he had sworn to defend. This attention-arresting story was distributed for profit by the AP to millions of readers of newspapers and even more millions of radio listeners and television viewers.

Petitioner was so anxious to merchandise its very salable but scandalous product** that AP put it on the market

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* Associated Press Exhibit 18 (R. 1487); also testimony of Dr. Charles E. Smith in **U. S. v. Edwin Walker,** Case No. 61 in U. S. D. C., Northern District of Mississippi, Western Division, dismissed Jan. 21, 1963 (R. 1425).

** On April 10, 1963, Lee Harvey Oswald "attempted to kill Major General Edwin A. Walker (Resigned U. S. Army) using a rifle he had ordered by mail one month previously under an assumed name". (Report of the Warren Commission, New York Times paperback edition, pp. 33, 39, 42, 113, 121, 170-175). Since Oswald had never met Walker, and had no known quarrel with him of any kind, it is a fair inference that the widespread

without any testing, checking or research. Had Walker been found criminally insane by the Federal Court instead of "functioning currently at the superior level of intelligence"** or had Walker been convicted of insurrection, etc., the gamble would have paid off and Petitioner would have felt that the profits it made justified the terrific risk it took. Unfortunately, the gamble failed. Like any other manufacturer of a defective product Petitioner must now face the consequences of its recklessness. In fairness, there should be some relation between the size and distribution of the "story" and the amount of damages where the story is false, not made in good faith, and does not represent the honest opinion of the writer.

Suppose, for example, that the Reverend Martin Luther King had been falsely charged by the Associated Press with a series of vicious crimes which resulted in his being arrested at the order of the U. S. Attorney General and thrown into a Federal prison for the criminally insane and Government psychiatrists had filed affidavits in Federal Court that Reverend King was insane. Under such circumstances, would anyone seriously contend, as the Associated Press now does, that the punishment is "so burdensome and oppressive that the Court should not, consistent with the First Amendment, permit its imposition"?

In libel, the financial standing of the wrongdoer is a factor to consider in assessing damages. On page 46 of its Brief, the Associated Press concedes that the expenses it

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defamatory reports about Walker, published by the AP, were a contributory factor to Oswald's attempt, a bare six months later, to murder Walker.

** As reported November 21, 1962 by Dr. Robert L. Stubblefield, the psychiatrist who was appointed by the Federal Court at Oxford, Mississippi to examine Walker (R. 1685).

has incurred in opposing relief for Edwin Walker "has already greatly exceeded the judgment in this case." Obviously because of the vast resources which Petitioner has hurled against Walker, his own expenses, while not of equal magnitude, are extremely heavy. The judgment of the Court below will not compensate Walker for very much more than his expenses, let alone for defaming him throughout his native state of Texas. For a fraction of the costs Petitioner claims to have expended resisting justice in this case, it could have paid the salary of a "back-up newsman" to check and double-check, before printing, the truth of defamatory reports of the type submitted by Van Savell. Compensation must be commensurate with the financial responsibility of the defendant and the enormity of the wrong it caused. Equal Justice Under Law requires that conservatives like Walker recover for wrongs to their reputation to the same extent that liberals are permitted to do so. Cf. **Quentin Reynolds v. Westbrook Pegler,** 223 F. 2d 429, cert. denied 350 U. S. 846, 100 L. Ed. 754 (1955); **John Henry Faulk v. Aware, Inc.,** 14 N. Y. 2d 954, 202 N. E. 2d 372, cert. denied 380 U. S. 916, 13 L. Ed. 2d 801 (1965).

CONCLUSION.

Petitioner seeks to extend the First Amendment so as to reverse a judgment for a news report accusing Respondent of insurrection and assaulting Federal marshals, etc., which report the jury found was false, not fair comment, and not published in good faith. Unless this Court, remote from the trial and by a procedure without precedent under the Seventh Amendment, should re-weigh the evidence and reverse the jury's verdict, Petitioner's defamatory report must be considered as knowingly false or made with reckless disregard of whether it was false or not.

The creation of a rule of law to fit this case, that would insulate the press from responsibility for such defamation, will produce a "two-edged sword", so far as freedom of **both** speech and press under the First Amendment are concerned.

Such a new rule of law would discourage, not encourage, free speech for the vast majority of citizens who do not own a newspaper, magazine, radio or television station. These citizens will be most reluctant to discuss public issues and controversies because they could then be subjected to vicious and defamatory lies on the excuse that they had voluntarily injected themselves into the vortex of a question of public concern. Such a rule would discourage housewives from speaking out at PTA meetings and handicap our Government in obtaining the advice of distinguished private citizens of the stature of Bernard Baruch, Herbert Hoover, Admiral Hyman Rickover, etc.

The genius of American Constitutional Government is our system of checks and balances and our denial of special privileges to any class or group. "The press is not above the reach of the law" and "to immunize the press . . . would be no service to freedom of the press."* The Canons of Journalism (adopted 1923) state:

> "By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities."**

---

* Mr. Justice Fortas, dissenting in **Time, Inc. v. Hill**, No. 22, decided January 9, 1967.

** Article IV of the Canons of Journalism of the American Society of Newspaper Editors quoted in 2 United Nations Freedom of Information 213.

The press should not, and most of the press does not, demand a privilege to harm a private citizen through violation of its own canons of good faith, truthfulness and accuracy, and then escape liability. A manufacturer of false news should be as responsible as a manufacturer of any other defective product.

Petitioner had a fair trial under due process of law with all its Constitutional rights protected, and the judgment should not be disturbed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY,
Petitioner,

versus

WALLACE BUTTS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

Respondent accepts petitioner's recital of "Opinions Below" and "Jurisdiction."[1]

QUESTIONS PRESENTED

Respondent construes the questions presented to be as follows:

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[1]Respondent will sometimes be referred to as Wallace Butts or Butts. Petitioner will sometimes be referred to as Curtis Publishing Company or Curtis.

I. Under the facts of this case, did petitioner waive the right to challenge the verdict and judgment on any of the constitutional grounds now asserted by its decision not to assert any such grounds at or before the long and expensive trial?

II. Assuming that *Times v. Sullivan* does apply and the constitutional defenses were not waived, did the undisputed evidence show conclusively that actual malice was proved?

III. Under the facts of this case, did the amount of punitive damages constitute an abridgement of freedom of the press or the taking of property without due process of law?

ADDITIONAL STATUTES INVOLVED

Additional statutory provisions involved are set forth in Appendix A.

COUNTERSTATEMENT

The questions to be decided must be determined upon the facts of this specific case. Petitioner's "Statement" is deficient in many respects.

Petitioner's Statement Fails To Set Out the Facts As to Waiver, The First Question Presented

Petitioner's "Statement" fails to set out the background against which it made its decision as to the

strategy it would employ in the trial court in defending this case. That background is vital in determining the question of waiver involved in the first question presented. In considering the facts, the trial strategy chosen by petitioner should be kept in mind, to-wit, that it would defend this case squarely and solely on a plea of justification (truth) under which it would obtain the right to open and conclude the jury argument and that no other defense would be relied on. Only when that strategy failed did petitioner seek after the trial a constitutional ground of defense and turn hopefully to *New York Times v. Sullivan*, 376 U.S. 254 (1964), as a means of escape.

In the early part of 1963 Paul Bryant, coach of the University of Alabama, filed suit against Curtis Publishing Company and Furman Bisher (Sports Editor of the *Atlanta Journal)* in the United States District Court for the Northern District of Alabama (Civil Action 63-2-W), claiming damages for libel in an article about him written by Furman Bisher and published by Curtis in its *Saturday Evening Post.*

On February 26, 1963, Curtis filed a motion to dismiss Bryant's action on various grounds, including the following (App. B, Exh. A):

> "(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

"(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

"(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad."

Curtis Publishing Company was represented in that action in Alabama by its general counsel, Pepper, Hamilton & Scheetz of Philadelphia, Pennsylvania, and by T. Eric Embry of Beddow, Embry & Beddow, Birmingham, Alabama.

The suit at bar brought by Wallace Butts against Curtis Publishing Company for libel published against him in *Saturday Evening Post* was filed March 25, 1963 (R. 14), almost exactly one month after Curtis had filed its constitutional defenses in the Bryant action. Curtis filed its answer to the Butts suit on April 10, 1963, and asserted no constitutional defenses whatsoever and chose to rely solely on the defense that the charges in the article complained of were true. (R. 20)

In the early part of April 1963 Coach Paul Bryant filed a second action in the United States District Court in Alabama against Curtis for libel, this one

growing out of the charges against him in the Butts-Bryant article which forms the basis for the action here. To the second Bryant action Curtis filed on April 30, 1963, its motion to dismiss on the same constitutional grounds it had filed in the first Bryant action. (App. B, Exh. B)

The constitutional defenses to the second Bryant action were filed on behalf of Curtis by its same general counsel, Pepper, Hamilton & Scheetz, and T. Eric Embry of Beddow, Embry & Beddow.

In addition to being counsel for Curtis in the Bryant cases, T. Eric Embry and the firm of Beddow, Embry & Beddow, along with Herbert Wechsler of New York City, were also counsel for the New York Times Company in the *Times v. Sullivan* case in the Alabama state courts (see 144 So.2d 25) long before it reached this Court. The firm of Beddow, Embry & Beddow and Mr. Wechsler presented the petition for writ of certiorari to this Court in the *Times* case (on Nov. 21 1962) and saw the writ granted on January 7, 1963, several months prior to the trial of the Butts case.

Mr. Roderick Beddow, Jr., of Curtis' Birmingham counsel, was the individual who first brought the Butts-Bryant story to the attention of Curtis. (R. 368) Mr. Philip H. Strubing of the Philadelphia firm which is general counsel for Curtis apparently received the information from Beddow, for he first brought it to the attention of *Post* editors Thomas and Kahn. (R. 720)

In an affidavit executed in the instant case by Philip H. Strubing (R. 1340) he stated he is a member of the

Philadelphia firm of Pepper, Hamilton & Scheetz, general counsel for Curtis, and that he participated actively with Mr. T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Bryant v. Curtis* in the United States District Court for the Northern District of Alabama and that he participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein, in the preparation of this (the Wallace Butts) case for trial. He further stated in said affidavit that Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. attended the trial of the instant case in Atlanta, "but only as spectators."

Editorial Philosophy of Petitioner At The Time It Published The Butts-Bryant Article

Petitioner publishes several magazines, including *Saturday Evening Post;* its advertising revenue fell from $106 million in 1960 to $86 million in 1961 and to about $66 million in 1962, a loss of $40 million in two years, an alarming rate of $20 million a year. (R. 707-08) Clay Blair, Jr., Editor-in-Chief of the *Post*, testified that, since the entire advertising rate schedule was based on how large the *Post's* circulation was, he, as Editor-in-Chief, decided to "change the image" of the magazine (R. 711) so as to attract more readers and thereby improve the critical advertising revenue picture. Using the language of Mr. Blair himself, this "change" in "image" was to be founded upon a policy of "sophisticated muckraking" (R. 710, 712-714) — of conducting "the expose in the mass magazines" (R. 714) calculated to "provoke people, make them mad." (R. 715) When asked if he had been facetious when he

boasted on a previous occasion that he would change the image of the *Post* from that which everyone had learned to admire and respect to that of a "sophisticated muckraker," Mr. Blair testified that he was "not being facetious," that he "meant it then" and "mean[s] it now." (R. 710-711)

Shortly after the "image" of the *Saturday Evening Post* was changed and it had embarked on its course of "sophisticated muckraking," petitioner, acting through Mr. Blair and his associate editors, purchased from one George Burnett, known by them to be a bad check artist then on probation (R. 689-92, 771-72), the Butts-Bryant story for which petitioner paid approximately $10,000.00 (R. 1041-46), and published the article here in question in its March 23, 1963, issue.

When asked how the Butts-Bryant story fitted his new image for the *Post*, Blair stated it was "a step in the right direction" and added, "we have gone 25 per cent toward the goal of the magazine that I envision." (R. 711)

On January 15, 1963, Mr. Blair had issued a memorandum to the staff of the *Post* congratulating them on the type of magazine being put out. The memorandum stated in part:

> "Your work has not gone unnoticed. We have many press clips commenting on the new vitality of the Post. Joe Culligan [President, Curtis Publishing Company] has been extremely flattering in his comments, as have the other directors of the Curtis Publishing Company. The final yardstick: we have about

> six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1040)

When questioned under oath about this memorandum and comments concerning it which had been published in *Time Magazine* on March 29, 1963, Mr. Blair stated that by his use of the statement "we are hitting them where it hurts," he meant, " 'Them' is the general phrase to refer to the whole United States of America." (R. 708-09) He stated that the lawsuits referred to in that memorandum were all libel suits. (R. 710)

The Butts-Bryant Article

Pursuant to its new "image" and its proclaimed new policy of "sophisticated muckraking," Curtis purchased the Butts-Bryant story from George Burnett on about February 21, 1963, for exclusive use in its *Saturday Evening Post.* The availability of the story had been brought to the attention of Curtis by Roderick Beddow, Jr., its Birmingham counsel then handling the defense of Curtis in the first libel action which had been filed by Coach Bryant several weeks earlier. (R. 368) The information had been relayed by attorney Philip H. Strubing to Davis Thomas and Roger Kahn, two of the *Post* editors (R. 720). On February 18 Thomas and Kahn engaged one Frank Graham, Jr., a freelance sports writer who apparently knew little about football, to write the story. (R. 362, 366-67) They instructed him to go to Atlanta and meet Curtis' counsel, Roderick Beddow of Birmingham, at the Heart of Atlanta Motel. They explained to him that Beddow was a Curtis lawyer handling the Bryant libel suit then pending against it in Birmingham. (R. 367)

Graham arrived in Atlanta on February 20 and met attorney Beddow at the designated motel, together with the latter's private investigator from Birmingham. (R. 368) Attorney Beddow arranged for Graham to meet George Burnett, the man who was supposed to have the Butts-Bryant story. (R. 368-69) Graham met Burnett the next day, February 21, in attorney Pierre Howard's office in Atlanta where it was agreed between Graham and Burnett's lawyer, Pierre Howart, that Curtis would pay Burnett $2,000.00 for an affidavit about the story and an additional $3,000.00 if the story appeared in print "and was a Post exclusive." (R. 369-71) The following day (February 22) Graham obtained an affidavit from George Burnett concerning the story, although Burnett told him "he couldn't remember anything definite about it . . . without his notes." (R. 390) Mr. Beddow and his private investigator then returned to Birmingham. (R. 375) Mr. Graham remained in Atlanta until Saturday morning when he returned to New York to write the Butts-Bryant article for the *Post*. (R. 379)

The article as written by Graham was published in the March 23, 1963, issue of the *Post*. It was entitled in bold black letters, "THE STORY OF A COLLEGE FOOTBALL FIX," with a sub-title reading, "A Shocking Report of How Wally Butts and Bear Bryant Rigged A Game Last Fall."

Superimposed on the first page of the article was an editorial written by "The Editors" of the *Post* which stated as follows:

> *"Not since the Chicago White Sox threw the 1919 World Series has there been a sports*

story as shocking as this one. This is the story of one fixed game of college football.

"Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men — Butts and Bryant — employed to educate and to guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know — yet. For now we can only be appalled. —THE EDITORS" (R. 1071) (Emphasis in original)

The body of the article as published included, in part, the following charges against respondent:

(a) He was charged with being a "rigger" and "fixer" and with having "fixed" and "rigged" the 1962 Georgia-Alabama football game. (R. 1072)

(b) It is slyly insinuated that he rigged and fixed the game with Coach Bryant as a *gam-*

bling device in order to restore his financial resources. (R. 1072, cols. 2, 3)

(d) He is charged with having betrayed the Georgia players by his alleged deception, "fixing" and "rigging," foulness and corruption, so that their moves were "analyzed and forecast like those of rats in a maze" and they "took a frightful physical beating." (R. 1072, col. 3)

(e) In the closing paragraph of the article, the term "fixer" is defined as one who never leaves open a "*chance*": "When a fixer works against you, that's the way he likes it." (R. 1074)

Curtis' Utter Disregard Of Whether The Article Was True or False

1. Before coming to Atlanta to buy the story from George Burnett, Frank Graham was informed that one John Carmichael was present with Burnett when the alleged telephone conversation was intercepted and that he may have overheard it. (R. 378-79) Graham was also aware that Burnett had been convicted of writing bad checks and was at that time on probation. (R. 689-92) *Post* Managing Editor Davis Thomas knew this also, and testified they knew there were possibly other instances of bad-check-writing by Burnett. Thomas acknowledged that he considered the act of writing bad checks essentially as "a lie." (R. 771-72) In spite of knowing this about George Burnett and that John Carmichael was present when the alleged telephone conversation was supposed to have been over-

heard by Burnett, Graham, with Thomas' approval, made no effort to contact or interview John Carmichael to verify Burnett's story. (R. 378-79, 771-72) Had Graham contacted John Carmichael he would have learned from him at the outset that Burnett's whole story was a fabrication. (See R. 636-44)

2. Before publishing the story in its March 23rd issue, petitioner was informed unequivocally by telegram and again by letter, each dated March 11, 1963, of the "absolute falsity of the charges" it was *preparing* to make in the proposed article. (R. 777-78) Said telegram and letter were ignored and went unanswered. No additional investigation was made. The story appeared as prepared.

3. Although the article states that Burnett "recorded *all* that he heard" in his notes (R. 1072, col. 1) (emphasis added), before publishing the story no representative of the Post even saw or read the notes which Burnett alleges he made during the course of the interdepted conversation (R. 772-73), preferring to rely upon the memory of one person as to the details of an alleged conversation he oveheard over *five months* previous and who told author Graham he was talking to him only from memory (R. 154) and "couldn't remember anything definite about it . . . without his notes." (R. 390). The notes contained no information that could possibly have been equated to a "fix." According to Coach Griffith, University of Georgia head football coach, a witness for petitioner, a "good number of those notes were inaccurate and didn't apply to anything that the University of Georgia had." (R. 281)[2]

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[2]In fact, Georgia had no "80-8 pop" play, as asserted in the ar-

The most the notes showed was a reference to two formations (and not "plays" (R. 1071) as the *Post* wrote) which had been used by Georgia throughout the *previous* football season and which therefore would have been nothing new to Alabama or anyone else. (R. 237-39) Petitioner's witness, Georgia head coach Griffith, testified there "wasn't anything secret about those formations." (R. 239) As a matter of fact, one of the two formations used by Georgia in the game did surprise Alabama to such an extent that it was executed quite successfully four out of five times it was used. (R. 333)

4. Before publishing the story no effort was made by petitioner to view the game film although the Sports Editor of the *Post*, Roger Kahn, considered that to be necessary (R. 736), and Furman Bisher thought "it would have been a very good idea." (R. 779)[3]

5. No effort was made by petitioner to interview any member of the Alabama football team to see if any changes had been made in the team's offensive or defensive plans after the alleged telephone conversation, or for any other purpose. (R. 779)

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ticle, or "29-0 series," as asserted in the notes. (R. 226, 279, 467, 569) Neither did Georgia have any play where the "onside guard pulls on sweep." (R. 470)

[3]Bisher, Sports Editor of the *Atlanta Journal*, was hired by Curtis for some undetermined function in connection with the story. (See R. 1043) The intimation in petitioner's brief (p. 31) that it relied on Bisher's failure to make any corrections in the article written by Graham is grossly misleading. Graham testified that he did not *ask* Bisher to make any corrections or suggestions, and in fact had sent the story to Bisher "for his files whenever the story was to be written in Atlanta, for the newspapers" (R. 384) — which it never was.

6. Neither author Graham nor any of the editors of the *Post* made any effort prior to publication to contact either Wallace Butts or Coach Paul Bryant for the purpose of verifying or negating any of the "facts" which they subsequently published in the article, or for any other purpose. (R. 677)

7. Curtis' Editor-in-Chief, Clay Blair, before publication brushed aside the tearful plea of Jean Butts Jones, a daughter of Wallace Butts, that the article not be published, that it was not true. (R. 717-18)

8. Curtis published the article knowing full well in in advance that it *would* "ruin Coach Butts' career" and *would* be "the death of Wally Butts in his chosen profession" (R. 693-94), and knowing all the time (at least one month before the issue of March 23) that he was hopeful "for [a] job with [the] pros." (R. 662) (The story itself stated: " 'I still think I'm able to coach a little,' Butts told a reporter that day [February 23], 'and I feel I can help a pro team.' The chances are Wally Butts will never help any football team again." (R. 1974, col. 2)) The testimony on this point was unequivocal:

(a) Frank Graham, the author of the article, testified by deposition as follows:

"Q. Now, in the third from last paragraph in the article you say: "The chances are that Wally Butts will never help any football team again.' Is that your language?"

"A. That is mine."

"Q. Is that your opinion?"

"A. That is my opinion."

"Q. You felt, and the Post felt, or *Curtis Publishing Company felt, that when this article was published that was the death of Wally Butts in his chosen profession?*"

"A. I would say that it would be very difficult for him ---

"Q. That is your opinion?"

"A. *That is my opinion.*"

"Q. The next to the last sentence of that same paragraph you say: 'But careers will be ruined, that is sure.' Is that your language?"

"A. That is my language."

"Q. Whose career were you referring to?"

"A. To Wally Butts."

"Q. *You knew* and the *Curtis Publishing Company* knew that *when that article was published it would ruin Coach Butts' career?*"

"A. *Yes, we did.*" (R. 693-94) (Emphasis added)

(b) Charles Davis Thomas, Managing Editor of the *Post* testified by deposition as follows:

"Q. Let me point out to you the statement in this story which says, and I read from Page 83 at the bottom of the second column: 'But careers will be ruined, that is sure.' So that you knew what was involved in this story before it was published? You knew that the *careers of two men would be ruined as a result of the publication* of the story, didn't you?"

"A. *Yes.*"

(R. 770) (Emphasis added)

The Trial

The article appeared in the March 23, 1963, issue of *Saturday Evening Post* and on March 25 Wallace Butts filed suit against Curtis. (R. 14-19)

To the plaintiff's complaint, Curtis answered (R. 19-21) with three defenses: first, specific admissions or denials of the allegations of the complaint; second, that the statements in the article complained of were true; third, that the complaint failed to state a claim upon which relief could be granted.

At pretrial hearings counsel for Curtis insisted that its second defense was a valid plea of justification and that it therefore had the burden of proof in the case and was entitled to have the opening and concluding arguments.[4] The trial court so ruled, and that order was followed in the trial of the case which began on August 5, 1963. The verdict was rendered two weeks later on August 20, 1963.

In its presentation of evidence, petitioner at no time put up as a witness the author of its article or any of its editors who had made additions to the article af-

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[4]Pretrial Conf., June 3, 1963. Page 8: "MR. CODY: Whether it's justification or the truth whatever distinction you make between the pleas, the defendant has the burden on that anyway." "MR. CODY: *I will concede that that puts the burden on me.*" Page 10: "THE COURT: No. I was just — I didn't know that question was to come up. I just thought it was already a plea of justification."
"MR. CODY: I don't think there is any difference between a plea of truth and of justification. I think one means the other. The cases so hold."
"MR. CODY: Your Honor, I interpret this as a plea of justification. I think the court in its pretrial order can say that." (Emphasis added)

ter it was submitted by the author or otherwise worked on the story, although petitioner had present in the courtroom during the trial its Editor-in-Chief, Clay Blair, its Executive Editor, Don A. Schanche, and its Managing Editor, Davis Thomas. (225 F. Supp. at 919) Neither did petitioner put up as a witness Furman Bisher, Sports Editor of the *Atlanta Journal*, who was available in Atlanta and to whom petitioner had paid $1,000.00 for his connection with the article. Neither did petitioner put up as a witness Milton Flack or attorney Pierre Howard, both of whom were available in Atlanta and to whom petitioner had paid sums of money for their connections with the article.

Petitioner, although pleading truth as a defense, neither produced Mr. Graham as a witness at the trial nor gave any reason for his absence. Therefore respondent was denied open confrontation in court with the very writer of the article as to the truth of what he had written and the sources from which he had obtained it. Respondent had to resort at the trial to the use of a deposition he had previously taken of Mr. Graham in New York, where Graham resides, in order to bring to the jury any testimony by the author of the article. The same was true as to petitioner's Sports Editor, Roger Kahn, who handled the editing of the article after it was written.

As its principal witnesses petitioner put up George Burnett and head coach Johnny Griffith of the University of Georgia. George Burnett was known by the petitioner to have a record of conviction for writing bad checks and to be on probation at the time he claimed to have listened in on the conversation. (R. 689-92) He testified concerning what he claimed to have

heard while listening in on a telephone conversation between respondent and Coach Bryant on September 13, 1962.[5] (R. 128-38) Burnett is quoted in the article as stating that all he heard is contained in the notes he claims he made. (R. 1072, col. 1) As will be hereinafter shown, Burnett testified that he had not told the author of the article many things quoted in the article as having been said by him.

Petitioner's other principal witness, head coach Johnny Griffith of the University of Georgia, stated that if information concerning two formations had been given to the University of Alabama it would, "to some extent, limit the preparation that was necessary on the part of Alabama," that is, "it would eliminate them making preparation and spending time on the practice field to prepare against any of the possibilities of formations that we had shown to try to stop." (R. 228) As will be shown later, Coach Griffith further testified that he had not given Furman Bisher or anyone else various statements attributed to him in the story.

Assistant Coaches Frank Inman and Leroy Pearce of the University of Georgia, witnesses for petitioner, were questioned at length as to technicalities about football. Coach Inman testified that certain information in the Burnett notes in his opinion could have been helpful. (R. 288)

Both of the principals charged in the article with having "fixed" and "rigged" the game, namely, Wallace Butts, and Coach Paul Bryant, testified at the

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[5]The story asserts that this call was made on September 14, 1962. There is no evidence to support this.

trial. They both stated they had no independent recollection of any specific telephone conversation they had had throughout the many years they have known each other, but stated that throughout those years they had discussed football in general by telephone many times. (R. 424-27, 485-86) They both emphatically denied the charges made against them in the article published by the petitioner and stated that there was never any conversation between them having as its purpose or effect the "fixing" or "rigging" of any football game. (R. 426-30, 487, 514, 601)

Coach Bryant testified in effect that the notes claimed to have been made by Burnett meant absolutely nothing, stating, "those notes, as far as I am concerned, would not help me one iota. As a matter of fact, all it would do is get me confused." (R. 428) Coach Bryant stated, on the other hand, that the only thing that would be useful to a coach would be his opponent's "game plan." This would include the "field position" tendencies of the team: "what this team is going to do over here on the hash mark, because they will be on the hash mark sixty-seven per cent of the time"; "both offensively and defensively . . . , what they are going to do on first down, because it is a guessing game on first down"; "what they are going to do" on the "five to seven plays in this area here between the 20's, five to seven plays that [are] going to determine the game"; and, more broadly, what the team will do or tend to do in a given down-yardage situation, such as third down and long yardage, third down and medium yardage, etc. (R. 428-29) "[T]he kind of stuff we have been talking about [the Burnett notes] is not the game plan." (R. 428)

Coach Bryant testified that he frequently talked with various football coaches all over the country, often discussing football. In fact on the very day the call in question is alleged to have taken place, he talked by phone with Coach Darrell Royal of Texas for 37 minutes. (R. 424)

When asked whether he and Wallace Butts "threw," "fixed" or "rigged" the outcome of the Georgia-Alabama game as charged by the *Saturday Evening Post*, Coach Bryant replied, "absolutely not, and if we did we ought to go to jail, and anybody that had anything to do with this ought to go to jail, because we didn't. Taking their money is not good enough." (R. 430) Coach Bryant also testified that during September of 1962 he undoubtedly had reasons to talk with Coach Butts by telephone and in person about such matters as game schedules, problems involving game tickets, matters relating to team work-outs and other matters concerning football in general; he testified that he had talked with Coach Butts several times during that period about enforcement policies of certain rules because of Coach Butts' connection with the rule-making body of college football. (R. 424-27, 485-86) Coach Bryant stated that he knew he had talked with Coach Butts about football in general,

> "because that is my business; that is my hobby; and I just talk to him in general about football. I know I have talked to him about our football. I know I have talked to him about his football, particularly his passing game, because he is the greatest passing coach this area has even known, and most

of us, what little we know about passing, we learned it from him." (R. 426-27)

Coach Bryant stated further:

"I have talked a whole lot with different coaches. I used to talk a lot to Coach Dodd here at Georgia Tech. I used to talk a lot with Coach Woodruff down in Florida, and I probably shouldn't say this, but Coach Woodruff is longer winded on the phone than Coach Butts is. You get him on there, and you are going to miss dinner." (R. 427)

The Alabama team was named National Champion of college football in 1962 (R. 427), as well as the previous year. (R. 442)

Respondent Butts testified that he knew he had talked by telephone at times with Coach Bryant about the enforcement policies of certain new rules, that he had talked at length with him about such matters with the hope that it would prevent serious injuries to players in football, but that he had no way of recalling any specific dates on which such conversations took place. (R. 485)

Charlie Trippi, former All-American football player at the University of Georgia, former professional player, chief offensive coach at Georgia at the time of the Georgia-Alabama game involved, and at the time of the trial a professional coach, testified that the notes claimed to have been made by Burnett were baseless, did not indicate "any tendencies," and that if he had received them as a coach the first thing he

would have done would have been to tear them up. (R. 546-47) He stated that as offensive coach for the University of Georgia in the 1962 Georgia-Alabama game* he saw nothing indicating that Alabama knew anything about what Georgia was going to do in that game and that the only thing he saw was "that Alabama blocked, tackled and ran harder than we did." (R. 549) He further stated that based upon his experience as a college football player and coach, as well as a professional football player and coach, the outcome of a college football game "definitely" cannot be "pre-arranged, fixed or rigged without the participation of the players, or some of the players, themselves." (R. 549-50). Trippi further testified:

> "I have studied these notes, and I believe I expressed my opinion of these notes when they first were announced; and I still contend there's nothing in here to substantiate anything of value in football planning." (R. 550)

He even stated:

> *"We give more information to the press every week to promote the game than is being expressed in these notes right here."* (R. 550) (Emphasis added)

Leroy Jordan, All-American linebacker and captain of the University of Alabama in the 1962 Georgia-Alabama game and at the time of the trial a member of the Dallas Cowboys professional football team (R.

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*As such Trippi called ninety percent of the plays used by Georgia in that game from the press box. (R. 545) Georgia's defense coach, Gregory, called all of Georgia's defensive formations from the side line. (R. 465)

534, 536), testified as a witness for respondent. He stated that in his opinion an opposing coach's knowledge of the formations that were going to be employed by a team would be of no value to the coach, because it is "*when* he is going to run a play" that is important, e.g., the "tendencies of a team on third down," and this information is established from "scouting reports and films." (R. 538-39) With reference to the Burnett notes which were examined by Leroy Jordan during his testimony, he stated that there was nothing contained therein which the University of Alabama specialized in defensively in preparation for its game with the University of Georgia. (R. 540-41) He was asked whether in his opinion as a football player "the outcome of a football game can be rigged or fixed without participation of the football players themselves in it." He stated, "No, sir. It couldn't be done." (R. 541) He testified further that in his opinion there is no "way that two coaches could rig or fix the outcome of a football game without the players' knowledge." (R. 541)

Jimmy Sharp, who played on the first team for Alabama in the game, testified that he heard no player on Alabama's team call out any such thing as "you can't run '80-8 pop' on us" during the game, as was asserted in the article. (R. 442) He also testified that no fundamental changes were made in the Alabama defensive plans between the alleged telephone call and the game (R. 441) and in fact that during the game the players on the Alabama team were greatly surprised by a formation (one of the two mentioned in Burnett's notes) used by the University of Georgia. (R. 438) In speaking of this formation which was used successfully against them in that game four

of five times, Sharp stated, "we hadn't anticipated it, and we could not make the necessary adjustments." (R. 439) He said the first time Georgia employed this formation the Alabama defensive reaction "was just mass confusion, because we hadn't worked in practice on the [necessary] adjustment." (R. 439) Sharp further testified that the other formation alluded to in the Burnett notes had been anticipated by Alabama because it was utilized 109 times (out of a total of 113 plays run) in Georgia's spring game in 1962. (R. 440)

Charles Pell, who played first team tackle on the Alabama team in the game, testified that from September 1 until the game against Georgia on September 22 there were no significant changes made in the defenses that Alabama prepared to use in the game, although sometime prior to that and as a result of a scouting report the Alabama coaching staff had devised a special defense for the formation Georgia had used 109 times in its 1962 spring game. (R. 447) He also testified that during that period between September 1 and September 22 the University of Alabama did not concentrate on any particular two formations or any particular three formations (R. 451); he stated further that in his opinion for Alabama to have known Georgia's formations and plays in advance would be of no advantage without also knowing "almost a thousand other things," some of which the witness described in detail. (R. 452-53) Pell also testified that in his opinion as a football player a football game cannot be rigged or fixed without the individual players knowing about it and participating in it. (R. 454)

Robert Williamson (R. 554), Mickey Babb (R. 560) and Brigham Woodward (R. 573), varsity players for

the University of Georgia in the 1962 Georgia-Alabama game, testified at the trial. Woodward testified that Georgia players in that game did not take a "frightful physical beating" as claimed in the article. (R. 575) Williamson, who played right guard on the first team for Georgia in the game, testified that there was "not a thing" done or said by the Alabama players during the game which indicated that they knew what Georgia was going to do. (R. 556) He further corroborated Woodward by saying that the statement in the article that the Georgia players took a frightful physical beating in that game was not true. (R. 556-57) Mickey Babb, right end on the Georgia team, corroborated Woodward and Williamson's testimony that the Georgia players did not take a frightful physical beating (R. 563) and stated that as a player in that game he did not feel that their moves were being analyzed by the Alabama team. (R. 563) He specifically denied having told Furman Bisher, as claimed in the article, that the Alabama players had taunted them by yelling out "you can't run eighty-eight pop on us." (R. 564)

William C. Hartman, Jr., former Assistant Coach of the University of Georgia and former professional football player with the Washington Redskins and at the time of the trial a businessman, testified. (R. 737) In addition to detailed testimony given by him concerning football technicalities, he testified that in his opinion the information contained in the Burnett notes would not be of any assistance at all to the University of Alabama in preparing for its game with the University of Georgia, that the information concerned nothing more than basic "T" formations, and that the University of Alabama and everyone else "in the United

States" had those formations in their own offenses. (R. 745-56) He stated that the University of Alabama must have previously seen several movies of Georgia games showing the same information. (R. 746)

John Carmichael was called by respondent as a witness at the trial. (R. 616) Petitioner and its writer Frank Graham had known that Carmichael had first-hand knowledge about the alleged telephone call but they had not questioned him about it before writing and publishing the article. Carmichael testified that on the morning Burnett claims he overheard a conversation between respondent and Coach Bryant, he, Carmichael, arrived at the office which he shared with Burnett and found Burnett at Carmichael's desk (R. 618); that shortly thereafter Burnett showed him some notes scribbled on pieces of paper which Burnett claimed he had written while listening in on a long distance telephone conversation. (R. 620) Carmichael testified that on that occasion Burnett told him that the two coaches were merely talking about "football in general." (R. 622) Burnett asked him whether he thought they should bet anything on the approaching game; Carmichael responded by asking Burnett if he knew who he would bet on and if there "was anything said to lead you to believe that there would be some favorite in the game." Burnett's answer was "no." (R. 622) During his testimony John Carmichael was shown the notes which Burnett had previously testified were the notes he had made in listening in on the conversation; Carmichael was asked whether those were the same notes Burnett had shown him immediately following the alleged telephone conversation in September 1962. Carmichael's reply was "*no, sir; these*

are not the same notes that Mr. Burnett handed me." (R. 643-44) (Emphasis added)

Dr. Frank A. Rose, President of the University of Alabama, former President of Transylvania College, Lexington, Kentucky, and a former minister of a church at Danville, Kentucky, also testified (R. 917) He testified at length as to his conversation with Coach Bryant concerning the charges against Coach Bryant as related in petitioner's article and explained the contents of a letter he wrote Dr. O. C. Aderhold of the University of Georgia concerning this matter,[7] as well as his lack of knowledge of the technicalities of present day football (R. 922) which resulted in his misuse of certain terminology in this letter. (R. 924-26, 932-34) Dr. Rose also testified that Coach Bryant had told him (when Coach Bryant was asked whether what Coach Butts had told him about rule interpretations, or anything else that was said, could have affected the outcome of the game) that "he received no specific information or any specific knowledge that would affect the score or the outcome of the ball game between the University of Alabama and the University of Georgia," (R. 926) and that the same information had been given to a meeting of coaches of the Southeastern Conference by Coach Butts when he spoke to them. (R. 926-27)

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[7]Petitioner (Brief, pp. 22-23) attempts to lead the Court to believe that in investigating and writing the story it relied on Dr. Rose's March 6 letter to Dr. Aderhold. The fact is that petitioner was not aware of the letter until long after it published the article. (See R. 855-56)

In addition to those heretofore mentioned, other direct quotations used in the article were denied under oath by the parties alleged to have been quoted:

(1) Graham wrote that Burnett had told him that Georgia quarterback Larry Rakestraw placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the Georgia play would be a run or a pass. (This, would have been vital information for an opponent (R. 266), as petitioner was aware. (R. 776)) But Burnett denied under oath that he had told Graham any such thing. (R. 175) Georgia's head coach, Johnny Griffith, who was in a better position than anyone else to know whether in fact Rakestraw did this with his feet, testified that it was not true. (R. 266)

(2) Sam Richwine, the Georgia trainer, specifically and categorically denied the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays. (R. 570)

(3) In its article petitioner wrote that Georgia Coach Griffith had stated: "We knew somebody had given our plays to Alabama . . . and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts." Coach Griffith testified emphatically that he had said no such thing. (R. 268-69)

(4) The article states that "Griffith went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain on his job." Coach Griffith categorically denied having done or said that. (R. 269)

(5) The article quotes Coach Griffith as saying, "You know, during the first half of the Alabama game my players kept coming to the sideline and saying, 'Coach, we been sold out.' " Coach Griffith at the trial denied that. (R. 269)

(6) The article attributes the following direct quotation to Coach Griffith: " 'I never had a chance did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.' " Coach Griffith denied under oath having said that to anybody. (R. 270)

Petitioner called several witnesses from the University of Georgia in an effort to impeach the testimony of respondent. Petitioner had admitted in its pleadings in this case that respondent enjoyed a national reputation (R. 19-21) in his chosen profession before the article was published, and thereafter petitioner admitted that respondent's *reputation would be ruined as the result of its article.* (R. 693-94, 770) In short, petitioner had accomplished what it set out to do.

Curtis' Post-Trial Motions

Following the two week trial and the jury's verdict of $3,060,000 for respondent on August 20, 1963 (reduced by remittur to $460,000), Curtis, having failed in its trial strategy of relying on its sole defense of proving the truth of the article, embarked upon a series of post-trial motions. It filed a motion for new trial (R. 36) and a motion for judgment notwithstanding the verdict (R. 67) on August 29, a motion for new trial based on newly discovered evidence on February 28, 1964 (R. 1090), and finally an extraordinary motion for

new trial on March 23, 1964. Certain First, Fifth, and Fourteenth Amendment claims were raised in the August 29, 1963, motion for new trial. (R. 36-38) The First Amendment claim now insisted on was raised in the March 23, 1964, extraordinary motion. (R. 1115)

To the new evidence motion respondent filed a response stating in part: (R. 1113)

> "[The] purported significance attached by defendant to this so-called 'recently discovered evidence' cannot be reconciled with defendant's action in paying Paul Bryant $300,000, tax free, to dismiss his libel suit growing out of this identical Saturday Evening Post article when *at that very time* defendant had all of this 'recently discovered evidence' in its possession."

In overruling Curtis' motions for new trial the District Court gave its appraisal of the evidence and stated in part as follows:

> "The article charged Butts with being corrupt and with betraying his players, and that the players were forced into the game like 'rats in a maze' and 'took a frightful physical beating'. The article charged, in an italicized editorial, Butts, along with Coach Bryant, with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial Butts was relegated to a status worse than that of 'disreputable gamblers', and a corrupt person who, employed to 'educate and guide the young men',

betrays or sells out his pupils." (225 F. Supp. at 917)

"Curtis Publishing Company based its defense on certain notes taken by one George Burnett who made such notes to a telephone conversation alleged to have been overhead between Coach Bear Bryant, of the University of Alabama, and Butts, as Athletic Director of the University of Georgia, on a morning in September, a few days prior to the Alabama-Georgia game. By some mechanical defect, Burnett was connected by telephone to the conversation. These rough notes were kept by Burnett and revealed to Head Coach Johnny Griffith, of the University of Georgia, in late December, 1962, or early January, 1963. Curtis paid Burnett consideration for the story after the same was brought to its attention by Curtis' Birmingham, Alabama lawyers, who were defending Curtis in a libel suit brought by Coach Bryant because of another article in the Saturday Evening Post.

"The evidence presented showed that Frank Graham, Jr., the author of the article, and Davis Thomas, Senior Editor of the Saturday Evening Post, knew that Burnett had been convicted of 'bad check writing.' No representative of the Post looked at the notes before the article was published. According to Coach Griffith of Georgia, defendant's witness, 'a good number of Burnett's notes were incorrect and didn't even apply to anything Georgia had.' No effort was made by the Post to view the actual game film, although the

Sports Editor of the Post, one Roger Kahn, considered that necessary." (255 F. Supp. at 918)

"The article was clearly defamatory and extremely so. The Saturday Evening Post had a circulation in excess of 6 million copies per issue. It claims readers of 22 million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." (225 F. Supp. at 919)

The Court of Appeals Approved The District Court's Appraisal Of The Evidence

In affirming the trial court on Curtis' appeal, the Court of Appeals stated:

"This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. *The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the*

jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

"The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. *We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned.* This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

"Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is Affirmed." (351 F. 2d at 719-20) (Emphasis added)

SUMMARY OF ARGUMENT

I.

Under the facts of this case, petitioner waived the right to challenge the verdict and judgment on any of the constitutional grounds now asserted by electing not to urge *any* constitutional grounds of defense before or during the long and expensive trial.

That Curtis knew of the constitutional defenses and

intentionally omitted them in this case as a part of its deliberate timed strategy is established by (1) the fact that its general counsel—who also appeared in this case—urged these defenses in the two companion libel suits pending against it in Alabama, (2) the fact that it pleaded the "public man" defense in the Alabama cases but omitted it in this case, although it is plainly provided for under Georgia law (Ga. Code Ann. 105-709(6)), (3) the intimate knowledge of its Alabama counsel of the proceedings in the *Times* case by virtue of their representation of the New York Times Company, and (4) its failure to object to the charge as required by Fed. R. Civ. P. 51.

Respondent suggests that the *reason* for their trial strategy is that Curtis hoped to get a favorable decision in Georgia which would discredit Bryant or realized it must establish the truth of its career-destroying charges or have its own reputation impaired or simply wanted the important right to open and conclude the arguments to the jury.

The Court of Appeals was correct in holding that Curtis obviously decided to rely solely on its plea of truth in this case for its own reasons of trial strategy and thereby waived its right to raise additional defenses on appeal. *Yakus v. U.S.*, 321 U.S. 414, 444 (1944); *U.S. v. Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949), *cert. den.*, 338 U.S. 868 (1949); *Ackermann v. U.S.*, 340 U.S. 193 (1950). The limitations expressed in *Times* were not new and a like rule had existed for many years in federal and state courts in cases involving public officials.

The cases cited by petitioner are inapposite here. Petitioner is not entitled to be relieved of its deliberate

decision omitting all constitutional defenses and to subject respondent to the time and expense of a new trial. Curtis has had its day in court.

II.

Assuming the constitutional defenses were not waived, *New York Times* should not be used as a basis for reversal in view of the facts of this case.

The trial court correctly held that respondent was not a public official within the meaning of *Times*, but rather was an employee of a separate business entity. Therefore, *Times* could in no event be applicable.

The subject of the libelous article was not a "public issue" so as to justify its false treatment. One may not escape responsibility for that which he publishes by *creating* the "public issue" upon which he comments.

In this case, as distinguished from the *Times* case, there was overwhelming proof of actual malice. The evidence established that Curtis had deliberately chosen a policy of "sophisticated muckraking," of "provoking people, making them mad," and measured its success by the number of libel suits against it. It intentionally ignored warnings received well in advance of publication that the story was false and made no effort to check the truth of the information it had obtained.

It would be useless to require another trial in view of the overwhelming evidence of malice, this Court having held that if actual malice is proven, a libeller ceases to enjoy constitutional protection.

The trial court's charge in respect to malice was adequate and met the standards set out in *Times*. No objections were made by Curtis to the court's charge in respect to malice as required by Fed. R. Civ. P. 51.

Even if *Times* is held applicable, the facts fully warrant the refusal by this Court to give it retroactive application in this case.

III.

Under the facts of this case the amount of punitive damages did not constitute an abridgment of freedom of the press or the taking of property without due process of law. Curtis carelessly published the sensational article here involved, knowing it would ruin respondent. Whether it did so for the purpose of discrediting Bryant or to improve its circulation, or both, is unimportant. If for the former reason alone, it is clearly not entitled to protection. If it were done for profit, it was a "libeller for profit" and not entitled to the same protection under the Federal Constitution against punitive damages as is the responsibly and objectively informative segment of the press.

Curtis having requested the trial judge, in open court, to reduce the size of the verdict, it cannot complain of the trial judge having done so. Curtis in its desire to profit from libel deliberately sought to squeeze from respondent his "breathing space . . . to survive" and cannot now complain that the $400,000 award of punitive damages deprives it of that "breathing space." Especially is this true considering the fact that prior to any trial Curtis paid Coach Bryant $300,000 for a dismissal of his companion suit. There is no law in Georgia

or enunciation of the federal courts that requires the existence of any relationship between compensatory and punitive damages, although the ratio here of $60,000-$400,000 is entirely reasonable.

ARGUMENT

I.

UNDER THE FACTS OF THIS CASE, PETITIONER WAIVED THE RIGHT TO CHALLENGE THE VERDICT AND JUDGMENT ON ANY OF THE CONSTITUTIONAL GROUNDS NOW ASSERTED.

In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) "*waiver*" was defined as the "intentional relinquishment . . . of a known right or privilege." In determining whether the right is *known*, the Court expressed the need to examine the "particular facts and circumstances" of the case.

It is elementary that a litigant who claims a constitutional or other right or defense must assert that right or defense at an appropriate time in a litigation in order to rely on it on appeal. It is also elementary that any defense attorney must determine the trial strategy best suited to protect his client's interest, and circumstances may be present which require abandoning an available defense as not fitting in with his over-all plan. Such circumstances were present in this case from the beginning, and petitioner quite deliberately evolved a trial strategy which excluded any number of available defenses (including the constitutional defenses here urged) and depended entirely on the defense of truth or "justification."

That such a trial strategy, excluding constitutional defenses, *was* evolved and done so *knowingly* and intentionally within the sense of *Zerbst*, is the only reasonable conclusion which can be drawn from the following facts:

(1) There were pending against petitioner at the time two libel suits brought by Coach Bryant, one of them arising out of the same *Post* story. In both of these suits petitioner, through its general counsel who was also leading the defense of the case at bar, had specifically invoked First and Fourteenth Amendment defenses at the initial pleading stage. (App. B) No such defenses were raised in the Butts case.

(2) In both of these Bryant cases petitioner also specifically pleaded the "public man" defense. No such defense was invoked by petitioner here, even though a Georgia statute has for many years provided a privilege, conditioned on the absence of actual malice, to publications commenting "upon the acts of public men in their public capacity. . . ." Ga. Code Ann. 105-709(6) (App. A) This statutory privilege has been construed to grant a complete defense to such publications, even though the publications may have been false. See *Pearce v. Brower*, 72 Ga. 243 (1884); *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274 (1888); *Augusta Evening News v. Radford*, 91 Ga. 494, 17 S. E. 612 (1893).[8]

(3) Petitioner, through its counsel, was fully in-

[8]Petitioner's suggestion (Brief, p. 50 n. 12) that more recent decisions of the Georgia appellate courts require that truth be established in order to take advantage of the privilege ignores the fact that the older decisions of the Georgia Supreme Court control. See, e.g., *Cauble v. Weimer*, 101 Ga. App. 313, 113 S.E. 2d 641 (1960).

formed of the proceedings in the *Times* case [illegible] the very beginning of that litigation in the Alaba[illegible]tate courts, including the constitutional defenses [illegible] as the Court of Appeals so graphically related ([illegible] 2d at 709-13).

(4) Petitioner made no objection to the court's charge on any constitutional grounds as required by Fed. R. Civ. P. 51, again demonstrating its intention not to rely on any constitutional defenses.

While Curtis asserts strongly it had no knowledge of any constitutional rights until this Court's decision in *Times* (March 9, 1964), this is refuted by its first motion for a new trial, filed August 29, 1963 immediately after the trial, in which it claims the verdict for punitive damages could not be sustained without violating the First, Fifth and Fourteenth Amendments. (R. 36-38)

It is inconceivable that Curtis and its general counsel should not have kept abreast of the law of libel. Curtis published not only the *Post*, but other magazines of large nationwide circulation. The *Post* was embarking on a new campaign to change the magazine's image through "sophisticated muckraking" which already had attracted a number of libel suits against Curtis. That it did keep abreast of the law of libel and was familiar with constitutional grounds is clear from its use of constitutional defenses in the two Bryant suits in Alabama and the constitutional grounds urged in its first motion for a new trial in this case, long before *Times*. (R. 36-38)

It is up to Curtis to explain why it chose the strategy

it did. However three questions do immediately come to mind:

(1) Was it part and parcel of its strategy to defend the suits brought by Coach Bryant in Alabama with Curtis hoping to get a favorable jury verdict in Georgia, thereby discrediting Bryant?

(2) Having made these charges which it knew would destroy Butts' career, did Curtis decide that the only defense open to it was to seek to establish the truth, this being necessary to preserve its reputation as a national magazine? Any other defense would have indicated to the public that Curtis had no confidence in the charges that it made on the one hand or, having destroyed Butts it would assume the attitude that it could not care less and defend on constitutional grounds.

(3) Was it for the purpose of obtaining the valuable right to open and conclude the arguments to the jury?

This strategy having been unsuccessful, Curtis now asks the Court to give it a second chance or as the District Court called it, "a second bite at the cake."[9] It was against this background that the Court of Appeals held these defenses to have been belatedly raised:

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[9]During the hearing on the first motion or new trial, petitioner's counsel offered a unique thesis which was characterized by the trial judge as the "two bites at the cake" theory. *Bite one* comes when the "error" is made; counsel for the aggrieved party may object and either have the error corrected or the record perfected. But if he feels that his client is sure to win the jury verdict, he will consciously fail to object. If he loses this gamble, i.e., if his client loses the jury verdict, he may nevertheless have *bite two* by convincing a federal appellate court that it should grant a new trial in the face of counsel's conscious decision not to object to the "error." Transcript of Proceedings, Hearing on First Motion for New Trial, Dec. 10, 1963, p. 17-18: ("MR. CODY: 'You never can tell how it affects — you can't tell how it affects the trial of a case until it

"We think that Curtis has had its day in Court. *It apparently thought so too until the jury verdict was returned.*" 351 F. 2d at 720. (Emphasis added)

The Court of Appeals in the second of its two opinions, after considering the affidavits filed in support of the petition for rehearing and the questions of law involved, reached the following conclusion relative to petitioner's choice of trial strategy (351 F. 2d at 735):

> "Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses[6] it had raised in the Alabama Bryant cases, in order to get the right to open and close the arguments."

"[6]These would include the conditional privilege recognized by § 105-709 (6) of the Georgia Code concerning published statements relating to the 'acts of public men in their public capacity.' See Note 20, 376 U.S. 254 at 280. . . ."

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is over, and the —.' THE COURT: 'Well, under that theory, you get two bites at the cake.' MR. CODY: 'That's possible; that is exactly what the courts have said.'"). It is submitted that this manipulation of the spirit of federal procedure should not be sanctioned. A successful party to a verdict should not have to be the loser in the other party's wager with the jury and courts.

The doctrine of waiver, as applicable to the facts of this case, is classically stated by this Court in *Yakus v. U.S.*, 321 U.S. 414, 444 (1944) as follows:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. [Citing cases]. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. [Citing cases]."

Eleven years later this Court reaffirmed its ruling in *Yakus* and found waiver of a constitutional right in a case involving capital punishment. *Michel v. Louisiana*, 350 U.S. 91, 99 (1955)

The waiver cases cited by petitioner are distinguishable because here petitioner deliberately chose, as a matter of strategy, to waive the constitutional grounds asserted in *Times*. Courts have long recognized that counsel may choose not to use certain defenses for strategic purposes and such choice will amount to an intentional relinquishment of a known right. *U. S. V. Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949), *cert. den.*, 338 U.S. 868 (1949).

In *Ackermann v. U.S.*, 340 U.S. 193, 198 (1950), the Court held:

> "His choice was a risk, but calculated and deliberate and such as follows a free choice.

> Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong, considering the outcome of the *Keilbar* Case. *There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.*" (Emphasis added)

It is of further interest to note that even Judge Rives, who dissented from the decision of the Court of Appeals relative to waiver, felt that the issue of waiver was a "debatable" one. (351 F. 2d at 726). Respondent respectfully submits that issue should be here decided in his favor as it was below.

Quite apart from the *specific facts* found by the Court of Appeals to constitute waiver in this case, we submit that defense counsel in *any other* libel case tried prior to *Times* would have had every reason and opportunity to include the constitutional claim in his defense if he had chosen. An analysis of *Times*, in proper historical context, shows that it made no fundamental change of law but merely gave sanction to a long-standing rule of state law and federal constitutional law as enunciated by courts and supported by scholars.

The *Times* case did not *create* the First Amendment. In that decision, this Court emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269.

This Court held in a libel case over fifty years ago that since the plaintiff was a "public officer [U.S. Attorney] in whose course of action connected with his

office the citizens of Porto Rico had a serious interest . . ., anything bearing on such action was a legitimate subject and comment . . . at least in the absence of express malice. . . ." *Gandia v. Pettingill*, 222 U.S. 452, 457 (1912). *Gandia* stands for the proposition that a qualified privilege has long existed under federal law in libel cases where the plaintiff is a "public official."

The identical constitutional issue now insisted on was raised twenty-six years ago in *Sweeney v. Schenectady Union Pub. Co.*, 122 F. 2d 288 (2nd Cir. 1941), aff'd by equally divided Court, 316 U.S. 642 (1942). Twenty years ago the Fifth Circuit Court of Appeals applied this specific defense in *Caldwell v. Crowell-Collier Pub. Co.*, 161 F. 2d 333, 336 (5th Cir. 1947). The argument offered by counsel for that defendant (Crowell-Collier) was that since the publication in question "related to a public officer," it was privileged. The Court of Appeals apparently accepted this contention as a sound statement of law, holding that the privilege had been avoided by an allegation in the complaint that the publisher was guilty of "malice in fact."

An indication of what was to come in *Times* is found in *Beauharnais v. Illinois*, 343 U.S. 642 (1952). In upholding a group libel statute, Mr. Justice Frankfurter, speaking for the Court, stated that he was not dealing with a statute outlawing defamation of political parties. He noted that quite different problems would be raised by such a statute because "political parties, like *public men*, are, as it were, public property." (Emphasis added) Id. at 263 n. 18.

This Court in *Times* recognized that a "like rule" has existed for many years in state courts. It stated

at page 280, "an oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908)." In a footnote at that point in its decision this Court cited eleven decisions from ten different states[10] as well as six scholarly works. The Kansas Supreme Court has since stated that *Times* requires no change in the law of that state since the principles of *Times* have long been the law. *Kennedy v. Mid-Continent Telecasting, Inc.*, 394 P. 2d 400 (Kan. 1964).

It is obvious from *Times* itself, *Gandia*, *Sweeney*, *Caldwell*, *Coleman*, the Georgia statute and cases, and the decisions from ten different states cited in the footnote at page 280 of this Court's decision in *Times*, as well as the six scholarly works there cited, that the defenses there discussed have long been recognized as being available to a defendant in a libel suit.

The decisions cited by petitioner for the proposition that this Court may apply any fundamental change in the law pending appeal are inapposite here. Those cases involve the effect of an intervening treaty in *U.S. v. The Schooner Peggy*, 1 Cranch 103 (1801); applicability of state law under the rules of decision statute in *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941); enactment of the Eighteenth Amendment repealing prohibition in *U.S. v. Chambers*, 291 U.S. 217 (1934); enactment of a statute in *U.S. v. Alabama*, 362 U.S. 602 (1960); enactment of the Civil Rights Act of 1964 in *Hamm v. Rock Hill*, 379 U.S. 306 (1964). We are

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[10] A complete assemblage of authorities, it is submitted, would have included the Georgia statute and decisions on the "public man" defense.

not here concerned with such a change in the law; *Times v. Sullivan* merely gave renewed constitutional sanction to a long recognized legal principle.

In addition, we submit that it is one thing to say that a change in the law may be taken advantage of by a litigant into whose chosen theory of the case the change fits without disrupting the premises of the litigation, but an entirely different thing to allow a litigant to try his case on one studied theory and then on appeal abandon this theory (or theories) and attempt to get a second chance at the jury on a quite different theory made available (or simply discovered by counsel) in the interim. There must be an end to litigation, and none of the cases cited by petitioner proposes that a litigant be allowed to proceed through pleading and the trial as many times as he chooses or as there may be innovations—real or supposed—in the body of all law. We cannot imagine this Court encouraging any such notion of piecemeal, hindsight litigation, yet it is precisely this that is being urged by petitioner and upon which its entire case stands.

We submit that petitioner should not now be relieved of its deliberate decision not to invoke any constitutional defenses.

II.

ASSUMING THE CONSTITUTIONAL DEFENSES WERE NOT WAIVED, NEW YORK TIMES V. SULLIVAN SHOULD NOT BE USED AS A BASIS FOR REVERSAL IN VIEW OF THE FACTS OF THIS CASE.

In Georgia, civil libel is a false and malicious defamation in print which exposes the victim to public

hatred, contempt or ridicule and which tends to injure him in his reputation. (Ga. Code Ann. § 105-701. See App. A) In finding for respondent in this case, the jury found the charges against him in petitioner's magazine article to be false. That these charges injured respondent's reputation and exposed him to public hatred, contempt and ridicule is beyond doubt.

Since this case was tried before a jury in August 1963, ending in a verdict and judgment in favor of respondent, this Court has handed down several decisions interpreting the constitutional right of free speech and free press in the area of libel and, in one instance, the right-of-privacy. These are *New York Times Company v. Sullivan* (March 9, 1964); *Garrison v. Louisiana*, 379 U.S. 64 (November 23, 1964); *Rosenblatt v. Baer*, 383 U.S. 75 (February 21, 1966); and *Time, Inc. v. Hill*, No. 22, October Term 1966 (January 9, 1967).

In these cases (the first three of which petitioner relies upon) the Court has discussed the question of limitations imposed by the free speech guarantees of the First Amendment at some length, *viz.*, fifteen opinions covering approximately 145 pages. We submit that there is a wide divergence between the factual situations in those cases and the one now under consideration.

The opinions of the Court in those cases emphasize the necessity for freedom of discussion where public issues are involved, saying that the press must have "breathing space" in order to survive and that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that

it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

In *Times* the plaintiff claimed to have been libeled in an advertisement appearing in a Sunday edition of the paper published by that company. A judgment was recovered in favor of the plaintiff. This Court reversed that judgment, holding that a state's power to award damages for libel in actions brought by public officials against critics of their official conduct is limited by the First Amendment and that factual error or content defamatory of an official's reputation, or both, are insufficient to support an award of damages for false statements unless actual malice, that is, knowledge that the statements were false or made in reckless disregard of their truth or falsity, is proved. The Court went on to hold that the case was not submitted to the jury under these restrictions and therefore the verdict and judgment offended the First Amendment.

The facts in the *Times* case more resemble those in the *Rosenblatt* case than those in the one under review. In both cases the plaintiffs had considerable difficulty in proving that the publications *referred* to them at all, for they were not named. Neither publication was a conscious destruction of the plaintiff's career, acknowledged to be "his death in his chosen profession," as in this case. The plaintiff in *Times* was the Commissioner of Public Affairs of Montgomery, Alabama, elected by the people and very properly classified as a public official, whereas the plaintiff in this case was an athletic director.

The *Garrison* case involved a conviction for criminal

defamation, under Louisiana statutes, of a district attorney who criticized the judicial conduct of eight judges of the criminal district court. The Court held that the restrictions on state power as to civil libel statutes set out in *Times* also limit state power to impose criminal sanctions for criticism of the official conduct of these public officials.

In *Garrison* the Court commented on the use of calculated falsehood (and this is quoted by Mr. Justice Brennan in *Time, Inc. v. Hill*) as follows:

> "The use of the calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U.S. at 75.

One important factor involved in the *Garrison* case was that the Louisiana statute authorized recovery where the remarks were true but uttered with actual malice. This was held unconstitutional, and this point is not present in the instant case.

The *Rosenblatt* case involved charges made against a former supervisor of a county recreation area which —he claimed—referred to him and constituted libel. The Court reversed the verdict and judgment and sent the case back for retrial, directing the trial court first to determine whether plaintiff Baer was a public official within the meaning of *Times*, and if it found that he was, to charge the jury in terms of the actual malice of *Times*.

In *Rosenblatt* there had been no finding by the trial court of whether Baer was such a public official. But in the case at bar, at the instance of petitioner's third motion for new trial (R. 1115), the trial court specifically found that respondent Butts was *not* a public official. 242 F. Supp. at 393-95. This is a compelling difference between the present case and *Rosenblatt*. In addition, unlike *Rosenblatt*, no *existing* "public issue" was being commented on in the libelous publication here, since there was at that time no suggestion about any corrupt dealings between Butts and Bryant. We submit that a publisher should not be allowed to escape liability by *creating* a public issue through the use of untrue statements and then to comment on that issue with impunity. Petitioner had itself created the issue here, and it is only logical to conclude that its purpose (aside from using a sensational story to sell more copies of its magazine) was to thwart Coach Bryant in his effort to obtain redress against petitioner for prior

articles. The charges made by petitioner cannot properly be described as a debate of a governmental operation or an attack on a public official entitled to special protection by our Constitution.

Time, Inc. v. Hill did not involve libel but an action under the New York right-of-privacy statute. The Court held that the limitations set out in *Times* are applicable to certain cases arising under the New York statute even where the plaintiff is not a public official. It expressly disclaimed that its ruling should be taken as applying to libel cases, such as the one at bar.

This brings us to the specific questions here involved.

1. Was respondent a public official within the concept of *Times*?

2. If *Times* applies, does not the undisputed evidence show that actual malice was proved?

3. If the facts of the case fall within the purview of *Times*, was the jury charge insufficient in the light of that decision?

4. Under the facts of this case, should *Times* be applied retroactively to it?

1.

Was Respondent A Public Official Within The Concept Of The Times Case?

Petitioner argues that respondent must be regarded as a "public official" under the criteria laid down in

Rosenblatt. Petitioner recognizes that this Court did not definitely hold that the constitutional standard of proof must apply if the publication in that case involved implied dishonesty in the financial management of the Belknap County Recreation Area, but argues that the Court's disposition of that case *suggests* that this must be so. Petitioner presents a lengthy argument in an effort to sustain its contentions and then goes on to assert that, in view of the conclusion for which it argues, the respondent here *must* have been a "public official" and the constitutional privilege of necessity has application in this case.

In *Rosenblatt*, this Court sent the case back with instructions that upon retrial the trial court should first determine if Baer was a "public official" to whom the constitutional privilege applied. In this case, the trial court has considered this particular question on petitioner's third motion for a new trial (R. 1115) and determined that respondent was not such a public official. As the District Court held on this point:

> "Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic associations. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners'

> he would not be a public official or officer. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. Regents of the University System of Georgia v. Blanton, 49 Ga. App. 602(4), 176 S.E. 673; Board of Education of Doerun v. Bacon, 22 Ga. App. 62, 95 S.E. 753." 242 F. Supp. at 394.

Thus the question has already been determined and, we submit, correctly so. Respondent was employed by the Athletic Association (a separate, non-governmental entity, Ga. Code Ann. §§32-152, 32-153) to supervise the sports program of the University of Georgia. This Court described the supervision of that program as the exercise of a proprietary rather than a governmental function. It held in *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 452 (1938):

> "The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain . . .
>
> ". . . however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a . . . tax laid on . . . admissions . . ."

Since, therefore, respondent was not a "public official" as envisioned by *Times* (and this has been judicially determined by the trial court), this action is based

upon a purely private defamation. And, as noted in the concurring opinion of Justices Goldberg and Douglas, the *Times* holding does not apply to libel of private individuals (376 U.S. at 301-02):

> "Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech. . . ."

If there is no limit to the concept of public official as used in *Times*, there seems no reason to be concerned with such a question and this Court may as well hold that the constitutional privilege announced in *Times* is applicable to *all* suits for libel under state defamation laws, regardless of the status of the plaintiffs. We submit this Court has not gone so far and we cannot envision it doing so.

In an attempt to avoid the facts as to respondent's status and the holding of the trial court on this point, petitioner asks the Court to extend the *Times* rule to situations where a "public issue" is involved. Petitioner argues that college football is of such importance that anything connected with it must be classified as a "public issue", as to which the discussion and debate "should be uninhibited, robust and wide-open."

We do not deny that college football is of interest to a great many people. In fact, we would assume that in selecting the material for its magazines—as a purely commercial decision—petitioner would endeavor to select only that which it thinks would be of "public interest", either before the article is published or as

a result of it being published. But we do not believe that this Court has elevated to a position of constitutional sanctuary every subject which "sells" magazines.

The absurdity of petitioner's argument in the context of this specific publication is apparent. There was, for example, no discussion of the role of football in college life, whether good or bad, no discussion of the question of its importance or over-emphasis. The article was a plain, unadulterated attack on the integrity of two individuals, Butts and Bryant. (We have already indicated as a probable reason for petitioner's enthusiasm in publishing the story its existing legal troubles with Bryant.) We do not believe that the Constitution guarantees the right to make false accusations and then to escape responsibility by asserting that the general public is interested in college football.

At any rate, there was no "public issue", even of the kind petitioner suggests, until this story was published. Yet, while Curtis' editors charged respondent with giving to Coach Bryant "Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed," now petitioner unabashedly concedes (Brief, p. 27):

> "There was no evidence, however, that related Alabama's strategy or performance in the game to specific information in the Burnett notes and there was some to the effect that Alabama did not take advantage in its play of points that the notes revealed."

The only "public issue" in this case was the validity of the charges made in the article itself, and that "issue" was put to rest five months later when the jury returned its verdict.

2.

The Undisputed Evidence Shows Conclusively That Actual Malice Was Proved

Even if it should be held that respondent was a "public official" or that college football is a "public issue" and that the *Times* rule should be extended so as to apply here, we submit that its application would immediately terminate when the evidence is reviewed. Petitioner argues illogically that the fact that "actual malice within *New York Times* was conclusively proven is . . . legally immaterial." (Brief, p. 42, 65). But this Court obviously disagrees when it emphatically states, as it did in *Garrison*:

> "the knowingly false statement and the false statement made with *reckless disregard* of the truth, *do not enjoy constitutional protection.*" (379 U.S. 175) (Emphasis added)

We say, therefore, that if actual malice was proven (as it was) the case should end since the article would "not enjoy constitutional protection."

We invite the Court's attention to the fact that the District Court and the Court of Appeals have reviewed the evidence and have each concluded that the article was published at least with a reckless disregard of the

truth."[11] We feel that these concurrent findings of fact by two courts below should bring this case within the "two-court" rule discussed in *Berenyi v. Immigration Service*, No. 66, October Term 1966 (January 23, 1967) that:

> "This Court . . . 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' E.g., *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275. . . .
>
> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

Both courts below found that the article was libelous per se under state law. This Court will not set aside

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[11] "In the trial of this case, there was ample evidence from which a jury could have concluded that there was a reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916." 242 F. Supp. at 395. "The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d at 719-20.

the ruling of lower federal courts applying state law in diversity suits except on a plain showing of error. *Palmer v. Hoffman*, 318 U.S. 109 (1943). On the issue of truth, the jury found for the respondent. This is a traditional element of the state right, in no way changed by the *Times* decision. Since truth was properly put to the jury as an absolute defense this Court will not determine that fact, for an evidentiary basis is apparent in the record. *Lavender v. Kurn*, 327 U.S. 645 (1946); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

On the other hand, should the Court feel it necessary "to undertake independent examination of factual issues when constitutional claims may depend on their resolution" and review the evidence in this case, we respectfully offer the following in support of our contention that actual malice was proved:

(1) Curtis was informed of the falsity of the story eleven days prior to publication of the story as a result of the telegram, letter, and telephone call. (R. 16-17, 20, 717-18, 777-78).

(2) Although there was adequate time in which to do so, no investigation or any other action was carried out as a result of these communications. (R. 717-18, 777-78).

(3) Prior to the publication of the story, Curtis' advertising revenues had been falling drastically. (R. 707-08). In order to bolster these revenues Editor-in-Chief Blair undertook four months before publication of this story to "change the image" of the magazine. (R. 711). He initiated a policy of "sophisticated muck-

raking," of "expose in the mass magazines." (R. 712-14). The new image was intended "to provoke people, make them mad." (R. 714-15). Blair testified that he "was not being facetious," that he "meant it then [November 1962]" and "mean[s] it now [May 1963]." (R. 710-11).

(4) Only two months prior to publication of this story, Curtis' Blair wrote a memorandum to his personnel complimenting them on their work under the new editorial policy and outlining "the final yardstick: we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism." (R. 1040). Blair later testified that the "them" who were being hit was everyone in the United States and that the law suits were all libel suits. (R. 708-10).

(5) Editor Blair later considered the Butts issue as bringing the magazine "25 per cent toward the goal of the magazine that I envision." (R. 711).

(6) The *sole* source of the story was one George Burnett, a man *known* to Graham *from the beginning* as a bad-check artist. (R. 689-92). Managing Editor Thomas, who also knew of Burnett's bad-check record, considered such a person to be a liar. (R. 771-72).

(7) Neither author Graham nor anyone else with Curtis made any *attempt* to talk to John Carmichael, who was known to Graham to have been with Burnett when the latter allegedly overheard the telephone conversation. (R. 378-79, 771-72). By performing this easy task, Graham would have learned at the outset that the whole story was a fabrication. (See R. 636-

44). Managing Editor Thomas admitted that "a responsible journalist" should rely on something more than the mere word of Burnett. (R. 772).

(8) Although the story as written relied heavily on the supposed existence and contents of some notes which Burnett allegedly made of the telephone conversation, no Curtis representative ever saw or read the notes (R. 772-73), notwithstanding the fact that Burnett told Graham that he needed the notes to refresh his memory (R. 154) and that he "couldn't remember anything definite about it . . . without his notes." (R. 390). When the notes were finally analyzed, they turned out to be largely nonsensical. (See R. 281).

(9) Before publishing the story, Curtis made no effort to view the game film, although Sports Editor Kahn considered that to be necessary (R. 736) and the collaborator, Furman Bisher, thought "it would have been a very good idea." (R. 779).

(10) No effort was made to interview any member or coach of the Alabama team in order to determine whether any changes had been made in the game plans. (R. 779).

(11) The patently outrageous story was never submitted to anyone familiar with the sport of football in order to get a knowledgeable reaction.

(12) Neither principal mentioned in the story was ever contacted before publication.

(13) After such a shockingly shoddy "investigation", Curtis published the story with full knowledge that it would ruin the career of Wallace Butts and would result in "the death of Wally Butts in his chosen profession." (R. 693).

(14) Furthermore, certain direct quotations which were inserted in the article for the sole purpose of lending truth to the charges were denied under oath by the parties alleged to have been quoted.

(a) Graham wrote that Burnett had told him that Georgia quarterback Rakestraw placed his feet in a certain position while on offense, thereby tipping off the defensive team as to whether the forthcoming Georgia play would be a run or a pass. (This, of course, would have been vital information for an opponent. (R. 266)) Petitioner was aware of the importance of this information and put it in its article to convince the readers of the truth of its indictment of Wallace Butts. (R. 776). But Burnett denied under oath that he had told Graham any such thing. (R. 175). Georgia's head coach, Johnny Griffith, a witness for petitioner, who was in a better position than anyone else to know whether in fact Rakestraw did this with his feet, testified that it was not true. (R. 266).

(b) Mickey Babb, University of Georgia all-conference end, specifically denied the quotation in the article attributed to him that the Alabama team knew the Georgia formations and plays. (R. 564). Babb was quoted in

the article as saying the Alabama players knew Georgia's key play (described in the article as "eighty-eight pop") and knew when Georgia would use it. Babb testified Georgia had no "eighty-eight pop" play. (R. 564). This was confirmed by Coach Johnny Griffith. (R. 279).

(c) Sam Richwine, Georgia trainer, specifically and categorically denied the quotation in the article attributed to him to the effect that Alabama knew Georgia's plays. (R. 570).

(d) In its article petitioner wrote that Georgia Coach Griffith had stated: "We knew somebody had given our plays to Alabama . . . and maybe to a couple of other teams we played too. But we had no idea that it was Wally Butts." Coach Griffith, appearing as a witness for petitioner, testified emphatically that he had said no such thing. (R. 268-69).

(e) The article states that "Griffith went to University officials, told them what he knew and said that he would resign if Butts was permitted to remain on his job." At the trial Coach Griffith categorically denied having done or said that. (R. 269).

(f) The article quotes Coach Griffith as saying, "You know, during the first half of the Alabama game my players kept coming to the sideline and saying, 'Coach, we been sold out.'" Coach Griffith at the trial denied that. (R. 269).

(g) The article attributes the following direct quotation to Coach Griffith: "'I never had a chance did I?' Coach Johnny Griffith said bitterly to a friend the other day. 'I never had a chance.'" Coach Griffith denied under oath having said that to anybody. (R. 270)

(15) There was no immediate urgency to put this story on the news stands. The alleged incident occurred six months earlier. Petitioner had an exclusive on the story from Burnett. Publication could have waited until at least the minimum standards of investigation had been met. In view of the gravity of the charges, the harm and the certainty of its occurrence, the standard of recklessness required no less.

That reckless disregard of a much lesser degree than proved here is proscribed was confirmed by the Court of Appeals for the Seventh Circuit in *Pape v. Time, Inc.*, 354 F. 2d 558, 560-61 (1965), *cert. den.*, 384 U.S. 909 (1966), wherein it was stated:

> "As stated in our previous decision— . . . Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. . . . As we put it (318 F. 2d at page 655)—'It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*.'

> "We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false."

Respondent submits that since both the District Court and the Court of Appeals have held unequivocally that actual malice was proved in the instant case, nothing would be accomplished by remanding the case for further consideration in light of *Times*.

3.

If The Facts Of The Case Fall Within The Purview Of Times, Was The Jury Charge Insufficient In The Light Of That Decision?

There is no fatal difference between the definition of malice in *Times* and that charged by the trial court. The latter, in its charge relative to punitive damages, told the jury (R. 1026):

> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required to, award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. . . . The plaintiff charges that the column was written and published both with actual malice and in utter and wanton dis-

> regard of his rights . . . Whether actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case."

In the *Times* case the Court held that a statement is made with actual malice when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." It did *not* announie that malice can be established only by proving that the publisher knew without any doubt that the charges it planned to make were false.

Although not in the exact language of the test set forth in *Times*, certainly it cannot be said that the jury in this case did not get the message expressed in the charge. Lest the Court be concerned about the use of the term "culpable negligence" in the charge, we point out that the concept denoted thereby is one of *criminal* law, with all of the attendant requisites of conscious conduct and narrowness of meaning. The term means—at the least—reckless or wanton misconduct.[12]

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[12]See language in *Cain v. State*, 55 Ga. App. 376, 190 S.E. 371, 374 (1937) that "the words 'criminal negligence' are synonymous with the words 'culpable negligence'. . . Culpable negligence rests on the assumption that he knew the probable consequences but was intentionally, recklessly . . ., or wantonly indifferent to the results."; and see following cases where the term "culpable negligence" is regarded as connoting, *at the least*, reckless or wanton conduct: *State v. Sealy*, 253 N.C. 802, 117 S.E. 2d 793 (1961) ("intentional, wilful or wanton"); *People v. Carlson*, 26 N.Y.S. 2d 1003 (1941) ("wanton disregard"); *State v. Schriver*, 275 S.W. 2d 304 (Mo. 1955) ("reckless or wanton", "utter indifference"); *State v. Tjaden*, 69 N.W. 2d 272 (N.D. 1955) ("utter disregard"). It is universally held that "culpable negligence" is *quite* distinct from the concept of "simple negligence" as is applied in ordinary civil cases (and as was found by the Court in *Times* to be insufficient.)

In the case now before this Court, considered in its full perspective, we submit even if the exact words used by this Court in *Times* in defining actual malice had been used, the verdict would have been the same. (As the trial court said: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." (R. 73)).

A cursory view of the record here will show that respondent's prime contention throughout the trial was that the story was published with no real investigation of its truth prior to publication, thereby demonstrating petitioner's utter disregard for the truth or falsity of its categorical statement of guilt. It will be seen that;

(a) Petitioner refused to interview any member of the Georgia coaching staff — the purported "victims" — to obtain their first-hand impression of the alleged "fix," "rig" and "sell-out." Yet, *when questioned*, petitioner's witness, Head Coach Griffith, stated that the only benefit Bryant could have obtained from the "information" was a shortening of his practice time; petitioner's witness, Pearce (first assistant coach to Griffith), when questioned, stated that he had seen nothing that related Alabama's strategy or performance in the game to the information in the Burnett notes.

(b) No one familiar with football terminology was consulted to give an interpretation of Burnett's information — this was author Graham's first football story.

(c) As "impartial" field investigators, petitioner

hired its own counsel (Beddow) and its co-defendant (Bisher) in the initial Alabama litigation with Bryant.

(d) No effort was made to review the game films which later were viewed by the jury which decided they in no way substantiated the charges.

(e) Petitioner made no effort to determine the truth of the story after being warned that it was untrue before publication.

The above enunciated failures (and many others) of petitioner showing beyond any question that the story was published without any meaningful investigation as to truth or falsity were repeatedly emphasized to the jury by respondent. *The jury's action showed that it agreed.* The fact that the trial court did not use the exact technical language of *Times* was not important and would not be important at a retrial. The jury understood the message, just as would any other twelve people who had these inexcusable failures of petitioner impressed upon them every day for over two weeks.

4.

Under The Facts Of This Case, Should Times Be Applied Retroactively To It?

Even if this Court should be of the opinion that if this case had been tried subsequently to the date of the decision in *Times* the limits expressed in that case would apply to it, the facts here involved nevertheless fully warrant this Court in holding that it will not give retroactive application to *Times* in this case.

The question of making new constitutional interpretations retroactive has been recently dealt with by this Court in *Johnson v. N. J.*, 384 U.S. 719 (1966). The Court there held that two landmark decisions[13] announcing constitutional rights of persons accused of crime should not be applied retroactively to cases tried before the decision dates, even where appeals were pending on such dates and the judgments had not become final.

In reaching its decision against retrospective application, the Court noted that it had the right to confine rules promulgated concerning constitutional claims to subsequently tried cases " 'where the exigencies of the situation require such an application.' " 384 U.S. at 726-27. Mr. Chief Justice Warren commented, "to reiterate what was said in *Linkletter* [*v. Walker*], we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." 384 U.S. at 728. The Court noted that retroactive application would seriously disrupt the administration of the criminal laws and found no persuasive reason to do so.[14]

In the instant case, a comparable situation is presented, for the case was tried before the Court's decision in *Times*. The Court noted in both *Escobedo* and

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[13] *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

[14] Other cases of interest on this point are *Linkletter v. Walker*, 381 U.S. 618 (1965), holding that no distinction is to be drawn between civil and criminal litigation in determining whether a case is to be applied retroactively and that the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), should not be given retroactive effect; and *Tehan v. Shott*, 382 U.S. 406 (1966), holding that the doctrine of *Griffin v. California*, 380 U.S. 609 (1965), should not be applied retroactively.

Miranda that its decisions had been foreshadowed by earlier cases. This was equally true of its decision in *Times*, as this Court pointed out in its opinion. There are no special considerations requiring that *Times* be applied retroactively here. On the contrary, where a person's career has been intentionally destroyed by libel, there is a special consideration that he should not be denied redress as a result of constitutional interpretations made subsequent to the trial, delaying indefinitely any relief he can hope to obtain. If a person convicted of murder prior to *Escobedo* and *Miranda* (as in *Johnson*) may not obtain the benefit of the constitutional right interpreted in those decisions, then we submit petitioner is not entitled to a new trial because of the subsequent decisions.

III.

UNDER THE FACTS OF THIS CASE THE AMOUNT OF PUNITIVE DAMAGES DID NOT CONSTITUTE AN ABRIDGEMENT OF FREEDOM OF THE PRESS OR THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW

Petitioner's third Question Presented (Brief p. 2), to which this section of its brief relates, is specifically framed in terms of "*the circumstances*" of this case. Applying petitioner's premise of examining this question "in the circumstances" of this case, respondent shows:

First: As stated by the Court of Appeals in its decision:

> "This is no ordinary libel case. A publication of the article by the *Post* . . . was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined." (351 F. 2d at p. 719)

Petitioner concedes "*arguendo*" (p. 72) "that an award of damages imposed as a deterrent to the defendant and to others and 'to protect the community' (R. 1026) is not per se invalid in a civil case."

Examined "*in the circumstances*" of this case ("petitioner's general policy of callousness") and in light of petitioner's above quoted concession, the judgment for punitive damages ($400,000) is not invalid on any constitutional basis.

Was not the judgment imposed as a valid deterrent to petitioner, deterring it from a repetition of the offense and warning others not to commit a like offense, neither of which purposes petitioner claims to be invalid. The judgment was in no sense to be used as an attempt to regulate publication or to infringe protected freedom of the press.

Was not this judgment for punitive damages also imposed "to protect the community," a purpose which petitioner concedes is not invalid? Is not the community in which this case was tried—and, indeed, the national community—entitled to such protection as hopefully could be obtained by the assessment of the judgment?

Petitioner argues that the verdict here was grossly excessive and "was designed to put defendant out of

business." That, respondent says, is pure melodrama and is intended by petitioner to draw the court's attention away from its own defamatory article, "The Story Of A College Football Fix," which was admittedly designed to put *respondent* out of business. Petitioner admitted (R. 693-94) it "knew when the article was published it would ruin Coach Butts' career." It was also admitted that "when the article was published that was the death of Wally Butts in his chosen profession." (R. 693-94) The article itself stated: "But careers will be ruined that is sure." By admittedly "ruining the career of Wally Butts" and admittedly "killing him in his chosen profession" did not petitioner flagrantly deprive Wally Butts of his property without due process of law in violation of the Fourteenth Amendment?

It strikes respondent that petitioner would urge this Court to substitute the laws of economics in place of "... the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life. . . ."' That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—*values reflecting the concern of our society for the right of each individual to be let alone.*" *Tehan v. Shott,* 382 U.S. 406, 416 (1966) (Emphasis added).

We recognize the constitutional provisions which guarantee freedom of the press and do not suggest that this right be circumscribed. But freedom of the press does not include a license to publish untruthful and

defamatory charges against another who has no means of retaliation except through the processes of the law, the cost of which can be prohibitive. Those who enjoy the freedom of the press must recognize that it includes a *corresponding obligation and responsibility* to print only that which is true and not that which falsely and maliciously holds individuals up to public hatred, scorn and ridicule.

The most valuable possession of the journalistic profession is unquestionably the constitutional provisions which protect its right to a free press. *The most valuable possession of an individual is his good reputation and good character.* Loss of career, health, reputation of any man in his declining years cannot be measured by a few dollars—nor in fact by many. The true injury of a libel such as this one is the inescapable legacy of shame falling upon all who follow in blood and name.

> "[A] good name is rather to be chosen than great riches. . . . A good reputation honestly earned is not only one of the most satisfying sources of a man's own contentment, but from a commercial standpoint it is one of the most productive kinds of capital he can possess. Therefore it ought to find guarantees of protection in the fundamental law along with those which guard the liberty of the press, and such is indeed the case." *Coleman v. MacLennan*, 78 Kan. 711, 721, 98 Pac. 281, 284-85 (1908); See

Clark v. Pearson, 248 F. Supp. 188, 191 (D.D.C. 1965).

As the Court so aptly said in *Tehan*, quoting *Linkletter*, "the ruptured privacy . . . cannot be restored." 382 U.S. at 416.

The courts have kept in mind that "a good reputation is one of man's choicest treasures and that its uncompensated loss through false charges should be required only where it is clear that the public good requires this sacrifice." Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 891 (1949).

The proof in this case conclusively shows that this "Story Of A College Football Fix" was an integral part of the new editorial philosophy adopted by petitioner to ameliorate the dramatic decline in its revenues. Petitioner felt that hitting people "where it hurt" and thereby inviting widely publicized libel suits would inure to its financial advantage. Historically, this type of libeller has been classified as a "libeller for profit." *Strickland v. Cox*, 101 Ga. 482, 495, 28 S.E. 655 (1897). Certainly this type of libeller is not representative of the "American press" referred to by Mr. Justice Black in *Times* as being "virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." 376 U.S. at 294

It is our position that our Constitution, laws and courts were not and are not designed for the protection of irresponsible libellers who are concerned only with the character assassination of their victims.

Second: Petitioner argues that the jury's verdict was unconstitutional and therefore could not be saved by the remittitur required by the District Court.

To that line of argument the Court of Appeals pointed out (351 F. 2d at 718):

> "Georgia prescribes that '(t)he measure of . . . punitive damages is to be fixed by the enlightened conscience of an impartial jury.' What the 'enlightened conscience' of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages. . . .
>
> "The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. As to, (a) the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was 'ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not.' Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess. The latter is a permissible course and does not infringe upon the Seventh Amendment's guaranty of a jury trial. In making his determination as to (b), he

pursued the correct standard of keeping the verdict 'within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights.' Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts. Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment."

Petitioner argues further that the remittitur required by the District Court was "inescapably a 'fruit' of the illegal action of the jury." (Brief, p. 75) Petitioner made the same point in its brief to the Court of Appeals. This entire position is diametrically contrary to the position taken by petitioner in oral arguments before the District Court on its motion for new trial, at which time the subject of the District Court's right to order a remittitur was discussed at length by the trial judge and counsel for petitioner.

As noted in respondent's Court of Appeals brief, at the time petitioner filed its designation of parts of the record to be printed, respondent did not know that petitioner intended to argue that the District Court did not have the authority to require the remittitur and, therefore, did not designate that portion of the transcript containing statements in open court by petitioner's counsel which not only agreed that the trial judge had this authority but even told the court that it would be

his "responsibility and . . . duty . . . to write it down to the point where it does meet with your own conscience." At page 171 of respondent's brief in the Court of Appeals, he set forth direct quotations from statements made by petitioner's leading counsel at the hearing:

> "I understand Your Honor perfectly . . . [I]f in your own conscience you feel that this verdict is excessive, then in that situation you have the right and, as Judge Hutcheson said, the duty to change that verdict. . . . [I]f that verdict is excessive, you have the responsibility and the duty, to use the lawyers' expression, to write it down to the point where it does meet with your own conscience."

In view of the position taken by petitioner in open court and petitioner having obtained the reduction it was seeking from the District Court (which at the time was questioning its right to order a remittitur), the contention here made by petitioner should receive the same treatment given it by the Court of Appeals as hereinabove quoted.

Third: Petitioner argued in its petition for certiorari and argues again here that the amount of the remittitur is repugnant to the Constitution, that it impinges far too heavily and arbitrarily upon the freedom of the press to preserve the "breathing space" required by the First Amendment freedom "to survive" and that the assessment was "arbitrary and unprincipled."

If the award of $400,000 in this case "impinges" as petitioner complains, how does petitioner explain its voluntary payment of $300,000 to Coach Bryant without

even a trial in this same matter? (R. 1113) How did that payment affect petitioner's "breathing space . . . to survive"? Obviously petitioner did not consider that its $300,000 payment to Coach Bryant would "put defendant out of business" or would affect its breathing space to survive. What about the effect of petitioner's malicious libel upon respondent's breathing space to survive and its effect of putting Wally Butts out of business?

Is the Constitution to be construed and applied so as to safeguard only the breathing space to survive and the financial well-being of that portion of the public press represented by petitioner and not to safeguard and protect those same interest of an individual who is subjected to such a malicious, libelous attack?

At this point we respectfully ask the Court to refer again to the editorial written by "The Editors" of the *Post* and superimposed on the picture on the first page of the article. (R. 1071) That editorial was not written by the author of the article but was written and signed by "The Editors" of the *Post*. It expressed the venom of petitioner's editors—presumably all of them. There, the editors did not raise the question of *whether* Wallace Butts had "fixed" and "rigged" the game; the editors stated unequivocally as a *fact* that he had "fixed" and "rigged" the game. The editors said Wallace Butts was corrupt. They labeled him a "fixer" and a "rigger." They *tried* him *in absentia*. They *found him guilty* and then sentenced him for the remaining days of his life to public hate, scorn, ridicule and oblivion with, in their own words, a "ruined career."

Petitioner seeks to relate the judgment for punitive damages here to what this Court said of the $500,000

judgment rendered in the *Times* case. There is no analogy whatsoever between the scurrilous attack made against respondent in the editorial written by the editors of the *Post* and the language used in the advertisement which formed the basis of the action in the *Times* case. The advertisement in the *Times* case and the statements therein were not directed at any particular person; its attacks were directed at "the police." Here respondent is named repeatedly in the article, his picture is used and he is categorized as being "corrupt." In the *Times* case, the New York Times was acting in the capacity of an impartial public forum, a medium for the expression of ideas by "a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. at p. 266. In the present case, Curtis published an article originating from within its own ranks pursuant to a self-advancing policy of "sophisticated muckraking" intended to "provoke people" and "make them mad" by "hitting them where it hurts," in order to increase circulation and advertising revenues. As a result of the Butts-Bryant article Curtis considered itself "25 percent" of the way to its new image as a "sophisticated muckraker." In *Times*, the court was concerned about foreclosing "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press." 376 U.S. at p. 266.

Petitioner argues that an award of punitive damages must bear a reasonable relationship to the allowance of actual damages. It has always been the law in Georgia that nominal damages will support punitive damages and that no relationship is required. *Sikes v. Fos-*

ter, 74 Ga. App. 350, 39 S.E. 2d (1946), and reverse title, 202 Ga. 122, 42 S.E. 2d 441 (1947) In the federal courts, punitive damages need not bear any relationship to actual damages. In *Selalise v. National Utility Service, Inc.*, 120 F. 2d 938 (5th Cir., 1941) it was said:

> "In Florida, as *in the Federal courts*, the giving of punitive damages is not dependent upon, nor must it bear any relation to, the allowance of actual damages." (Emphasis added)

In *Wardman-Justice Motors v. Petrie*, 39 F. 2d 512, 516 (D.C. Cir. 1930) the court stated:

> "In many states the rule prevails that actual damages must be established as a basis for the assessment of punitive damages, but this is not the Federal rule nor the rule applied in this district."

Attention is also called to the case of *Reynolds v. Pegler*, 233 F. 2d 429 (2nd Cir. 1955), *cert. den.*, 350 U.S. 846 (1955), which upheld an award of $1.00 compensatory damages and $175,000 punitive damages, a ratio of one hundred seventy-five thousand to one.

CONCLUSION

The Court of Appeals stated in its decision rendered in this case July 16, 1965:

> "We think that Curtis has had its day in Court. It apparently thought so too until the jury verdict was returned." 351 F. 2d at 719.

For the reasons which prompted the Court of Appeals to that conclusion and for all the foregoing reasons, the judgment in this case should be affirmed, or, in the alternative, the writ should be dismissed.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE
RULE 51

INSTRUCTIONS TO JURY: OBJECTION. "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

GEORGIA CODE ANNOTATED.

§ 32-152.

ATHLETIC ASSOCIATIONS OF UNIVERSITY OF GEORGIA AND GEORGIA SCHOOL OF TECHNOLOGY DECLARED TO BE CORPORATIONS. — "The Athletic Associations of the University of Georgia and the Georgia School of Technology are hereby declared to be corporations, incorporated under charter

issued by the superior court of the county in which said associations are located. (Acts 1949, p. 29.)"

§ 32-153.

ASSOCIATIONS AS NOT STATE AGENCIES: FINANCIAL OPERATION RULES AND REGULATIONS. — "The Associations named are hereby declared not to be agencies of the State and not subject to the limitations, restrictions and laws of general application imposed on State agencies by the Constitution of Georgia and the laws enacted by the General Assembly of Georgia in compliance with the Constitution of Georgia, and the Associations are authorized under their corporate charter issued by the superior court to make such rules and regulations for the financial operations of the Associations as they deem necessary: Provided, however, that this resolution shall not apply to any tax money appropriated by the State of Georgia. (Acts 1949, p. 29.)"

§ 105-701.

LIBEL DEFINED; NECESSITY OF PUBLICATION. — "A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery."

§ 105-709.

PRIVILEGED COMMUNICATIONS. — "The following are deemed privileged communications: . . .

"6. Comments upon the acts of public men in their public capacity and with reference thereto."

APPENDIX B

EXHIBIT "A"

Filed: Feb. 26, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

PAUL BRYANT,

Plaintiff,

versus Civil Action No. 63-2-W

THE CURTIS PUBLISHING COMPANY,
A Corporation, and
FURMAN BISHER,

Defendants.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON &
SCHEETZ
BEDDOW, EMBRY &
BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing
Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiffs in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

EXHIBIT "B"

Filed: Apr. 30, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL BRYANT,

Plaintiff,

versus Civil Action No. 63-166

THE CURTIS PUBLISHING COMPANY,
A Corporation,

Defendant.

MOTION OF DEFENDANT,
THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(a) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States,

made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW
BY T. ERIC EMBRY
T. Eric Embry,
Attorneys for
The Curtis Publishing Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

(Signed) T. ERIC EMBRY
Of Counsel

CERTIFICATE OF SERVICE

I do hereby certify that I am of counsel for Respondent in the above styled case and I have this day served a copy of the within and foregoing Brief for Respondent, by mailing, in the United States Mail, a copy of same to Petitioner's attorneys of record, HERBERT WECHSLER, ESQ., 435 West 116th Street, New York, New York 10027; PHILIP H. STRUBING, ESQ., PEPPER, HAMILTON & SCHEETZ, 123 South Broad Street, Philadelphia, Pennsylvania 19109 and KILPATRICK, CODY, ROGERS, McCLATCHEY & REGENSTEIN, 1045 Hurt Building, Atlanta, Georgia 30303, in envelopes properly addressed and with sufficient pre-paid postage thereon, pursuant to Supreme Court Rule 33.

This ____ day of February, 1967.

_____
Of Counsel for Respondent

FILED
FEB 17 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS,
Petitioner,

—against—

EDWIN A. WALKER,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

REPLY BRIEF FOR THE PETITIONER

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The Associated Press

IN THE

Supreme Court of the United States

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THE ASSOCIATED PRESS,

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REPLY BRIEF FOR THE PETTTIONER

Since Respondent has elected to fragment his argument into two briefs, one in response to Petitioner's brief and the other in response to the amicus brief of The Tribune Company, Petitioner will here respond to both.

I.

In his briefs, particularly the brief in response to the amicus brief of The Tribune Company, Respondent attempts to create the impression that he was arrested and charged with a felony and suffered various other humiliations as a direct and proximate result of the news reports

here involved (Respondent's Answer to Amicus Curiae Brief, pp. 2-3, 11, 14-15; Respondent's Brief, pp. 38-39, 46-47).

Nothing could be further from the fact.

The documents annexed to General Walker's answer to The Tribune Company's amicus brief disclose on their face that Walker was arrested on October 1, 1962 (Respondent's Answer to Amicus Curiae Brief, Appendix, pp. i, viii-ix). The dispatches here complained of are dated, respectively, October 2 and October 3, 1962 (R. 11). Each dispatch states expressly that General Walker had already been arrested (R. 11, 12). It is therefore obvious that the arrest occurred before the dispatches were written, much less published.

II.

At pages 40 and 41 of his brief, Respondent has cited a number of cases which he claims militate against the extension of *Sullivan* to public figures. Two of these cases, *Clark* v. *Drew Pearson,* 248 F. Supp.188 (D. D. C. 1965), and *Fignole* v. *Curtis Publishing Co.,* 247 F. Supp. 595 (S. D. N. Y. 1965), are based upon the theory of reciprocity of official privilege with respect to public officials. But this Court made it clear, in *Rosenblatt,** that the rationale of its decision in *Sullivan* did not rest upon any theory of reciprocity of official privilege. Moreover, as this record so clearly establishes, General Walker was able to obtain publicity for his opinions and his version of the facts far exceeding that which was available to the public officials involved in *Sullivan, Garrison, Henry* and *Rosenblatt.*

The other cases cited by the Respondent are clearly distinguishable on their facts or totally inapposite.

**Rosenblatt* v. *Baer,* 383 U. S. 75, 84, n. 10.

III.

General Walker has argued (Respondent's Brief, p. 36) that the definition of "actual malice" under Texas law is more stringent than under *Sullivan*, and that the findings by the Texas courts of no "actual malice" do not, therefore, necessarily preclude a finding of "actual malice" within the meaning of *Sullivan*. A reading of the charge given by the trial court here discloses, however, that the Texas definition of malice is more favorable to Walker than the "actual malice" test prescribed by *Sullivan* (R. 60). Cf. *Henry* v. *Collins*, 380 U. S. 356, 357. In any event, Walker's argument ignores the fact that the Texas courts expressly found that there was in this record no evidence of "actual malice" as defined by this Court in *Sullivan*. The trial court said (R. 72):

> "Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of *New York Times* v. *Sullivan* . . . should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside . . ."

The Texas Court of Civil Appeals affirmed the trial court's judgment in this, as in all other respects (R. 1551), and Walker's conditional application for a writ of error on the malice point was denied by the Texas Supreme Court (R. 1553).

IV.

Even apart from the findings of the Texas courts, Respondent's contention that Van Savell deliberately lied is implausible on its face, because Savell had no motive to defame General Walker. Van Savell, despite his youth, was an experienced reporter (R. 720-721, 750). He was a Southerner, born and bred in Mississippi (R. 719-720). He

had previously worked for the Jackson Clarion-Ledger (R. 720), a paper whose segregationist views were well known. There is not the slightest suggestion that Savell had any personal animosity toward General Walker, or any reason to portray the General unfairly. And in the light of the inflammatory statements and speeches made by General Walker before he arrived at the Oxford campus, there was nothing in the content of the dispatches which would have suggested to the Associated Press that the activities attributed by Savell to General Walker did not, in fact, occur.

Finally, General Walker suggests no reason why the Associated Press—a non-profit mutual cooperative association composed of hundreds of members throughout the United States, representing a wide range of opinion on all issues, including integration—would deliberately lie about him. There is not the slightest evidence that the Associated Press did not in this instance live up to its well-deserved reputation for impartiality and fairness in reporting the news.

V.

Respondent's claim that Petitioner "waived" its defense of fair comment is wholly unsupported by the record. In fact, Petitioner raised the fair comment defense at every stage of this case: in its answer (R. 29-30); in its motion for an instructed verdict at the close of Respondent's evidence (R. 42, 44, 45); in its motion for an instructed verdict at the close of all the evidence (R. 49-52); in its exceptions to the charge of the court (R. 54); in its motion for judgment notwithstanding the verdict (R. 64-67); and in its motion for a new trial (R. 83-86, 90), as well as on appeal to the Texas Court of Civil Appeals (Appellant's Brief, pp. 3-4, 65-73) and on application for writ of error to the Supreme Court of Texas (Application for Writ of Error, pp. 5, 86-95).

CONCLUSION

For each of the reasons assigned herein and in our principal brief, we respectfully submit that the relief requested by Petitioner should be granted.

Respectfully submitted,

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Attorneys for Petitioner
The Associated Press

SUPREME COURT OF THE UNITED STATES

Nos. 37 AND 150.—OCTOBER TERM, 1966.

Curtis Publishing Co., Petitioner, 37 *v.* Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Associated Press, Petitioner, 150 *v.* Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. JUSTICE HARLAN announced the judgments of the Court and delivered an opinion in which MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS join.*

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280, this Court held that "[t]he constitutional guarantees [of freedom of speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." We brought these two cases here, 385 U. S. 811, 385 U. S. 812, to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are "public figures" and involved in issues in which the public has a justified

*Five members of the Court, while concurring in the result reached in No. 150, would rest decision on grounds other than those stated in this opinion. See separate opinions of THE CHIEF JUSTICE (*post*, p. —), of MR. JUSTICE BRENNAN (*post*, p. —), and of MR. JUSTICE BLACK (*post*, p. —).

and important interest. The sweep of the *New York Times* rule in libel actions brought under state law was a question expressly reserved in that case, 376 U. S. 283, n. 23, and while that question has been involved in later cases, *Garrison* v. *Louisiana*, 379 U. S. 64; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374, it has not been fully settled.

The matter has, however, been passed on by a considerable number of state and lower federal courts and has produced a sharp division of opinion as to whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach. Compare, *e. g.*, *Pearson* v. *Fairbanks Publishing Co.*, 413 P. 2d 711 (Alaska), with *Clark* v. *Pearson*, 248 F. Supp. 188.[1] The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the "New York Times Rule" become a talisman which gives the press

[1] See also *Afro-American Publishing Co.* v. *Jaffe*, 366 F. 2d 649, — U. S. App. D. C. —; *Washington Post Co.* v. *Keogh*, 365 F. 2d 965, — U. S. App. D. C. —; *Pauling* v. *Globe Democrat Publishing Co.*, 362 F. 2d 188; *Pape* v. *Time, Inc.*, 354 F. 2d 558; *Pauling* v. *News Syndicate Co., Inc.*, 335 F. 2d 659; *Fignole* v. *Curtis Publishing Co.*, 247 F. Supp. 595; *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231; *United Medical Labs* v. *CBS, Inc.*, 228 F. Supp. 735; *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404; *Walker* v. *Associated Press*, 417 P. 2d 486 (Colorado); *Powell* v. *Monitor Publishing Co., Inc.*, 107 N. H. 83, 217 A. 2d 196; *Eadie* v. *Pole*, 191 N. J. Super. 504, 221 A. 2d 547; *State* v. *Browne*, 86 N. J. Super. 217, 206 A. 2d 591; *People* v. *Mager*, 25 App. Div. 2d 363, 269 N. Y. S. 2d 848; *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823; *Krutech* v. *Schimmel*, 50 Misc. 2d 1052, 272 N. Y. S. 2d 261; *Cabin* v. *Community Newspapers, Inc.*, 50 Misc. 2d 574, 270 N. Y. S. 2d 913; *Pauling* v. *National Review*, 49 Misc. 2d 975, 269 N. Y. S. 2d 11; *Block* v. *Benton*, 44 Misc. 2d 1053, 255 N. Y. S. 2d 767; *Fegley* v. *Morthimer*, 204 Pa. Super. 54, 202 A. 2d 125; *Tucker* v. *Kilgore*, 388 S. W. 2d 112 (Ky.).

constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. These two libel actions, although they arise out of quite different sets of circumstances, provide that opportunity. We think they are best treated together in one opinion.

I.

No. 37, *Curtis Publishing Co.* v. *Butts,* stems from an article published in petitioner's Saturday Evening Post which accused respondent of conspiring to "fix" a football game between the University of Georgia and the University of Alabama, played in 1962. At the time of the article, Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program. Georgia is a state university, but Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself.[2] Butts had previously served as head football coach of the University and was a well-known and respected figure in coaching ranks. He had maintained an interest in coaching and was negotiating for a position with a professional team at the time of publication.

The article was entitled "The Story of a College Football Fix" and prefaced by a note from the editors stating: "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. . . . Before the University of Georgia played the

[2] In *Allen* v. *Regents of the University System of Georgia,* 304 U. S. 439, this Court described the Athletic Association as a body carrying on "a business comparable in all essentials to those usually conducted by private owners." *Id.,* at 451. Section 32–153 of the Georgia Code specifically provides that athletic associations are not to be considered agencies of the State.

University of Alabama . . . Wally Butts . . . gave [to its coach] . . . Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed." The text revealed that one George Burnett, an Atlanta insurance salesman, had accidentally overheard, because of electronic error, a telephone conversation between Butts and the head coach of the University of Alabama, Paul Bryant, which took place approximately one week prior to the game. Burnett was said to have listened while "Butts outlined Georgia's offensive plays . . . and told . . . how Georgia planned to defend . . . . Butts mentioned both players and plays by name." The readers were told that Burnett had made notes of the conversation, and specific examples of the divulged secrets were set out.

The article went on to discuss the game and the players' reaction to the game, concluding that "[t]he Georgia players, their moves analyzed, and forecast like those of rats in a maze, took a frightful physical beating," and said that the players, and other sideline observers, were aware that Alabama was privy to Georgia's secrets. It set out the series of events commencing with Burnett's later presentation of his notes to the Georgia head coach, Johnny Griffith, and culminating in Butt's resignation from the University's athletic affairs, for health and business reasons. The article's conclusion made clear its expected impact:

> "The chances are that Wally Butts will never help any football team again. . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure."

Butts brought this diversity libel action in the federal courts in Georgia seeking $5,000,000 compensatory and $5,000,000 punitive damages. The complaint was filed,

and the trial completed, before this Court handed down its decision in *New York Times*, and the only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were interposed although Curtis' counsel were aware of the progress of the *New York Times* case, and although general constitutional defenses had been raised by Curtis in a libel action instituted by the Alabama coach who was a state employee.

Evidence at trial was directed both to the truth of the article and to its preparation. The latter point was put in issue by the claim for punitive damages which required a finding of "malice" under Georgia law. The evidence showed that Burnett had indeed overheard a conversation between Butts and the Alabama coach, but the content of that conversation was hotly disputed. It was Butts' contention that the conversation had been general football talk and that nothing Burnett had overheard would have been of any particular value to an opposing coach. Expert witnesses supported Butts by analyzing Burnett's notes and the films of the game itself. The Saturday Evening Post's version of the game and of the players' remarks about the game was severely contradicted.

The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying the article. It was Butts' contention that the magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and wanton conduct, in light of the devastating nature of the article's assertions.

The jury was instructed that in order for the defense of truth to be sustained it was "necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff." The "sting of the libel" was said to be "the charge that the plaintiff rigged and fixed

the 1962 Georgia-Alabama game by giving Coach Bryant [of Alabama] information which was calculated to or could have affected the outcome of the game." The jury was also instructed that it could award punitive damages "to deter the wrong-doer from repeating the trespass" in an amount within its sole discretion if it found that actual malice had been proved.[3]

The jury returned a verdict for $60,000 in general damages and for $3,000,000 punitive damages. The trial court reduced the total to $460,000 by remittitur. Soon thereafter we handed down our decision in *New York Times* and Curtis immediately brought it to the attention of the trial court by a motion for new trial. The trial judge rejected Curtis' motion on two grounds. He first held that *New York Times* was inapplicable because Butts was not a public official. He also held that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

Curtis appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court by a two-to-one vote. The majority there did not reach the merits of petitioner's constitutional claim, holding that Curtis had "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times," 351 F. 2d 702, 713, on the basis of *Michel* v. *Louisiana*, 350 U. S. 91. It found Curtis chargeable with knowledge of the

[3] Actual malice was defined by the charge as encompassing "the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others." The jury was told that whether "actual malice or wanton or reckless indifference has been established must be determined from all of the evidence in the case." The trial court then directed the jury's attention to the circumstances of preparation. The impact of the charge is considered in more detail at pp. 23–25, *infra*.

constitutional limitations on libel law at the time it filed its pleadings below because of its "interlocking battery of able and distinguished attorneys" some of whom were involved in the *New York Times* litigation. This holding rendered the compensatory damage decision purely one of state law and no error was found in its application. Turning to the punitive damage award, the majority upheld it as stemming from the "enlightened conscience" of the jury as adjusted by the lawful action of the trial judge. It was in "complete accord" with the trial court's determination that the evidence justified the finding "that what the Post did was done with reckless disregard of whether the article was false or not." 351 F. 2d, at 719.

Judge Rives dissented, arguing that the record did not support a finding of knowing waiver of constitutional defenses. He concluded that the *New York Times* rule was applicable because Butts was involved in activities of great interest to the public. He would have reversed because "the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than the intent to inflict harm through falsehood . . . ." 351 F. 2d, at 723.

Rehearing was denied, 351 F. 2d 733, and we granted certiorari, as indicated above. For reasons given below, we would affirm.

II.

No. 150, *Associated Press* v. *Walker*, arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the

campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas..

Walker was a private citizen at the time of the riot and publication. He had pursued a long and honorable career in the United States Army before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957. He was acutely interested in the issue of physical federal intervention, and had made a number of strong statements against such action which had received wide publicity. Walker had his own following, the "Friends of Walker," and could fairly be deemed a man of some political prominence.

Walker initiated this libel action in the state courts of Texas, seeking a total of $2,000,000 in compensatory and punitive damages. Associated Press raised both the defense of truth and constitutional defenses. At trial both sides attempted to reconstruct the stormy events on the campus of the University of Mississippi. Walker admitted his presence on the campus and conceded that he had spoken to a group of students. He claimed, however, that he had counseled restraint and peaceful protest, and exercised no control whatever over the crowd which had rejected his plea. He denied categorically taking part in any charge against the federal marshals.

There was little evidence relating to the preparation of the news dispatch. It was clear, however, that the author of this dispatch, Van Savell, was actually present during the events described and had reported them almost immediately to the Associated Press office in Atlanta. A discrepancy was shown between an oral account given

the office and a later written dispatch, but it related solely to whether Walker had spoken to the group before or after approaching the marshals. No other showing of improper preparation was attempted, nor was there any evidence of personal prejudice or incompetency on the part of Savell or the Associated Press.

The jury was instructed that an award of compensatory damages could be made if the dispatch was not substantially true,[4] and that punitive damages could be added if the article was actuated by "ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

A verdict of $500,000 compensatory damages and $300,000 punitive damages was returned. The trial judge, however, found that there was "no evidence to support the jury's answers that there was actual malice" and refused to enter the punitive award. He concluded that the failure further to investigate the minor discrepancy between the oral and written versions of the incident could not be construed as that *entire want of care* which would amount to a *conscious indifference* [*sic*] to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice." The trial judge also noted that this lack of "malice" would require a verdict for the Associated Press if *New York Times* were applicable. But he rejected its applicability since there were "no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense."

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[4] Two particular statements were at issue, the remark that "Walker assumed command of the crowd," and the accusation that Walker led a charge against the marshals.

Both sides appealed and the Texas Court of Civil Appeals affirmed both the award of compensatory damages and the striking of punitive damages. It stated without elaboration that *New York Times* was inapplicable. As to the punitive damage award, the plea for reinstatement was refused because "[i]n view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in light of all the evidence, we hold that appellee failed to prove malice . . . ." 393 S. W. 2d 671, 683.

The Supreme Court of Texas denied a writ of error, and we granted certiorari, as already indicated. For reasons given below, we would reverse.

III:

Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of *Rosenblatt* v. *Baer*, *supra*, and other cases involving constitutional questions indicate,[5] the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, *Michel* v. *Louisiana*, *supra*, at 99,[6] but an effective waiver must, as was said in *Johnson* v. *Zerbst*, 304 U. S. 458, 464, be one of a "known right or privilege."

Butts makes two arguments in support of his contention that Curtis' failure to raise constitutional defenses amounted to a knowing waiver. The first is that the

[5] See *Teham* v. *Shott*, 382 U. S. 406, 409, n. 3; *Linkletter* v. *Walker*, 381 U. S. 618, 622–629; *Griffin* v. *California*, 380 U. S. 609; *White* v. *Maryland*, 373 U. S. 59.

[6] See also *Ackermann* v. *United States*, 340 U. S. 193, 198.

general state of the law at the time of this trial was such that Curtis should, in the words of the Fifth Circuit majority, have seen "the handwriting on the wall." 351 F. 2d 734. We cannot accept this contention. Although our decision in *New York Times* did draw upon earlier precedents in state law, *e. g.*, *Coleman* v. *MacLennan*, 78 Kan. 711, 98 P. 281, and there were intimations in a prior opinion and the extra-judicial comments of one Justice,[7] that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny.[8] Given the state of the law prior to our decision in *New York Times*, we do not think it unreasonable for a lawyer trying a case of this kind, where the plaintiff was not even a public official under state law, to have looked solely to the defenses provided by state libel law. Nor do we think that the previous grant of certiorari in *New York Times* alone indicates a different conclusion. The questions presented for review there were premised on

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[7] In *Beauharnais* v. *Illinois*, 343 U. S. 250, the Court had upheld an Illinois group-libel statute but the majority had warned that "'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Id.*, at 263–264. There were also four vigorous dissenters to the holding in that case. An article appearing in the June 1962 NYU Law Review had quoted MR. JUSTICE BLACK as believing that "there should be no libel or defamation law in the United States . . . ." Cahn, Justice Black and First Amendment "Absolutes"; A Public Interview, 7 N. Y. U. L. Rev. 549, 557.

[8] In *Robertson* v. *Baldwin*, 165 U. S. 275, 281, the Court said: "Thus the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation . . . ." That sentiment was repeated in a number of cases including *Beauharnais* v. *Illinois*, *supra*, n. 7. See *Near* v. *Minnesota*, 283 U. S. 697, 715; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

Sullivan's status as an elected public official, and elected officials traditionally have been subject to special rules of libel law.[9]

Butts' second contention is that whatever defenses might reasonably have been apparent to the average lawyer, some of Curtis' trial attorneys were involved in the *New York Times* litigation and thus should have been especially alert to constitutional contentions. This was the argument which swayed the Court of Appeals, but we do not find it convincing.

First, as a general matter, we think it inadvisable to determine whether a "right or privilege" is "known" by relying on information outside the record concerning the special legal knowledge of particular attorneys. Second, even a lawyer fully cognizant of the record and briefs in the *New York Times* litigation might reasonably have expected the resolution of that case to have no impact on this litigation, since the arguments advanced there depended so heavily on the analogy to seditious libel. We think that it was our eventual resolution of *New York Times*, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt.

Our rejection of Butts' arguments is supported by factors which point to the justice of that conclusion. See *Hormel* v. *Helvering*, 312 U. S. 552, 556–557. Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it

[9] See, *e. g.*, *Sweeney* v. *Patterson*, 128 F. 2d 457, 76 U. S. App. D. C. 23; *Hendrix* v. *Mobile Register*, 202 Ala. 616, 81 So. 558.

evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below.[10] Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U. S. 319, 327. Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling. Cf. *New York Times Co.* v. *Connor*, 365 F. 2d 567, 572.

IV.

We thus turn to a consideration, on the merits, of the constitutional claims raised by Curtis in *Butts* and by the Associated Press in *Walker*. Powerful arguments are brought to bear for the extension of the *New York Times* rule in both cases. In *Butts* it is contended that the facts are on all fours with those of *Rosenblatt* v. *Baer*, *supra*, since Butts was charged with the important responsibility of managing the athletic affairs of a state university. It is argued that while the Athletic Association is financially independent from the State and Butts was not technically a state employee, as was Baer, his role in state administration was so significant that this technical distinction from *Rosenblatt* should be ignored. Even if this factor is to be given some weight, we are told that the public interest in education in general, and in the conduct of the athletic affairs of educational insti-

[10] Even after our decision in *New York Times* was before him, the trial judge held it inapplicable. It is almost certain that he would have rebuffed any effort to interpose general constitutional defenses at the time of trial. See Note, Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers? 114 U. Pa. L. Rev. 451.

tutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials.

A similar argument is raised in the *Walker* case where the important public interest in being informed about the events and personalities involved in the Mississippi riot is pressed. In that case we are also urged to recognize that Walker's claims to the protection of libel laws are limited since he thrust himself into the "vortex" of the controversy.

We are urged by the respondents, Butts and Walker, to recognize society's "pervasive and strong interest in preventing and redressing attacks upon reputation," and the "important social values which underlie the law of defamation." *Rosenblatt* v. *Baer, supra,* at 86. It is pointed out that the publicity in these instances was not directed at employees of government and that these cases cannot be analogized to seditious libel prosecutions. *Id.,* at 92 (STEWART, J., concurring). We are told that "[t]he rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes," *Afro-American Pub. Co.* v. *Jaffe,* 366 F. 2d 649, 660, — U. S. App. D. C. —, —, and that:

> "Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand." *Buckley* v. *New York Post Corp.,* 373 F. 2d 175, 182.

We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues. In *Time, Inc.* v. *Hill, supra,* at 388, we held that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . ." and affirmed that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102. This carries out the intent of the founders who felt that a free press would advance "truth, science, morality and arts in general" as well as responsible government. Address to the People of Quebec, 1 Journals of the Continental Cong. 108. From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials." *Pauling* v. *Globe Democrat Pub. Co.,* 362 F. 2d 188, 196.

On the other hand, to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, *Rosenblatt* v. *Baer, supra,* at 86, as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc.* v. *Hill, supra,* at 390, we counseled against "blind application of *New York Times Co.* v. *Sullivan*" and considered

"the factors which arise in the particular context." Here we must undertake a parallel evaluation.[11]

The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right. From the fountainhead opinions of Justices Holmes and Brandeis in *Schenck*, *Abrams*, and *Whitney*,[12] which considered the problem when the disruptive effects of speech might strip the protection from the speaker, to our recent decision in *Adderley* v. *Florida*, 385 U. S. 39, where we found the freedom of speech not to include a freedom to trespass, the Court's primary concern has been to determine the extent of the right and the surrounding safeguards necessary to give it "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433. That concern has perhaps omitted from searching consideration the "real problem" of defining or delimiting the right itself. See Freund, Mr. Justice Black and the Judicial Function, 14 U. C. L. A. L. Rev. 467, 471.

It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, see Holt, Of the Liberty of the Press, in Nelson, Freedom of the Press from Hamilton to the Warren Court 18–19, as it is a social necessity required for the "maintenance of our political system and an open society." *Time, Inc.* v. *Hill*, *supra*, at 389. It is because

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[11] The majority opinion in *Time, Inc.* v. *Hill*, 385 U. S. 374, was limited to the consideration of nondefamatory matter. *Id.*, at 391.

[12] *Schenck* v. *United States*, 249 U. S. 47 (Holmes, J.); *Abrams* v. *United States*, 250 U. S. 616, 624 (Holmes, J., dissenting); *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

of the personal nature of this right that we have rejected all manner of prior restraint on publication, *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, despite strong arguments that if the material was unprotected the time of suppression was immaterial. Pound, Equitable Relief Again Defamation and Injuries to Personality, 29 Harv. L. Rev. 640. The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "inalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" [13] but that they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish his opinions." *Respublica* v. *Oswald*, 1 Dall. 319 (Pa.).

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132–133. Federal Securities regulation,[14] mail fraud statutes,[15] and common-law actions for deceit and misrepresentation [16] are only some examples of our under-

[13] See Levy, Legacy of Suppression. The phrase is from the Court's opinion in *Time, Inc.* v. *Hill*, *supra*, at 389.

[14] *E. g.*, 15 U. S. C. § 77k (penalizing negligent misstatement).

[15] 18 U. S. C. § 1341.

[16] See *Traylor Engineering & Mfg. Co.* v. *National Container Corp.*, 6 Del. 143, 70 A. 2d 9; Restatement, Torts § 525 (deceit); *Nash* v. *Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N. E. 1039 (negligent misrepresentation).

standing that the right to communicate information of public interest is not "unconditional." See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191. However, as our decision in *New York Times* makes explicit, while protected activity may in some respects be subjected to sanctions, it is not open to all forms of regulation. The guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." 2 Cooley, Constitutional Limitations (8th ed.) 886. Our touchstones are that acceptable limitations must not affect "the impartial distribution of news" and ideas, *Associated Press* v. *N. L. R. B.*, *supra*, at 133, nor because of their history or impact constitute a special burden on the press, *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. The same truthful statement might be the basis of a criminal

libel action. See *Commonwealth* v. *Clap*, 4 Tyng 163 (Mass.); see generally Veeder, The History and Theory of the Law of Defamation, 3 Col. L. Rev. 546.

The law of libel has, of course, changed substantially since the early days of the Republic, and this change is "the direct consequence of the friction between it . . . and the highly cherished right of free speech." *State* v. *Browne*, 86 N. J. Super. 217, 228, 206 A. 2d 591, 597. The emphasis has shifted from criminal to civil remedies, from the protection of absolute social values to the safeguarding of valid personal interests. Truth has become an absolute defense in almost all cases,[17] and privileges designed to foster free communication are almost universally recognized.[18] But the basic theory of libel has not changed, and words defamatory of another, are still placed "in the same class with the use of explosives or the keeping of dangerous animals." Prosser Torts § 108, at 792. Thus some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.

While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm and thus resolve the antithesis on a neutral ground, we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a

[17] See 1 Harper & James, The Law of Torts § 5.20.

[18] Some privileges such as the one pertaining to reports of judicial proceedings are recognized as absolute. Others, such as the fair-comment privilege are recognized only as conditional privileges and may be vitiated by proof of actual malice. See generally, Prosser, The Law of Torts §§ 109, 110.

finding of falsity alone should strip protections from the publisher. *New York Times Co.* v. *Sullivan*, *supra*, at 272. We have recognized that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship," and "the inevitability of some error in the situation presented in free debate," *Time, Inc.* v. *Hill*, *supra*, at 406. (Opinion of this writer.)

Our resolution of *New York Times Co.* v. *Sullivan*, in the context of the numerous statutes and cases which allow ideologically neutral, and generally applicable regulatory measures to be applied to publication, makes clear, however, that neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

In *New York Times* we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability. The plaintiff in that case was an official whose position in government was such "that the public [had] an independent interest in the qualifications and performance of the person who [held] it." *Rosenblatt* v. *Baer*, *supra*, at 86. Such officials usually enjoy a privilege against libel actions for their utterances, see, *e. g.*, *Barr* v. *Matteo*, 360 U. S. 564, and there were analogous considerations involved in *New York Times*, *supra*, at 282. Thus we invoked "the

hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies," *Dennis* v. *United States*, 341 U. S. 494, 503, and limited recovery to those cases where "calculated falsehood" placed the publisher "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison* v. *Louisiana*, 379 U. S. 64, 75. That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. See *New York Times*, at 286–288, 292; *Garrison* v. *Louisiana*, *supra*, at 73–75, 79.

In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss. In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants' activities. Prosser, The Law of Torts § 31, at 151. The courts have also, espe-

cially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. See *Brewer* v. *Hearst Publishing Co.*, 185 F. 2d 846; *Flanagan* v. *Nicholson Publishing Co.*, 137 La. 587, 68 So. 964. We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. See *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543, remanded on other grounds, — U. S. —. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. *Whitney* v. *California*, 274 U. S. 357, 377 (Brandeis, J., dissenting).

These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also

recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Cf. Sulzberger, Responsibility and Freedom in Nelson, Freedom of the Press from Hamilton to the Warren Court, 409, 412.

Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, including our recent decision in *Time, Inc.* v. *Hill.*[19]

V.

Having set forth the standard by which we believe the constitutionality of the damage awards in these cases must be judged, we turn now, as the Court did in *New York Times*, to the question whether the evidence and findings below meet that standard. We find the standard satisfied in No. 37, *Butts*, and not satisfied by either the evidence or the findings in No. 150, *Walker*.

The *Butts* jury was instructed, in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions." These considerations were said to be relevant to a determination whether defendant had proceeded with "wanton and reckless indifference." In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered,[20] was grossly inadequate in the circumstances. The

[19] Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest.

[20] Counsel for Butts continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care. He did not seriously contend that the Saturday Evening Post was

impact of a jury instruction "is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of proof in the case to which they could possibly be applied." *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 672.

This jury finding was found to be supported by the evidence by the trial judge and the majority in the Fifth Circuit. Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth,"[21] or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious

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actuated by pre-existing animosity toward Butts. Arguing that the misquotations which were shown to be present were proof of malice he stated: "I say that is not fair journalism; I say that is not true, careful reporting." After reviewing the failure of Curtis to interview Carmichael (see p. 25, *infra*) or to check the game films, he asked the jury: "Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me . . . when it is getting ready to write an article which it knows and which it states therein that it is going to ruin us . . . ." The gist of Butts' contention on "actual malice" was that Curtis had been anxious to publish an exposé and had thus wantonly and recklessly seized on a questionable affidavit from Burnett. It is this theory which we feel that the jury must have accepted in awarding punitive damages.

[21] It is inconceivable that the jury might have treated the "investigatory" evidence differently if it had been presented with respect to compensatory damages rather than with regard to punitive damages.

charges. Elementary precautions were, nevertheless, ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The situation in *Walker* is considerably different. There the trial court found the evidence insufficient to support more than a finding of even ordinary negligence and the Court of Civil Appeals supported the trial court's

view of the evidence. Ordinarily we would, under the governing constitutional standard, reverse the decision below on the concurrent findings rule. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. But, as in *New York Times*, we think it better to face for ourselves the question whether there is sufficient evidence to support the finding we would require.

In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy.[22] Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards. We therefore conclude that General Walker should not be entitled to damages from the Associated Press.

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[22] On September 26, 1962, Walker had made a statement on radio station KWKH at Shreveport, Louisiana, urging people to "[r]ise to a stand beside Governor Ross Barnett at Jackson, Mississippi." He contended that the people had "talked, listened and been pushed around far too much . . . ." He promised that he would "be there," on "the right side." The next morning in a television appearance in Dallas he repeated the same sentiments, and he set out his views once again from New Orleans on the evening of September 28, 1962. On September 29, 1962, Walker arrived in Jackson, Mississippi, and held another press and television conference in which he called for "violent vocal protest." On the afternoon of September 30, 1962, Walker held a final press conference at which he again urged defiance of court orders and federal power.

VI.

We come finally to Curtis' contention that whether or not it can be required to compensate Butts for any injury it may have caused him, it cannot be subjected to an assessment for punitive damages limited only by the "enlightened conscience" of the community. Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case, *Day* v. *Woodworth*, 13 How. 363, 370–371, but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning. Publishers like Curtis engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee. *Associated Press* v. *N. L. R. B.*, *supra*. We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted. See, *e. g.*, *Minneapolis, St. P. & S. S. M. Ry.* v. *Moquin*, 283 U. S. 520, 521.

Despite this conclusion, it might be argued that an award of punitive damages cannot be justified constitutionally by the same degree of misconduct required to support a compensatory award. The usual rule in libel actions, and other state-created tort actions, is that a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award. And it might be

asserted that the need to compensate the injured plaintiff is not relevant to the issue of punitive damages in libel since an award of general damages compensates for any possible pecuniary and intangible harm. Thus the argument would be that the strong speech and press interest in publishing material on public issues, which we have recognized as parallel to the interest in publishing political criticism present in *New York Times*, must be served by a limitation on punitive damages restricting them to cases of "actual malice" as defined in *New York Times* and *Garrison* v. *Louisiana*, *supra*. We find the force of any such argument quite insufficient to overcome the compelling contrary considerations, and there is, moreover, nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different constitutional standards of misconduct.

Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse. Moreover, punitive damages require a finding of "ill will" under general libel law and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation. We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of

the jury. As we have already noted (*supra*, pp. 23–25) the case on punitive damages was put to the jury under instructions which satisfied the constitutional test we would apply in cases of this kind, and the evidence amply supported the jury's findings.[23]

The judgment of the Court of Appeals for the Fifth Circuit in No. 37 is affirmed. The judgment of the Texas Court of Civil Appeals in No. 150 is reversed and the case is remanded to that court for further proceedings not inconsistent wtih the opinions that have been filed herein by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BRENNAN.

It is so ordered.

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[23] It should also be noted that prior to publication the Saturday Evening Post had been notified both by Butts and his daughter that the material about to be printed was false. Despite these warnings, and the fact that no member of the staff had ever even seen Burnett's crucial notes, no further efforts at investigation were undertaken prior to publication. It might indeed be argued that this conduct would have sufficed, under proper instructions, to satisfy even the "actual malice" standard of *New York Times*, the notice to the Saturday Evening Post being considered as furnishing the necessary "mental element." *New York Times*, *supra*, at 287.

SUPREME COURT OF THE UNITED STATES

Nos. 37 AND 150.—OCTOBER TERM, 1966.

Curtis Publishing Co., Petitioner, 37 v. Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Associated Press, Petitioner, 150 v. Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. CHIEF JUSTICE WARREN, concurring in the result.

While I agree with the results announced by MR. JUSTICE HARLAN in both of these cases, I find myself in disagreement with his stated reasons for reaching those results. Our difference stems from his departure from the teaching of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), to which we both subscribed only three years ago.

I.

In the *New York Times* case, we held that a State cannot, consistently with the First and Fourteenth Amendments, award damages to a "public official" for a defamatory falsehood relating to his official conduct unless the verdict is based on proof of "actual malice"—that is, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 280. The present cases involve not "public officials," but "public figures" whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of "public officials" with respect to the same issues and events.

All of us agree that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to "public figures" as well as "public officials." Similarly, the seven members of the Court who deem it necessary to pass upon the question agree that the respondents in these cases are "public figures" for First Amendment purposes. Having reached this point, however, MR. JUSTICE HARLAN'S opinion departs from the standard of *New York Times* and substitutes in cases involving "public figures" a standard that is based on "highly unreasonable conduct" and is phrased in terms of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (*ante*, p. ——). I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of layment or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.

To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly

considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occured in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation. Its definition of "actual malice" is not so restrictive that recovery is limited to situations where

there is "knowing falsehood" on the part of the publisher of false and defamatory matter. "Reckless disregard" for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability for publishing false material which is injurious to reputation. More significantly, however, the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.

II.

I have no difficulty in concluding that No. 150, *The Associated Press* v. *Walker*, must be reversed since it is in clear conflict with *New York Times*. The constitutional defenses were properly raised and preserved by the petitioner. The trial judge expressly ruled that no showing of malice in any sense had been made, and he reversed an award of punitive damages for that reason. The seven members of this Court who reach the question agree with that conclusion, and all agree that the courts below erred in holding the First Amendment inapplicable. Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest.

III.

But No. 37, *Curtis Publishing Co.* v. *Butts*, presents an entirely different situation. There, no First Amendment defenses were raised by the petitioner until after the trial. Because of this failure and because the case was tried before our decision in *New York Times*, the trial judge did not instruct the jury in terms of the pre-

cise formulation we adopted. In connection with the issue of punitive damages, however, the trial judge did give an "actual malice" instruction which invoked the elements we later held necessary in *New York Times*. He instructed the jury that it would have to find "actual malice" before awarding punitive damages, and he continued by defining "actual malice" as denoting "wanton or reckless indifference or culpable negligence with regard to the rights of others" and as including notions of "ill will, spite, hatred and an intent to injure one." Under the Georgia law of defamation which governed the case, the jury was also specifically required to find that the defamatory statements were false before it could award any damages, and it was so instructed. With the jury's attention thus focussed on this threshold requirement of falsity, the references in the instructions to wanton or reckless indifference and *culpable* negligence most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which we spoke in *New York Times*.[1] Although the "actual malice" instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive of how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by "actual malice" instructions, awarded $3,000,000 in punitive damages.[2]

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[1] We held unconstitutional in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), a criminal defamation statute which authorized conviction on proof that a defamatory statement had been motivated by ill will. The statute did not require that the defamatory statement be false to sustain such a conviction.

[2] In the *New York Times* case, "actual malice" instructions were given in connection with punitive damages. However, we noted: "While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is presumed. Such a presumption is inconsistent with the

Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. We should not, however, be so inflexible in judging cases tried prior thereto, especially when as here the trial judge—unaided by advice or objections from counsel—recognized the essential principle and conformed with it to a substantial degree. Moreover, after the *New York Times* rule was brought to the trial judge's attention in a post-trial motion, he reviewed the record in light of that precise standard and held that the jury verdict should not be disturbed since "there was ample evidence from which a jury could have concluded that there was reckless disregard by the [petitioner] of whether the article was false or not."

An additional factor leads me to the conclusion that we should not insist on the financial and emotional expenses of a retrial here merely because the trial judge's instructions were not given in the precise terms of the present constitutional standard.[3] That factor, to which I briefly adverted above, was the choice of the petitioner in this case to raise only truth as a defense and to omit in its pleadings and at the trial any reference to possible First Amendment defenses or even to the conditional privilege provided by Georgia law for "comments upon the acts of public men in their public capacity and with

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federal rule. . . . Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. *Because of this uncertainty,* the judgment must be reversed and the case remanded." 376 U. S., at 283–284. (Emphasis added.)

The jury in the present case was required to separate compensatory and punitive damages.

[3] Cf. *Time, Inc.* v. *Hill,* 385 U. S. 374, 411 (1967) (concurring opinion of MR. JUSTICE FORTAS).

reference thereto."[4] I use the word "choice" in this connection, because the facts lead me, as they did the Court of Appeals, to the firm conclusion that the omissions were deliberate. Although this trial occurred before our decision in *New York Times*, we had granted certiorari to review that case even before the complaint here was filed.[5] The Alabama law firm which had represented the New York Times in the state courts was involved in the trial of this case. Lead counsel in the cases conferred periodically, and one of the members of the Alabama law firm referred to above sat at the counsel table throughout this trial. The same Alabama law firm was retained to represent petitioner in a lawsuit filed by Coach Paul Bryant, who was also libeled by the magazine article here in question. First Amendment defenses were raised both at the trial of the *New York Times* case and by the pleadings in the Bryant lawsuit which was settled for a substantial sum of money. But counsel

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[4] Ga. Code Ann. § 105–709 (6) provides:

"Privileged communications.—The following are deemed privileged communications:

. . . . . .

"6. Comments upon the acts of public men in their public capacity and with reference thereto."

This privilege is qualified by Ga. Code Ann. § 105–710, which provides:

"Malicious use of privilege.—In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action."

[5] Certiorari was granted in *New York Times* v. *Sullivan* on January 7, 1963. 371 U. S. 946. The complaint in this case was filed approximately 2½ months later, on March 25, 1963. Counsel here could not have anticipated the precise standard we announced in *New York Times*. In the Bryant lawsuit and, of course, in the *New York Times* case itself counsel did, however, raise general First Amendment defenses. No reference whatever to the First Amendment was made by defense counsel in the trial of this case.

did not raise such defenses here. Given the importance of this case to petitioner and the interplay between overlapping counsel aligned on the same sides of related lawsuits, I can only conclude that tactical or public relations considerations explain the failure here to defend on First Amendment grounds.

IV.

Satisfied, as I am, that under the circumstances of the *Butts* case no retrial should be ordered merely because of the instructions, I turn now to the final duty which this Court has when violations of fundamental constitutional principles are alleged. We must review the evidence to ascertain whether the judgment can stand consistently with those principles. *New York Times* v. *Sullivan*, 376 U. S. 254, 285 (1964); *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958).

The petitioner in this case is a major factor in the publishing business. Among its publications is the Saturday Evening Post which published the defamatory falsehoods here in question. Apparently because of declining advertising revenues, an editorial decision was made to "change the image" of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of "sophisticated muckraking,"[6] designed to "provoke people, make them mad."

[6] Webster's New International Dictionary (2d ed., unabr.), p. 1606, reports the source of the term "muckrake" as follows:

"On April 14, 1906, President Roosevelt delivered a speech in which he used the term *muckrake* in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations . . . ."

Roget's International Thesaurus § 934 (3) lists the following as synonyms: muckrake; throw mud at; throw or fling dirt at; drag through the mud; bespatter.

Shortly thereafter, and as an apparent implementation of the new policy, the Saturday Evening Post purchased the rights to the article which formed the subject matter of this case. The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of MR. JUSTICE HARLAN. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article. This knowledge was signaled by the statements at the conclusion of the article that "Wally Butts will never help any football team again" and "careers will be ruined, that is sure."

I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison*. Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.

SUPREME COURT OF THE UNITED STATES

Nos. 37 AND 150.—OCTOBER TERM, 1966.

37	Curtis Publishing Co., Petitioner, v. Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
150	The Associated Press, Petitioner, v. Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in No. 150, and dissenting in No. 37.

I concur in reversal of the judgment in No. 150, *The Associated Press* v. *Walker*, based on the grounds and reasons stated in Parts I and II of THE CHIEF JUSTICE's opinion. I do this, however, as in *Time, Inc.* v. *Hill*, 385 U. S. 374, 398, "in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in *New York Times* v. *Sullivan*, 376 U. S. 254. [THE CHIEF JUSTICE's] . . . opinion decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to . . . [that] opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, *e. g.*, *New York Times* v. *Sullivan*, 376 U. S., at 293 (concurring opinion); *Rosenblatt* v. *Baer*, 383 U. S. 75, 94 (concurring and dissenting opinion)."

I would reverse the judgment in No. 37 for the reasons given in my concurring opinion in *New York Times* v. *Sullivan*, 376 U. S. 254, 293, and my concurring and dis-

senting opinion in *Rosenblatt* v. *Baer*, 383 U. S. 75, 94, but wish to add a few words.

These cases illustrate, I think, the accuracy of my prior predictions that the *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. Here the Court reverses the case of *Associated Press* v. *Walker*, but affirms the judgment of *Curtis Publishing Co.* v. *Butts*. The main reason for this quite contradictory action, so far as I can determine, is that the Court looks at the facts in both cases as though it were a jury and reaches the conclusion that the Saturday Evening Post, in writing about Butts, was so abusive that its article is more of a libel at the constitutional level than is the one by the Associated Press. That seems a strange way to erect a constitutional standard for libel cases. If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries—a review which is a flat violation of the Seventh Amendment.

It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings. Today the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the First Amendment. In fact, the Court is suggesting various experimental expedients in libel cases, all of which boil down to a determination of how offensive

to this Court a particular libel judgment may be, either because of its immense size or because the Court does not like the way an alleged libelee was treated. Again I suggest (see *Time, Inc.* v. *Hill*, 385 U. S. 374, 399) that we are rapidly but surely getting ourselves in the dilemma we found ourselves in when we were compelled to overrule the ill-starred case of *Betts* v. *Brady*, 316 U. S. 455,* in order that the state courts of the country might be able to determine with some degree of certainty when an indigent person was entitled to the benefit of a lawyer and avoid the spawning of hundreds of habeas corpus cases that finally raised questions that a lawyer could and would have raised at the trial.

I think it is time for this Court to abandon *New York Times* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

Gideon v. *Wainwright*, 372 U. S. 335.

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[June 12, 1967.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, concurring in No. 150, and dissenting in No. 37.

I join Parts I and II of the opinion of THE CHIEF JUSTICE and the disposition in No. 150, *Associated Press* v. *Walker*.

In No. 37, *Curtis Publishing Co.* v. *Butts*, insofar as THE CHIEF JUSTICE's opinion demonstrates that the evidence unmistakably would support a judgment for Butts under the *New York Times* standard, I agree. I would, however, remand for a new trial since the charge to the jury did not comport with that standard.[1] The charge on compensatory damages directed that the jury find liability on a finding of mere falsehood. And the trial court stated that punitive damages might be awarded on a finding of "actual malice" which it defined to encompass "the notion of ill will, spite, hatred and an intent to injure one," and also to denote "a wanton or reckless indifference or culpable negligence with regard to the rights of others." The court detailed some

[1] For the reasons expressed in the opinion of MR. JUSTICE HARLAN I agree that petitioner did not waive his contentions under *New York Times*.

factors the jury could consider in applying this standard. It said, for example, that "a publication may be so extravagant in its denunciation and so vituperative in its character as to justify an inference of malice," and that "proof that the plaintiff did demand a retraction but that the defendant failed to retract the article may be considered by you on the question of punitive damages." But "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison* v. *Louisiana*, 379 U. S. 64, 73. The "good motives" of the publisher can be no more relevant in the context of "public men" than in the context of criticism of "public officials." See *Garrison, supra*. The court added that the Post could show *in mitigation* of punitive damages that "it in good faith relied upon matters which had come to its attention." This makes crystal clear that the standard announced authorized the jury to award punitive damages even though it found that the Post had in good faith relied on matters which had come to its attention. The charge undoubtedly fails to comport with *New York Times*.[2]

That the evidence might support a verdict under *New York Times* cannot justify our taking from the jury the function of determining, under proper instructions, whether the *New York Times* standard has been

[2] The statement by the trial court that "malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" could reasonably have been regarded by the jury to relate not to the truth or falsity of the matter, but to the Post's attitude toward Butt's reputation, akin to the spite and ill will in which terms the court had just defined "malice." See *Time, Inc.* v. *Hill*, 385 U. S. 374, 396, n. 12.

met. The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–292; *Time, Inc.* v. *Hill*, 385 U. S. 374, 391–394. When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction of a new trial. See *Time, Inc.* v. *Hill*, *supra*.